BCLP'S COMPETITION COLLECTIVE:

ANTITRUST, FOREIGN INVESTMENT AND TRADE INSIGHTS FROM AROUND THE WORLD

BRYAN CAVE LEIGHTON PAISNER BCLP

In our global antitrust and competition collective, we guide you through the trends we saw in 2020 and set out emerging trends in 2021 across four key areas: Cartels & Investigations, M&A, Litigation and Trade.

BCLP'S ANTITRUST AND COMPETITION TEAM AT A GLANCE

80+ antitrust and competition lawyers across the globe.

+$3.7bn cumulative value of claims handled in 2020.

30+ rankings in leading legal directories in Belgium, France, Russia, UK and the USA.

120 the number of jurisdictions in which we have preferred firms and a network of first class local lawyers.

400+ antitrust and competition matters in 2020.

NAVIGATING UNCERTAINTY

Welcome to this first edition of BCLP'S Competition Collective: Antitrust, Foreign Investment and Trade Insights from around the world. This period was marked by uncertainty – and the harsh realities of the pandemic for many individuals and businesses.

Against the context of the pandemic and political unrest, competition authorities globally remained extremely active. Antitrust and competition law issues continue to pose complex and evolving risks with wide-reaching implications for our clients and how they operate.

In this guide, we discuss some of the most important antitrust developments of 2020 and identify challenges and opportunities for 2021 across the core areas of: cartels & investigations, M&A; and litigation. We also consider the current state of play for the flow of goods, services and capital as governments strengthen their hands in the quest for national resilience.

The digital space remains the central priority of enforcers, with the pharmaceutical sector not far behind. Hurdles for M&A are increasing with new substantive and procedural challenges including novel theories of harm and increased political intervention to take into account on every deal. Meanwhile, the class actions regime in Europe is taking off, and the effects on cross-border trade and of the new UK-EU relationship will materialize.

We want to help navigate you through these uncertain and rapidly changing times. You can protect your business and plan ahead to manage new and longstanding risks, and make the most of the associated opportunities. If you would like to discuss any of the trends in this guide, please do get in touch.

Best wishes,

ANDREW HOCKLEY
Partner and Leader, Antitrust and Competition, London

andrew.hockley@bclplaw.com
T: +44 (0) 20 3400 4630
Link to bio

CARTELS & INVESTIGATIONS COMPASS

MEET SOME OF THE TEAM

PAT WATSON
Partner, Atlanta

Having thirty plus years of experience representing companies in a wide range of antitrust litigation, investigations, mergers and other matters across the United States, I have the broad-based experience needed to advise companies on all kinds of competition related issues. I have developed a particular expertise in assisting corporations with recoveries when they have been harmed by antitrust violations.

Link to bio

ANNA BAKHAEVA
Senior Associate, Moscow

In the last 4 years, I have built an extensive skillset in contentious matters, representing clients before regulators and in courts with my areas of expertise being abuse of dominance, market assessment and administrative cases. I help protect our clients from harmful actions of other market participants or wrongful accusations by the authorities. The cases I act on make a meaningful difference to our clients' businesses.

Link to bio

VICTOR BARRUOL
Associate, Paris

My first 5 years as an associate allowed me to work on an incredible variety of cartel and antitrust cases before French and European authorities. This wide-ranging experience allowed me to develop the French version of the BCLP Dawn Raid App, designed to accompany clients during antitrust investigations.

Link to bio

WHAT WE'VE SEEN ON THE ROAD SO FAR...

AUTHORITIES FOCUSED ON DIGITAL MARKETS:

Public scrutiny and years of investigations led to novel antitrust lawsuits against "Big Tech" by the Federal Trade Commission (FTC), Department of Justice (DOJ), and chorus of state Attorney-Generals with murmurs of additional investigations in progress that haven't hit the public domain. This follows a series of infringement decisions against big technology platforms in Europe in 2019, with further investigations launched in 2020. Big Tech was also increasingly scrutinized at a domestic level throughout Europe.

COMPETITION IN THE SPORTS STANDS:

Despite not making its way into mainstream headlines as frequently as the big digital platforms, competition authorities honed in on the sports industry. While the US Supreme Court heard arguments about athletic associations' rules and whether they impose an illegal restraint on competition among college athletes, the European General Court upheld the European Commission's (EC) 2017 decision that a sporting body's rules did impose a restraint on competitions athletes can participate in.

HEALTHCARE IN THE HEADLINES:

Notwithstanding the pandemic, there was a business-as-usual approach by US antitrust authorities to violations in the healthcare sector including challenging mergers and pursuing actions against price-fixing healthcare workers' pay rates. Meanwhile, the EU and UK competition authorities continued focussing their attention on conduct in the pharmaceutical sector, opening new investigations, imposing fines and agreeing commitments in relation to pay-for-delay agreements or excessive drug prices.

At the time of writing, the UK's Competition and Markets Authority (CMA) had eight ongoing pharma investigations (with many of these at SO stage and a few in settlement talks) making the CMA the most active authority in enforcing competition law against companies in the healthcare sector over the last few years. After a 3 year investigation, the EU ended its first excessive pricing probe into a large pharmaceutical company with commitments that the company would reduce the price of its six cancer drugs.

