# Fireside Chat with FTC Director Liu

## 1:30 PM – 2:00 PM, April 17, 2024

- 10 Key Themes: Global Antitrust in 2024
  - Taking Center Stage
  - Merger Enforcement: The Path to Clearance Gets Even Tougher
  - Investing Across Borders in 2024: Strengthened Controls to Protect Domestic Capabilities
  - Digital Markets: Antitrust and Artificial Intelligence - The Next Frontier?
  - Consumer-Driven Enforcement: Consumer-Facing Businesses in the Regulatory Spotlight
  - In Focus: Life Sciences and Pharma - Conduct and Commercial Practices Under the Microscope
  - Antitrust and Sustainability: Will 2024 Bring Regulatory Alignment or Will the Chilling Effect of Uncertainty Persist?
  - Dominance and Monopolization: Back to the Future?
  - Antitrust Investigations: Uptick in Enforcement with Tougher Powers and Increased Interagency Cooperation
  - Cross Border Claimant Strategies: Focused on Investigations and Litigation
- U.S. Antitrust Agencies Issue Final 2023 Merger Guidelines
  - Key Takeaways from the Guidelines
    - *Scrutiny of Less Concentrated Markets*
    - *Explicit Potential Competition Analysis*
    - *Enhanced Scrutiny of Vertical and Non-Horizontal Transactions*
    - *Prohibiting Entrenchment or Extension of "Dominant Positions"*
  - Changes from the Draft Guidelines
    - *Additional Guidance Regarding Novel Theories of Competitive Harm*
    - *Increased Discussion of Rebuttal Evidence*
    - *Some Softening of Presumptions and Focus on Market Power*
    - *Reemphasis on Economic and Evidentiary Tools*
  - What Comes Next?
- Kroger/Albertsons: The FTC's First Challenge Under the 2023 Merger Guidelines
  - Lower Market Concentration Thresholds Are Firmly in Play
  - The FTC Is Keenly Attuned to How Mergers Impact Workers
  - Traditional Considerations for Divestitures Remain Highly Relevant
- FTC and DOJ Front and Center in New Biden Executive Order on Competition, with a Focus on Labor Issues
  - Increased Merger Scrutiny
  - Labor Initiatives
  - Additional Expansive Initiatives
    - *Healthcare*
    - *Agriculture*
    - *Technology*
  - Continued Spotlight on Antitrust

- Latest Round of Section 8 Enforcement Demonstrates Agency Efforts to Expand Statute's Boundaries
    - FTC Enforces Section 8 for the First Time in 40 Years
    - FTC Declares that Section 8 Applies to Non-Corporate Forms
    - FTC Alleged a Stand-Alone Section 5 Violation Resulting from Inappropriate Information Exchanges
- Proposed Update to U.S. HSR Merger Clearance Process Risks Extended Review Timelines
    - Expanded Corporate and Transaction Information
    - Expanded Document Requirements May Impose Compliance Burdens
    - Narratives Reflect EU Inspiration
    - New Labor Market Data Requests
    - Foreign Subsidy Disclosures
    - HSR and Litigation Holds
    - Proposed Changes Reflect Agencies' Enforcement Agenda
    - What Is Next?

10 key themes

# Global antitrust in 2024

Welcome to the 14th edition of 10 Key Themes, our annual review of 10 of the most significant global antitrust trends to be prepared for in 2024

As we enter the mid-2020s, global antitrust policy and enforcement face ever more complex and unprecedented issues. The "polycrisis" of geopolitical and macroeconomic challenges – including the cost-of-living crisis, fragmented supply chains and military conflict, combined with advancements in technology and artificial intelligence, as well as strengthened sustainability ambitions – looks set to continue throughout 2024. Against this backdrop, a question is emerging: whether antitrust can be – or should be – a panacea?

We are seeing antitrust play an ever-expanding role as new regulation and frameworks take hold around the world. From much debated ex ante digital regulation in Europe through the Digital Markets Act – under which the first gatekeepers have now been appointed – to new outbound foreign investment review in the US following President Biden's August 2023 executive order, antitrust is permeating further into the commercial landscape. And in doing so, it is increasing the web of rules with which businesses operating across borders need to comply.

On top of this, antitrust agencies globally feel pressure to support governments in delivering economic growth and inspiring innovation, as well as to help protect consumers, whether through the creation of new or enhanced powers, such as those proposed under the "flagship" Digital Markets, Competition and Consumers Bill set to enter into force in the UK later this year, or via the "reactivation" of older legislation, as we have seen in the US with the revival by the Federal Trade Commission of the Robinson-Patman Act. As a result, certain sectors – in particular those that are consumer-facing, such as life sciences and pharma – may find themselves increasingly under the regulatory spotlight, with the heightened risk of competition law also being used to achieve non-competition goals. This is especially true in the field of antitrust litigation, where using antitrust claims and complaints proactively to achieve commercial aims is finding growing favor among litigants.

As agency thinking and political demands develop through 2024, the role of antitrust for companies seeking sustainability objectives and addressing environmental harm also continues to evolve, impacting businesses looking to achieve "green collaborations" or realize other environmental, social or governance benefits as part of their commercial strategy.

And last, but certainly not least, we see new and emerging theories of harm in the global M&A context, with antitrust agencies seeking not only to broaden their already expansive jurisdiction but also to further widen the boundaries of established substantive assessment. Against ongoing criticism among authorities and politicians across multiple jurisdictions that excessive consolidation in certain industries has been exacerbated in recent years by a lenient approach to enforcement, antitrust authorities globally continue their move toward more stringent merger control, resulting in increased intervention rates and a growing number of transactions being blocked, requiring remedies or being abandoned by merging parties.

Amid the unpredictability and change, one thing is certain: 2024 is set to be a bumper year for global antitrust. Anticipating and proactively navigating the evolving enforcement environment will remain key for businesses that want to remain one step ahead.

**Alastair Chapman**
Global Head,
Antitrust, Competition
and Trade Group

*With thanks to Karen Slaney for her contribution.*

# Contents


**Introduction** 01

**01. Taking center stage**
global antitrust for the mid-2020s 04

**02. Merger enforcement**
the path to clearance gets even tougher 08

**03. Investing across borders in 2024**
strengthened controls to protect domestic capabilities 14

**04. Digital markets**
antitrust and artificial intelligence – the next frontier? 19

**05. Consumer-driven enforcement**
consumer-facing businesses in the regulatory spotlight 24

**06. In focus: life sciences and pharma**
conduct and commercial practices under the microscope 29

**07. Antitrust and sustainability**
will 2024 bring regulatory alignment or will the chilling effect of uncertainty persist? 33

**08. Dominance and monopolization**
back to the future? 38

**09. Antitrust investigations**
uptick in enforcement with tougher powers and increased interagency cooperation 42

**10. Cross border claimant strategies**
focused on investigations and litigation 46

**Contacts** 50

# 01. Taking center stage

## global antitrust for the mid-2020s

**James Aitken**
Antitrust Partner, London

**Ninette Dodoo**
Antitrust Partner, Beijing

**Jamillia Ferris**
Antitrust Partner, Washington, DC

**Thomas Janssens**
Antitrust Partner, Brussels

### IN BRIEF

Antitrust is evolving. Geopolitical tensions, market volatility, inflation, trade realignment and supply chain issues are intensifying economic complexity worldwide. As the role and scope of antitrust law and policy develop to meet these challenges, so too do the tools of competition authorities and the courts. There is broad consensus among authorities that they can be part of the solution by promoting competitive markets, protecting consumers and supporting productivity, innovation and growth. But the ways and means by which different authorities are pursuing those goals show signs of divergence. The effect of such enforcement and evolving regulatory challenges on the cost, certainty and timing of global business should not be underestimated. Businesses need to be aware of, and prepare for, the myriad changes taking place now and down the line.

The remit of antitrust authorities is expanding. New regulation, theories of harm and enforcement priorities are indicative of a belief that global economic structures are broken and that more assertive regulators are part of the solution.

**Thomas Janssens**
Antitrust Partner, Brussels

### Authorities are more likely to investigate mergers and challenge them in unconventional ways

Authorities appear to have a mandate from elected officials to resist further concentration in certain markets and to correct perceived past underenforcement in merger review. Regulatory toolkits and appetites to consider novel or resuscitated theories of harm are expanding to match this ambition. In 2024, across many jurisdictions, the net for notifiable deals will widen and new processes will introduce more stringent notification requirements for M&A transactions (see Theme 2).

Beyond competition risks, rising geopolitical tensions between Western economies and Russia and China have added a layer of complexity to authorities' scrutiny of transactions. The trend toward deglobalization is unfolding through the tougher application and expansion of existing foreign direct investment (***FDI***) regimes, as well as the introduction of new ones. The introduction of the EU Foreign Subsidies Regulation in 2023, investigating deals where companies involved have received subsidies granted by non-EU countries, has established a third dimension of review in Europe (see Theme 3).

For deals caught by review thresholds, scrutiny by authorities will become more complex. As they react to fast-changing markets, agencies are stretching orthodox concepts and introducing novel theories of when a deal is likely to harm competition, threaten national security or give an unfair advantage to foreign (subsidized) businesses over homegrown players. The end effect will likely be increasing intervention in M&A activity in major jurisdictions resulting in longer review periods and increased execution risk and cost.

**Given the uncertainty in the current regulatory environment, early antitrust assessment is critical to anticipating global review timelines and outcomes. An early assessment can inform transaction negotiations and antitrust strategy, including the possibility of litigation in the US.**

**Jamillia Ferris**
Antitrust Partner, Washington, DC

## Governments look to new regulatory approaches to police certain markets

A key question is not whether government shapes markets, but how government shapes markets and towards what ends.

**Lina Khan**
Chair, US Federal Trade Commission – November 2023

Digital and consumer markets are at the top of the enforcement agenda. 2023 saw the groundwork being laid for a host of new laws set to bite in 2024 that will give authorities the ability to proactively shape these sectors.

The EU-wide Digital Markets Act will move to its final compliance and enforcement phase in 2024 for designated gatekeepers. In the UK, the Digital Markets, Competition and Consumers Bill (***DMCC Bill***) – set to be fully in force in late 2024 – is intended to improve the effectiveness of the existing UK competition law regime in dealing with concerns arising in digital markets and the tech sector, particularly in response to the alleged market dominance of a few players. Outside Europe, the movement toward digital regulation continues to gain momentum. In May 2023, a bill proposing the Federal Digital Platform Commission Act was introduced in US Congress. If the bill is enacted, a new commission would be established that could designate undertakings as systematically important digital platforms. A new regime in Japan has provided the government with an expanded remit to "secure fairness in operating digital platforms"

and India looks set to gain an ex ante regulatory regime with the proposed Digital Competition Act. Authorities will step up efforts in identifying and preempting anticompetitive harm in artificial intelligence-focused markets while also attempting to foster competition and innovation (see Theme 4).

**Enforcers in the Asia-Pacific region continue to attract attention, and while approaches may differ in terms of enforcement intensity, levels of fines and priorities, there is emerging consensus among antitrust authorities around regulating digital markets.**

**Ninette Dodoo**
Antitrust Partner, Beijing

Countering cost-of-living challenges, protecting vulnerable consumers and cracking down on unfair commercial practices are also at the forefront of antitrust agencies' priorities. In 2024, the Federal Trade Commission (***FTC***) is expected to ramp up investigations and enforcement actions focused on consumer protection by leveraging an expanded interpretation of "unfair methods of competition". The DMCC Bill will significantly expand enforcement of UK consumer protection laws by the Competition and Markets Authority, allowing the authority (rather than the courts) to determine directly whether consumer laws have been breached and, if appropriate, impose penalties. The European Commission's "New Consumer Agenda" continues to drive regulatory changes across Europe. 2023 saw the INFORM Consumers Act take effect in the US, putting new requirements in place for online marketplace to boost transparency and deter illicit sales (see Theme 5).

**Spurred by governments that increasingly regard antitrust enforcement as a way to unlock growth and counter economic uncertainty, enforcers are looking to get ahead of potential harms – not react to them.**

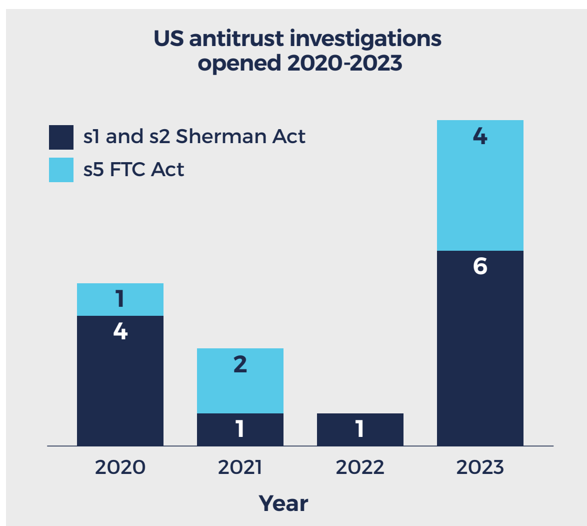
**James Aitken**
Antitrust Partner, London

### Antitrust enforcement set to rise

Authorities have been quick to confirm that new regulatory regimes will not temper ex post antitrust enforcement. If anything, the signs are that enforcement will continue with renewed vigor (see Theme 9).

As the European Commission's recent investigations into large technology businesses show, there is still an appetite to tackle difficult dominance cases and investigate digital markets with conventional tools. An emerging challenge is the increasingly sophisticated cross-border strategies that claimants are deploying for related antitrust litigation (see Theme 10).

The US Department of Justice Antitrust Division and the FTC look set to continue their recent push to slow consolidation and counter what they view as anticompetitive business conduct. High-profile cases against some of the world's largest technology companies will progress; the FTC's "unfair practices" cases against Amazon and US Anesthesia Partners are set to further advance their enforcement agenda (see Theme 8).




While the supply shocks of the pandemic have passed, inflated prices and high rates of businesses exiting markets remain. Enforcers have pointed to their antitrust toolkit as a key way to examine whether these hangover effects are due to market characteristics or less legitimate reasons. For example, a number of Asian enforcers have scrutinized household goods and food delivery sectors as part of a wider push to focus on the cost of living. Reinvigorated cartel enforcement is key to these efforts: the return to physical (and virtual) dawn raids following a COVID-induced hiatus continued in 2023, with the added surprise of an increased willingness to raid private homes in the work-from-home environment.

With authorities keen to play their part facilitating competitor collaborations to promote green initiatives, new horizontal guidelines will allow sectors and companies to cooperate to find more sustainable solutions. However, regulators have made clear that environmental, social and governance initiatives cannot be used as cover for anticompetitive behavior and will look to crackdown on "greenwashing" (see Theme 7).

## Looking ahead in 2024

- **Proactively prepare for regulatory changes.** A shifting regulatory landscape means proactive planning and preparation are crucial. Businesses need to creatively anticipate and address potential issues, be it in M&A negotiations or defending against antitrust investigations. Staying ahead of the curve through strategic planning is essential.
- **Engage with global authorities.** As regulators (on the whole) become more globally connected and cooperative, businesses must engage on an international scale. Ensuring consistent communication and messaging to agencies worldwide is vital. Whether navigating cross-border M&A or responding to antitrust challenges, businesses should be prepared to present a unified front.
- **Issue-spot authorities' evidence base early on.** Strong economic evidence using sophisticated analytical tools can buttress arguments for the benefits of a transaction or a business's conduct on competition. But authorities are increasingly basing negative decisions on internal documents (focusing on a "story" rather than on quantitative data). Rigorously engage with competitors' and customers' perceptions of a transaction or conduct and ensure internal documents accurately reflect rationale.

*With thanks to Milo Noone, Kara King and Charles Tay for their contributions to this theme.*

02.

# Merger enforcement

## the path to clearance gets even tougher

**Mary Lehner**
Antitrust Partner, Washington, DC

**Thomas McGrath**
Antitrust Partner, London

**Frank Montag**
Antitrust Partner, Brussels

**Meghan Rissmiller**
Antitrust Partner, Washington, DC

**Paul Tiger**
Global Transactions Partner, New York

**Hazel Yin**
Antitrust Partner, RuiMin Law Firm, China

### IN BRIEF

The global merger control landscape continues to get more challenging. Driven by a perceived need to address underenforcement, regulators around the world are testing the limits of their jurisdiction and developing novel theories of harm. The results include longer regulatory timelines for complex, cross-border M&A and a greater potential for divergent outcomes at the end. A global merger control strategy that anticipates these challenges and seeks to mitigate them wherever possible has never been more vital.

Merger analysis is not a one-size-fits-all exercise. In different situations, different tools will shine the clearest light on a merger's risk of harming competition.

**Jonathan Kanter**
Assistant Attorney General,
US Department of Justice – September 2023

### Jurisdictional uncertainty: authorities continue to widen the net

Flexible use of existing tools and new legislation has enabled agencies to review deals that may be of substantive interest, even where the basis for jurisdiction has not been clearly established.

