Linklaters

# Pushing the Boundaries:

## Eight Global Competition/Antitrust Predictions for 2018

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# Using competition law as a catch-all for bad behaviour comes at a risk

Increasingly, governments see antitrust enforcement as a fall-back option for wider social and political objectives, ranging from fair taxes to fair prices. While the urge to intervene is often well motivated (for example, supporting vulnerable consumer groups), antitrust is not necessarily an appropriate or effective tool.

A good example of this is the recent wave of intervention against "excessive" prices, particularly in the pharma sector. In the UK, we await the outcome of the ongoing appeal by Pfizer and Flynn Pharma against the Competition and Markets Authority's record £89.4m fine for charging excessive prices to the NHS for an anti-epilepsy drug; and several additional investigations will continue. The EC has launched its first excessive pricing investigation in the pharma sector against Aspen Pharmacare. In the US, the DOJ is investigating numerous instances of suspected collusion among generic pharmaceutical companies. On the back of several cases, China's NDRC has published new guidance, re-affirming that excessive pricing is illegal. Several national competition authorities are engaged in similar probes, many of which are expected to conclude in 2018. Uncertainty remains as to the potency of this challenge against excessive pricing. While authorities seem to be able to identify excessive prices, they struggle to provide clear guidance on where to draw the dividing line between lawful and abusive prices. The EU Court of Justice's September 2017 ruling in AKKA/LAA, for example, said there was no single adequate method or framework to determine whether a price is excessive, only that there must be a "significant and persistent price difference".

A second illustration of competition authorities stepping into the breach for other regulators is the German Federal Cartel Office's investigation into a possible abuse of dominance by Facebook. In its Statement of Objections, published in December 2017, the FCO raises concerns "about the collection of data outside Facebook's social network and the merging of this data into a user's Facebook account", a concern falling within the remit of data protection.

Frequently, these cases arise because the primary regulator is deemed, in the circumstances, to lack effective powers: in the UK, the pharmaceutical regulator felt it had insufficient powers to intervene against the price increases by pharmaceutical companies; in Germany, the data protection agencies were seen to be lacking adequate powers.

These examples follow on the heels of the EC's state aid investigations into various high-profile tax avoidance schemes (for example, against Apple).

> "Authorities experimenting with antitrust as a quick-fix to patch over gaps in, say, fiscal or social policies may actually be doing more harm than good."
>
> **Nicole Kar**, Partner – London

## Prediction

Competition law is a powerful policy instrument but one which aims to apply a rigorous methodology and to give clear guidance as to which type of behaviour is permitted and which is prohibited. Extending the scope of competition law and turning it into a catch-all tool for open-ended "bad behaviour" from unfair prices to unfair data collection risks undermining those qualities.

Nevertheless, we would expect to see more attempts at extending the boundaries of competition law in 2018 as competition authorities are increasingly coming under pressure to demonstrate that their policies deliver immediate, positive outcomes, particularly for vulnerable consumers. The long-term negative side effects will have to be dealt with at a later stage.

# Authorities using "innovation-based" theory of harm with unpredictable consequences

Innovation is a main driver of competition and competitive economies. Competition authorities rightly take action against business' conduct and deals that harm innovation, price or choice. Sometimes a link between business strategy, innovation and competitive harm is evident, for instance where the firm buys its main competitor so that it can close down the rival's product development programme before "the next big thing" is brought to market.

Nevertheless, the EC's citing of an "innovation-based theory of harm" (for example, in the cases of Dow/DuPont and Johnson & Johnson/Actelion) has generated controversy and uncertainty. The claim is that companies, post-merger, would rein back investment in R&D and stifle innovation in the interests of preserving market share. However, this claim has not translated into an evidence based theory of harm which would allow merging parties to assess the potential competition concerns pertaining to their deal.

This is an issue in many industries where innovation competition and the development of new products, rather than mere price competition, is important. Further to the cases mentioned above, there is an ongoing investigation against Merck and Sigma-Aldrich in relation to their alleged failure to inform the EC about "an important R&D project" in the context of their merger. This trend is not limited to Europe. In the US, in its challenge to AT&T's proposed acquisition of Time Warner, the DOJ has cited the merged company's ability to impede or slow innovation by hindering emerging online video distribution.