ROLL UP, ROLL UP: ENFORCEMENT VS. BIG TECH, COMING TO A COURT NEAR YOU.

Last year, antitrust and competition authorities around the world not only revisited legislation in light of digital developments, but also initiated enforcement actions and launched a number of investigations against Big Tech companies. These actions are just the opening act in the drama that is unfolding in 2021 and beyond.

While COVID-19 raged around the world, antitrust and competition authorities focused on digital markets and Big Tech. In the US, lawsuits against these companies were filed while The House released a 449 page report on competition in digital markets with a focus on Big Tech companies. Meanwhile, the EC considered new regulatory measures to target concerns arising from the perceived power of Big Tech companies and Germany introduced amendments to its competition law legislation suggesting it will take a more interventionist approach to digital markets.

Big Tech are seemingly spending unprecedented amounts on lobbying efforts in Brussels in response to this onslaught, and the legal battles in the US are just getting started. Further, the current cases and investigations represent only the tip of the iceberg when it comes to government and private party scrutiny of Big Tech; other lawsuits, investigations, legislation, and regulations are almost certainly on the horizon.

Although focus is currently on Big Tech, there are lessons to be learned for all businesses from this first wave of actions:

The regulation of Big Tech will not only affect the handful of companies that are considered Big Tech. Where legislative or public enforcement bodies enact new, often generally applicable regulations targeted at Big Tech, other companies should examine the regulation's impact on their own operations. Otherwise, smaller companies (tech-focussed or otherwise) might also find themselves in the sights of regulators. Even those proposed "ex ante" regimes (such as in the EU and UK), where "market power" thresholds and platform-specific rules are envisaged, counterparties to those platforms should be alive to opportunities to influence the nascent and emerging regimes.

Lawsuits aimed at Big Tech include novel theories of wrongdoing or the reapplication of old antitrust theories in new, unforeseen scenarios. These new/old legal approaches will not stay confined to the Big Tech controversies for long. Regulators (the same pressing Big Tech and others) and private litigants are liable to latch onto the new or repurposed theories to make their own cases in realms far beyond Big Tech. Companies engaging in analogous conduct, no matter how far removed from the world of Big Tech, should assess whether they might face a similar challenge from their customers, competitors, or regulators.

The interest in Big Tech is not limited to competition issues. Privacy and speech are also high on the list of grievances being levied against Big Tech companies. Compliance with privacy regulations should be a cornerstone of compliance for any organization that the regulations cover; compliance with privacy regulations is not just a legal necessity—it is good business as consumers increasingly scrutinize how businesses handle their personal information. Companies that offer individuals a forum to speak should also be mindful of the potential fallout from the increased scrutiny on Big Tech. While not every platform has similar reach, efforts to impose obligations on platform providers to regulate the content shared on their platforms will not stop with Big Tech.

Understanding how different competition authorities are approaching the digital discussion is essential in ensuring your response is both appropriate and mitigates potential competition risks globally. Companies should be aware of these legal developments concerning Big Tech and be mindful of the lessons to be drawn from that activity for their own businesses. As with many things that seemingly affect only the largest companies, the trickle down effects of the regulatory actions concerning Big Tech firms will have implications for all companies in years to come.

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AUTHORS

PHILIP BARTZ
Partner and US Leader, Antitrust and Competition, Washington, DC
E: philip.bartz@bclplaw.com
T: +1 202 508 6022
Link to bio

JOSH JAMES
Associate, Washington, DC
E: josh.james@bclplaw.com
T: +1 202 508 6265
Link to bio

PIT STOP: WHAT DO COMPANIES NEED TO KNOW ABOUT RUSSIAN CARTEL INVESTIGATIONS LATELY?

The Federal Antimonopoly Service (FAS) has consistently been very active in cartel investigations, however two recent important insights stand out:

FAS close cooperation with Russia's criminal law enforcement bodies means they have a wider scope of investigative powers, and access to a broader array of evidence than historically. For example, while the FAS cannot seize a smartphone, the Police can. Companies should be aware of this cooperation, in the event that they become subject to an investigation. The FAS, Police, and the Federal Security Service can conduct joint or separate dawn raids of a single company. As only individuals can be criminally liable in Russia, as opposed to corporates, law enforcement bodies are focused on individual employees and company officers, while the FAS focuses on administrative sanctions against the corporates. Corporates and employees/company officers subject to investigation should therefore assume that they will face the full suite of administrative and criminal investigative powers and sanctions.

Companies in the digital space are likely already aware of the global focus of competition authorities on digital markets, however prudent companies will ensure they have organized and trained their IT departments in order to ensure compliance with competition laws. FAS has begun using sophisticated electronic investigation tools during investigations to uncover indirect evidence of anticompetitive conduct. Through its analyses – such as similarity of conduct between competing firms or usage of the same IP address - evidence of bid-rigging and indirect evidence of cartel behavior is more easily uncovered by the FAS.