- **US:** The Federal Trade Commission (***FTC***) and Department of Justice (***DOJ***) Antitrust Division have begun to investigate a broader scope of transactions. The revised DOJ and FTC merger guidelines (***US Merger Guidelines***), finalized in December 2023, give the agencies maximum flexibility to find potential anticompetitive harm and encourage aggressive enforcement (especially in relation to

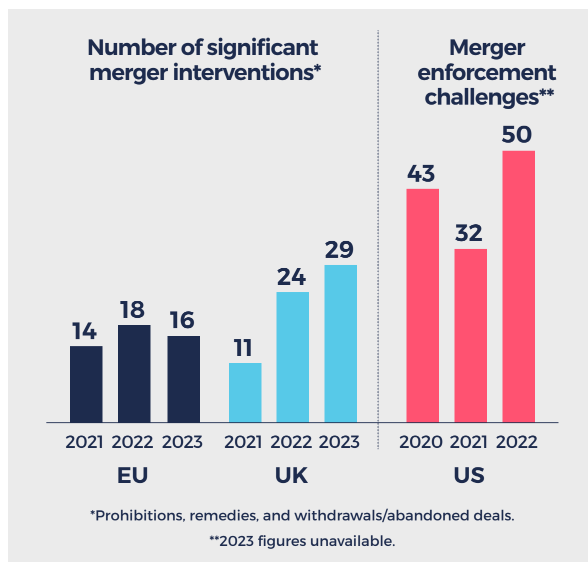
areas of perceived underenforcement such as roll-up acquisitions and mergers' impact on labor markets). Proposed changes to the Hart-Scott-Rodino Act notification form and rules (***HSR Form***), if adopted, will increase the time, cost and burden on all businesses conducting M&A in the US.

**The US Merger Guidelines are an unambiguous statement that the US antitrust authorities are committed to increased enforcement by clearly laying out an analytical framework for evaluating an array of traditional and non-traditional theories of harm and using new, lower or different thresholds than in the prior guidelines.**

**Meghan Rissmiller**
Antitrust Partner, Washington, DC

- **EU:** Emboldened by the landmark *Illumina/Grail* case – a leading example of agencies forcing the unwinding of a merger on the basis of debatable legal theories – the European Commission (***EC***) has continued to apply its more expansionist approach towards the tool that allows it to accept requests from EU member states to review deals that do not meet either the EU's or any member state's national merger control thresholds (***Article 22 referrals***). Historically the EC has only accepted requests to review deals which met the thresholds for at least one member state. The recent *Qualcomm/Autotalks* and *European Energy Exchange/Nasdaq Power* transactions bring the number of Article 22 referrals that do not meet either EC or EU member state merger control thresholds since the EC issued revised guidance, with more possible in 2024. The EC looks set to expand the parameters on which businesses are deemed to compete, with a new Market Definition Notice. A merger control simplification package, adopted in April 2023, has reduced the administrative burden for some merging businesses but increased red tape for others, especially investors with large portfolios.
- **EU member states:** National competition authorities in Europe are also widening their reach. In **Italy**, new powers for the Italian Competition Authority have allowed it to "call in" transactions that are below mandatory filing thresholds. The **German** Federal Cartel Office (***FCO***) has recently investigated a number of completed foreign-to-foreign transactions – including Microsoft's investment in OpenAI. Investigations have considered whether these transactions should have been notified under the German deal value threshold and, if so, whether they pose a competition problem that should lead to the merger being unwound. Furthermore, if a sector inquiry reveals that future mergers in the sector may lead to a significant impediment of effective competition, the FCO can now require a company in that sector to notify future transactions that meet certain lower thresholds than Germany's standard merger control thresholds. The **Belgian** and **French** authorities have investigated transactions under the EU rules that prohibit the abuse of a dominant position, even though they did not trigger any national thresholds for merger control review. The Court of Justice's *Towercast* judgment validates the approach – authorities now have a tool that allows them to revisit transactions that do not meet merger thresholds long after they have closed.
- **APAC:** A mandatory and suspensory regime in **Australia**, a new transaction-value based filing threshold targeting so called "killer acquisitions" in **India** and updates to existing filing thresholds in **China**, **Indonesia** and **Taiwan** are all on the cards in 2024. New legislation in **China** has codified the ability of the State Administration for Market Regulation (***SAMR***) to review transactions that do not meet turnover thresholds, which existed before the new legislation but had rarely been used. SAMR has already flexed its power and imposed remedies on a below-threshold deal in the pharmaceutical industry. The enforcer's boosted ability to review such transactions calls for a more robust filing analysis for dealmakers, particularly in tech markets – such as semiconductors – in which SAMR takes a keen interest.

- **UK:** The UK's share of supply test continues to give the Competition and Markets Authority (*CMA*) significant discretion in deciding which transactions it wants to review. The Digital Markets, Competition and Consumers Bill, expected to come into effect in late 2024, will introduce an additional acquirer-focused jurisdictional threshold. The focus will be on vertical and conglomerate transactions but also so called "killer acquisitions".




## Novel theories of harm: regulators push the limits

Once they have claimed jurisdiction, authorities continue to explore non-traditional theories of harm, leaning heavily on a dynamic competition and innovation lens and turning up the heat on deals between parties that are not direct competitors (so-called non-horizontal deals). Developing theories – such as in the field of behavioral economics – are informing their approach. As authorities adopt more novel and speculative ways to assess horizontal, vertical and conglomerate relationships between merging parties, their concerns are becoming harder to predict and rebut with economic evidence.

- **Strengthening/entrenching of a dominant position:** Regulatory scrutiny of non-horizontal transactions reached new heights in 2023 with the EC's prohibition of *Booking/eTraveli*. The EC ignored its own guidelines and discarded the conglomerate analytical framework that would have conventionally been applied to the deal; Olivier Guersent, (Director-General for Competition at the EC), later remarked, "*If we were bound by our guidelines, then [we] would fossilize [our] practice… we need to have some capacity to depart from guidelines*." Instead, the EC undertook a blended analysis of both horizontal and non-horizontal aspects of the deal and blocked the transaction on the belief that the merger of the two complementary businesses would strengthen Booking's alleged dominant position in the hotel online travel agency market.

  The decision signals focus by the EC on deals in which it considers large companies are seeking to expand their existing suite of products and services through the acquisition of complementary assets. The approach is gathering momentum with other recent EC merger investigations examining whether a party's dominant position in certain markets could be strengthened through the acquisition of a rival, even if that rival is not a strong player in those markets. US regulators look set to follow in the EC's footsteps. The US Merger Guidelines, elucidate the expansive approach to enforcement that the US agencies have taken in the past three years. Among the notable guidelines is one that directs the US agencies to examine whether a transaction "entrench[es] or extend[s] a dominant position."

> **The recent emergence of novel non-horizontal theories of harm around strengthening or entrenching a dominant position has demonstrated authorities' willingness to stretch analytical boundaries and depart from established guidance, without any clear indication of limiting principles. Anticipating when and how these theories of harm might apply will be critical to deal execution.**
>
> **Thomas McGrath**
> Antitrust Partner, London

- **Ecosystems:** Crucial to the *Booking/eTraveli* prohibition was the assertion that the transaction would allow Booking to expand its "ecosystem" of travel services. Tech ecosystems were also under the microscope in *Microsoft/Activision* (but, in contrast to the conglomerate nature of *Booking/eTraveli*, this time in a vertical context). The CMA deemed Microsoft's product range a "multi-product ecosystem", believing it to be greater than the sum of its parts, and dismissed Microsoft's claims that its products were not integrated or linked and could not be used to "tip" the cloud gaming market in its favor. Regulators' scrutiny of ecosystems is nascent, particularly in the merger control context. For example, SAMR used an ecosystem theory of harm to find Alibaba dominant in its landmark investigation against the e-commerce platform, but so far it has rarely referenced it in the merger control context. However, it is clear that firms should consider how a collection of products might fit into an authority's conceptualization of an ecosystem.

**In the realm of complex merger control enforcement, navigating novel theories of harm such as the rise of ecosystem theories requires a forward-looking analysis of dynamic competition. This underscores the importance of a nuanced global regulatory strategy early on.**

**Frank Montag**
Antitrust Partner, Brussels

- **Portfolio effects:** In the US, the FTC sued to block Amgen's acquisition of Horizon Therapeutics, a biopharmaceutical company with treatments for rare conditions. With no horizontal or vertical overlaps between the parties, the FTC alleged a novel portfolio effects theory that Amgen could leverage its own blockbuster drugs to insulate Horizon products from future competition. The FTC ultimately settled with the parties subject to conditions that prohibited the type of bundling the FTC alleged could cause harm (despite the parties having already committed not to bundle before the FTC challenged the deal). Arguably *Amgen/Horizon* is an outlier – many large pharmaceutical transactions continue to happen unhindered. However, the US Merger Guidelines are indicative of the DOJ's and FTC's persistent ambition, even in the face of high-profile losses, to investigate (and potentially challenge) a wider range of deals including a further focus on vertical transactions, mergers between potential competitors and mergers in a series of acquisitions.

**The DOJ Antitrust Division and the FTC are pushing the boundaries of vigorous merger enforcement. US agencies are better funded and more aggressive than ever before – but most deals are still doable with careful planning and the right strategic approach to the regulators.**

**Mary Lehner**
Antitrust Partner, Washington, DC

### Deal certainty under pressure: timelines lengthen and divergent outcomes rise

Growing jurisdictional uncertainty and tougher substantive assessment have meant that review outcomes – and when parties can expect to receive them – are increasingly difficult to predict.

**The new enforcement environment is causing merger counterparties to rethink their approach to substantive risk allocation: more reluctance to agree to 'hell-or-high-water' undertakings, greater reliance on reverse termination fees, and a greater willingness to agree to outside dates as long as 18-24 months, with an agreement to litigate if necessary.**

**Paul Tiger**
Global Transactions Partner, New York

- **Timelines:** Authorities' increasing use of information requests and stop-the-clocks as they more closely scrutinize transactions is extending review timelines and challenging traditional long stop date projections. The leading example in 2023 was *Intel/Tower* – the deal was abandoned after 18 months, following lengthy review in China with uncertainty over when regulatory approval might be given. SAMR has often been the long pole to approve global deals despite greenlights from other major authorities, forcing merging parties to extend long stop dates to secure clearance or abandon deals altogether. Proposed revisions to the HSR Form would require production of significantly more information and ordinary-course documents at the time of filing, which extends the timeline before agency review begins and underscores the need for advanced preparation.
- **Divergence:** Authorities' historical efforts to reach consistent outcomes on deals, absent compelling local differences in competitive conditions, are fading. Authorities' willingness to explore non-traditional theories of harm, coupled with the growing number of significant merger interventions, is driving divergent outcomes for global mergers as regulators identify and assess competition concerns in different ways.

The divergent trend set by *Google/FitBit* and *Konecranes/Cargotec* was followed in 2023. Most notable was *Microsoft/Activision*. While SAMR gave the green light to the transaction after a series of thorough market tests, the EC cleared the transaction subject to licensing remedies. The CMA blocked the transaction but, in an unprecedented development, allowed Microsoft to submit a restructured transaction for review and cleared it on the basis of a fix-it-first remedy. At the time of publication, the FTC continues to oppose the transaction in federal court and its own administrative proceeding, despite having lost in July 2023 its motion for preliminary injunction to stop the deal from closing, which is now on appeal.

## Looking ahead in 2024

- **Mitigate decreasing deal certainty through innovative drafting of deal documents.** Provide for a broader range of competition review outcomes – both jurisdictionally and substantively – in transaction documents through conditionality, risk allocation and long stops.
- **Prepare for increasing application of "strengthening of dominant position" theory by regulators.** Anticipate use of the theory by major enforcers (and others) in transactions involving a dominant market player and push for alignment in analytical framework across regulators. Search for limiting principles that can be applied to transactions and distinguishing factors from current precedents.
- **Consider potential remedies early on.** Remedies are increasingly common in regulatory reviews. Minimize regulatory risk by identifying workable and commercially acceptable remedies, assessing how they interact in the context of multiple parallel reviews, and potentially offering them up proactively to regulators where appropriate. But assess whether merger control remedies undercut other reviews – such as foreign direct investment – or negatively impact their timeline.

Advance planning is key. Well before signing, parties must assess the jurisdiction-specific level of interest in a deal and scope out competitive, geopolitical and industrial policy issues that could affect a decision. Despite these headwinds, deals can still get done with careful substantive and procedural planning.

**Hazel Yin**
Antitrust Partner, RuiMin Law Firm, China*

*With thanks to Milo Noone, Emily Abbott, Tuna Tanik and Wenting Ge for their contributions to this theme.*

**RuiMin is an independent PRC law firm that is part of our global StrongerTogether Network.*

03.

# Investing across borders in 2024 –

## strengthened controls to protect domestic capabilities

**Andreas von Bonin**
Antitrust Partner, Brussels

**Barbara Keil**
Global Transactions Partner, Munich

**Aimen Mir**
CFIUS Partner, Washington, DC

**Alastair Mordaunt**
Antitrust Partner, London/Hong Kong

**Frank Röhling**
Antitrust Partner, Berlin

**Kaori Yamada**
Antitrust Partner, Tokyo



### IN BRIEF

With no sign of geopolitical tensions between leading Western economies and China and Russia abating, and with other tensions emerging, governments are sustaining the trend of deglobalization and tending toward a more economically self-sufficient approach. The pattern looks set to continue in 2024. Governments are likely to push forward agendas to invest in domestic critical capabilities while simultaneously pursuing the tougher application and expansion of existing foreign investment controls and introducing other review mechanisms. Inevitably, this shift will impact how dealmakers assess potential transactions – including execution risk, cost and timelines.


### Policymakers are devising "run faster" strategies to invest in and expand domestic critical capabilities

Driven by historic high reliance on foreign actors – particularly for critical resources, infrastructure and technologies – governments are devising policies to develop (or restore) self-sufficiency and competitiveness in sensitive homegrown industries. The US Inflation Reduction Act and the CHIPS and Science Act have marked the way in improving capabilities in semiconductors and sustainable energy. The European Commission (*EC*) has introduced similar measures, including the European Chips Act and the Green Deal Industrial Plan, and looked to protect yet more sectors with the Critical Raw Materials Act. The UK's National Semiconductor Strategy and Energy Security Plan are indicative of how more countries will follow the US's and the EU's lead. Subsidies for domestic companies in these sensitive areas are proliferating at the same time as public administrations are becoming more cautious of foreign investors. Detailed assessment of sources of financing is now crucial to ensure smooth execution of projects.

Government interventions pushing the Green Transition are becoming more frequent, particularly in Europe. We can help turn this push into opportunities for our clients by identifying funding sources for projects and securing regulatory approvals.

**Andreas von Bonin**
Antitrust Partner, Brussels

## Governments are intensifying FDI screening across a broader set of investors and businesses to protect sensitive sectors

Trends in inbound foreign direct investment (***FDI***) screening have echoed the economic development priorities behind the expanding investment in domestic critical capabilities.

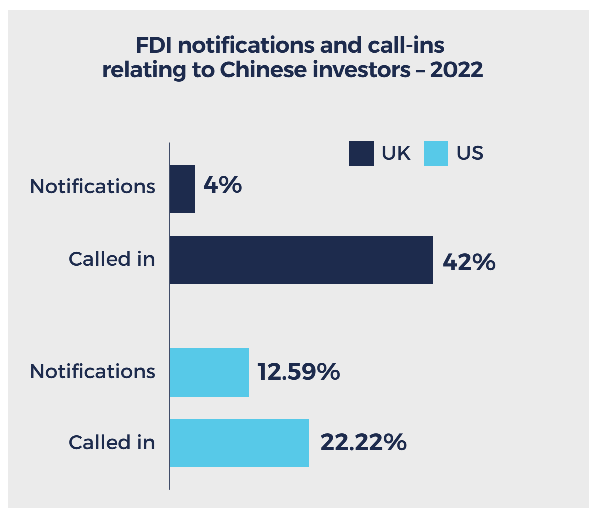
- **Sectors:** Many of the sectors facing intense scrutiny are comparable across the Western hemisphere. The Committee on Foreign Investment in the United States (***CFIUS***) annual report shows that in 2022 most notices were filed in the Finance, Information and Services and Manufacturing ectors. The EC's 2023 EU FDI Screening Regulation report tells a similar story: transactions in the Manufacturing and Information and Communication Technologies sectors were most likely to be subject to an in-depth review. In the UK, the majority of 2022-2023 transactions resulting in blocks or remedies were in related sectors – Communications Technology, Computing Hardware and Advanced Materials – but also Energy, Defense and Military/Dual-use. In Japan, cybersecurity deals (including data processing, semiconductors and software transactions) accounted for 61 percent of notifiable stock acquisitions.

**FDI review – top 3 target sectors**

Although the US' reputation as the premier source and destination of foreign direct investment is firmly grounded, the US government continues to take opportunities to secure its critical capabilities where necessary. Other countries are also likely to continue to intensify their efforts as they race to make sure that their critical assets and capabilities are not left vulnerable to foreign takeover.

**Aimen Mir**
CFIUS Partner, Washington, DC

- **Investors**: Unsurprisingly, given geopolitical fault lines, investors linked either directly or indirectly to China are subject to the most rigorous examination when it comes to FDI reviews (Russian investment has been broadly blocked by sanctions). Under the UK FDI regime, Chinese investors made up approximately 4 percent of overall notifications but comprised 42 percent of those subject to in-depth reviews, and approximately 50 percent of those were subject to remedies. In Japan, the number of Chinese notifications doubled between 2021 and 2022, with the Japanese government reportedly in close dialogue with US authorities when reviewing some cases. Although the volume of Chinese notifications has decreased, investors in the EU and the US with links to China (even if distant) have faced increased scrutiny, including longer reviews and greater risk of remedies. For example, Japanese investors have become subject to intensifying scrutiny due to their links to China, including deep supply chains, revenue dependency and targeting by China of Japanese tech. Similarly, Singapore has become more of a focus because many Chinese companies have redomiciled to Singapore, in part to hedge against geopolitical risk.



