GCR Global Competition Review News

Post-pandemic antitrust – what to expect and what to do

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The outbreak of the covid-19 pandemic in early 2020 came as a global shock. Its ripple effects on the economy, trade, travel as well as individual freedoms and society as a whole were – and in many ways still are – strongly felt and widely reported. What went largely below the public radar, however, was the fact that the pandemic also put a spanner in the works of antitrust enforcement and, for quite some time, brought matters to a grinding halt in many jurisdictions. Thanks to the availability of effective vaccines, we might now be seeing some light at the end of the tunnel – which, in turn, gives rise to the question: what must companies expect in antitrust enforcement as the pandemic recedes?

Hogan Lovells' Global Cartel Investigations Group sketches out its views on likely trends in post-pandemic antitrust that are expected to shape antitrust enforcement in the coming years and what this means for companies. This is

based on the bundled expertise and trend-spotting efforts of our Global Cartel Investigations Group at Hogan Lovells, distilled into key topics which translate to six capabilities companies around the globe should leverage to successfully navigate the post-pandemic world of antitrust.

Not gone, just dormant – antitrust risk will increase

It is no secret that throughout the last decade, the enforcement of antitrust laws posed an ever-increasing risk to businesses across all sectors. Competition authorities worldwide have pursued antitrust violations aggressively and the fines imposed, measured against a company's turnover rather than its profits, have long risen beyond the single-digit million amounts and headed to the hundreds of millions or even billions. This will often leave offenders financially scarred and can amount to significant (existential) company crises – in particular given that the impact of antitrust investigations routinely goes well beyond fines. In addition to reputational risks, being caught up in antitrust violations may entail imprisonment or other criminal sanctions, director disqualification orders and damages litigation in civil court including US-style class actions.

In recent years, however, several factors may have caused the impression that antitrust risk is not as severe as it used to be. Indeed, a number of enforcers – including the **German Federal Cartel Office** (FCO), the **EU** Commission, and authorities in Japan, Australia and India – have seen a decrease in cartel investigations as well as fines imposed over the last couple of years. This trend can be attributed to: the increased risk of follow-on damages litigation, which can make leniency applications seem less attractive; heightened awareness of cartel risks and improved compliance measures by companies; advancements in technology which can make distortions of competition harder to detect than the classic "smoke filled room" cartels and; the impact of the coronavirus pandemic. The pandemic has practically impeded dawn raids and shifted authorities' focus from cartel and antitrust enforcement to assessing companies' cooperative activities or ventures, state aid and, in some jurisdictions, merger control.

However, it would be unwise to become indifferent about antitrust enforcement and cartel enforcement in particular. This is for the simple reason

that underenforcement in this area is not acceptable for competition authorities. Cartels are still unequivocally considered one of the most severe impediments to competition and, thus, overall welfare. Accordingly, competition enforcers, as well as legislators, will continue to do everything in their power to detect cartels as well as similarly severe antitrust violations and to deter (potential) offenders. We consider an uptick in enforcement activity very likely for the near- to mid-term, as the practical limitations to investigations caused by covid-19 recede. Various competition authorities – in **the US**, **Brazil**, the **UK**, **Portugal**, **Mexico** or the **Philippines** – have already warned companies against colluding in the wake of the pandemic or engaging in or continuing collaboration that is no longer necessary to overcome crisis issues. Authorities have also sent requests for information to companies suspected of illicit behavior (like in **Israel**) or (like **EU** officials) have voiced concerns that crisis-induced cartels may be on the rise. Indeed, our research indicates that a sizeable proportion of EU Commission investigations since 2008 can be linked to some form of sector or company-specific distress.

Fittingly, the **EU Commission** has communicated its eagerness to resume regular procedures in 2021, with officials stressing that they have covid-related cartels on their radar. Similarly, the**BRICS countries** have publicly committed to strengthening their antitrust response amid the gradual lifting of covid-related restrictions whilst, in the UK, Brexit will likely have an impact on the Competition and Markets Authority's (CMA) appetite for more rigorous enforcement. In this latter respect, the CMA appears keen to establish its own – independent – credentials on the world stage, with the end of the Brexit transition period meaning that there is now a real threat of parallel investigations by the UK and EU competition authorities in matters with a trans-national dimension. The **Australian Competition & Consumer Commission** (ACCC) has already announced its goal to engage in more cartel prosecutions in the near term.