NIKOLAY VOZNESENSKIY
Partner, Moscow
nikolay.voznesenskiy@bclplaw.com
T: +7 495 287 4444
Link to bio

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UNWINDING CRISIS CARTELS IN A POST-COVID-19 WORLD:

Competition agencies around the world may turn a critical eye to whether coordinated efforts to vaccinate the world population and respond to the crisis provide cover for broader harm to competition to the detriment of consumers and effectively-functioning markets. The French Competition Authority and the European Competition Network have already vocalized that they won't hesitate in pursuing actions against companies which, through anticompetitive behavior, took advantage of the pandemic situation.

FALLOUT FROM BIG TECH INVESTIGATIONS:

Given competition authorities' increased focus on the digital ecosystem, the investigations and lawsuits in this area will remain a priority, and continue to unfold this year and beyond. Antitrust authorities will grapple with adapting traditional antitrust prohibitions to innovative theories of harm and theories of remedy to adequately alleviate such harm. Notably, we will see developed proposals for the adoption of new "ex ante" powers, allowing the authorities to regulate the Big Tech platforms without the need first to demonstrate historic infringing conduct. The French Competition Authority has already communicated that its priority for 2021 is the digital sector, and specifically, it will focus on the transformation of the financial sector with the emergence of FinTech companies. In the UK, the CMA's Digital Markets Unit has been created to enforce a proposed new regulatory regime for the digital platforms. Meanwhile, in Europe the introduction of the Digital Markets Act will impact the way in which businesses operate in the digital space.

CHANGES TO COMPETITION POLICY:

While the Biden campaign focused on antitrust enforcement in agriculture and healthcare sectors, the administration is likely to sets its sights more broadly and aggressively enforce in the digital space. We are likely to see a number of key changes to existing competition rules in the UK and in the EU during 2021. At the EU level, the Commission will be updating the Vertical Agreements Block Exemption Regulation attempting to address developments in the digital space. The UK's Competition and Markets Authority (CMA) now has autonomy to move away from EU competition rules altogether and the report by John Penrose MP, penned at the request of the UK government proposed nothing short of an end-to-end redesign of the competition and consumer protection regime in the UK. Read our blog post here.

ROAD BLOCKS AHEAD FOR M&A

MEET SOME OF THE TEAM

ARINDAM KAR
Partner, St. Louis

My experience in antitrust compliance, counseling, investigations, and litigation in a wide range of industries gives me the foundation to be a partner to clients when analyzing and advocating for transactions in order to secure merger review approvals.

Link to bio

VITALY DIANOV
Partner, Moscow

When advising clients, my approach is strategic and pro-active. This is to ensure I navigate projects effectively and successfully, while ensuring a high ethical standard. Because of this approach, clients and peers often praise me for my phenomenal expertise and practical knowledge.

Link to bio

EMILEE HARGIS
Associate, St. Louis

I frequently advise clients through all steps of the merger process, from evaluating applicable HSR filing exemptions to preparing advocacy for clients before the federal agencies. I utilize my litigation background to critically assess clients' proposed transactions and spot any potential competitive concerns.

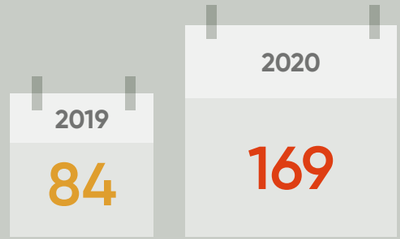
Link to bio

WHAT WE'VE SEEN ON THE ROAD SO FAR...

PANDEMIC PRESSURES ON DEALS:

Like many, competition agencies had to work remotely, and continue ongoing cases while meeting statutory deadlines. In light of pressures posed, many agencies requested that companies avoid making merger filings altogether where possible and there were extensions to time limits in some countries. The pandemic, and related economic fallout, also impacted the substantive review of transactions. For example, parties increasingly used the "failing firm" defense in transactions where targets may have gone out of business but-for an acquisition. However, many agencies globally, including the FTC, EC, and the CMA maintained a hard-line approach, saying that even during the pandemic such defenses would rarely succeed. This stance has not been without criticism, with the CMA being criticized on appeal for not doing enough to assess the pandemic's impact in its decision to block JD Sports' acquisition of Footasylum. We map out the global approaches taken during COVID-19 here

In 2020, because of COVID-19, EC pre-notification for deals doubled with the median being 169 calendar days versus the 2019 median of 84 calendar days.



AUTHORITIES PURSUING PROCEDURAL INFRINGEMENTS:

In the last year, the drive to crack down on infringements of merger control procedure by authorities globally continued apace. In 2020, competition agencies in the UK, China, Norway, Portugal and Spain imposed fines on merging parties for gun-jumping, failure-to-notify, late responses to RFIs and the provision of incorrect information, continuing a still relatively new, but important, enforcement trend worldwide.

DIGITAL DEVELOPMENTS – WILL THIS HELP YOUR DEAL OR DISRUPT IT?

The global focus on mergers in the digital space showed no signs of letting up in 2020. Competition agencies around the world continued to grapple with the challenge of how to "catch" many deals in the technology sector that fall below existing notification thresholds. The tough approach has continued substantively, too. The FTC and 48 State Attorneys-General are suing Facebook for anticompetitive harm arising from its acquisition of companies such as WhatsApp and Instagram, while the EC cleared Google's acquisition of Fitbit only after a lengthy review and subject to significant commitments relating to Google's use of Fitbit's data in 2020.