**Japanese companies are long-standing and trusted investors in the West but often have significant business interests in China. As scrutiny of Chinese-linked investment grows, Japanese investors can also expect to face more scrutiny where previously they may have had an easier ride.**

**Kaori Yamada**
Antitrust Partner, Tokyo

Businesses must ensure that they analyze FDI risk as part of a holistic regulatory assessment. A synced approach between merger control and FDI is especially crucial. For example, the tension between offering domestic supply commitments in semiconductor mergers in China and respecting broader US export control rules limiting China's chip access raises concerns about the ability of US firms to meet stipulated conditions in Chinese merger decisions.

## New and amended regimes are being introduced to counter perceived threats to national security and fair competition

A decade ago, many jurisdictions did not have FDI regimes. Now, traditional FDI regimes are no longer deemed as sufficient protection from the new generation of perceived threats to national security. The European system of FDI screening will likely see a further tightening of the net. In December 2023, the EU Court of Auditors recommended that the EU screening system be reformed to avoid "blind spots" and called for increased cohesion of the system and cooperation between the EC and the member states' FDI authorities. The number of interventions in Europe continues to be high, at least in certain key jurisdictions.

For example, of 325 FDI applications filed in France in 2022, 70 transactions were only authorized subject to conditions – a figure proportionally higher than in merger control under the competition regimes.

**Governments are multiplying and refining their tools to protect their economies against unfair competition and national security threats. Investors need to factor in the onerous and potentially unpredictable impact of the resulting multifaceted reviews to prevent deals being derailed.**

**Alastair Mordaunt**
Antitrust Partner, London/Hong Kong

Omissions that were considered inconsequential have gained new significance with the evolution of the global geopolitical landscape, and governments are now introducing new regimes to fill the gaps.

- **Outbound investment**: Outbound investment screening (***OIS***) regimes are likely to become more widespread in the coming months as they (i) provide control over strategic investments abroad, particularly in hostile states; (ii) counter the risk that investors may aid the development of sensitive technologies in those hostile states; and (iii) address offshoring of critical capabilities and the resulting reliance on other countries. The US, the EU and the UK are following suit, since China, Japan, South Korea and Taiwan already have OIS regimes. In August 2023, President Biden issued Executive Order 14105 directing the Department of the Treasury to establish an outbound FDI regime regulating certain US investments in "countries of concern" – for now, only China – which is likely to come into force sometime in 2024. The EC is likely to issue its proposal, together with its suggested revisions to the EU FDI Screening Regulation, in 2024, together with its suggested revisions to the EU FDI Screening Regulation. The UK government is also currently reviewing whether, and if so how, it should strengthen its outbound investment controls.
- **Foreign subsidies**: There are growing perceptions that unfair competition exists between homegrown competition and foreign (subsidized) competition. In particular, governments are concerned that unfairly subsidized foreign competition could undermine (and potentially eliminate) domestic competitors, especially in sensitive sectors. The EU's Foreign Subsidies Regulation (***FSR***) – which became fully effective in October 2023 – has been introduced to tackle this issue. The FSR establishes a mandatory and suspensory obligation on parties meeting certain thresholds to notify the EC of foreign subsidies received from non-EU states (including the US and the UK), which may impair competition within the internal market. Similarly, in the US, the Federal Trade Commission has proposed numerous amendments to the Hart-Scott-Rodino (***HSR***) Act notification form including an obligation on transaction parties to identify and describe subsidies received (or anticipated to be received) from a "foreign entity or government of concern" (i.e., countries or entities that are strategic or economic threats to the US). This amendment addresses congressional concerns that subsidies from such entities can distort the competitive process or otherwise change the business strategies of subsidized firms in ways that undermine competition following an acquisition.

More than ever, investing in sensitive areas requires a holistic approach to regulatory approvals. Given the flurry of new FDI and subsidies filing requirements, there is an increased risk of conflicting outcomes and remedies. From the start of the M&A process, companies will need to have a strategy to actively manage this risk. In particular, remedies in one country will need to also take into account other regulators' views.

**Frank Röhling**
Antitrust Partner, Berlin

There is now a wall of regulatory processes that must be mastered in any multi-jurisdictional transaction. Dealmakers should realize that for many new regimes clear guidance from authorities is sparse.
As a consequence, deal security and deal speed are more unpredictable, creating a need for finely balanced deal documentation to hedge the uncertainty.

**Barbara Keil**
Global Transactions Partner, Munich

## Looking ahead in 2024

In an increasingly unpredictable and multifarious regulatory environment, dealmakers need to:

- **Monitor the evolving regulatory landscape and design deal structures (and documents) accordingly.** Dealmakers will need to be informed of amendments in 2024 to existing regimes (HSR, EU FDI Screening Regulation and the UK National Security & Investment Act 2021) and potential introduction of new ones (e.g., new national FDI regimes in the EU and OIS regimes in the EU and the UK). A comprehensive understanding of these regimes and the underlying policy drivers will enable dealmakers to navigate them effectively and efficiently, minimizing execution risk.
- **Be prepared for multidimensional scrutiny and onerous information collection requirements.** As reviews intensify and the number and types of regimes continue to increase, so will the competing information gathering obligations on transaction parties. Preparing for these requests in advance, particularly for regimes such as the FSR, will make the review processes smoother and shorter while also enabling parties to assess deal risk early and accurately.
- **Prepare for increasing interference of governments and public bodies in markets.** At the same time as countries are protecting their markets from certain types of foreign investment via FSR and FDI regimes, there is a broad trend of governments stepping onto the scene with large-scale funding programs and interventions to push economic transitions. Deal and investment planning needs to take this into account, both as a risk factor and as an opportunity.

*With thanks to Iona Crawford, Justyna Smela, Edward Dean and Tim Swartz for their contributions to this theme.*

04.

# Digital markets

## antitrust and artificial intelligence – the next frontier?

**Michele Davis**
Antitrust Partner, London

**Rikki Haria**
Antitrust Partner, London

**Jenn Mellott**
Antitrust Partner, Washington, DC/ Brussels

**Meredith Mommers**
Antitrust Counsel, Washington, DC

**Tone Oeyen**
Antitrust Partner, Brussels

**IN BRIEF**

2023 saw the first major inroads in digital regulation in Europe. Other jurisdictions, such as the UK and Japan, are well on their way to introducing new digital markets legislation. Artificial intelligence (***AI***) has become the focal point for authorities as they look to police these markets. Safety and security, transparency, fairness, and the protection of intellectual property and data are the key areas to watch in 2024 as countries develop their approaches to regulating digital markets and AI.

### Full steam ahead for digital regulation in the EU as gatekeepers grapple with the DMA

Following the enactment of the Digital Markets Act (***DMA***), the European Commission (***EC***) designated six "gatekeepers" in September 2023, identifying 22 "core platform services" among them. Gatekeepers have until March 2024 to ensure compliance with the slew of DMA obligations covering different types of specified conduct, ranging from self-preferencing to tying and bundling and the use of data, which seek to enhance contestability and fairness in EU digital markets. Controversy surrounds the designations; the EC has opened market investigations to establish whether several core platform services should have been designated, and a number of gatekeepers are challenging decisions in the EU courts.

The EC will be responsible for ensuring gatekeepers comply with their obligations. However, national competition authorities also have the power to provide investigatory support to the EC to monitor compliance with the DMA's obligations. Authorities in France, Germany and the Netherlands have expanded their resources and investigatory tools to enable support.

**Private litigants are expected to play an important role, since the DMA allows them to bring direct actions in national courts against gatekeepers for noncompliance at any point after March 6, 2024. Users of gatekeepers' services will likely see themselves as particularly well placed to spot noncompliance given their intimate understanding of the technical complexity of digital markets, and are likely to be eager complainants.**

**Tone Oeyen**
Antitrust Partner, Brussels

The broader impact of the DMA on antitrust enforcement will become clearer in 2024. Both the EC and national competition authorities have stressed that the DMA will not supplant traditional dominance or merger control enforcement. However, authorities – including those with regulatory powers impacting digital markets (such as data protection) – will need to ensure consistency, avoid encroachment and prevent the risk of double jeopardy.

## Launch of the legislative process for digital regulation in the UK: a less prescriptive approach

In the UK, the long-awaited Digital Markets, Competition and Consumers Bill (***DMCC Bill***), was introduced to the legislative process in 2023. Among other things, the DMCC Bill promises to give the Competition and Markets Authority (***CMA***) powers to enforce a new ex-ante regulatory regime for digital markets through its established Digital Markets Unit (***DMU***). In a markedly different approach to the prescriptive obligations in the DMA, the DMU will be able to impose bespoke "conduct requirements" on businesses with "strategic market status" (***SMS***). It will also be able to address perceived competition problems in digital markets by making "pro-competition interventions" on an SMS firm's digital activities where it considers doing so would "remedy an adverse effect on competition". Any interventions must be proportionate or risk challenge on appeal.

The DMCC Bill is expected to take effect in late 2024. Businesses that have been the subject of recent market studies and investigations by the CMA in digital markets should expect to be among the first firms to be designated as having SMS and potentially face the first conduct requirements. Given the proposed scope ambit of the DMU's powers, businesses that interact with designated SMS firms will also be heavily impacted by the new regime.

**The CMA has not been sitting on its hands while the EC marches ahead with its designation of gatekeepers. It has been actively undertaking market studies and engaging with large online players and other stakeholders to develop its understanding of different digital markets and the issues at hand. The DMU will be ready to hit the ground running come Q4 2024. Companies should start planning early for potential interventions.**

**Rikki Haria**
Antitrust Partner, London

## Regulation of digital markets remains on the agenda in the US

Despite previous attempts falling short, Congress has not given up hope of passing digital-facing legislation. 2023 saw the introduction of several new bills, including the Digital Consumer Protection Commission Act which would establish a new commission to regulate online platforms alongside the Federal Trade Commission (***FTC***) and the Department of Justice Antitrust Division. Lawmakers will continue to push for legislation addressing digital markets and AI in 2024. More immediately, US companies will have to grapple with the global

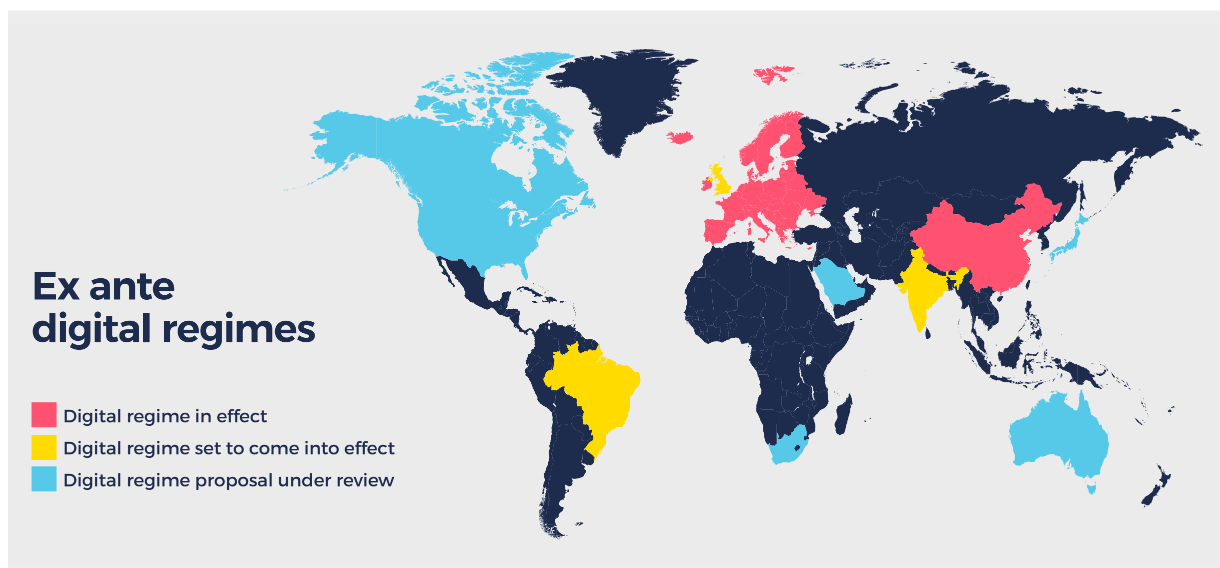
implications of digital regulation in other jurisdictions, given the interconnected nature of digital markets and the potential knock-on effects of legislation such as the DMA.

**Large US tech companies are often most affected by new digital regulations around the world. Despite legislative gridlock in the US resulting in a lack of US-specific digital regulation, US agencies are laser-focused on digital markets and new digital regulation abroad, so there is a real benefit in thinking holistically and strategically about compliance.**

**Jenn Mellott**
Antitrust Partner, Washington, DC/Brussels

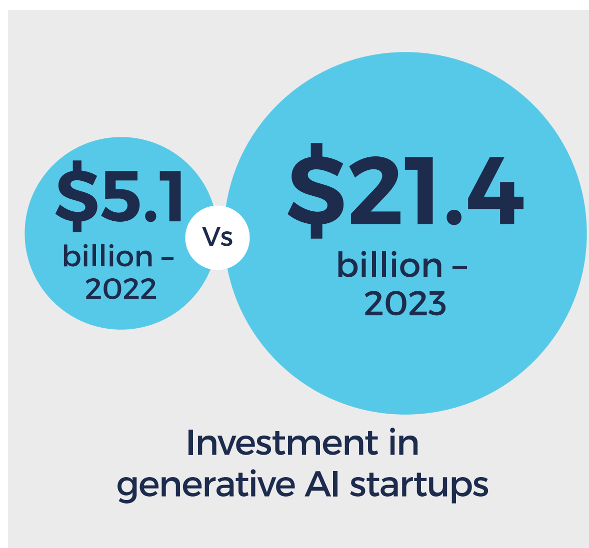
## Regulation of digital markets is extending beyond antitrust authorities

Complex regulatory structures for digital markets that go beyond antitrust authorities are developing in multiple jurisdictions. SAMR is just one piece of the Chinese regulatory puzzle for digital markets – companies must also take into account broader governmental involvement, which can increasingly have a national security angle. In Japan, the Japanese Fair Trade Commission will likely lead the implementation of the upcoming digital legislation but it will do so in close coordination with the Digital Market Competition Headquarters, the Ministry of Economy and other government bodies. While the Australian Competition and Consumer Commission is currently the only authority responsible for digital markets, the ongoing Digital Platform Services Inquiry promotes a holistic approach beyond competition aspects. In Brazil, the draft of new digital platforms legislation implies significant coordination between the Administrative Council for Economic Defence and the National Telecommunications Agency. A similar picture is emerging in Mexico, with both the competition watchdog and the telecom regulator enforcing digital markets. Digital companies will therefore need to interact with an expanding ecosystem of government bodies when implementing their commercial strategies and undertaking transactions.



### Artificial intelligence taking center stage in 2023

2023 was the year of generative AI. Since ChatGPT's launch in November 2022, there has been a flurry of model and product announcements and remarkable investment in AI.




To keep up, global regulation of AI is developing at pace. Some countries (such as China) have already introduced laws that specifically target AI, while others (such as Canada, Thailand and Brazil) have new legislation under consideration. The EU's AI Act – which made headlines when it was passed in December 2023 but is unlikely to take effect until at least 2025 – will include various obligations, including those surrounding risk management systems, accountability and user information, with significant financial penalties for noncompliance. Other countries, such as the UK, are taking a less direct approach to AI regulation, often seeking to work within existing laws and regulatory structures.

**The CMA is building its expertise on AI through the DMU and its foundation model review, driven by a desire to ensure that the development of foundation models evolves in a way that promotes competition. While the CMA has been clear that it will not hesitate to intervene if it identifies issues, it has stressed its commitment to an 'outcome focused' approach and highlighted the need to balance any intervention with the risks of over-regulation that may inadvertently harm smaller players and/or innovation.**

**Michele Davis**
Antitrust Partner, London

### Fostering competition and innovation across the AI value chain

New capabilities in machine learning have already started to realign industrial organization around a new "AI value chain" centered around generative model capabilities. Much of the political and regulatory attention on AI (evident at the UK's AI Safety Summit and in the establishment of the US AI Safety Institute and G7 Guiding Principles) has initially focused on the safety and security of highly capable foundation models, the protection of IP and personal data, and the implementation of strong governance.

Recently, authorities have started to explore competition and consumer protection issues across the AI value chain. The CMA's October 2023 initial report on AI foundation models has led the way in proposing principles to guide the development of foundation models and to protect consumers. An update report is due in March 2024. The US agencies have also set out initial views – specifically encouraged by President Biden's executive order on AI – to look closely at competition issues and possible consumer harms stemming from AI.

While antitrust agencies recognize the fast-evolving nature of the technology and the value chain itself, three key focuses have emerged:

1. **Access to key AI inputs as possible barriers to entry/expansion**, with a particular focus on computing power, pre-training and fine-tuning data (including human input for reinforced learning), talent and expertise, and access to capital.
2. **Sustained diversity in model competition** across model performance and downstream use cases, including balancing the pro-competitive benefits of open-source projects against the associated proliferation risks of frontier models.
3. **Effects on downstream markets and wider digital ecosystems** from AI model integration across the digital sector.

Antitrust authorities view merger control as an essential tool to address concentration risk at different levels of the AI stack. For example, the CMA was clear in its October 2023 initial report that it will be "*vigilant*" in scanning for potential harm to competition from transactions in the space.

**The FTC recently approved an omnibus resolution authorizing the use of the compulsory process in non-public investigations involving AI. This facilitates the FTC's ability to gather documents, information and testimony for consumer protection and competition investigations in AI. Parties need to think strategically about their position in the AI value chain and the risks of FTC scrutiny.**

**Meredith Mommers**
Antitrust Counsel, Washington, DC

## Looking ahead in 2024

- **Think strategically about how to navigate the increasing number of digital regimes globally.** Compliance with the DMA and the introduction of new regimes in jurisdictions such as UK and Japan will pose a challenge to existing ways of doing business.
- **Anticipate areas of concern for regulators.** Companies active in digital markets should be increasingly ready to deal with complex governance structures outside of just antitrust authorities and be prepared to address potential national security, data privacy and other regulatory concerns.
- **Monitor and forecast potential legislative changes.** AI regulation is set to be a fast-shifting and evolving landscape in 2024 as different jurisdictions continue to grapple with different approaches to regulation despite seeing an overall global convergence around key issues. Businesses will need to keep abreast of future regulatory developments and build anticipated requirements into their plans.