> "The challenge for business is that, as yet, the authorities have not been able to formulate a coherent theory of harm, based on perceived reduction of innovation."
>
> **Annamaria Mangiaracina**, Partner – Brussels

## Prediction

However ill-defined the innovation-based theories of harm are at present, we expect that authorities, particularly the EC, will continue to pursue them if there is evidence that, post-merger, the parties are going to cut down significantly on R&D spend.

Parties contemplating transactions in R&D intensive sectors should be sure to assess the impact of their deal on innovation, not only in terms of pipeline assessment but also in relation to the implications of R&D and the context of wider strategic deal planning. They should consider in their initial deal planning how they would respond to a potential challenge by the authorities that innovation will be reduced or restricted.

# Increasing pressure on competition authorities to intervene more aggressively in merger control

There is a growing perception in the public policy sphere that merger control may have become overly permissive. Major public figures such as Senator Elizabeth Warren have expressed concerns about increasing concentration and decreasing competition in US markets, demanding that antitrust enforcers pick up their tools and start enforcing again.

Former anti-trust officials have echoed these concerns: Massimo Motta, who served as the EC's chief antitrust economist until August 2016, recently commented that antitrust officials should reconsider the idea that mergers are generally good and went on to opine that officials had been too optimistic in their decisions to approve certain deals in the past. Commentators also draw support from ex post studies, for instance in relation to the functioning of the telecoms markets in the EU, which raise questions about price increases post-merger in a number of cleared mergers.

Merger control authorities are, in turn, feeling the heat and have arguably already shown a greater willingness to intervene in merger cases in recent times. In the EU, the proportion of substantial cases under the EU merger control where the EC has intervened has increased from around 16% in 2012 to around 20% in 2017. Similarly, Brazil's CADE appears to be more willing to block mergers. Three in a row were prohibited last year and a fourth, involving the gas distribution market, looks likely to be rejected on the grounds that proposed remedies are inadequate. Another example is in South Africa where the Competition Commission has vetoed a significant number of mergers in recent years, mostly on the grounds that they were considered likely to enhance co-ordination and/or were taking place in industries with a history of collusion.

> "More concentrated sectors now sit in a changed public policy environment. This means that further industry consolidation can only face greater headwinds and friction in gaining merger control approval."
>
> **Simon Pritchard**, Partner – London

## Prediction

There is no indication that this trend is likely to wane in 2018 so expect more active enforcement. Parties should be mindful of what increased enforcement means for their proposed transactions. While, for most, increased enforcement activity is unlikely to change the decision-making calculus for deals, parties may want to think carefully about merger control strategy in "close to the line" high profile deals.

# Vertical mergers under closer scrutiny

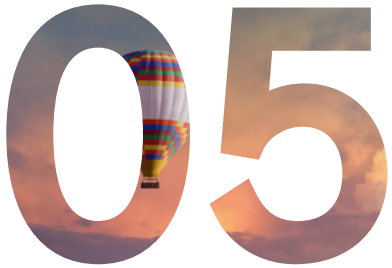
Whilst vertical mergers have traditionally raised only limited concerns, antitrust authorities across a range of jurisdictions are taking a closer interest in them. Most recently, in its ongoing review of AT&T's acquisition of Time Warner, the DOJ has argued that the combined company would hinder rivals by forcing them to pay more for distribution rights of Time Warner and slowing the development of distribution models (and therefore resulting in higher bills for consumers). The point to note is that the DOJ made this assertion even though the telecommunications and media companies do not compete directly with each other. These concerns were addressed in the past by requiring the parties to guarantee access – behavioural remedies. But recent statements suggest the new antitrust chief at the DOJ, Makan Delrahim, may be more focussed on divestiture. The AT&T challenge also puts other vertical mergers on notice that antitrust approval may not be as easy as once thought, including for CVS/Aetna, another recently-announced vertical mega-merger likely to attract the attention of US regulators. The outcome in this case may depend on whether it is ultimately reviewed by the FTC or the DOJ.