CATCHING DIGITAL DEALS – AGENCIES FEAR A REGULATORY "GAP"

M&A in the digital space has sparked a global debate as to whether agencies have sufficient powers in their "toolbox" to rule on these deals. A key concern expressed in recent years by many agencies is that they may miss the acquisition of "low revenue/high value" tech targets that fall below traditional revenue-based thresholds. This concern coupled with a wave of digital mergers and acquisitions has presented competition agencies and governments around the world with both a jurisdictional challenge (i.e. whether they are actually legally entitled to review those transactions) and a substantive one (i.e. how should competition agencies assess the possible anticompetitive impacts of transactions in novel and fast changing markets).

Focussing on the jurisdictional challenges, competition agencies and governments around the world have explored and, in some cases, implemented a range of different approaches to ensure they have the ability to review these transactions. While, for the most part, the primary driver of such amendments and proposals is capturing transactions in the digital space, they usually have broader application – meaning that companies active in other industries may find themselves as unknowingly impacted victims of the global drive to better scrutinise the digital sector.

THRESHOLDS

Most commonly, mandatory merger control regimes operate on the basis of thresholds, which must be satisfied in order for the transaction to require a notification (or, in some cases where notification is voluntary, for the local competition agency to have jurisdiction to review the transaction). While flexible market share based thresholds in some countries (e.g. Spain, Portugal and the UK) have caught some transactions, most notification thresholds are based on revenues generated by the acquirer and target and may miss "low revenue" target deals.

In order to try to avoid so-called "low revenue/high value" deals slipping through the merger control net, many governments and competition agencies around the world have raised the possibility of amending or, in some cases, have actually amended thresholds to require notifications when the consideration paid exceeds a certain level. Jurisdictions that have raised and investigated this possibility have included the EU, France, South Korea and Russia. Germany and Austria have already implemented amended thresholds, albeit with limited success – of the transactions captured since implementation of those thresholds around three years ago, none have been the high value technology sector deals that agencies want to capture through such threshold changes.

"CALL IN" POWERS

Another option often discussed is agencies using "call-in" powers, allowing them to request notifications of, or otherwise investigate, acquisitions that would not meet the relevant thresholds. This isn't novel because countries like the US and Sweden have had such systems for many years. However, there has been a resurgence in discussions about such regimes in light of the perceived jurisdictional "gap" with digital deals. Practitioners have suggested that "call-in" powers provide a more proportionate option to deal value thresholds, as they would avoid transactions being notified or investigated where they do not raise issues but would otherwise be caught under a value threshold regime.

As noted, the US has always allowed its antitrust agencies to challenge non-notifiable transactions (or to challenge notified and closed acquisitions well into the future). This has led to the FTC and Attorney-Generals' recent examinations of transactions by several large technology companies, including court challenges against Facebook's acquisitions of Whatsapp and Instagram.

MANDATORY NOTIFICATION REQUIREMENTS

A suggestion that goes a step further than "call-in" powers is a requirement that specified companies inform a competition agency of all acquisitions that they undertake – thereby allowing the agency to determine whether they want to examine that transaction further. The French Competition Authority in particular had suggested such a measure in early 2020. However, particularly in light of the new EU approach discussed below, it appears unlikely that such an approach will be adopted for some years, if at all.

A UNIQUELY EU SOLUTION?

Under EU merger control law, one or more EU Member States can request that the Commission's reviews a transaction that does not otherwise meet the EU thresholds, but that threatens competition within the EU. Indeed, this quirk of EU law allowed the Commission to review Apple's acquisition of Shazam in 2018. Although the wording of the relevant provision does not expressly require it, the Commission's policy to date has been that they would only review such transactions if they were notifiable in at least one EU Member State. However, in 2020, Competition Commissioner Vestager announced that, from around mid-2021, the Commission will start accepting such requests for referral even if the relevant national thresholds are not met. As such, it is possible that companies involved in transactions that do not meet merger thresholds in any country could have their transactions referred to the European Commission for review.

While this approach raises significant uncertainties for businesses, the EC has just issued guidance on this in March 2020. This guidance should go a long way to reducing otherwise significant levels of uncertainty for companies engaging in deals that impact one or more EU countries.

CONCLUSION – PROMOTING BETTER MERGER REGULATION WORLDWIDE

Global competition agencies have been grappling with the question of how to capture digital transactions for several years now, and the discussion and debate will likely heat up in 2021. While the changes and proposals to date are almost all primarily aimed at capturing more deals in the digital space, most changes (e.g. to thresholds) have general application and so deals in other sectors could be affected. As a result, companies doing deals outside the digital space could find themselves as "collateral damage", by being caught up in these changes, thereby facing significant additional regulatory burdens and the accompanying delays and costs that these can entail.