*With thanks to Aaron Green, Edgar Martin, Sarah Melanson, Wenjie Shen and Megan Yeates for their contributions to this theme.*

05.

# Consumer driven enforcement

## consumer-facing businesses in the regulatory spotlight

**Andrew Austin**
Dispute Resolution Partner, London

**Sharon Malhi**
Antitrust Partner, London

**Alvaro Pliego Selie**
Antitrust Counsel, Amsterdam

**Jan Rybnicek**
Antitrust Partner, Washington, DC

### IN BRIEF

With another year characterized by shocks to the global economy and a cost-of-living crisis, governments, authorities and private litigants worldwide have found a renewed impetus on putting consumer protection at the heart of enforcement action, regulatory reform and redress – both as part of and in addition to existing antitrust laws. All indications are that 2024 will see an even closer and more expanded focus on the consumer.

This strict separation between consumer protection and competition – it's… breaking down… a lot of the competition issues really touch on consumer protection and vice versa.

**Aviv Nevo**
Director, Federal Trade Commission's Bureau of Economics – December 2023

### Growing focus on consumer protection and online choice architecture

Businesses are increasingly required to make challenging judgments on whether to continue practices that comply with established antitrust principles or to make changes to head off potential enforcement under broader notions of consumer harm.

**Jan Rybnicek**
Antitrust Partner, Washington, DC

In line with the global rise of populist movements, the Biden administration's Federal Trade Commission (*FTC*) and Department of Justice (*DOJ*) Antitrust Division have increasingly been moving away from focusing on consumer welfare toward enforcement against a broader range of harms. This expansion has been far-reaching, with the agencies having focused on commercial practices across a wide variety of sectors. Particularly notable, for example, has been the FTC's stated expansion of Section 5 of the FTC Act –

a broad prohibition against "unfair methods of competition" – which the FTC has said will be used to "*focus on stopping unfair methods of competition in their incipiency based on their tendency to harm competitive concerns*". The FTC has prioritized the pharmaceutical sector, an area it perceives as having widespread consumer harms, issuing a September 2023 policy statement announcing "improper" patent listings may be challenged under the prohibition, and then accusing 10 major companies of doing so in relation to over 100 listed patents. The FTC's revived use of the Robinson-Patman Act, a Depression-era law banning price discrimination, has also targeted the pharmaceutical industry, probing rebates or fees in exchange for allegedly excluding lower-cost drugs. Beyond pharma, the FTC has since launched Robinson-Patman Act investigations into pricing practices in the wine and spirits and soft drinks industries in its efforts to protect small businesses.

In parallel, the FTC has pursued both wide-ranging consumer protection investigations into "*dark patterns*" in the tech space used to "*trick or manipulate consumers into buying products or services*" and a ban on hidden and bogus fees. That approach mirrors the one being adopted across Europe. In the UK, for example, the Digital Regulation Cooperation Forum – an association of the UK's competition, privacy and telecoms regulators established to enhance cross-disciplinary cooperation – issued guidance in August 2023 to companies on its expectations regarding online choice architecture, similar to those published by the Dutch Consumer and Markets Authority (***ACM***). The UK's Competition and Markets Authority (***CMA***) has also bolstered its enforcement efforts in this space, including via recent enforcement action against an online retailer for its alleged use of misleading urgency claims, and shown a desire to focus on rolling subscription contracts and fake reviews in new powers proposed in the Digital Markets, Competition and Consumers Bill (***DMCC Bill***).

More broadly, the UK government's November 2023 "strategic steer" to the CMA requested that outcomes for consumers be central to the CMA's enforcement prioritization. Similarly, the European Commission (***EC***) has emphasized its focus on the effective enforcement of consumer rights and the protection of vulnerable consumers, including in the enforcement of existing antitrust laws. This is reflected in practice, with several antitrust investigations across Europe (including by the EC, the CMA and the ACM) having sought to frame themselves as targeting "exploitative unfair trading condition abuses".

## New and pending reforms to further bolster consumer protection enforcement

2024 looks set to deliver an even greater lease of life to consumer protection enforcement, with new and pending consumer protection-focused powers.

In addition to the growing focus on consumer protection issues in antitrust enforcement cases, businesses should expect an additional wave of separate consumer law enforcement powers as authorities seek to acquire direct and strengthened powers to enforce consumer law akin to their competition law enforcement powers and processes. For example, under the DMCC Bill, the CMA is seeking additional powers to investigate and enforce consumer law and to directly impose fines of up to 10 percent of worldwide turnover without needing to prove an infringement in court.

**All businesses – not just digital businesses – will need to review the way in which they interact with consumers in light of what is likely to be a tougher and more aggressive enforcement regime, backed by big new fining powers. The UK government has tasked the CMA with focusing its use of strengthened consumer protection tools on all sectors where consumers are feeling the cost-of-living crisis hardest.**

**Andrew Austin**
Dispute Resolution Partner, London

These proposals sit alongside:

- the newly in force EU Digital Markets Act (***DMA***) and EU Digital Services Act (***DSA***) which also focus on expanding consumer choice;
- the strengthened tools of the German Federal Cartel Office, including to carry out sector wide inquiries looking at competition and consumer protection issues (other authorities, such as the Italian Competition Authority, are being promised similar powers, while still others, such as the Spanish Competition Authority, have publicly called for such powers); and
- the widening activity by authorities with dual competition and consumer protection powers, including the Australian Competition and Consumer Commission and the ACM. A clear indication of this being the ACM's focus on greenwashing practices, including intensified consumer protection enforcement against misleading green claims by manufacturers and e-commerce operators.

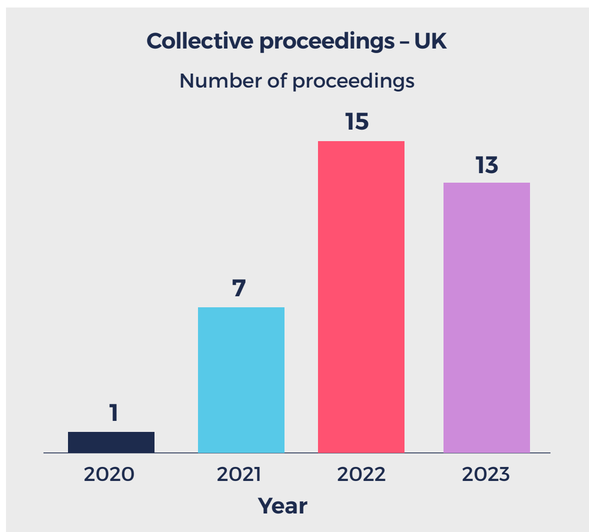
Businesses therefore need to be joined up across antitrust, consumer and privacy regulation, as well as across jurisdictions, to navigate these overlapping regimes.

**When it comes to online choice architecture and consumer, competition and privacy matters, businesses will need to pay close attention to – and prepare for – the significant strengthening of the CMA's consumer law enforcement powers under the DMCC Bill. Together with regulators, businesses will need to think holistically about the practical impact of the growing myriad of consumer-focused regulation.**

**Sharon Malhi**
Antitrust Partner, London

## Private enforcement action also set to continue to have a strong consumer-focused agenda

The thriving environment for mass claims, in particular in the UK, has increasingly driven prospective class representatives to pursue collective actions with a consumer-focused agenda. Applications for collective proceedings orders filed in the UK in 2023 continue to include major opt-out claims brought on behalf of large classes of UK consumers involving "abuse of dominance" antitrust claims that have a strong focus on consumer devices, consumer choice and transparency.




Although the UK Competition Appeal Tribunal requires proposed class representatives to demonstrate, for example, that they have an arguable claim, including a credible methodology for establishing any class wide losses, it has been willing to grant repeated "bites at the cherry" to achieve this and to stretch the definition of what may constitute an "antitrust claim". This invigoration of the claimant bar in the UK runs alongside the lively mass claim activity in the US, where consumer-focused theories of harm are regularly invoked, and elsewhere in Europe (for example Portugal), where there is also an increased prevalence of (threatened) mass claim actions spearheaded by consumer associations invoking direct consumer harm.

Businesses should be wary that the private enforcement landscape will continue to mirror the pro-consumer public enforcement agenda closely.

**The volume of competition damages claims across the UK and Continental Europe continues to rise and shows no sign of abating. Increased regulator focus on consumer-driven enforcement and consumer associations championing consumer-focused private enforcement claims will continue to contribute to an environment where standalone and follow-on competition litigation thrive.**

**Alvaro Pliego Selie**
Antitrust Counsel, Amsterdam

## Looking ahead in 2024

So how should consumer-facing businesses prepare?

- **Know and map your risk.** It is vital to understand which parts of a business may cause tension with the key issues at the heart of the uptick in consumer protection activity – be it online choice architecture, so-called dark patterns, or consumer transparency and fairness – and which should therefore be kept under review.
- **Join the dots.** Some jurisdictions, such as the UK, the Netherlands and the US, are pioneering new areas of enforcement. Keeping pace with these developments and understanding the contours of "acceptable conduct" in these jurisdictions may shape the development and design of existing and new global products and services. The expansive use of existing tools, the introduction of – and proposals for further – new tools and powers, and industry-changing regulations such as the DMA and DSA make this a growing necessity.
- **Prepare internally.** Consumer protection-focused action is expected to grow in volume and intensity and to mirror antitrust enforcement action and procedures. Companies will therefore need to be prepared with appropriate internal systems and procedures and ensure that they are thinking of these issues on a holistic and cross-disciplinary basis – including in conjunction with in-house antitrust, privacy, consumer protection and compliance teams.

*With thanks to Tom Morgan, Dan Wylde, Martin Dickson, Haris Ismail, Katie Kissinger and Sabina Pacifico for their contributions to this theme.*

# 06. In focus: life sciences and pharma

## conduct and commercial practices under the microscope

**Uta Itzen**
Antitrust Partner, Düsseldorf

**Heather Lamberg**
Antitrust Partner, Washington, DC

**Jenny Leahy**
Antitrust Partner, London

**Giles Pratt**
IP/Tech Partner, London



**IN BRIEF**

2023 has seen significant regulatory interest in the commercial practices and conduct of companies operating in the life sciences sector, with renewed focus on traditional conduct-based theories of harm relating to companies' pricing and distribution strategies as well as an increased appetite of regulators to pursue novel abuses and theories of harm too. Such scrutiny is set to continue throughout 2024.


### Life sciences has been – and is likely to remain – an enforcement priority for antitrust authorities across the globe

Antitrust authorities worldwide have pursued an aggressive enforcement agenda in the life sciences space in recent years. Sustained political focus on affordable access to medicines, budget pressures on national health services and a desire to enable innovative biotechs and generics to compete head-on with big pharma companies means that we expect regulators to continue to pursue enforcement action in the life sciences sector in 2024. Regulatory enforcement in the industry spans both exploitative and exclusionary practices. We have seen regulatory interest in, for example, traditional patent settlement cases (in particular "pay for delay" arrangements) and pricing abuses, as well as novel patent misuse concerns and denigration/disparagement cases. For example, the European Commission (*EC*) is investigating Teva for allegedly misusing the patent system and disparaging its competitors to protect its multiple sclerosis medicine Copaxone and is investigating Vifor Pharma for the dissemination of misleading information on competitor products. In the US, the Department of Justice (*DOJ*) Antitrust Division's and Federal Trade Commission's (*FTC*) attention to the life sciences space remains robust, with both agencies

emphasizing the importance of the pharmaceutical sector to consumers. In China, the life sciences sector continues to be a prominent focus on the enforcement agenda of the State Administration for Market Regulation (***SAMR***), with heightened scrutiny of pricing-related conducts.

**Life sciences is still very much front of mind for regulators, despite their simultaneous focus on digital markets. Businesses in the life sciences sector should continue to expect authorities to dedicate significant resources to enforcement in this space.**

**Uta Itzen**
Antitrust Partner, Düsseldorf

## Resurgence in conduct-based antitrust enforcement

Commercial practices are coming under increasing scrutiny, with regulators across Europe, the US and Asia initiating proceedings focused on traditional antitrust practices, including unfair and excessive pricing, particularly in the wake of significant concerns as to the affordability of medical services and products. In the UK, a series of excessive pricing cases brought by the Competition and Markets Authority (***CMA***) have recently been upheld by the first instance specialist appellate court (the Competition Appeal Tribunal) with respect to liothyronine tablets and hydrocortisone tablets. Given that excessive pricing cases are notoriously difficult to bring for regulators, the CMA's recent wins on appeal are expected to embolden it to continue to pursue enforcement in this area.

The excessive pricing of essential medicines can have a significant impact on the [National Health Service] and on patients, and we will continue to take action in the public interest where we see companies abusing their market power.

**Sarah Cardell**
Chief Executive, Competition and Markets Authority – August 2023

In the US, perceived high drug prices – including for generics – have prompted continued DOJ enforcement action against generic drug price-fixing, potential FTC challenges to Orange Book patent listings under the Food and Drug Administration's regulatory process, and increased attention to bundling and bundled discount practices. In China, SAMR has persistently pursued enforcement action with respect to excessive pricing of active pharmaceutical ingredients (***APIs***), such as levocarnitine API, as well as resale price maintenance in the distribution of drugs and medical devices such as dental implants. This resurgent interest in traditional antitrust theories of harm means companies should ensure that their commercial practices and conduct continue to be compliant with antitrust rules.

### Competition authorities have raised behavioral antitrust considerations in merger reviews, with the risk of triggering standalone antitrust investigations

Consolidation among pharmaceutical companies can facilitate collusion, distort incentives to research and develop new drugs, increase the bargaining leverage of large incumbents, and reduce potential entrants' access to capital.

**Lina Khan**
Chair, US Federal Trade Commission – September 2023

The revised Merger Guidelines in the US (***US Merger Guidelines***), finalized by the DOJ and the FTC in December 2023 (see Theme 2), make clear that the agencies will consider both prior antitrust violations or allegations of the merging parties and the potential for a merger to entrench or extend a dominant position, including via conduct such as bundling across the parties' portfolios. While ultimately settled, the FTC's challenge to Amgen's acquisition of Horizon exemplifies these themes in the life sciences sector.

**Antitrust compliance is increasingly relevant for merger review. While the agencies historically would pursue potential antitrust violations identified during a merger review independently, today they are increasingly considering parties' course of conduct as relevant to the merger assessment itself.**

**Heather Lamberg**
Antitrust Partner, Washington, DC

### What this means for life sciences and pharmaceutical companies

Companies should revisit their compliance policies to ensure that these account for "traditional" antitrust risk areas as well as novel theories of harm, including regular updates to reflect evolving rules and antitrust enforcement trends. This includes, for example, ensuring that policies are in place to ensure that antitrust risk is mitigated across all aspects of day-to-day operations, including with respect to pricing and discounting, patent strategies and settlements, and agreements with distributors and competitors for the purposes of jointly developing new products. Awareness of these issues across core business teams (e.g., go-to-market and pricing teams, sales representatives, and patent attorneys) is key to mitigating risk. Similarly, these teams should ensure clear and appropriate communications in dealings with counterparties to avoid inadvertently raising antitrust concerns (e.g., disparagement-type concerns).

### Artificial intelligence: the interplay between life sciences and digital markets.

**The crossover between antitrust compliance and compliance with other areas of regulation is becoming increasingly important for life sciences companies, particularly as data and AI are increasingly important components of the R&D and product marketing life cycle. Companies will need to ensure that compliance is assessed holistically, bringing in expertise across all areas including antitrust, data protection and IP.**

**Jenny Leahy**
Antitrust Partner, London

Companies should also ensure that compliance policies consider the interplay with other laws and regulations, such as IP and patent laws, and in Europe, the General Data Protection Regulation, the Data Act and the AI Act. Applications using AI technology are becoming increasingly commonplace across all industries, and the life sciences sector is no exception. For all the promise that AI holds for the sector, there are several legal challenges and risks that businesses should be aware of. For example, final adoption of the EU's long-anticipated AI Act – which will have a significant impact on the ongoing use and development of AI in the industry – is expected imminently. In particular, companies that develop or operate medical devices – which are expressly covered by the AI Act – will become subject to far-reaching requirements, including compliance with self-assessment processes, testing procedures and the creation of technical documents. Regulators around the world are alive to the disruptive impact that AI technology can have across the economic value chain, and we expect that the use of AI technology by life sciences and pharmaceutical companies will be subject to close regulatory scrutiny (see Theme 4).

AI represents a huge opportunity for collaborations between life sciences, medtech and tech businesses. Making a success of these collaborations means understanding who takes responsibility for emerging regulatory risks, as well as a clear allocation of rights in data inputs and outputs. Putting in place AI governance that spans the AI life cycle – and the various regulatory, IP and contractual regimes that it engages – is no longer optional.

**Giles Pratt**
IP/Tech Partner, London

## Looking ahead in 2024

- **Expect antitrust authorities to aggressively enforce antitrust rules in the life sciences sector space.** Agencies will continue to focus on promoting innovation and ensuring that consumers have access to innovative, safe and affordable products and services.
- **Anticipate a greater focus on the interplay between life sciences and other policy areas.** The intersection with data protection/privacy and AI will be heavily scrutinized as they become increasingly central to the R&D and commercialization life cycle.
- **Proactive steps can mitigate risk exposure.** Ensure that internal compliance policies are updated to reflect emerging areas of concern and that clear escalation mechanisms to in-house counsel are in place.

