

ANTITRUST RISK IN

A NEW REGULATORY CLIMATE

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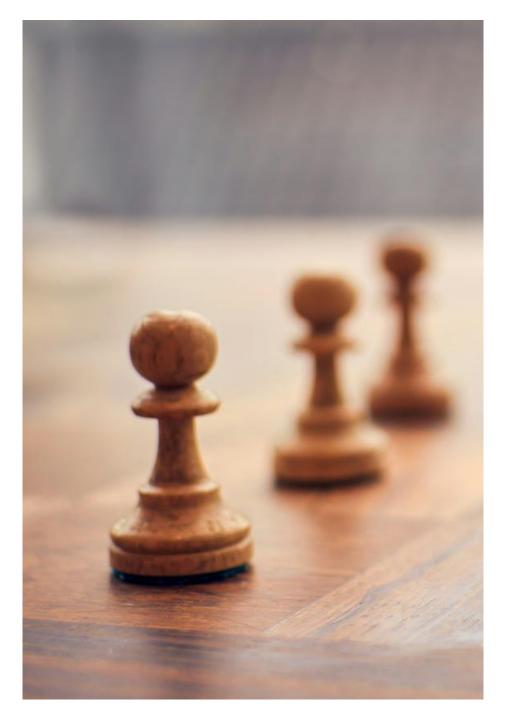
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CHANGES AT THE TOP OF THE AUTHORITIES AND WHAT DOES IT MEAN FOR YOU?

New leadership at US antitrust enforcers

Implications on enforcement antitrust and mergers/ HSR

New EU Commissioner for competition

Opposite to Trump Administration priorities

- "Clean, Just, and Competitive Transition"
- Support for European companies to grow

Changes on a national authorities level in Europe

- Change of Chairman of the UK CMA
- Stability at other European authorities

WHAT WE ARE SEEING ON THE GROUND

Pro-business in Europe or will the red tape win

- View in Europe that EU champions need to be created to compete on the global scene
- UK perspective: enhanced powers, but we are seeing the Competition and Markets Authority brought to heel. UK antitrust risk climate will be much less aggressive than in the past

Protectionism

 Increasingly seeing FDI and FSR being used as a tool of industrial policy, particularly with respect to Chinese and Middle East investors

Uncertainty reigns

- EU is continuing (and even increasing) enforcement of grey zone areas
- Creative merger control enforcement
- Broad theories of harm in the non-merger context
- More private litigation to fill the gaps created by some of this uncertainty



SHIFTING REGULATORY CLIMATE IN THE EU

Key Drivers of Change

- Shift in role of the new EU Commissioner Teresa Ribera and the Directorate-General for Competition (DG COMP)
- Implementation of the Digital Markets Act (DMA) and Digital Services Act (DSA)
- Increased scrutiny on Big Tech and large conglomerates
- Shift toward a more proactive, policy-driven exante regulation
- Green Deal vs. European champions

Emerging Areas of Antitrust Risk

- Abuse of dominance and national derivatives, especially in digital markets
- More creative mergers scrutiny driven by policy considerations
- Price transparency: information sharing, algorithms and price signaling
- Continued focus on sustainability agreements and industry cooperation

LEGAL UNCERTAINTY IN EU ANTITRUST ENFORCEMENT

EU and national competition authorities in the EU

- Growing unpredictability in merger control:
 - Post Illumina/Grail: Attempts of the EU Commission to assert jurisdiction over mergers below the relevant notification thresholds
 - Creativity of national competition authorities ("call-in-powers", broad enforcement of transaction value thresholds, dominance merger enforcement)
- Challenges to predictability and legal certainty in the non-merger context:
 - Increased focus on HR-related collusion such as no-poach agreements
 - Challenge of increased price transparency: signaling and price transparency through in investor communications
 - Scrutiny of joint bidding/collaboration on a member state level
- Procedural unpredictability:
 - Increased detection risks with innovative tools of competition authorities
 - Less formal proceedings in some jurisdictions (mergers, settlements, commitments)

Practical Considerations For Businesses

Managing legal uncertainty by:

- Understanding the shifting regulatory landscape in merger and cartel enforcement
- Adapting business conduct and transaction planning
 - Up-to-date antitrust compliance to manage increased legal risks

UK ANTITRUST BECOMES PRO-GROWTH



Competition chair told by ministers to help 'maximise' UK investment

Former Amazon director Doug Gurr says he has been instructed to be a 'bridge' to business

Chancellor wants Competition and Markets Authority's probes to be faster and more predictable

Department for Business & Trade

Competition & Markets Authority

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UK competition regulator will review fewer global deals, says boss

CMA head also warns it will not be 'open season' for takeovers harmful to consumers

Closed consultation

Strategic steer to the Comp Markets Authority

Published 13 February 2025

BUT NEW UK DIGITAL MARKETS, COMPETITION AND CONSUMER ACT EXPANDS **AUTHORITY'S POWERS**

	Wider merger control jurisdiction	New threshold aimed at "killer acquisitions". One party >£350m and 33% share of supply + target UK nexus
	Procedural penalties now much higher	Non-compliance with investigative measures or breach of orders etc. 1%/5% annual global turnover and/or daily penalties 5% daily global turnover
<u></u>	UK digital markets regime	Designated with strategic market status (SMS) subject to multiple conduct obligations
Q	Investigation powers fit for the digital age	Access to cloud-based data and focus on ephemeral messages. New duty to preserve
	Consumer protection enforcement now like antitrust	Administrative rather than court-based procedure. Fines now as high as antitrust (i.e., cap of 10% global turnover)

Questions?