In a nutshell, authorities worldwide can be expected to aggressively pursue cartels as the immediate effects of the pandemic recede. This will include making up for lost dawn raid opportunities, working off a "backlog" of investigations which they had considered before the pandemic hit (as evidenced by recent statements from the **EU Commission** and the **FCO**) as

well as intervening to disentangle covid-related competitor cooperation which falls foul of antitrust laws in the post-pandemic world. In many countries, these endeavours will be fostered by legislators allowing for more financial and personnel resources for their respective competition authorities. For instance, Brexit has bolstered substantially the resources allocated and available to the CMA and other UK regulators with concurrent competition powers. **In the US**, members of Congress are working towards expanding budgets of both the Department of Justice (DOJ) and the FTC. Additionally, changes to the legislative framework – such as the significantly reduced merger control thresholds in Germany – may free up even more capacity to deploy in antitrust enforcement and investigations.

Keep the Reins in Hand – Competition Compliance and Compliance Management Systems remain indispensable

Against that backdrop, companies across all sectors will feel a growing need to meet these developments by devoting sufficient resources to antitrust risk management – dealing with compliance issues and implementing compliance management systems (CMS). Not least since the DOJ published its **guidance** on corporate compliance programs last June, effective compliance management is one the most prominent areas of legal "housekeeping", including – and probably most notably – in antitrust. Only an effectively working CMS will allow companies to understand the risk exposure and profile of their organisation and undertake the necessary steps to create structures and processes to consistently assess and mitigate antitrust and other legal risks.

This in turn allows them to keep the reins in hand and thoroughly develop strategies for proactively dealing with any issues identified – including, if need be, confidently interacting with the relevant authorities. This latter aspect may well gain further importance in the years to come, as more national laws might allow for fine reductions where a company is able to credibly show that it sought to avoid antitrust infringements by setting up an effective CMS. For instance, Germany has recently amended its laws accordingly. With the presumed increase in enforcement activities, this will become an ever more important consideration.

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To be really effective, however, a CMS should not just rely on standard internal processes but instead be complemented by obtaining discrete compliance advice on specific issues of a company's operations, and a willingness to conduct internal audits and investigations to provide a sufficient evidential basis for a further course of action. This should certainly be done whenever specific issues have been spotted by the in-house legal team – for example due to internal whistleblowing – but may also extend to situations where there is no pressing cause. Internal audits and investigations can be effective tools for a company to detect issues, check the workability of its CMS as well as to demonstrate to its workforce its commitment to compliance, including antitrust compliance, and awareness of its social responsibilities.

Compliance sensitivity will also play an important role with regards to an issue high on the agenda for many companies across sectors worldwide: how to properly disentangle from crisis-induced cooperative arrangements with competitors? In addition to regulators' resolve to tackle crisis cartels and use their antitrust laws as a means to help with the economic recovery, we expect that in the post-pandemic world the timely, effective and law-abiding termination of all cooperation with competitors – which had been considered legal during the acute phase of the crisis – will be one of the most important topics to address. Over the past year, competition authorities across the globe have permitted competitor cooperation in many sectors and markets. However, any comfort letters – such as the one provided by the **EU Commission** to the pharmaceutical industry last year – or other "clean bills of health" granted so far, such as one the **FCO** recently gave to a vaccination equipment platform, cannot provide lasting protection.

Together with the pandemic, the underlying reason for these types of cooperation will cease to exist. Thereafter, companies must expect to face the full force of applicable antitrust laws and the pallet of sanctions that accompany them. To avoid this, comprehensive competition compliance will continue to be a necessity.

Data Room, Board Room, Court Room – Think Antitrust, and think it through to the End

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Successfully dealing with the first two features described above – the high and heightened importance of antitrust and the indispensability of effective compliance efforts – requires, now more than ever, a holistic view. Even with a working CMS in place, companies will struggle to assess properly the risks associated with cartels and other competition law infringements without a deep understanding of the type of potential infringement, the underlying theories of harm, sector-specific particularities, procedural particularities, the pros and cons of cooperating with authorities and the risk of subsequent damages litigation.

The importance of these last two aspects can hardly be overstated. As both defending against accusations of prosecutors as well as damages claims from private parties may very well be the "end game" in any given compliance scenario, companies seeking to navigate antitrust risks will benefit from creating combined strategies for defending both public investigations and private damages claims. This is a delicate issue since it will often entail the balancing of competing interests and require long-term planning as to how to deal with numerous 'moving parts' along the way.

While this will certainly present mounting challenges, looking the other way will not be an option. On the cusp of this decade, litigation has, especially in the US, the UK and the EU, already become a crucial part of the antitrust landscape. And there are a number of factors that will reinforce the increasing litigation risk in the years to come. These include a heightened awareness on the part of potential claimants; new claimant-friendly laws; an international competition between jurisdictions for the most attractive litigation venues; and an increasingly institutionalised industry offering class actions or mass proceedings in which specialised litigation vehicles bundle the claims of thousands of potential cartel victims.