AUTHORS

DAVE ANDERSON
Managing Partner, Brussels
david.anderson@bclplaw.com
T: +32 (0) 2 792 2421
Link to bio

PAUL CULLIFORD
Senior Associate, Brussels
paul.culliford@bclplaw.com
T: +32 (0) 2 792 2424
Link to bio

THOMAS WRIGHT
Associate, Brussels
thomas.wright@bclplaw.com
T: +32 (0) 2 792 2437
Link to bio

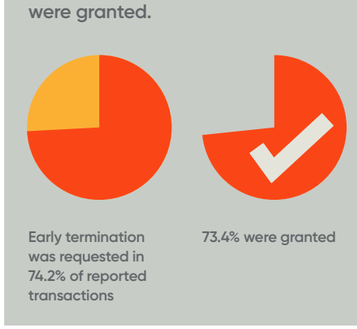
UNDER THE NEW BIDEN ADMINISTRATION, WHAT CHANGES DO YOU EXPECT IN REGARDS TO ANTITRUST INVESTIGATIONS, MERGERS AND MERGER ENFORCEMENT?

While the new antitrust team is still taking shape, they have signaled an intention to appoint a blend of experienced Washington antitrust insiders and emerging leaders focused on consumer protection. The administration has also said that it may appoint a White House "Antitrust Czar," a new position designed to harmonize antitrust enforcement between the federal antitrust agencies. Notably, President Biden faces pressure from the progressive movement to ensure that the antitrust laws are much more rigorously enforced to prevent or unwind mergers that may have previously been allowed.

It's important to remember that the staff of the FTC and the Antitrust Division of the DOJ will remain largely the same. While the priorities for enforcement and cutting-edge interpretations of the antitrust laws will change, the mainstream cases will continue. The Biden administration inherits a large number of significant ongoing antitrust investigations into the Big Tech industry that are expected to continue and grow. With respect to vertical mergers, the prior administration took a more aggressive enforcement stance that was not always successful, and Biden's antitrust appointees will consider whether to revise the Vertical Merger Guidelines that were issued in 2020.

A comprehensive antitrust law reform bill has already been introduced in Congress. In addition, the Agencies cited the leadership transition (as well as high filing volume amid a pandemic), when they recently announced a review of the merger clearance process, temporarily suspending their practice of granting "early termination" of the premerger waiting period. The Agencies anticipate that the suspension will be brief, although they have not announced a timeline.

In 2019, early termination was requested in 74.2% of reported transactions; of those requests, 73.4% were granted.



Early termination was requested in 74.2% of reported transactions

73.4% were granted

REBECCA NELSON
Partner, St. Louis/Washington, DC
rebecca.nelson@bclplaw.com
T: +1 314 259 2412
Link to bio

...WHERE THE ROAD IS TAKING US

BREXIT MAY IMPACT YOUR DEAL:

While, on the face of it, Brexit may sound like an issue that only impacts the EU and the UK, it is likely to have an important impact on a number of global transactions throughout 2021 and beyond. Most notably, the EU and UK competition agencies will now have separate jurisdiction to review transactions, where previously a notification for many deals affecting the UK and EU market only required one notification to the EU, the "one stop shop". As a result, companies may find themselves making parallel notifications in both jurisdictions. At the same time, the CMA will be required to look at much larger and more complicated transactions than it has previously (with those larger transactions previously going to the EU in Brussels). With this increased caseload, we anticipate that the CMA may find itself having to take a different approach to prioritizing transaction review.

TOUGHER SUBSTANTIVE REVIEWS AHEAD:

Over recent years, some competition agencies have come under criticism for being too "relaxed" in their review of mergers leading to high concentration levels in many sectors. As a result of such criticism, we have seen many agencies spanning from the US, to Russia, to the UK and the EU (and its Member States, such as France, which blocked a transaction for the first time in 2020) carrying out more intense merger control reviews. This includes taking deeper looks at internal documents and being more willing to "intervene" (either by requiring remedies or blocking transactions) than at any other time in recent memory. With the CMA now reviewing many more significant transactions than previously and the US antitrust agencies being more willing to rely on novel theories of harm, we expect this trend of intervention to continue into 2021. It would not come as a surprise to see more transactions being pushed into in-depth reviews, an increased requirement for remedies if they are cleared, and potentially further deals being blocked by competition authorities. It is also likely that there will be more mergers that are cleared or challenged in court.

MORE M&A HURDLES - NOT JUST COMPETITION:

Throughout 2021 and into the future, companies engaged in transactions will have to consider more regulatory hurdles that go beyond "traditional" merger control/competition law reviews of deals. There has already been an expansion of foreign investment regulations across the world (including the expansion of the US CFIUS regime and the new EU screening and coordination regime) and new regimes (such as the UK's National Security and Investment Act) are coming into force throughout the year. Simultaneously, the EC is considering a new regime requiring companies to notify transactions if the buyer benefits from foreign subsidies when acquiring EU-based targets and a legislative proposal for levelling the playing field was adopted on 5 May 2021. With this trend, companies engaged in M&A will have to consider traditional merger control filings, foreign investment regimes, and possibly other regulatory hurdles in 2021 and beyond.