*With thanks to Jake Bullock, Alexandra Forrest, Laura Onken and Enrica Schaeffer for their contributions to this theme.*

# 07. Antitrust and sustainability

## will 2024 bring regulatory alignment or will the chilling effect of uncertainty persist?

**Sarah Jensen**
Antitrust Counsel, London

**Winfred Knibbeler**
Antitrust Partner, Amsterdam

**Martin McElwee**
Antitrust Partner, London/Brussels

**Justin Stewart-Teitelbaum**
Antitrust Partner, Washington, DC

**IN BRIEF**

Following an unprecedented number of climate-based natural disasters in 2023, the role that businesses should play in addressing environmental harm is high on boardroom agendas. However, any steps to accelerate the low-carbon transition through collaborations, acquisitions or public funding must be accompanied by a thorough understanding of the antitrust risks and opportunities that may arise. This is a rapidly developing area, with authorities and politicians in different jurisdictions taking very different approaches on some key issues. We expect further important developments throughout 2024 as agency thinking, political pressures and practices develop.

### Divergent approaches create risk for companies seeking to collaborate on sustainability initiatives

As pressure on businesses grows, it has become clear that the ambitious environmental goals set by governments and other stakeholders often can be met only through collaborative efforts among competitors across the entire value chain to change production, distribution and sales processes.

Antitrust authorities are typically keen to ensure that laws and enforcement policies do not stifle legitimate collaborations, but they will take a hard line on any conduct that infringes the law. The line between permissible and illegal collaborations has become more significant, and staying on the right side of that line can be challenging when:

- the legal analysis rests on a complex evaluation of future sustainability benefits (beyond price or efficiency gains) against potential costs for consumers; and
- antitrust authorities are taking divergent approaches to this assessment – with the debate focused on how long-standing “consumer welfare” principles apply when the whole of society will benefit from the initiative.

While authorities in the UK, the EU and APAC have adopted specific guidance to better enable businesses to collaborate within the confines of the law, the US agencies have been clear that environmental justifications do not affect the legality of agreements between competitors. Companies have complained that such uncertainty is chilling legitimate initiatives that are needed now.

### Welcome guidance in the EU and the UK

2023 saw both the European Commission (***EC***) and the UK Competition and Markets Authority (***CMA***) publish long-awaited final guidelines on agreements between competitors that pursue sustainability objectives. The EU is also following the UK in producing guidance for businesses making environmental claims, with the aim of tackling "greenwashing".

Importantly, the CMA and EC have joined the Dutch and Greek authorities in encouraging informal consultations on initiatives, which offer a way for businesses to get direction as to how their agreement is likely to be viewed. For collaborations that have some restrictive effect, a key challenge is how to demonstrate with cogent evidence that collaboration, as opposed to unilateral action, is needed to achieve the intended goals and that future benefits for consumers (or wider society) will outweigh any short-term harm.

**New approaches such as the CMA's open-door policy provide a welcome channel for companies seeking comfort on whether competition law concerns arise in particular initiatives. As practice develops in 2024, we are likely to have a clearer picture of how authorities approach these issues and the evidence parties may need to present.**

**Sarah Jensen**
Antitrust Counsel, London

However, convergence between authorities on key issues at an international level remains elusive. While some other jurisdictions (such as Japan) have also published similar guidance, the prevailing view of US federal antitrust agencies remains that no quantum of Environmental, Social and Governance (***ESG***) benefits can save an agreement that negatively affects competition.

### No special treatment for ESG agreements in the US

In the US, the US Department of Justice (***DOJ***) Antitrust Division and Federal Trade Commission (***FTC***) continue to affirm that there is no exemption from the antitrust laws for agreements relating to ESG. The agencies have been clear that they intend to assess ESG-related conduct within the traditional antitrust framework.

By contrast, state antitrust enforcers and legislators have been much more active in pursuing ESG-related agendas – in divergent ways. Various state attorneys general have sent letters to climate-focused initiatives and alliances interrogating the legality of commitments to collaborate to achieve sustainability. Although there has been no litigation to date, some participants have responded by withdrawing from the alliances. On the other hand, pro-ESG states are pushing legislative efforts in the opposite direction, such as by requiring pension funds to divest interests in fossil fuel assets.

**Collaborative efforts and ESG initiatives remain a high-profile and highly politicized subject, including in the context of US antitrust. While the US antitrust laws provide flexibility for a range of permissible collaborative conduct, awareness of politically motivated risk and confidence in ongoing compliance with the antitrust laws should remain a priority.**

**Justin Stewart-Teitelbaum**
Antitrust Partner, Washington, DC

Looking forward, ongoing attention to antitrust compliance within the context of ESG initiatives will remain critical. The US federal agencies are not anticipated to issue any explicit guidance in the near future and we do not expect them to modify their approach in applying traditional antitrust principles to ESG-related conduct. As a result, requests for the agencies to provide guidance to businesses on the legality of particular initiatives will generally be unproductive.

### Will ESG factors influence the outcome of merger reviews?

We are increasingly seeing the issue of sustainability raised at all stages of the merger review process; as part of the rationale for a transaction; in the assessment of the market (such as the impact of competition on green innovation and changing consumer preferences); and in whether ESG benefits can outweigh other potential consumer harm.

**Sustainability benefits and concerns could become an important element for the assessment of transactions. We expect that antitrust authorities across the world will increasingly compare notes on their analytical framework for this important topic.**

**Winfred Knibbeler**
Antitrust Partner, Amsterdam

This can work both ways. On the one hand, merging parties should prepare for authorities taking narrower approaches to market definition as consumer preferences for "green" products are increasingly seen as differentiating factors, raising the bar for clearance in some cases. On the other hand, some authorities are making tentative signals that sustainability benefits may count as efficiencies that offset any adverse effects. Deals cleared on this basis are still very rare, largely because the burden on parties to demonstrate efficiencies and benefits is so high.

However, the groundbreaking decision by the Australian Competition and Consumer Commission (**ACCC**) in October 2023 to approve the *Brookfield/Origin Energy* merger on the basis that environmental benefits are likely to outweigh any detriment to competition may signal greater willingness by some authorities to take account of sustainability benefits in future merger reviews.

of **Gen Z shoppers** are willing to **pay more** for sustainable products

As experience with identifying and quantifying benefits grows, businesses should get a better sense of how these issues will be addressed in practice. However, authorities are again likely to take divergent approaches – driven by the different legislative frameworks within which the agencies operate. The ACCC is one of a small group of agencies that can clear mergers on the basis of "public benefits". In *Brookfield/Origin Energy*, an accelerated roll-out of renewable energy generation leading to a more rapid reduction in greenhouse gas emissions was treated as a public benefit. Other agencies apply narrower tests, with exemptions often framed around concepts of economic efficiency.

The EC has, however, explicitly recognized sustainability as a parameter of competition in its draft updated market definition notice and highlighted the growing role of ESG issues in merger reviews in a recent brief on sustainability in merger decisions. It emphasizes that the current assessment framework is flexible enough to take account of sustainability issues but also highlights the risk of so called "green killer acquisitions" coming under extra scrutiny.

The CMA has also recognized sustainability as a potential parameter of competition and/or consumer benefit, but these are considered under the existing framework, which imposes a very high bar for the recognition of such benefits.

In the US, the agencies have not recognized ESG considerations as relevant in merger analysis. FTC Chair Lina Khan has stated that ESG benefits are "no defense" for otherwise illegal mergers. While the revised US merger guidelines published in December 2023 do not mention ESG-related conduct or efficiencies, the proposed framework would allow for a more expansive approach to merger analysis, providing the agencies with flexibility to assert potential anticompetitive harm and further scrutinize efficiencies claims.

## Financing a greener future

The past few years have seen governments introduce major subsidies to help finance the shift to a greener future. In March 2023, the EU unveiled its proposal for a Net Zero Industry Act to boost competitiveness in Europe, which followed the US and its $369 billion subsidy-rich Inflation Reduction Act. However, these schemes can pose problems under international trade law, and there are an increasing number of examples where challenges are being brought under anti-subsidy or trade rules against subsidization of green industries, which can cause problems for companies relying on these measures and schemes given the uncertainty that these challenges create.

**As governments try to incentivize a green shift from the private sector, companies should check that incentive schemes are legally robust before relying on them.**

**Martin McElwee**
Antitrust Partner, London/Brussels

For example, 2023 saw the EC open a probe into Chinese electric vehicles as well as engage in talks with EU wind turbine makers about a potential probe into unfair state subsidies that help Chinese producers undercut EU competitors.

The EU Carbon Border Adjustment Mechanism, a controversial levy on carbon-intensive goods that acts as a complement to the EU Emissions Trading System, is also not without its critics, with allegations leveled that it breaches international trade law.

Subsidy wars have created some uncertainty for businesses on a global scale, while bolstering investment in green tech at the EU level. 2024 will likely bring further subsidy control enforcement as the EU seeks to protect domestic industry.

**€620bn**

in **annual additional investments** will be needed to meet the objectives of the EU Green Deal and REPowerEU

From 2021–2027 the EU will spend

**€578bn**

**at least 30%** of its budget, on climate-relevant action

### Looking ahead in 2024

- **Monitor upcoming guidance.** Further clarity on the line between legitimate and illegal "green agreements" is expected to emerge in 2024 as authorities apply their new policies and respond to requests for informal guidance.
- **Divergence between regulators will remain a key risk for firms seeking to collaborate on sustainability issues**. Carry out a careful jurisdiction-by-jurisdiction assessment of any collaboration agreements. Consider seeking informal guidance where available, to give some comfort as to how the agreement will be viewed by authorities and clearly document the expected sustainability/environmental benefits of the agreement so environmental claims can be substantiated. Don't assume that unsubstantiated sustainability claims are sufficient to mitigate antitrust enforcement risk; regulators will closely assess environmental claims.
- **Significant legislative developments will continue in 2024**. The EU's Corporate Sustainability Due Diligence Directive is still in trilogue phase, but the draft envisages that companies can share information/collaborate to reduce emissions up the supply chains. The forthcoming EU Green Claims Directive is indicative of increased regulatory scrutiny of "greenwashing", following similar initiatives by the CMA and ACCC. The 2024 US election cycle likely will include competing views of ESG principles, and the outcomes will impact ESG-focused policy more broadly and potentially in the antitrust sphere.

*With thanks to Donna Faye Imadi, Tina LaRitz, Francesca Triggs and Marianne Wood for their contributions to this theme.*

08.

# Dominance and monopolization

## back to the future?

**Andy Ewalt**
Antitrust Partner, Washington, DC

**Bertrand Guerin**
Antitrust Counsel, Berlin/Silicon Valley

**Mark Sansom**
Antitrust and Dispute Resolution Partner, London

### IN BRIEF

The focus on dominance and monopolization investigations is set to further increase in 2024. US agencies show no signs of slowing down their pursuit of alleged anticompetitive conduct, even reverting to older legislation to bring novel monopolization claims.
This is matched by active public and private enforcement in the UK, with expansive class action litigation firmly taking root. Europe can expect new draft guidelines on exclusionary abuses, representing the first major reforms in this area since 2008.

### Novel monopolization claims in the US

In the US, the US Department of Justice Antitrust Division and the Federal Trade Commission (***FTC***) are primed to continue their recent push to bring novel monopolization claims – and in greater numbers. High-profile cases against some of the world's largest technology companies will keep progressing, with the companies' innovative products contrasting with enforcers' distinctly old-fashioned approaches.

US regulators are not only bringing more monopolization cases – they are also seeking drastic remedies in more of those cases.
If they prevail, courts could have to decide whether to order a divestiture in a non-merger case for the first time in decades.

**Andy Ewalt**
Antitrust Partner, Washington, DC

### "Unfair practices" under scrutiny

In 2024, all eyes will be fixed on the FTC's suit against Amazon. Spearheaded by FTC Chair Lina Khan, a longtime critic of the company, the case alleges that Amazon engaged in an unfair course of conduct that enabled it to maintain monopoly power in markets for online superstores and online marketplace services. Five days before suing Amazon, the FTC brought another monopolization case against U.S. Anesthesia Partners (*USAP*) and its private equity parent, challenging the serial acquisition of more than a dozen smaller anesthesiology practices in Texas over the past decade as part of a "roll-up" strategy.

Notably, both actions include claims under Section 5 of the FTC Act alleging "unfair" practices. As the FTC previewed in late 2022 in its updated Section 5 policy statement, it no longer views its Section 5 authority as limited to challenging historically recognized anticompetitive conduct. Instead, it may challenge any act that it considers an unfair method of competition, an approach the agency has not systematically pursued since suffering a string of court losses in the early 1980s.

### Structural remedies back in fashion

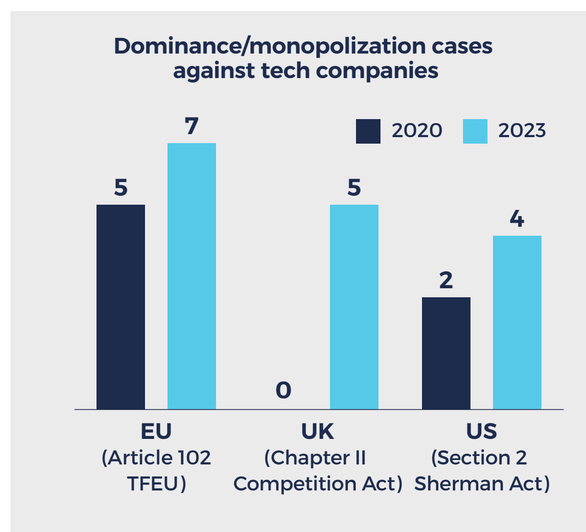
The Amazon and USAP cases also illustrate US regulators' reversion to 1960s-era structural relief as their preferred remedy for monopolization concerns. In USAP, as in some of the agencies' other recent monopolization suits, the FTC explicitly seeks to break up the formerly independent anesthesiology practices. And in Amazon, the FTC's cagey request for "structural relief" leaves open the possibility that it may yet try to break up the company.

### Active public and private enforcement in the UK

In the UK, active public and private enforcement continues apace. Recent public enforcement has centered on the technology and pharmaceutical sectors. The Competition and Markets Authority (*CMA*) has been successful at the UK Competition Appeal Tribunal (*CAT*) in excessive pricing cases in the pharmaceutical sector – cases that have historically been difficult to prove. The focus on large tech companies will continue as the CMA looks to settle allegations of abusive conduct in a number of cases and to progress other investigations in the digital sector.

**The multiple ongoing CMA abuse of dominance investigations into large tech companies are expected to spawn damages claims based on the alleged abusive conduct. Indeed, the CMA is actively encouraging customers of those companies to seek compensation.**

**Mark Sansom**
Antitrust and Dispute Resolution Partner, London



## Class actions booming and categories of abuse expanding

In private enforcement, 2024 will see heavy use of the UK's antitrust-only opt-out class action regime to target tech companies. A number of these actions are already before the CAT.

It is now common for such class actions to be brought on a standalone basis – i.e., without any prior competition authority investigation or decision – and to be based on expansive allegations of abuse that go well beyond established precedent. Categories of abuse are being broadened to encompass general consumer protection issues, such as information opacity, product liability, data breaches and environmental protection.

A permissive approach to class certification by the CAT and the continued availability of significant litigation funding (notwithstanding the recent outlawing by the UK Supreme Court of certain funding agreements) will see claimants continue to pursue these novel theories of harm, deploying competition law to what are in fact general consumer claims. Hopefully the CAT (and the appeal courts) will shortly clarify whether the law on the abuse of dominance is the appropriate tool to address issues historically dealt with by the CMA's consumer protection and market investigation tools. Meanwhile, consumer-facing companies face significant risk from such class actions.

## Lowering the bar for intervention in the EU

In March 2023, without prior consultation, the European Commission (***EC***) published a revised version of its 2008 guidance on enforcement priorities for abusive exclusionary conduct by dominant undertakings (***Guidance***). In parallel, it also launched a public consultation on a new set of guidelines, a draft of which is expected to form the basis of a consultation in June 2024.

**The European Commission is determined to bring dominant companies to heel and has changed its policy guidance to give it greater leeway. A resurgence in investigations against exploitative abuses at the EU or national level is also possible due to the difficult macroeconomic context.**

**Bertrand Guerin**
Antitrust Counsel, Berlin/Silicon Valley

The March amendments reduce the importance of the effects-based, or "economic," approach to abuse cases under Article 102 of the Treaty on the Functioning of the European Union – in particular, the application of the "as-efficient competitor" (***AEC***) test – thereby lowering the bar for intervention. The revised Guidance now recognizes that in certain (unspecified) circumstances, companies that are not (yet) as-efficient competitors may also warrant protection from exclusionary behavior by dominant companies.

The revised Guidance also lowers the bar on what the EC considers constitutes "anti-competitive foreclosure". That bar is no longer set at exclusion of competitors linked to the ability of the dominant company to profitably increase prices. Instead, it is sufficient if the dominant company's conduct adversely impacts an effective competitive structure of the market, allowing it to "negatively influence" the parameters of competition (such as price and innovation) – without the need to show the strategy is profitable.

Although the revised Guidance is aimed at "enhancing transparency on the principles underpinning the Commission's enforcement action", it is uncertain whether the changes make it more difficult for companies accused of abusing a dominant position to defend themselves in an investigation. At the very least, the revisions bring with them a loss of legal certainty. For example, how will the revised Guidance impact companies' ex ante self-assessment? How should companies know whether an AEC test is considered appropriate in their market and – where it is – which elements could outweigh its application? Time will tell.