Companies will need to keep that 'end game' in mind at all times and tailor their approach to antitrust risks in a manner accounting for the entire chain of developments. A prerequisite for this will be forensic expertise regarding fact-finding, strategy development and mounting a defence both in and out of court. To put it differently, whether it is the data room, where forensically relevant data are stored and analysed, the board room, or the courtroom, companies that have the means to leverage forensic expertise will have the

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highest probability of success. Long-term strategic thinking, rooted in real-life experience, will be decisive.

Work that Tech Mentality – Tech Capabilities and Understanding become a Necessity

Speaking of data, the use of data and digitisation will be another key feature of antitrust. That is for two reasons. Firstly, as digitisation continues to facilitate the expansion of business models globally, the same is true for anticompetitive conduct. Digitisation reshapes the way businesses operate and competition authorities worldwide are very much aware of the fact that they have to look beyond traditional issues such as price-fixing and their conventional means of being brought about, such as exchanges of letters or clandestine meetings in airport hotels.

While traditional cartels will certainly not go away overnight – or indeed at all – they will increasingly be coupled or replaced with investigations that concern new infringement types, novel theories of harm and new ways of facilitating illicit behaviour. For instance, Japan's Fair Trade Commission **released** a report and publicly warned against the use of algorithms that would assimilate competitors' pricing in a hub-and-spoke type of arrangement. Similarly, the and **European antitrust officials** have called on companies to remain vigilant to the fact that their use of algorithms could potentially break antitrust laws by straying into collusive behaviour.

The second main area where digitisation is going to leave a mark on antitrust law concerns the investigation tools deployed by enforcers worldwide. In view of the perceived risk of new types of tech-induced collusion, competition authorities are keen to ramp up their own technological capabilities and adopt digital countermeasures. This angle of digitisation is closely linked to the declining number of leniency applications in some jurisdictions, as observed, for example, by the **German**,**Canadian, Mexican and Japanese** competition authorities. In response to this trend, many enforcers will continue to **explore** alternative means to uncover cartels and other competition law **violations**, which will be tech-driven, ranging from forensic tools used in or after dawn raids to price monitoring software, electronic whistle-blower tools, market screening tools, or big data analytics.

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The EU Commission's **anonymous whistle-blower tool** is reported to already be receiving around 100 messages per year and the authority has set up a specialised investigation unit staffed with experts in the area of digital investigations. Similarly, the French competition authority has recently **signed** an agreement with France's Digital Regulation Expertise Cluster, which aims to assist the authority in data analysis, source codes, computer programs, algorithmic processing and algorithm auditing as well as to provide technical expertise in investigations. In a similar vein, Pierre Régibeau, the EU Commission's chief economist, has recently floated the idea that enforcers should integrate dedicated chief technology officers and IT specialists which complement the strengths of the officials in the respective legal and economic teams.

All of this shows that competition authorities worldwide can be expected to ramp up continuously their technological capabilities as they seek to create equal fire power when confronting increasingly tech-savvy market participants. Companies that can draw on resources that provide not just for the required technological capabilities in terms of hardware and software but also the necessary understanding of technology in terms of its potential and development, will achieve the best results in post-pandemic antitrust.

"Blended Antitrust" and non-cartel Enforcement – The Need to look beyond Cartels

When it comes to a certain way of thinking, however, it is not just technology that should occupy our minds but also another trend: the growing propensity of enforcers to look beyond the prosecution of traditional cartels. Cartels are still widely perceived as the worst type of anticompetitive conduct, with a lot of established theories of harm, case law and regulatory expertise to back the bringing of new enforcement activities in the years to come. But we think that we are going to see a much more differentiated antitrust enforcement in the future. In particular, in continental Europe and the UK, recent years have already seen a trend to look beyond cartels and bolster enforcement against vertical restraints – such as geo-blocking, most-favoured-nation clauses and resale price maintenance – as well as abuses of dominance.

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With regards to vertical restraints, the CMA even deemed it necessary to **issue** an 'open letter' to companies in the musical instruments sector, after cracking down on several market participants who had engaged in resale price maintenance infringements.

This readjustment of focus is directly linked to the effects of digitisation on markets. Not only does digitisation facilitate algorithm-based interventions by a seller in the distribution activities of others by fixing resale prices or allocating customers or territories. More importantly, digitisation has promoted, and will continue to promote, the rise of market players and business models that in themselves create new vertical or dominance issues. Enforcement against vertical restraints and dominance abuses often results in complex investigations, behavioural commitments by companies, fines and, in the case of vertical restraints, an increased willingness of authorities to grant leniency-style benefits – as already demonstrated by the **EU Commission** in several cases. In the future, we think these investigations are going to become both more prevalent and more complex.