Whilst the majority of the attention is focused on developments in the US, the EC is also considering vertical theories of harm, notably as part of its current in-depth investigations into the Bayer/Monsanto and Luxottica/Essilor deals, for which the outcomes are expected shortly. In addition, the UK Competition Appeal Tribunal upheld the UK CMA's decision in the ICE/Trayport case, the first ever to prohibit a merger on vertical foreclosure grounds.

> "Agencies are working towards a way of finding a coherent approach to vertical mergers, as yet unsuccessfully."
>
> **Tom McGrath**, Partner – New York

## Prediction

Whilst vertical mergers are currently receiving particular attention in the US, vertical issues are also being considered in a number of other jurisdictions and it is likely that we will have some greater clarity on how antitrust authorities will deal with these issues by the end of 2018.



# Competition authorities enforce strict procedural standards in merger control against a backdrop of longer and more onerous investigations

Competition authorities around the globe are demonstrating greater intolerance of merging companies breaching merger control procedures. Agencies are becoming increasingly assertive: they apply closer scrutiny of the process and hold the merging parties to a higher standard. This greater assertiveness has to be seen against the backdrop of ever longer investigations and ever more burdensome information requests.

In particular, we are seeing increased procedural enforcement where parties anticipate clearance and carry through integration measures when they should not. Recently, the French Competition Authority fined Altice a record €80 million for "early implementation" (see Linklaters' client alert here); the EC is conducting an investigation into another potential infringement by that company; and the EU General Court upheld a €20 million gun jumping fine imposed by the EC in Marine Harvest (see Linklaters' client alert here). There have also been a number of cases in the US. In China, the regulator (MOFCOM) published nine penalty cases last year, and, together with Japan's JFTC, condemned the Canon/Toshiba Medical Systems Corporation deal structure as unlawful gun-jumping. The EC has now also initiated proceedings against those two companies and its decision is expected soon (see Linklaters' client alert here). This case has cast further doubt on the use of two-stage deal structures, given the standstill obligation which exists under most regimes.

At the same time, authorities have imposed a number of fines for the provision of misleading or incorrect information during a merger review, notably the EC's €110 million fine against Facebook and the UK CMA's decision most recently to fine Hungryhouse £20,000 for failing to provide certain documents responsive to an information request. There are also pending EC investigations against General Electric and Merck for similar failures.

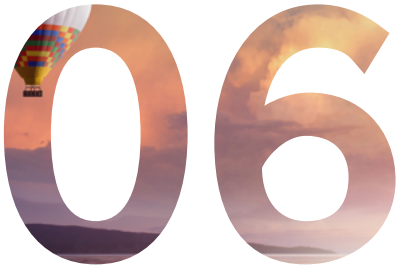
The increased enforcement action of the authorities has to be viewed against the backdrop of longer merger control investigations, driven by more complex theories of harm and more burdensome document requests. Between 2011 and 2017, there has been a dramatic increase in the time it takes to get clearance for the most complex deals in the EU, the US and China. In these three major jurisdictions, it now takes between 50% and 90% longer than it did just six years ago.

In addition to these longer investigations, authorities are requesting ever greater volumes of documents as part of their investigations. The CEO of Bayer recently bemoaned the "unimaginable depths" to which the EC was going in the context of the company's proposed merger with Monsanto, and revealed that Bayer alone had already submitted four million pages of documents to the EC.

> "In the course of merger proceedings, authorities are holding the merging parties to a strict standard, both on process obligations and information requests."
>
> **Pierre Zelenko**, Partner – Paris

## Prediction

Those planning to merge can expect the process to become both more complex and drawn-out. There is likely to be ever more stringent enforcement of the procedural rules, at every stage of the process, and closer scrutiny of the documentation provided by the merging parties to advance their case, including in relation to claims that documents are covered by legal privilege. Dealmakers need to calibrate their integration planning carefully, to take into account the potential for standstills, the requirement to deliver far greater volumes of data and the increased scrutiny of regulators, while keeping their business moving and making sure that, on receiving clearance, they can hit the ground running.