FURTHER READING:

US CFIUS regime

EU screening and coordination regime

National Security and Investment Bill

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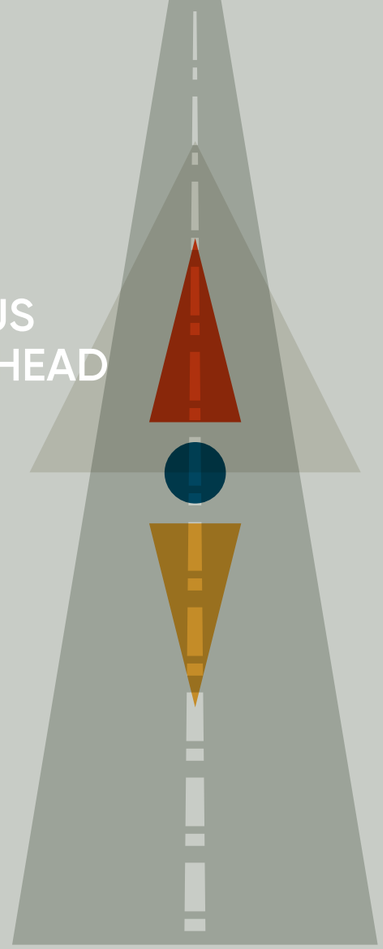
LITIGIOUS ROAD AHEAD



MEET SOME OF THE TEAM

LINDSAY SKLAR JOHNSON
Partner, Atlanta

For almost ten years, I've focused my practice on pursuing antitrust recovery for large corporate clients. These matters have been litigated in federal courts across the country. Additionally, I've defended clients in antitrust cases, assisted clients with antitrust clearance issues, and counseled clients in connection with day-to-day antitrust concerns. This has resulted in a broad understanding of U.S. antitrust law across a variety of industries.

Link to bio

RÉMI BEYDON
Counsel, Paris

For almost ten years, I've been involved in complex litigation cases before the commercial courts and the French Competition Authority, in particular in the telecom and media sectors. This experience developed and deepened my knowledge in abuse of dominance and merger control litigation.

Link to bio

ALEXANDRA HILDYARD
Senior Associate, London

I spent the first three years of my career as an associate in BCLP's Commercial Disputes team before moving across to the Antitrust and Competition team two years ago. I have significant experience of both commercial and competition law litigation and have a particular focus on cartel damages actions. I frequently work with regulated clients and have developed a strong understanding of the particular challenges faced by them.

Link to bio

WHAT WE'VE SEEN ON THE ROAD SO FAR...

WAS 2020 THE YEAR PRIVATE ENFORCEMENT OVERTOOK PUBLIC ENFORCEMENT?

The interplay between public and private enforcement has been debated and discussed for years. While the US private enforcement system promotes both deterrence and compensation via private treble damages actions – historically, public enforcement has been predominant in Europe. But after years of rapid growth, was 2020 the tipping point where private enforcement became the greater exposure risk for corporates in breach of competition law in Europe? Adding up the number and value of claims: including standalone actions, collective actions seeking certification, the host of Trucks cartel litigation, as well as the Court of Appeal of Paris' biggest award of damages in a follow-on action – this may be the year that the balance tipped more in favor of private enforcement in the EU.

INCREASE IN TECH CLAIMS:

The US has seen a huge wave of antitrust tech claims filed in 2020. With the flurry of antirust tech lawsuits came novel theories of wrongdoing, the reapplication of old antitrust theories, and an overlap into other legal disciplines such as privacy. To add fuel to the fire, a US Senator introduced a bill that, if enacted, will only serve to accelerate antitrust challenges to Big Tech. Over in Europe, the EC and national regulators scrutinized the behavior of tech platforms – no doubt with high profile litigation to follow imminently.

ADMISSIONS MADE TO A REGULATOR CAN BE BINDING IN FOLLOW-ON LITIGATION:

The English Court of Appeal held that it was abuse of process for Defendants in Trucks cartel litigation to deny in litigation facts they had previously admitted to the European Commission – even where those facts were not in the binding part of the Commission's infringement decision. Corporates settling antitrust breaches with regulators need to take extra care.

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AN IMPORTANT WAYPOINT: THE RISE OF CLASS ACTIONS IN THE UK AND EUROPE

Until recently, corporates in breach of global competition laws were faced with class actions in the US, and fragmented individual claims in other jurisdictions. The recent rise of the class action regimes in the UK, France and at EU level is set to shake up that status quo. The result is likely to be consolidated, high-stakes, market-wide damages claims.

Until recently, once the dust settled on competition authorities' investigations on a global competition infringement, defendants faced large class actions in the US, in addition to a multitude of fragmented individual claims brought by aggrieved claimants in other jurisdictions. That picture is rapidly changing with the rise of class action regimes in the UK, France and at EU level. This is likely to have significant ramifications for the overall financial liability faced by businesses in breach of global competition laws, and the opportunity for businesses and consumers to obtain compensation for their losses.

THE STORY SO FAR

Class actions have been a well-established procedure in the US courts for decades, and almost every significant competition infringement impacting the US attracts class action filings.

In contrast, a new collective actions regime was brought into force in the UK in 2015 and had a stuttering start. The first claim brought under the new regime was abandoned after becoming commercially unviable to pursue, following the UK Tribunal narrowing the class that was entitled to claim damages. The second collective action sought damages in relation to anticompetitive interchange fees on behalf of an extremely broad class and was struck out at class certification stage, due to apparent insurmountable difficulties in assessing and distributing damages.