## Looking ahead in 2024

- **Consider contributing to the EC's consultation** on its draft guidelines on exclusionary abuses of dominance.
- **Take account of possible public or private intervention alleging abuse of dominance** when assessing possible transactions involving a dominant company.
- **Be aware of the heightened risk of competition authorities pursuing structural remedies**, up to and including divestitures in monopolization cases.
- **Consumer-facing companies should be alert to the risk of investigations into alleged abusive pricing conduct**, and also to private class actions based on broad notions of consumer harm.
- **Monitor the results of pending cases in relevant jurisdictions** to gauge the extent to which robust agency action is endorsed by the courts.

*With thanks to Bola Ajayi, Tyler Garrett and Joanna Goyder for their contributions to this theme.*

# 09.
# Antitrust investigations
## uptick in enforcement with tougher powers and increased interagency cooperation

**Rachael Annear**
Global Transactions Partner, London

**Laurent Bougard**
Antitrust Counsel, Hong Kong

**Deba Das**
Antitrust and Dispute Resolution Partner, London

**Tobias Klose**
Antitrust Partner, Düsseldorf

**Bruce McCulloch**
Antitrust Partner, Washington, DC

**IN BRIEF**

In an already aggressive antitrust environment, businesses should prepare for increased regulatory enforcement in 2024. Leniency applications (triggering investigations) are increasing, and antitrust authorities are enhancing their investigatory and enforcement powers while deploying existing powers more aggressively. In practice, this means broader information requests from regulators, expansive interagency cooperation (including multi-jurisdictional dawn raids), and regulators using their antitrust powers to pursue infringements outside the scope of their original investigation or to remedy alleged violations of consumer or data protection laws.

### A changing legislative environment and new areas of regulatory focus

New legislation underpins competition authorities' more proactive approach to enforcement. Recently, the German Federal Cartel Office's (*FCO*) powers have expanded significantly, and the UK Competition and Markets Authority (*CMA*) seems likely to follow suit. The UK's Digital Markets, Competition and Consumers Bill – expected to come into effect in late 2024 – would enable the CMA to impose tougher penalties on businesses, expedite investigations, and gather more extensive information from parties, including from foreign domiciled entities.

Agencies have also proposed new rules or rolled back guidance to expand their ambit. In the US, the Federal Trade Commission (*FTC*) recently proposed a rule banning non-compete clauses in labor contracts, which it continues to consider, and the US Department of Justice (*DOJ*) Antitrust Division withdrew long-standing guidance regarding the acceptability of information sharing between competitors. The rollback underscores the DOJ's increased scrutiny of anticompetitive information exchanges, embodied in the DOJ's recent suit against Agri Stats, in which the agency alleges Agri Stats

organized and managed anticompetitive information exchanges between competitors. Labor markets are also increasingly under the microscope in the UK: the CMA currently has two investigations open into alleged wage-fixing.

**Information sharing between foreign regulators and the CMA looks set to increase, and we can expect additional cooperation agreements between regulators and more coordinated requests for information. The CMA is also set to obtain new powers to require production of cloud data and other forms of electronically stored evidence and to make individuals subject to a duty to preserve any evidence where they know or suspect that an infringement has taken place.**

**Deba Das**
Antitrust and Dispute Resolution Partner, London

## Increased exercise of existing powers

Businesses should expect agencies to continue with their recent practice of issuing wide-ranging requests for information (***RFIs***). Often these RFIs necessitate complex electronic searches and expansive document submissions in short time frames. RFIs can be directed to an entire industry and go beyond the scope of the authority's original investigation, requiring the production of responsive documents without any leniency discount in return. In the US, the FTC has shown an increased willingness to enforce these RFIs against non-responsive third-party recipients of an RFI. For example, the FTC recently enforced an information request against an entity that was not the subject of the FTC's investigation, emphasizing the need for recipients of such notices to develop comprehensive response strategies and clearly assess the benefits and burdens of compliance.

**Authorities' recent practice of issuing extensive RFIs leaves companies with difficult strategic decisions on how best to preserve and, if necessary, defend their right not to incriminate themselves while avoiding significant fines for noncompliance.**

**Tobias Klose**
Antitrust Partner, Düsseldorf

Authorities are also developing their own tools to supplement existing powers. For example, the Spanish competition authority announced in October 2023 that it had developed a tool based on machine learning that predicts whether a tender is likely to be competitive or not, which would enable it to initiate "pure" ex officio cartel investigations.

Simultaneously, authorities are launching more frequent and burdensome market studies, which can evolve into standalone investigations for affected companies or even shape future legislation to develop or protect markets. We have seen this pattern in many jurisdictions, and the FCO stated publicly that its recent market investigations will inform various upcoming investigations. This trend appears likely to continue as the CMA bolsters its powers with more procedural flexibility and the ability to impose condensed timetables on respondents.

The pattern is also playing out in Asia. The new Economic Analysis Office is bolstering the Japanese Fair Trade Commission's investigative powers in several areas, including digital advertising, public-sector IT system procurement and cloud services. In China, updates to the Anti-Monopoly Law are empowering the State Administration for Market Regulation to increasingly act in non-horizontal cases and impose harsher penalties for serious antitrust violations. In Hong Kong and elsewhere in the region, regulators have prioritized enforcement in sectors affecting people's livelihoods, including consumer goods and pharmaceuticals.

**The recent uptick in market investigations is a strong indicator that more investigations into individual companies will follow suit. This is a global phenomenon but also something we especially expect to see in Asia. Consumer-facing sectors are particularly prone to investigation.**

**Laurent Bougard**
Antitrust Counsel, Hong Kong

## The trend toward interdisciplinary investigations

Interdisciplinary investigations are on the rise as agencies leverage existing investigations to pursue ancillary or even unrelated theories of harm. For example, in the US, the FTC recently alleged, after investigating a merger, that the transaction violated a standalone antitrust prohibition against interlocking directorates without challenging the underlying transaction. To complete the deal, the parties agreed to an extensive settlement to resolve the FTC's standalone claims regarding interlocking directorates and information exchange.

**The FTC and the DOJ are broadening the scope of investigations to uncover unrelated antitrust violations. Now more than ever, businesses approaching competition authorities should be equipped with a complete understanding of global antitrust risk.**

**Bruce McCulloch**
Antitrust Partner, Washington, DC

Regulators are also focusing on new legal areas. The FCO was recently empowered to investigate consumer-related issues and has focused on the intersection of antitrust and data protection laws. Similarly, the French competition and data protection authorities published a joint declaration in December 2023 vaunting increased cooperation and highlighting the "distinct but compatible objectives" and "synergies to be harnessed" in better integrating privacy and competition in the respective agendas of the two authorities. And in the UK, new legislation will enable the CMA to enforce breaches of consumer law with up to 10 percent of the company's global turnover. We expect the CMA to use its new powers to focus on dual consumer and competition theories of harm, broadening its investigatory scope and covering issues such as data use and privacy.

The increasing importance of data in the digital economy is likely to drive further overlaps between antitrust and data regulators. Coordination and strategic alignment remain key in responding to crossover investigations.

**Rachael Annear**
Global Transactions Partner, London

## Global interagency cooperation and coordination

Regulators are also aiming for more frequent and extensive cross-border collaboration, including via information sharing and coordinated investigations. In 2023, the DOJ and the FTC hosted an Enforcers' Summit, convening various international enforcement agencies to discuss enforcement priorities and strategies for effective coordination. The DOJ further announced it is working with antitrust agencies around the globe on future enforcement activities, including with the CMA and the European Commission. Association of Southeast Asian Nations member states are negotiating a framework agreement to facilitate coordination on competition policy and law, which presages increased regulatory alignment in Asia. Leniency applications are also on the rise. When faced with these ever-expanding multi-jurisdictional investigations, seamless interdisciplinary legal advice is key.

## Looking ahead in 2024

- **Monitor legislative and market study developments.** Understand the existing complex web of international enforcement powers and track new powers that regulators may exercise. Prepare for the potential implications of market studies and be ready (where relevant) to respond to extensive RFIs from regulators, recognizing that enforcers are cracking down on any perceived lack of responsiveness.
- **Prepare for more expansive, interdisciplinary and interagency investigations.** Be mindful of increased cooperation between competition regulators. Expect regulators to work closely together and frequently exchange information among themselves. Recognize that investigations into one market can quickly lead to additional investigations into other potential areas. Consider preparing for any tangential antitrust investigations by conducting internal risk assessments.

*With thanks to Dominic Divivier, Sam Fulliton, Sarah Holland, George Lumbers and Jack Bailey for their contributions to this theme.*

# 10. Cross border claimant strategies focused on investigations and litigation

**Nick Frey**
Antitrust and Dispute Resolution Partner, London

**Daniel Hunt**
Antitrust and Dispute Resolution Counsel, London

**Tina Sessions**
Antitrust Partner, Silicon Valley

**Mijke Sinninghe Damsté**
Dispute Resolution Partner, Amsterdam

**IN BRIEF**

In 2024, well-resourced competitors, commercial counterparties and claimants will continue the trend of leveraging competition regimes to further their commercial goals through increasingly sophisticated strategies. Cross-border coordination on regulatory engagement, novel litigation approaches and public relations campaigns are increasing their chances of success. Particularly attractive targets for these strategies are businesses that operate internationally. Coordinated action is already visible in the litigation and regulatory scrutiny faced by some major international firms, such as those in the tech industry.

### The (continued) rise of cross-border and cross-forum strategies

Sophisticated complainants have developed increasingly complex and coordinated cross-border litigation and regulatory strategies, combined with publicity campaigns, to maximize the impact of their complaints and to further their commercial aims.

Because clients are increasingly fighting parallel (and often simultaneous) investigations and litigation in multiple jurisdictions across the globe, deploying a coordinated litigation strategy across forums is now more important than ever.

**Tina Sessions**
Antitrust Partner, Silicon Valley

Cross-border litigation and regulatory engagement can increase the practical effectiveness of complaints and litigation through arbitrage between different national procedural rules, such as the use of wide disclosure regimes in one jurisdiction to identify

key information or documents for more targeted use in other jurisdictions. Similarly, claimants are increasingly scrutinizing defendant submissions across jurisdictions and across both defenses and regulatory submissions (where obtainable), with the aim of identifying alleged admissions or inconsistencies that could give rise to estoppel-type arguments. At the other end of the spectrum, "shotgun" strategies – making complaints to a number of regulators across different jurisdictions in an attempt to ensure regulatory engagement – are increasingly effective as they can allow complainants to benefit from the broadening and deepening of cross-border collaboration and communication between antitrust regulators globally.

These methods are often adopted alongside other forms of pressure, such as international publicity campaigns aimed at driving the complaint into public consciousness in an effort to drive complainant-friendly resolutions.

Recent examples of the deployment of some or all of these strategies include:

- A major video game and software developer launched parallel litigation seeking injunctive relief in the US, the UK and Australia against app marketplace operators alleging that the fees charged on in-app purchases constitute an abuse of dominance or monopolization. These standalone claims were combined with cross-border regulatory complaints, including to the European Commission (***EC***) and the UK's Competition and Markets Authority (***CMA***), and a major public relations campaign. EC and CMA investigations are ongoing, while the US private plaintiffs' cases on related claims have advanced to the merits stages. Following a trial in 2021, a US district court determined that an application marketplace operator did not have a monopoly under US federal law, but also ruled in favor of the plaintiff on a US state law claim. That case is currently on appeal. Meanwhile, the US private plaintiff went to trial against another operator in the fall of 2023, and the jury found in favor of the plaintiff on the monopoly claim.
- A semiconductor producer is facing a claim brought in England and Wales drawing on an (unrelated) infringement decision issued by the Korea Fair Trade Commission. Claimants in these proceedings are attempting to leverage the adverse factual findings of the Korean regulator and are seeking, via England's rules of disclosure and for use in English proceedings, documents from the case file of the Korean regulator.
- The announcement of a formal investigation by the EC into allegations that a technology company was unfairly bundling communication and collaboration products with its productivity software (itself spurred by a complaint from a communication and collaboration competitor) was quickly followed by a call for action from other regulators by a separate competitor. The complainant was reported to have held informal discussions in relation to the same conduct with other regulators including in the US, the UK and Germany, while its CEO referred to its concerns in a public forum. These public comments reignited media interest in the bundling allegations, with a number of articles reporting on the comments appearing in the business press.
- A major technology company has faced regulatory scrutiny around the globe (including investigations in the US, the EU, the UK, France and Australia) regarding the company's advertising products. At least one of these investigations was preceded by

a complaint to the regulator filed by an online news publisher. Claimants have launched litigation against the company in multiple countries, including by drawing on regulatory findings in other jurisdictions, seeking damages for alleged monopolization or abuse of dominance in online advertising technology.

## An expanding waterfront of jurisdictions friendly to complainants and claimants

**The past few years have seen, alongside traditional hotspots for competition litigation like the US, Germany, the Netherlands and the UK, growth in major antitrust claims brought in newer forums, driven by legislative change and claimant-friendly decisions.**

**Nick Frey**
Antitrust and Dispute Resolution Partner, London

A key reason it is easier for complainants and claimants to arbitrage between jurisdictions is the growth in the number of attractive venues for major antitrust litigation.

Examples include Portugal, which has an established class action regime increasingly being used to bring large antitrust claims with an international angle, together with a specialist Competition Court that in the past year has listed several class actions against tech companies relating to in-app transaction fees. The local firms advising the Portuguese class representative are supported by an international firm that has brought similar suits in other jurisdictions, including the UK and the US, and are being financed by a Spanish legal services company.

Spain itself will feature prominently in the thoughts of claimant firms deciding where to bring claims, following a series of claimant-friendly rulings from the Supreme Court of Spain earlier this year, which identified a low standard of proof for claimants to establish loss and causation and endorsed the use of high-level considerations and judicial estimation to justify awards of damages in certain circumstances.

The upcoming implementation of the European Representative Actions Directive may result in further major antitrust claims in even more jurisdictions. While the directive itself does not require member states to apply the regime to competition infringements, a number of jurisdictions may in fact do so, with proposals to extend the regime to cover antitrust claims having been raised in at least Spain and France.

**Litigation funders continue to regard the Netherlands as one of the more favorable jurisdictions for claimants. The country has witnessed a significant increase in competition litigation, encompassing not only traditional follow-on damages claims but also, more recently, claims related to the abuse of dominance.**

**Mijke Sinninghe Damsté**
Dispute Resolution Partner, Amsterdam

## Looking ahead in 2024

- **Claimants and complainants will embrace widening opportunities.** The global environment has rarely been more favorable for the use of antitrust claims and complaints to achieve commercial aims. Companies looking to use antitrust law offensively will challenge their advisors to think globally and holistically, and to propose strategies that are deep and broad enough to test defendants across multiple pressure points.
- **Defendants will focus on identifying and managing regulatory risk across jurisdictions.** Increasing regulatory coordination and deployment of foreign regulatory decisions in claims means that international businesses must redouble efforts to ensure that their regulatory engagement, litigation and public relations strategies are joined up, including across countries and regions, with relevant risks in one region notified to the wider business early to facilitate the identification of (and response to) coordinated international attacks.

It is more important than ever to avoid geographic and subject-matter silos. One practical step that we see increasingly adopted at an early stage when issues do arise is the engagement of a coordinating external counsel tasked with providing global oversight across jurisdictions.