On top of these activities, companies must also expect public enforcement to be rooted in entirely new provisions against anticompetitive conduct, specifically in the digital sphere. Such rules have been implemented in Germany and China, while they are in the process of being implemented in the EU or are actively being considered in many other jurisdictions. We would expect currently inactive legislators to follow suit over time. Less than six months after the respective provisions entered into force, Germany has already initiated several proceedings based on these new enforcement powers – targeting the full roster of the so-called **GAFA** companies. Enforcement based on such novel rules will be complemented by investigations and sanctions based on traditional antitrust laws but applied to digital markets – such as the prosecution of vertical restraints in digital distribution, which has already come under scrutiny e.g. in **Poland**, the **UK**, the **US** or **Germany**.

But it does not stop there. We anticipate yet another trend will trickle down into antitrust enforcement – a trend we might call 'blended antitrust'. Enforcers around the globe show an increased willingness to tackle complex legal issues at the intersection of traditional competition law and other matters such

as data protection law, employment law, intellectual property rights or environmental protection provisions, thus conjoining areas of the law that, at first glance, look entirely unrelated. However, there continues to be strong resolve to pursue conduct as well as novel theories of harm that a few years ago would have struck observers in many jurisdictions as outlandish or at least overly speculative, including cartel enforcement concerning labour, abuses of dominance by way of data protection or consumer law violations – think of the **case in Germany** – or perceived restrictions on innovation in nascent technologies.

Successfully managing post-pandemic antitrust risks will, therefore, require sensitivity to the increasing legal complexities and authorities' tendencies to venture into the unknown – be it based on the particularities of a given industry or entirely new theories of harm. To assess and, if need be, defend against the risk of allegations of competition law infringements in general and of 'blended antitrust' in particular will require in-depth expertise – not just in competition law, but also in matters such as intellectual property rights and licensing issues, data protection laws, information technology laws or environmental laws. Companies would be well advised to secure access to teams of top-notch experts from all areas of the legal profession as well as non-legal policy specialists, available to assist in such matters whenever the need arises.

Antitrust without Borders – the international Perspective is crucial

But whether it is the issue of 'blended antitrust' or any of the other key themes described so far, there is one overarching feature that resonates within all of them: globalisation and the required international perspective on antitrust. Despite rising tendencies of economic protectionism and sceptical views on cross-border trade and foreign investment, globalisation has resulted in even middle-market companies operating internationally and meeting competition on a global scale – meaning that business has become international in its dimension almost irrespective of a company's size. Accordingly, the number of 'only local' issues has significantly decreased in recent years and will continue to. For instance, a French niche supplier of certain components exporting its goods cannot simply rely on its compliance with French antitrust laws. Instead, it must consider the implications of its conduct in all countries where this could

have effects. While this is not a new development as such, we expect it to further grow in importance over the next few years, not least since the features described above add several new layers of complexity.

Over the last few years, and in particular in the wake of the covid-19 pandemic, competition authorities worldwide have continuously expanded their cooperation mechanisms and seek to further **strengthen** their ties, including by **sharing** intelligence to support their investigations. This means that the number of local, jurisdiction-specific problems shrinks – while at the same time the increasing number of transnational problems will continue to translate to real-life antitrust enforcement, more or less simultaneously across the globe. There is a proven track record of successful cooperation among enforcers which has already resulted in the prosecution of global cartels in several countries, such as the 'air cargo' and the 'capacitors' cartels in the **EU** and the **US** or the **worldwide shipping cartel** that was investigated in Australia, the US, Japan and the EU.

We expect these ties between enforcers to be strengthened. While many observers perceived an Atlantic divide between the competition policies of the last US administration and its counterparts in Europe, the Biden administration appears likely to build new bridges, resulting in more aligned views on substantive issues and procedural cooperation. Similarly, despite Brexit, the EU and the UK are already preparing negotiations for a 'Competition Cooperation Agreement' similar to the agreements in place between the EU and the US, Canada, Japan, South Korea and Switzerland. The **BRICS competition authorities** have also recently expanded their cooperation agreement.

Companies are therefore well advised to assume a global perspective on antitrust, compliance and all related issues, ideally reflected by working with integrated legal teams comprised of lawyers with deep roots and on the ground expertise in their respective jurisdictions and connected in a manner that matches the authorities' global coordination. Advisors familiar with each other, talking at eye level and adhering to the same standards of quality and corporate culture will create an invaluable added benefit as they provide companies a degree of transnational firepower that can rival the enforcers. An international footprint and perspective will be a decisive advantage when

navigating in the depths of post-pandemic antitrust, as it does not just provide value in and of itself but will also bolster the impact of any measures taken in response to the other key issues set out above.

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