Other jurisdictions in the EU have had their own forms of group action, but none have enabled "opt-out" damages actions (where claimants are automatically included in the claim unless they take active steps to expressly exclude themselves from the class) to be pursued.

For example:

- Class actions in Germany have generally been structured by assignment of claims, often to special purpose vehicles to bring such claims, however those actions are akin to "opt-in" actions (where claimants must take active steps to expressly include themselves in the class, otherwise they will automatically be excluded) as opposed to "opt-out" actions; and
- In the Netherlands, "opt-in" style actions are similarly available through assignments to special purpose vehicles (called "Stichtings"). Whilst "opt-out" settlements are permitted through the "WCAM" procedure, that procedure cannot be used for contested "opt-out" claims.

Because of these limitations, class actions in the EU had not taken off. Defendants were faced with major, market-wide liability in the US, together with piecemeal individual claims across the EU. Claimants in the UK and EU also generally required a reasonably sizeable individual claim to render it commercially worthwhile to pursue.

RECENT DEVELOPMENTS AND LOOKING AHEAD TO 2021 AND BEYOND

2020 was a breakthrough year for class actions in the UK. The interchange fees collective action that was struck out by the Tribunal at certification stage was successfully appealed to the UK's Supreme Court, which found in the class representative's favour. Several collective actions that had been paused, awaiting the Supreme Court's decision, will now proceed towards certification hearings in 2021. The judgment is widely seen as lowering the strict certification standard in the UK regime, and is expected to result in a significant uptick in collective actions being filed in the UK.

Other notable developments have taken place in Europe in recent years. In particular, a collective regime launched in France, which was subsequently expanded beyond competition and consumer law into other areas including data protection and environmental law.

Currently, French class claims must be "opt-in" and brought by registered bodies, and competition damages claims must follow a competition authority decision establishing the liability of the defendant(s). However, this is similar to the old UK collective actions regime, which was subsequently expanded to the new opt-out UK regime. France may follow a similar trajectory.

Further, an EU Directive enabling consumer class actions was adopted and published in December 2020. The Directive must be implemented into the national laws of EU Member States within two years, and covers all infringements of EU law by traders which impact the rights of consumers.

Taken together, these developments may lead to a fundamental shift in the nature of corporate liability for anticompetitive behaviour in global markets. Defendants may find that their liability is increased by facing high value market-wide class actions in key jurisdictions, as opposed to a multitude of individual damages actions across the EU. Access to compensation will open up to many claimants with claims, which would be commercially unviable to pursue individually. The result is likely to be a raising of the stakes in litigation arising from competition infringements - expect to see much more on class actions through 2021 and the years ahead.

> "The result is likely to be a raising of the stakes in litigation arising from competition infringements - expect to see much more on class actions through 2021 and the years ahead."

AUTHORS

EDWARD COULSON
Partner, London
edward.coulson@bclplaw.com
T: +44 (0) 20 3400 4968
Link to bio

ANDREW LEITCH
Senior Associate (Scottish Solicitor), London
andrew.leitch@bclplaw.com
T: +44 (0) 20 3400 4023
Link to bio

ARE COMPANIES EXPOSED TO A SERIOUS RISK OF COMPETITION LITIGATION DAMAGES IN FRANCE? AND IS PRIVATE ENFORCEMENT AN EFFECTIVE TOOL FOR THOSE WHO HAVE BEEN HARMED?

The risk of damages litigation is increasingly high in France and private enforcement cases are multiplying with judges seeming more receptive to victims' claims. Even though individual actions are predominant in France, since class actions were introduced in 2014, collective actions have recently become more of a concern.

The risk of damages litigation is increasingly high in France and private enforcement cases are multiplying with judges seeming more receptive to victims' claims. Even though individual actions are predominant in France, since class actions were introduced in 2014, collective actions have recently become more of a concern.

Private enforcement is an effective tool for those harmed, especially since the Damages Directive. Now, French law has numerous rules aimed at facilitating the compensation of victims of anticompetitive practices. This is in relation to stand-alone actions, and more specifically in the context of follow-on actions, through presumptions of fault and harm arising from cartels and abuse of a dominant position. Recently, Nathalie Dostert, President of the Chamber in charge of private enforcement within the Commercial Court of Paris, declared that the Court was inspired by the practice in other countries. She also noted the complexity of these cases and indicated that she wanted to give a prominent place to experts.

JULIE CATALA MARTY
Partner, Paris
julie.catalamarty@bclplaw.com
T: +33 (0) 1 44 17 77 95
Link to bio

"The practice enjoys multijurisdictional experience and has a skilled and client-oriented team. The partners and associates are client-oriented and keen to deliver the outcome not only legally impeccable but also relevant to the client's industry and other particulars."
LEGAL 500 2021

...WHERE THE ROAD IS TAKING US

CRISIS CARTEL LITIGATION RESULTING FROM THE PANDEMIC:

While the majority of cases we have seen arising as a result of the pandemic have been related to price-gouging and consumer law, we expect to see crisis cartel litigation in 2021 and beyond. Past evidence suggests that it is during times of crisis that companies interact more, and despite some gaining the permission to collaborate to a certain extent, it is plausible that many others may have crossed the line into anticompetitive territory. Because of the inherent secretive nature of cartels, it is unlikely we will immediately see these cartels uncovered and the damages claims that will follow, but it is certainly something to watch.