**Daniel Hunt**
Antitrust and Dispute Resolution Counsel, London

*With thanks to Xander Friedlaender, Claire Leonard and Lydia Ream for their contributions to this theme.*

# Our international antitrust, competition and trade group

## Your contacts

### Amsterdam
Onno Brouwer
Winfred Knibbeler
Alvaro Pliego Selie
Paul van den Berg
T +31 20 485 7000

### Beijing/Shanghai
Ninette Dodoo
Hazel Yin (RuiMin Law Firm)*
T +86 10 6505 3448

### Berlin
Dr. Helmut Bergmann
Bertrand Guerin
Dr. Thomas Lübbig
Mariusz Motyka-Mojkowski
Merit Olthoff
Dr. Frank Röhling
Dr. Uwe Salaschek
T +49 30 20 28 36 00

### Brussels
Rafique Bachour
Dr. Lorand Bartels
Onno Brouwer
Rod Carlton
Dr. Maria Dreher-Lorjé
Laurent Garzaniti
Thomas Janssens
Martin McElwee
Mairi McMartin
Jenn Mellott
Dr. Frank Montag
Tone Oeyen
Merit Olthoff
Alan Ryan
Sascha Schubert
Alicia Van Cauwelaert
Paul van den Berg
Dr. Andreas von Bonin
Dr. Thomas Wessely
T +32 2 504 7000

*RuiMin is an independent PRC law firm that is part of our global **Stronger**Together Network

### Düsseldorf
Dr. Katrin Gaßner
Dr. Uta Itzen
Dr. Tobias Klose
Dr. Martin Klusmann
Dr. Peter Niggemann
Dr. Ulrich Scholz
Prof. Dr. Gerhard Wiedemann
Juliane Ziebarth
T +49 211 49 790

### Hanoi/Ho Chi Minh City
Hoang Ha An
Thanh Tien Bui
T +84 24 3824 7422

### Hong Kong
Laurent Bougard
Alastair Mordaunt
T +852 2846 3400

### London
James Aitken
David Aitman
Dr. Lorand Bartels
Rod Carlton
Alastair Chapman
Deba Das
Michele Davis
Nicholas French
Nicholas Frey
Rikki Haria
Daniel Hunt
Sarah Jensen
Jenny Leahy
Sharon Malhi
Martin McElwee
Thomas McGrath
Alastair Mordaunt
Alex Potter
Simon Priddis
Colin Raftery
William Robinson
Mark Sansom
Bea Tormey
Deirdre Trapp
Ricky Versteeg
T +44 20 7936 4000

### Madrid
Enrique Carrera
Álvaro Iza
T +34 91 700 3700

### New York
Tom Morgan
T +1 212 277 4000

### Paris
Petya Katsarska
Jérôme Philippe
T +33 1 44 56 44 56

### Rome/Milan
Giorgio Candeloro
Alessandro Di Giò
Ermelinda Spinelli
Gian Luca Zampa
T +39 06 695 331

### Silicon Valley
Bertrand Guerin
Alan Ryan
Justina Sessions
T +1 650 618 9250

### Tokyo
Akinori Uesugi
Kaori Yamada
T +81 3 3584 8500

### Vienna
Dr. Maria Dreher-Lorjé
T +43 1 515 15 0

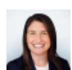
### Washington, DC
Julie Elmer
Andrew Ewalt
Jamillia Ferris
Christine Laciak
Heather Lamberg
Angela Landry
Mary Lehner
Eric Mahr
Meytal McCoy
Bruce McCulloch
Matthew McDonald
Jenn Mellott
Aimen Mir
Meredith Mommers
Laura Onken
Charles Ramsey
Brian Reissaus
Meghan Rissmiller
Jan Rybnicek
Justin Stewart-Teitelbaum
T +1 202 777 4500

February 29, 2024 | 6 minutes read

# Kroger/Albertsons: The FTC's First Challenge Under the 2023 Merger Guidelines

**Justin Stewart-Teitelbaum**
Partner

**Angela Landry**
Counsel



**Gabriella Small**
Associate


On February 26, 2024, the Federal Trade Commission (FTC) filed a lawsuit to block The Kroger Company's proposed acquisition of Albertsons Companies, Inc. for $24.6 billion. The challenge marks the first attempt to block a merger by either the FTC or the Department of Justice's Antitrust Division (DOJ) since their joint publication of the *2023 Merger Guidelines*, a revamping of the *Horizontal Merger Guidelines* issued in 2010 and Vertical Merger Guidelines issued in 2020. The FTC alleges that the Kroger/Albertsons merger would eliminate head-to-head competition between the companies, resulting in higher prices for food and grocery products at supermarkets and harm to thousands of union grocery workers in the United States. To allay the FTC's concerns, the companies previously announced a proposed divestiture of 413 stores and

associated assets to C&S Wholesale Grocers, LLC, but the FTC rejected the divestiture as insufficient to resolve the competitive issues. The Offices of the Attorneys General of Arizona, California, the District of Columbia, Illinois, Maryland, Nevada, New Mexico, Oregon, and Wyoming have joined the lawsuit, which comes amid the backdrop of two separate and ongoing state lawsuits to block the merger, in Colorado and Washington, where Kroger and Albertsons have filed motions to dismiss.

The FTC's challenge provides some key insight into its enforcement strategy under the new 2023 *Merger Guidelines*. Unsurprisingly, the lawsuit demonstrates that the FTC is following through with asserting presumptive illegality of transactions in which market concentration measures exceed the newly lowered *Merger Guidelines* thresholds. Additionally, although the agencies under the Biden Administration have been transparent about their willingness to investigate and challenge transactions they believe harm workers, this is the first challenge that does not allege that workers need to be highly specialized in a particular field but instead puts the focus on union membership. Finally, the FTC's rejection of the divestiture package does not suggest a significant divergence from recent prior practice, at least in this instance, with the agencies casting a critical eye on sufficiency of remedy offers.

## Lower Market Concentration Thresholds Are Firmly in Play

Guideline 1 of the 2023 *Merger Guidelines* identifies market concentration thresholds above which the FTC and DOJ will presume a transaction is unlawful. There are two, alternative thresholds: (1) a Herfindahl-Hirschman Index (HHI) measure (which sums the squares of each market participant's market share) greater than 1,800 for the post-merger market and a post-merger HHI increase greater than 100, and (2) a combined market share of 30% and a post-merger HHI increase greater than 100. The 2010 *Horizontal Merger Guidelines*' presumption was stated only in the context of HHIs (rather than

market shares) and maintained a higher threshold of 2,500 with an increase of 200.

The complaint alleges that the transaction exceeds at least one of the new thresholds in local markets surrounding more than 1500 Kroger and Albertsons supermarkets in 17 states and exceeds the new market share threshold in local areas covered by collective bargaining agreements (CBAs) in 4 states. Given that the 2023 *Merger Guidelines* state the antitrust agencies' current enforcement policy, it should not come as a surprise that the FTC relies on the new thresholds to allege that the Kroger/Albertsons transaction is presumptively unlawful. We expect this practice to continue.

## The FTC Is Keenly Attuned to How Mergers Impact Workers

A key theory of harm under which the FTC challenges the transaction is the reduction of competition in a labor market. The complaint notes that Kroger and Albertsons are two of the largest employers of union grocery labor in the United States. The FTC defines the relevant labor markets as "union grocery labor" in local areas defined by coverage of their respective CBAs. As support for its theory of harm, the FTC explains that in areas of overlap between Kroger and Albertsons, unions negotiate separately but simultaneously with the companies and frequently can obtain favorable deals with the employers by leveraging them against each other. For example, the FTC asserts that union members can threaten to strike or coordinate a strike against Kroger and encourage customers to shop and fill their prescriptions at Albertsons or vice versa, with the diversion of sales pressuring Kroger to offer better employment terms to the members to end the strike. The lawsuit in Colorado also pointed to competitive concerns in the grocery labor market, alleging that the no-poach agreements during a 2022 strike by Kroger employees, and the non-solicitation agreements of pharmacy customers, are per se unlawful under state law.

The FTC's approach to the labor theory of harm is a novel one in modern merger enforcement under Section 7 of the Clayton Act. One likely issue to resolve is whether the markets are appropriately defined for antitrust purposes. For example, in an area where workers may not need to have highly specialized training or experience, there is a question whether businesses operating in different industries compete for the same workers—that is, could a clothing retailer or a restaurant hire a worker from a grocery store? The complaint attempts to define the labor market by arguing that union grocery workers have incentives to keep their pension and healthcare benefits by staying within the union. Regardless of any potential judicial outcome, these allegations demonstrate that the FTC remains focused on labor markets, including in merger control.

## Traditional Considerations for Divestitures Remain Highly Relevant

The FTC alleges that the proposed divestiture to C&S Wholesale Grocers, LLC, is insufficient to mitigate the harm to competition expected from the transaction. The FTC expresses concerns with C&S as the divestiture buyer and with the divestiture package. It alleges that C&S is a grocery wholesaler and has limited experience with retail supermarkets. Interestingly C&S was an approved divestiture buyer involved in the 2021 transaction between Tops and Price Chopper. However, the scenarios may be distinguished. In Tops/Price Chopper, C&S acquired 12 stores in that divestiture package. Here, C&S would be acquiring 413 stores from Kroger/Albertsons, increasing C&S's retail footprint 18-fold. The FTC also alleges that C&S's publicly stated business strategy as recently as 2021 was to not grow its grocery retailing operations or operate its retail grocery stores in the long term, indicating the FTC is skeptical of C&S's ability and incentive to maintain the competitive status quo.

Additionally, the FTC alleges that the divestiture package is a "hodgepodge" of 413 out of over 5,000 stores, rather than a standalone business capable of operating as a viable competitor, due

to a lack of scale and necessary assets (e.g., banners, distribution centers, IT). Moreover, a lengthy transition period raises FTC concerns regarding ongoing entanglement between Kroger/Albertsons and C&S following the closure of the transaction.

These concerns are highly salient to the FTC (whether they have merit or not in this case), particularly when it comes to supermarkets. Sufficient incentives and capabilities on a divestiture buyer's part, the ability to operate as a standalone business, and a clean transition that timely eliminates ongoing entanglements are issues that the FTC and DOJ have historically tried to resolve when considering divestiture packages. The issues are also relevant to the FTC in the context of supermarket mergers considering a recent history of divestitures in the space that did not succeed.

## Key Takeaways

This challenge presents the first glimpse of the FTC's application of the 2023 *Merger Guidelines* and underpins several recommendations for companies considering mergers:

- Merging parties should be prepared to overcome presumptions present in transactions that meet the 2023 *Merger Guidelines*' lower market concentration and market share thresholds.
- Merging parties should consider whether there are any potential labor-focused competitive concerns in a given transaction, especially in circumstances where there are stakeholders that may complain, such as unions.
- The importance of the identity of the divestiture buyer and the scope of the divestiture package continues, especially in the context of US agencies that are skeptical of remedies. The FTC will test critically whether the divestiture package comprises a standalone business that will allow the divestiture buyer to continue operating the business as a viable competitor.

If you have any questions, feel free to reach out to our Merger Antitrust Team, including Jamillia Ferris, Mary Lehner, Bruce McCulloch, Jenn Mellott, Meghan Rissmiller, Jan Rybnicek, Justin Stewart-Teitelbaum, and Christine Wilson.

July 13, 2021 | 4 minutes read

# FTC and DOJ Front and Center in New Biden Executive Order on Competition, with a Focus on Labor Issues

**Justin Stewart-Teitelbaum**
Partner

**Bruce McCulloch**
Partner

**Meredith Mommers**
Counsel

+1 more...

On July 9, 2021, President Biden signed a far-reaching executive order (the ***Order***) aimed at promoting competition in the American economy. This Order is a "whole-of-government" effort, which establishes a new White House Competition Council and contains 72 initiatives for a dozen federal agencies. These agencies are tasked with implementing policies and rules that target a multitude of sectors, including technology, healthcare, and agriculture, as well as labor markets across sectors. The Biden Administration justified the sweeping order by pointing to an increase in consolidation in American industries, which it argues has driven up prices for consumers.

## Increased Merger Scrutiny

As expected, the antitrust agencies – both the Federal Trade Commission (***FTC***) and the U.S. Department of Justice (***DOJ***) – play a prominent role throughout the Order. Among the various actions the FTC and DOJ are encouraged to take, the Order requests that both agencies enforce the competition laws with vigor and explicitly refers to the agencies' authority to challenge consummated mergers under the current merger guidelines.

The Order further announces a policy of greater scrutiny of mergers, particularly those in the technology, banking, and hospital sectors. FTC Chairwoman Lina Khan and Acting Assistant Attorney General Richard Powers have already announced that they will begin to review current merger guidelines to determine if they are "overly permissive" in light of current economic trends and therefore require updating. Consequently, banks, technology companies, and hospitals should consider in their deal-planning the possibility of heightened scrutiny of mergers in their sectors.

## Labor Initiatives

Although the Order as a whole has received bipartisan praise, President Biden's labor antitrust proposals have been particularly popular on both sides of the aisle. In fact, labor-related competition issues have received greater scrutiny over the past five years under two separate administrations. The Obama Administration was the first to announce that wage-fixing and no-poach practices could result in criminal liability, but it was during the Trump Administration when the DOJ ultimately brought the first criminal charges for this type of conduct.

The Biden Administration has attributed what it sees as fewer opportunities for workers to a lack of competition among employers. In response, the Order encourages the FTC to ban or limit (i) any unnecessary occupational licensing restrictions; and (ii) non-compete agreements. Non-compete agreements generally prevent workers from going to work for competitors of their former employers. Newly

confirmed FTC Chairwoman Lina Khan has previously argued that non-compete agreements diminish workers' bargaining power. However, these agreements presently are only unenforceable in a few states, including California, and are prohibited for low wage workers in about a dozen more. An outright federal ban would be a significant departure from the current state-by-state approach.

The Order also asks the agencies to reassess the Antitrust Guidance for Human Resource Professionals, which the DOJ and FTC jointly issued in 2016 under the Obama Administration. The Biden Administration argues that workers "may … be harmed by [the] existing guidance" that "allows third parties to make wage information available to employers – and not to workers – in certain circumstances without triggering antitrust scrutiny." According to the Biden Administration, such data could be used by employers to collaborate to suppress wages and benefits.

In light of this Order, companies are likely to see increased regulatory scrutiny of their employment practices. While the FTC develops new rules, businesses across sectors should reflect on and update their compliance and HR training to ensure that they cover the latest developments related to non-compete agreements and exchange of wage information.

## Additional Expansive Initiatives

The other enforcement efforts identified in the Order are wide-ranging and focus on the healthcare, transportation, agriculture, and technology sectors.

*Healthcare*

: The Order encourages the import of prescription drugs from Canada and supports the use of generic and biosimilar drugs. It also encourages the FTC to implement a rule to ban "pay for delay" and allows hearing aids to be sold over the counter.

*Transportation****DOT***) to issue rules requiring transparency of fees and to demand refunds of fees for customers when baggage is delayed or when a service (such as in-flight WiFi) is not provided. It also asks the DOJ to work with regulatory agencies against foreign-owned shipping alliances and monopolized rail routes that the Biden Administration believes have driven up shipping costs.

: The Order directs the Department of Transportation (

*Agriculture*

: The Order encourages new rules to allow farmers to sue large agricultural processors if they are either underpaid or retaliated against for speaking out regarding certain bad practices. It also asks the FTC to create rules limiting manufacturers from restricting consumers' ability to use independent repair shops or DIY repairs, which would impact farmers looking to repair their own tractors, as well as manufacturers of mobile phones and gaming systems.

*Technology*

: The Order encourages the FTC to establish rules on the accumulation of data and to bar unfair methods of competition on internet marketplaces. It also asks the Federal Communications Commission to restore net neutrality rules and would require internet service providers to report their prices and subscription rates to the FTC.

**Continued Spotlight on Antitrust**

The implementation of the rules and regulations outlined in the Order will take time and will likely be challenged by businesses, so some of the proposals may end up narrowed. However, the Order demonstrates that the Biden Administration will continue to focus on antitrust enforcement and reform in the labor market and beyond. President Biden has appointed many well-known progressive advocates for antitrust reform, including FTC Chairwoman Lina Khan

and Tim Wu, who serves as the Special Assistant to the President for Technology and Competition Policy.  While the fate of the more controversial antitrust reform bills currently advancing in Congress remains uncertain, the Order illustrates how the Biden Administration is prepared to advance an aggressive antitrust agenda — with or without Congress.

August 28, 2023 | 5 minutes read

# Latest Round of Section 8 Enforcement Demonstrates Agency Efforts to Expand Statute's Boundaries

**Bruce McCulloch**
Partner

**Justin Stewart-Teitelbaum**
Partner

**Meytal McCoy**
Special Counsel

+1 more...

The latest enforcement effort involving Section 8 of the Clayton Act, which prohibits interlocking directorates, "put[s] market participants . . . on notice" that Section 8 "must [be] follow[ed]." On August 16, 2023, the US Federal Trade Commission (***FTC***) announced an action to prevent "an interlocking directorate arrangement" between Quantum Energy Partners and EQT Corporation. This settlement demonstrates the continued resolve of the US antitrust agencies not only to enforce Section 8 but also to expand its reach.

## Key Takeaways

- For the first time, the FTC applied Section 8 to non-corporate entities (i.e., LLCs or LPs) in an enforcement action. This likely will have impacts for private equity and financial sponsor clients that typically operate via LLC or LP structures.
- The FTC has demonstrated that it will impose interlocking directorate structural remedies, even where the underlying transaction may not, by itself, raise competition questions.
- Prior approval provisions are not limited to transactions. By requiring prior approval notice for future board appointments, the FTC is making clear that it will impose restrictions and monitoring provisions in multiple enforcement scenarios.
- Section 8 enforcement remains a high priority for the US antitrust agencies, and companies should remain vigilant with regard to potential Section 8 exposure and should consider mechanisms to remain compliant – especially when an HSR-reportable transaction puts companies in front of the agencies.

## FTC Enforces Section 8 for the First Time in 40 Years

The FTC's settlement with Quantum and EQT is consistent with efforts by the Antitrust Division of the US Department of Justice to "effectively put market participants back on notice" that Section 8 enforcement has been reactivated. Arguably, however, the Quantum/EQT settlement does more than just put parties on notice; it represents a significant and "innovative" expansion of Section 8 enforcement.

According to the FTC's complaint, EQT Corporation is the largest producer of natural gas in the US and operates mostly in the Appalachian basin. Quantum Energy Partners is a private equity firm with portfolio companies that produce natural gas both in the Appalachian basin and elsewhere in the US. On September 6, 2022, EQT and Quantum entered a Purchase Agreement containing the following provisions:

- EQT would acquire Tug Hill, a natural gas producer, and XcL Midstream, a natural gas gatherer and processor, both located in

the Appalachian Basin, in exchange for cash and EQT stock. The total deal value was approximately $5.2 billion.
- Quantum would receive 55 million EQT shares, or about 11%, making it one of EQT's largest shareholders.
- Quantum's CEO or a designee would be appointed to the EQT board, although Quantum later voluntarily agreed to no longer seek this board seat at closing "out of an abundance of caution and to ensure compliance with Section 8 of the Clayton Antitrust Act." However, Quantum retained its right to the seat in case it wanted to exercise that right in the future.