# Record fine for Google sign of things to come in abuse cases

Abuse of dominance has been pushed up the agenda, particularly in Europe with a number of important decisions handed down by the authorities and Courts last year. But, concerns have also been raised across the world in relation to the power that the most successful companies wield across numerous industries.

The most eye-catching case was the EC's Google Search decision which set a record €2.42 billion fine (see Linklaters' client alert here). The case is seen by many as pushing the boundaries of "abusive conduct" and raises an array of issues around the future treatment of technology platforms under Article 102 TFEU. The EC is also pursuing separate investigations into Google's AdSense service and its Android mobile platform. These investigations are expected to conclude in 2018 and should shed more light on the EC's evolving approach to abuse of dominance.

The EU Court of Justice also upheld – in part – Intel's long-running appeal against the EC's 2009 decision that Intel's exclusivity rebate schemes were abusive. The Court's judgment means that the EC must address economic arguments put forward by defendants contending that their conduct was not capable of having anti-competitive effects (see Linklaters' client alert here). Rebates are set to remain centre stage in 2018 as the judgment remitted Intel back to the General Court and the EC is reportedly close to concluding its ongoing Qualcomm investigation involving rebates.

Australia has toughened its laws to prohibit "misuse of market power", among other significant legislative reforms, which came into effect in November 2017. The amendment of the misuse of market power prohibition expands the scope of the provision to prohibit any conduct by a firm with substantial market power which may have the purpose, or effect, of substantially lessening competition. Australia's anti-competitive conduct provisions are also set to be amended in 2018, with the proposed introduction of a prohibition against "concerted practices" that have the purpose or effect of substantially lessening competition.

These developments will help define business behaviour that gives rise to competitive concerns. But there remains greater disparity of enforcers' perspectives in the field of unilateral conduct than in, for instance, merger review or anti-cartel enforcement. For multi-national firms, this means an increasing need to adapt business behaviour nimbly to the local demands on dominant firms' unilateral conduct.

> "Fine of €2.42 billion is for the headline. But the fine print is all about changes to business models and behaviour."
>
> **Jonas Koponen**, Partner – Brussels

## Prediction

Abuse of dominance issues are at the limits of antitrust policy and are industry-specific as well as country-specific. Direction and intensity of enforcement vary considerably from one jurisdiction to the next. With penalties heading for the sky, it is more important than ever to stay ahead of the curve.

# More stringent antitrust enforcement against companies and individuals

As with the move towards greater merger control in many jurisdictions, competition authorities are intensifying antitrust enforcement and not just against cartel behaviour. In Europe, 14 years after its previous fine for resale price maintenance (RPM), the EC has announced the opening of four separate RPM proceedings against ASUS, Denon & Marantz, Philips and Pioneer.

In India, too, the Competition Commission of India (CCI) issued its very first decision on vertical restraints, holding Hyundai Motor India guilty of RPM and tie-in arrangements with its dealers. Indeed, the CCI is also showing a greater general willingness to prosecute, while at the same time issuing its first leniency decision in 2017. In China, the NDRC and SAIC are demonstrating greater sophistication in substantive and procedural issues, including applying collective dominance as a theory of harm.

In Hong Kong, the first antitrust enforcement trials will take place in the Competition Tribunal in 2018 and they will be the first real tests of the Competition Commission's ability to prosecute alleged cartel conduct. The Commission has said it will target individuals as well as firms accused of contravention. The government is due to review the effectiveness of the competition law (Ordinance, in Hong Kong terminology), including considering whether to introduce a cross-sector merger control regime and a standalone right of action.