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DISRUPTION FROM THREE PERSPECTIVES

- 1. Artificial Intelligence (AI)
- 2. Shifting Governmental Policies
- 3. Responding to Disruption and Disruptors



AI POWERED DECISION-MAKING

Businesses are rapidly adopting AI, resulting in significant regulatory developments both domestically and abroad.

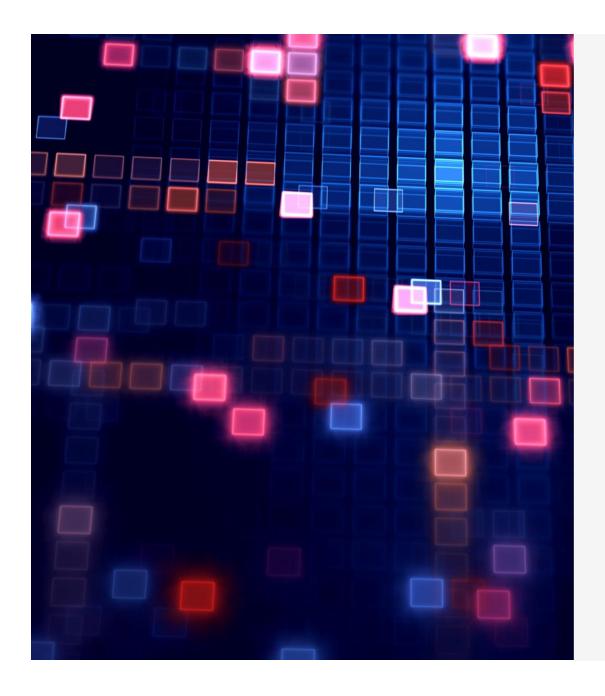
The current focus is on using commercial algorithms trained by AI to inform competitive decision-making.

FTC & DOJ

- Have argued that AI can violate antitrust laws when competitors adopt the same technology and use it to:
- Set starting-point or maximum prices.
 - Exchange competitive information.
- Contribution to a common "data pool" is used to infer the existence of a horizontal agreement.

EC and CMA

- Focus on hub-and-spoke agreements.
- Pricing practices that are illegal offline are illegal online.
- Firms cannot avoid liability by blaming Al.



ARTIFICIAL INTELLIGENCE

- Biden Administration: Close attention to perceived threats to competition in the AI space
- Trump Administration: Concerns about overregulation
 - FTC Commissioner Holyoak: "We have a vested interest in keeping America first when it comes to AI technology"
 - FTC Chairman (then Commissioner) Ferguson: "A knee-jerk regulatory response will only squelch innovation, further entrench Big Tech incumbents, and ensure that Al innovators move to jurisdictions friendlier to them—but perhaps hostile to the United States."

PRACTICAL CONSIDERATIONS FOR BUSINESSES USING AI

Challenges:

The rapid, widespread adoption of Al raises unique antitrust questions, requiring business to confront novel legal issues. Regulators are focused on preventing Big Tech from monopolizing AI and policing the perceived threat that AI could facilitate collusion, while avoiding over-regulation. A nuanced approach is needed given the potential for AI to improve efficiency, reduce bias, and enhance competition.

Recommendations:

- Review terms and conditions of your algorithm providers – how is your data being used?
 - Consider contractual safeguards against unauthorized use or disclosure of data input into the Al model
- Continue to monitor the evolving regulatory landscape.



INCREASED SCRUTINY OF M&A DEALS

EU

- Regulators are bridging a perceived merger control enforcement gap with various tools:
 - Alternative merger controls
 - Call-in powers
 - Existing antitrust toolkits
- Calls to preserve legal certainty in deal planning and the EU competitiveness may temper merger control complexity.
- In parallel, the multiplication of FDI regimes and the introduction of the FSR add an additional layer of complexity.

US

 The HSR reform imposes likewise additional burdens on transacting parties.

Practical Considerations For Businesses

Initiate antitrust and regulatory analyses early in the process.

Involve antitrust experts when negotiating transactional materials, for optimal risk management.

Consider using these tools strategically.

ESG POLICY

As the EU and US pursue divergent approaches to ESG regulation, businesses must carefully balance antitrust and reputational concerns.

EU

US

Encourages joint cooperation to address climate and human rights issues.

EC revised its Horizontal Guidelines to enable ESG-related cooperation among competitors.

National competition authorities encourage competitors to submit their projects for informal antitrust assessment.

Six large banks quit the Net Zero Alliance.

Recent Trump appointments (e.g., Chair Ferguson) are poised to target ESG protocols, as are state attorneys general.

O3 RESPONDING TO DISRUPTION AND DISRUPTORS

RESPONDING TO DISRUPTIONS & DISRUPTORS

Countering disruption raises its own set of antitrust concerns that must be weighed alongside business considerations.

Potential Exclusionary Practices

- Exclusive deals, "most favored nations" provisions, group boycotts.
- Antitrust concerns are less significant for:
 - Contracts with short durations or that are easily termination.
 - Exclusive deals with distributors rather than customers.
 - Deals with a demonstrable pro-competitive benefit.

Protecting Intellectual Property

- Businesses must weigh the need to protect their IP against the risks that may arise from overzealous litigation or enforcement.
 - Claims of "sham" litigation initiated without probable cause to block a rival are potentially actionable as exclusionary conduct.
 - Walker Process enforcement of a patent obtained through fraud.



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