Although the FTC did not allege that EQT's acquisition of Tug Hill or XcL would harm competition, the FTC argued that the agreement would lead to violations of both Section 8 and Section 5 (unfair competition) of the FTC Act. To close the underlying transaction, the parties agreed to settle the FTC's investigation and be subject to a consent decree with the following terms:

- **Board Seats:** Quantum is subject to Section 8 notwithstanding the fact that it is not a corporation; therefore it must give up its right to an EQT board seat. Quantum also will be subject to prior approval before serving on the board of any of the top 7 Appalachian Basin natural gas producers. EQT cannot serve in any management capacity relating to Quantum.
- **Minority Holding:** Quantum must sell its minority holding in EQT, and it cannot sell its shares to one of the top 7 Appalachian Basin natural gas producers. To the extent there is a period when Quantum owns the shares, the shares will be held in a voting trust and voted pro rata with other shareholders.
- **Prior Approval:** Quantum is subject to prior approval for any acquisition of additional EQT shares.
- **The Mineral Company:** Quantum and EQT are required to unwind The Mineral Company (***TMC***), an existing JV relating to mineral rights.
- **Future Entanglements:** Quantum and EQT are prohibited from entering into additional agreements, including non-competes, other than those ancillary to the sale of a business.

- **Compliance:** A monitor will be appointed, and the parties will be required to submit regular compliance reports. Quantum and EQT also must design, maintain, and operate an antitrust compliance program.

## FTC Declares that Section 8 Applies to Non-Corporate Forms

The statutory text of Section 8 provides that it only applies to corporations. Agency enforcers previously have questioned whether Section 8 should be read more broadly to apply to LLCs and other corporate forms. In the Quantum/EQT settlement, the FTC makes clear that "Section 8 applies to businesses even if they are structured as limited partnerships or limited liability corporations."

Specifically, the FTC alleged that Quantum's right to a seat on the EQT board would be a violation of Section 8 because it would involve the simultaneous service of an officer or director (the Quantum CEO or his designee) on the board of a competitor. In addition to meeting the jurisdictional thresholds and exceeding the exemption thresholds, the FTC alleges that EQT competes directly with a Quantum portfolio company in the production and sale of natural gas in the Appalachian Basin. Note that even though Quantum agreed to not seek the EQT board seat at closing, this concession appears to have been insufficient to allay FTC's Section 8 concerns.

## FTC Alleged a Stand-Alone Section 5 Violation Resulting from Inappropriate Information Exchanges

The FTC also alleged two claims under Section 5 of the FTC Act, the first time in decades that the FTC has challenged the structure of a transaction as a standalone violation of Section 5. First, Quantum's purchase of 11% of EQT would make Quantum one of EQT's largest shareholders with the "ability to sway competitive decision-making" and have the "potential to access EQT's competitively sensitive information." Additionally, the FTC alleged that the proposed

interlocking directorate would lead to an opportunity for both parties to solicit and exchange competitively sensitive information with "purpose, tendency, and capacity to facilitate collusion or coordination".

Second, the FTC alleged that TMC, a pre-existing JV between the parties, created additional opportunities for the parties to exchange competitively sensitive business information. The FTC also alleged that information exchanged via the JV, "coupled with noncompete agreements in place, harms competition."

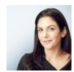
## Conclusion

The expansion of Section 8 to cover non-corporate forms brings many more business relationships and minority investments into the lens of Section 8. Now that this door has been opened, parties can expect agencies to enforce Section 8 increasingly in situations involving LLCs or LPs, either alone or in conjunction with a Section 5 claim. Additionally, where there is a minority investment as part of merger consideration and the parties will remain competitors, the FTC will closely scrutinize the ongoing relationship, including the potential for anticompetitive information sharing or undue influence. As always, the best defense is to be proactive: conduct regular audits of board appointments across all corporate and non-corporate relationships, maintain a regular schedule of antitrust compliance training, and ensure that all information sharing protocols are up-to-date and followed by relevant employees.

July 3, 2023 | 5 minutes read

# Proposed Update to U.S. HSR Merger Clearance Process Risks Extended Review Timelines

**Bruce McCulloch**
Partner



**Jamillia Ferris**
Partner

**Mary Lehner**
Partner

+6 more...


On June 27, 2023, the U.S. Federal Trade Commission (***FTC***) announced the first significant overhaul to the HSR Act filing form (***HSR Filing***) and rules (***HSR Rules***) since the HSR Act was promulgated in 1978. The proposed changes impact nearly every component of the HSR Filing and reflect the current enforcement priorities of the FTC and Antitrust Division of U.S. Department of Justice (***DOJ***) (the ***Agencies***)—i.e., focus on tech/digital platforms, potential/nascent competition, private equity, and labor markets. The rules would align certain aspects of the HSR Form more closely with requests from jurisdictions outside the United States, while also expanding document requests in unique ways. If enacted, the proposed changes will significantly impact the time, cost, and

burden of submitting an HSR Filing, and to the extent multiple jurisdictions are reviewing transactions, heighten the need for merging parties to have a coordinated global approach.

## Key Take-Aways

- The time, cost, and burden on *all* filing parties would increase significantly.
- Expanded disclosures and new narrative and data requests would create headaches for all companies, but private equity/financial sponsor clients, in particular.
- New HSR Rules highlight the need to have consistent antitrust compliance training, particularly regarding document creation to ensure that documents accurately reflect competitive dynamics and deal rationale.
- Disclosures of subsidies from certain foreign governments would target investments from countries such as China, Russia, North Korea, and Iran.
- New HSR Rules could impose electronic discovery burdens—i.e., litigation hold-type obligations—on merging parties irrespective of the competitive implications or issues raised by a transaction.
- Inability to rely on published HSR guidance will lead to uncertainty at the outset.
- Significant overlap with ex-U.S. merger clearance processes, further increasing the importance of a coordinated global approach to merger control filings.
- But when all is said and done, will enforcement increase? Potentially, but at a minimum timelines for review could increase by 2–3 months and the new HSR Rules reinforce the need for careful analysis of antitrust risk and strategic consideration of antitrust risk mitigation provisions in deal documents.

## Expanded Corporate and Transaction Information

The new HSR Rules would significantly expand the existing corporate and transaction disclosures in the HSR Form. We call out key new or

expanded requests below:

- Additional information regarding certain minority LPs.
- Officer/director relationships, including board observer roles.
- Information about entities that may exert influence over the filing party, including entities that provide (or provided) credit to the acquiring party, that hold non-voting securities comprising greater than 10% of the acquiring party, that have board membership (or observer status) or the right to appoint a board member (or observer), and that have an agreement to directly or indirectly manage or control the acquiring party.
- Disclosures of prior acquisitions within the past 10 years (up from 5 in the current HSR Form) now for both acquiring and acquired parties.

The proposed HSR Rules also would require the parties to provide all agreements, exhibits, and schedules that relate to the transaction, regardless of whether the parties themselves are signatories (the current HSR requirement is more limited), as well as any agreements between the parties up to one year before the HSR Filing. The proposed HSR Rules also would require parties to provide information about certain U.S. Department of Defense and intelligence community procurement contracts.

## Expanded Document Requirements May Impose Compliance Burdens

The new rules would expand the existing HSR document production requirements by:

- Increasing the universe of company employees who should be searched for responsive documents from Officers and Directors to include the "supervisory team lead(s)."
- Requiring the production of ordinary course strategic business documents that discuss certain competition topics that were provided to the CEO or people who report to the CEO and produced within one year of the HSR Filing.

- Requiring production of all **drafts** of responsive documents provided to any team lead, officer, or director.

A search for draft documents also may require forensic collection (i.e., electronic discovery) to ensure a thorough search for all drafts unless steps are taken up front to ensure that drafts are stored in a central location.

## Narratives Reflect EU Inspiration

Taking a page from EU filing requirements, the newly devised narrative sections would require in-depth information about current and planned products and services. For any "overlapping" products and services, additional information regarding sales, customer contacts, licensing arrangements, and non-compete agreements would be required. There is an additional proposed narrative section regarding supply relationships.

## New Labor Market Data Requests

The new labor market rules would require detailed data on a filing party's workers based on certain classification codes. Identifying and collecting this data and categorizing it by code may be a challenge, particularly for large companies and private equity/financial sponsor clients.

## Foreign Subsidy Disclosures

The Merger Filing Fee Modernization Act that was signed into law in December 2022 included a provision that required the disclosure of subsidies from foreign states that are of strategic concern to the United States. The proposed rule changes here implement this statute—i.e., that certain subsidies from China, Russia, Iran, or North Korea must be disclosed.

## HSR and Litigation Holds

The proposed HSR Rules also would require parties to provide a list of all communication and messaging systems used including, specifically, ephemeral messaging systems. The Agencies' stated rationale is that parties presently are not expanding document holds to include these types of communication systems. To address this, the FTC and DOJ are proposing to require parties to sign a certification stating that they have taken the necessary steps to prevent the destruction of documents and information relating to the transaction, including, for example, suspension of auto-delete policies. Effectively, this certification would require a filing party to institute a litigation hold on anyone whose files were searched for the filing process until the HSR waiting period ends.

## Proposed Changes Reflect Agencies' Enforcement Agenda

The changes track many of the issues that FTC and DOJ political leadership have been focused on in recent years. The proposal contains, for example, a discussion of how technology and digital platform markets have altered the competitive landscape and required enforcers to consider "premerger relationships [that are not] clearly horizontal or vertical" and firms "in related business lines [where there is] potential for direct competition in the future." To this end, many of the new and expanded rules seek information about competition as it exists today or how parties believe it may exist in the future.

The proposed HSR Rules also seek information regarding board appointments, including board observer roles, explicitly stating that this information is sought to identify potential Clayton Act Section 8 violations relating to board interlocks—a recent focus for the Agencies' enforcement efforts. Other proposed changes specifically target private equity entities, such as seeking more information about minority investors or expanding the prior acquisitions rule (to get more information about so-called "roll-up" deals). Finally, adding

an entire section requiring detailed labor market data highlights the continued focus on employee competition issues.

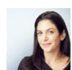
## What is next?

- Will the new HSR Rules be implemented? Likely yes. Based on the aggressiveness of current FTC political leadership, we can expect the FTC to adopt as many of the proposed new rules as possible, amending only those rules that FTC leadership thinks could be subject to a legal challenge.
- When will the changes be implemented? The notice/comment period will end on Monday, August 28, 2023, but it could be extended an additional 30 days to Wednesday, September 27, 2023. After that, the FTC will need time to review and respond to the comments. The earliest final HSR Rules will be published likely is early 2024. However, while the changes are not immediate, companies that make multiple filings can start preparing now so as to efficiently navigate the more complex regime.
- Will this lead to more enforcement? The Agencies have made clear that increased antitrust enforcement is a priority, and this potentially is another tool in the toolkit. But undoubtedly this will result in longer reviews (e.g., more questions and potentially more instances in which parties decide to pull-and-refile).

If you have questions, contact Bruce McCulloch, Jamillia Ferris, Mary Lehner, Meytal McCoy, Jennifer Mellott, Charles Ramsey, Meghan Rissmiller, Jan Rybnicek, and Justin Stewart-Teitelbaum.

December 20, 2023 | 5 minutes read

# U.S. Antitrust Agencies Issue Final 2023 Merger Guidelines


**Jamillia Ferris**
Partner

**Meghan Rissmiller**
Partner

**Jan Rybnicek**
Partner

+2 more...

On December 18, 2023, the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") issued the final version of the 2023 Merger Guidelines (the "Guidelines"). The Guidelines are not legally binding but describe how the DOJ and FTC conduct merger analyses. The final Guidelines, which largely track the draft Guidelines issued in July, represent a significant departure from the 2010 Guidelines and reflect the expansive enforcement approach followed by current DOJ and FTC leadership.

We summarize below (i) the key takeaways from the final Guidelines; (ii) notable changes from the draft Guidelines issued in July; and (iii) how the agencies will likely put the new Guidelines into practice.

## Key Takeaways from the Guidelines

As we observed of the draft guidelines when they were issued in July, the final Guidelines take a broad view of potential theories of competitive harm and discount potential benefits associated with mergers. The key takeaways are:

- **Scrutiny of Less Concentrated Markets.** As in prior versions, the Guidelines prohibit mergers that significantly increase concentration in a highly concentrated market. The 2023 Guidelines, however, substantially lower the threshold both for what constitutes a "highly concentrated market," and for what is considered to "significantly increase concentration." In effect, more transactions will be captured under the agencies' lower thresholds. Similarly, the Guidelines presume illegality, although this may be rebutted, at lower market shares. Under the Guidelines, a merger resulting in a 30% market share is presumptively illegal if the merger also significantly increases concentration. These changes mark a return to a more formalistic approach than what the agencies had used in the past several administrations.
- **Explicit Potential Competition Analysis.** The Guidelines establish an explicit framework for evaluating a merger's impact on actual and perceived potential competition, and they detail broad categories of subjective and objective evidence considered relevant to that analysis. These changes mark a significant shift from the 2010 Guidelines, which only briefly discussed the analysis of potential competition. The Guidelines also note that an acquisition of a potential competitor can be anticompetitive, while at the same time discounting the competitive significance of other similarly situated potential entrants.
- **Enhanced Scrutiny of Vertical and Non-Horizontal Transactions.** Under the Guidelines, the agencies will scrutinize transactions between firms that do not compete directly, including by evaluating whether mergers could limit access to or raise costs on products or services that rivals use to compete, weakening or foreclosing them, or provide access to rivals'

competitively sensitive information, undermining competition or facilitating coordination. A transaction may also harm competition by threatening to limit access to competitive inputs, and thereby deter potential rivals from entering the market or expanding their operations.

- **Prohibiting Entrenchment or Extension of "Dominant Positions."** The Guidelines provide a framework for evaluating transactions that could "entrench or extend" a "dominant" position. A firm may be considered dominant based either on direct evidence or market shares showing "durable market power." Under the Guidelines, acquisitions by dominant firms could draw increased scrutiny, even in mergers not involving direct competitors. For example, the Guidelines describe how a dominant firm could be entrenched by the elimination of a nascent competitive threat, increasing barriers to entry, or depriving rivals of scale economies or network effects. The Guidelines also proscribe mergers where the combined firm could "extend a dominant position from one market into a related market."

The Guidelines further highlight the potential for anticompetitive harm from mergers in the context of labor markets, "roll-up" strategies involving a series of acquisitions (even if no single transaction on its own would be unlawful), and deals that involve partial ownership of or minority investments in a firm.

## Changes from the Draft Guidelines

Despite receiving more than 30,000 comments to the draft guidelines and conducting three Merger Guidelines Workshops, the final Guidelines do not substantially differ from the July draft. Below are the differences of note:

- **Additional Guidance Regarding Novel Theories of Competitive Harm**. The final Guidelines elaborate on novel theories of harm outlined in the draft Guidelines, potentially expanding the ways

that the agencies can find a merger to be anticompetitive. For example, the final Guidelines detail how a nascent firm can grow into a competitive threat to a dominant incumbent. A nascent competitor may add features or products over time, thereby intensifying competition with the incumbent. Alternatively, a nascent firm may promote "ecosystem competition," meaning it aggregates products and services from different firms that, in combination, serve as a competitive alternative to the incumbent.

- **Increased Discussion of Rebuttal Evidence**. *T*he final Guidelines acknowledge that competitive concerns regarding a merger may be rebutted by evidence from the merging parties, including failing firm defenses, market entry, and certain efficiencies. The final Guidelines slightly expand the views adopted in the draft guidelines. For example, the Guidelines acknowledge that vertical transactions may result in reduced prices to consumers through the elimination of double marginalization. That said, the Guidelines express deep skepticism of efficiencies claims generally, reasoning that "[c]ompetition usually spurs firms to achieve efficiencies internally," and that many efficiencies can be achieved through means short of a merger.
- **Some Softening of Presumptions and Focus on Market Power**. The final Guidelines soften guidance indicating when a merger is presumptively anticompetitive, focusing instead on the consideration of market power. For example, regarding entrenchment, the draft guidelines' 30% market-share threshold for a "dominant position" has been replaced with a requirement of "durable market power." The draft Guidelines similarly presumed that a vertical merger is anticompetitive if one of the merging parties has greater than 50% share of an input used by rivals. In the final Guidelines, the use of market structure in the analysis of foreclosure – i.e., where a 50% foreclosure share was "sufficient . . . to conclude" a merger may violate the Clayton Act – is now explicitly tied to "monopoly power" (although, in a

footnote, the Guidelines note the agencies will "generally infer" that a firm has monopoly power if it has a share of 50% or more).

- **Reemphasis on Economic and Evidentiary Tools.** As explained by the Chief Economist in the DOJ's Antitrust Division and the Director of the FTC's Bureau of Economics, "some commentators were concerned that putting the economic tools in the appendices [of the draft guidelines] was a signal that the tools, and economic analysis more generally, are less important." The final Guidelines promote these economic and analytical tools out of the appendix and into their own section, clarifying "that the economic tools are an integral part" of the agencies' analytical process.

## What Comes Next?

The Guidelines reflect the DOJ's and FTC's current approach to merger review. In that sense, they signal business as usual under the Biden administration. Their long-term implications will be determined in future merger litigation, as courts decide whether to adopt the Guidelines' reasoning in their decisions. The agencies have presumably sought to encourage judicial adoption by citing extensively to Supreme Court caselaw. Yet many of the cited decisions predate the 1982 Horizontal Merger Guidelines, which established the modern framework for merger analysis that has remained in place for more than 40 years. Merging parties defending transactions will likely cite more recent judicial precedent to undermine the Guidelines. It remains to be seen how courts will respond.

In the interim, merging parties should continue to expect close scrutiny of mergers, even if they do not involve direct competitors. Global antitrust enforcers are instituting more aggressive merger enforcement, similar to the DOJ and FTC. Early antitrust assessment is critical for anticipating global review timelines and outcomes, informing both transaction negotiations and antitrust strategy – including the possibility of litigation.

If you have any questions, feel free to reach out to our Merger Antitrust Team, including Jamillia Ferris, Mary Lehner, Bruce McCulloch, Jenn Mellott, Meghan Rissmiller, Jan Rybnicek, and Justin Stewart-Teitelbaum.