Other regimes are planning comprehensive overhauls of their antitrust rules in 2018 including Vietnam (creation of an independent enforcement agency), Indonesia (significant increase in the level of fines that can be imposed) and South Korea (introduction of class actions for antitrust violations and introduction of direct right of action to allow individuals and companies who are victims of anticompetitive practices to sue in court). Thailand's new competition law will see implementing regulations giving the new independent regulator the tools and resources to begin civil and criminal enforcement cases.

In South Africa, the Competition Commission referred so-called complaint investigations across numerous industries, with a focus on alleged contraventions involving cartel conduct and abuse of dominance. We expect the Competition Commission to strongly pursue cartel cases, conduct more dawn raids and finally begin to actively enforce criminal sanctions against directors or managers found to have engaged in cartel conduct.

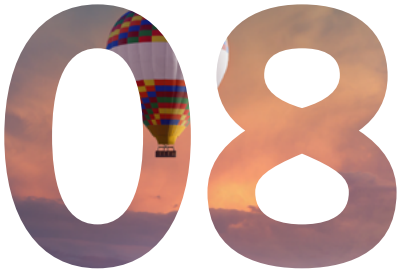
There is a greater propensity to go after individuals in criminal antitrust cases, particularly by the DOJ in the US. Over the past year, the DOJ has charged or accepted plea agreements from foreign nationals from the UK, Japan, Sweden, Norway and Germany for anti-competitive behaviour, including conspiracy to fix prices and rig bids, conspiracy to allocate customers and obstruction of justice. In many instances, the foreign nationals have agreed to pay fines and serve prison terms of more than a year. These cases demonstrate the DOJ's far reach in global cartel investigations and serve as a potent reminder that criminal behaviour taking place outside of the US can have serious consequences for individual executives.

> "Agencies in an ever-wider range of countries are becoming bolder in their prosecutions across the full spectrum of alleged anti-competitive behaviour."
>
> **Fay Zhou**, Partner – Beijing

## Prediction

For 2018, we expect that hardcore cartels, RPM, tying/bundling and excessive pricing will continue to be enforcement priorities and that the treatment of concerted action and standalone information exchange will also be closely scrutinised.

Antitrust enforcement is no longer just the preserve of more established regulators. A new generation of enforcers is keen to make its mark, particularly in Asia. We expect to see much greater co-operation and information-sharing for enforcement purposes, both between the members of this new generation and also with the more established authorities.



# Foreign investments under the spotlight

More countries are scrutinising inward investments by foreign investors and reforming, or considering reforming, their foreign investment laws. Europe is strengthening its control over foreign investment, with key members having introduced or proposed stricter enforcement regimes (see Linklaters' client alert on UK proposals here), and with the EC aiming for a co-ordinating role between its Member States (see Linklaters' client alert here).

Proposals for a significant tightening up of the rules are also under consideration in the US. These changes are the result of growing scepticism over globalisation and a perception that national security concerns may arise in industries not traditionally thought to be sensitive - another example of a shifting political environment having a legal impact on business. This is also extending to investments by sovereign wealth funds and state-owned enterprises. Intervention and outcomes in foreign investment cases are harder to predict than under the tried and tested merger control rules, as witnessed in the case of Ant Financial's proposed acquisition of MoneyGram, which was recently blocked by the US, or in GE's acquisition of Alstom, where the French Government not only intervened to review the transaction but also passed new laws requiring government approval for acquisitions in certain sectors, including energy.

This uncertainty in turn leads to deals taking longer to complete. Unlike for merger control, many foreign investment regimes have very unclear and open-ended review timetables, making deal closure less easy to predict. The case of the planned acquisition by US-owned Schlumberger of the Russian Eurasia Drilling Company, which was held up by the Russian authorities for more than three years due to the sudden imposition of US sanctions against Russia, is a notable example.

> "A shifting political environment in many countries in response to public reaction against globalisation is translating into closer scrutiny of foreign investment."
>
> **Christian Ahlborn**, Partner – London / Düsseldorf

## Prediction

Potential investors can expect an increase in timeframes and complexity for a broader range of deals. They will need to consider foreign investment issues upfront to mitigate any potential delays. Greater scrutiny of foreign investments by authorities needs to be factored into deal-making.