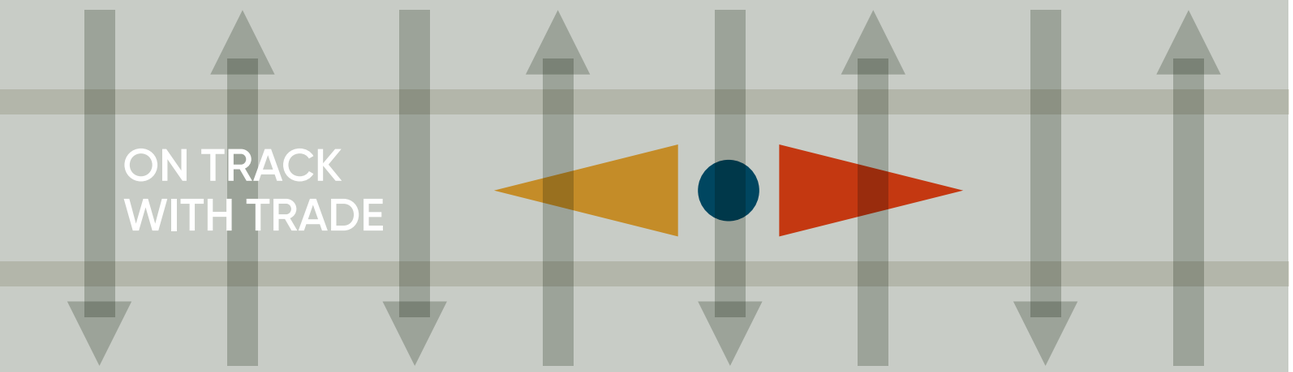
CLASS ACTIONS FLOW IN THE UK:

2020 was a breakthrough year for class actions in the UK given that interchange fees collective action struck out by the Tribunal was successfully appealed to the UK's Supreme Court. With a series of class action certification hearings now set for 2021, this is just the beginning. The rise in class actions in the UK and Europe means that defendants may find an increase in liability via high value market-wide class actions in key jurisdictions, as opposed to a multitude of individual damages actions across the EU.

CLARIFICATION ON CARTEL LITIGATION LIMITATION:

England has one of the longest limitation periods for follow-on litigation against secret cartels. In a recent judgment in April 2021, the Court of Appeal upheld a Commercial Court ruling that the point at which the limitation clock starts to run against a claimant depends on the position of the claimant, and accordingly what information that claimant was in a position to discover. Different limitation periods therefore apply to different claimants (and particular, insolvent claimants, who are to be judged by what an administrator could reasonably have discovered, as opposed to what would be expected of the management of a company that remained a going concern). This clarification of the law is likely to lead to greater uncertainty of what the limitation deadline is in individual cases. Therefore this decision, together with the Commercial Court's first instance determination that limitation periods can start to run prior to the publication of a competition authority decision, is likely to lead to a significant up-tick in limitation related challenges in the years ahead.

"They are first-class – not only do they know how to run cases and get results, but they are very commercial when it comes to fee arrangements."
Legal 500 2021



MEET SOME OF THE TEAM

SUSAN KOVAROVICS
Managing Partner, Washington, DC

Having started my career as a transactional lawyer, I bring a greater appreciation to my trade work in terms of the impact the advice will have on the whole business. As a result, clients regularly comment on the practical and easily accessible nature of my advice for their business teams.

Link to bio

SONJA HAINSWORTH
Senior Associate, London

My knowledge and in-depth understanding of the EU and UK economic sanctions regimes enables me to help clients navigate the subtleties of the regulations and ensure they remain compliant in conducting their business.

Link to bio

SANDY AZIZ
Knowledge Development Lawyer - Litigation & Investigations, London

My unique knowledge development lawyer and associate hybrid role allows me to breakdown the technical aspects of our law and spot trends to stay on track with trade and competition law. This ensures that we can consistently offer our clients the latest developments and in an innovative way.

Link to bio

WHAT WE'VE SEEN ON THE ROAD SO FAR...

CONTINUATION OF RETALIATORY APPROACHES TO TRADE ISSUES:

Trade tensions continued escalating towards retaliation, whether actual or threatened. The US threatened to impose $1.3bn tariffs on French goods in response to the French digital services tax, which President Trump argued unfairly penalized American firms. Retaliatory measures in the Boeing/Airbus dispute over aircraft subsidies also rumbled on last year. In December, the Trump administration announced an increase in tariffs on aircraft parts and alcoholic beverages from France and Germany. This followed the EU's decision in November to impose a wide-ranging set of tariffs of up to 25% on US products, after being granted retaliation rights by the WTO in October. In the UK, in a bid to lay the groundwork for a trade deal with the US, the Government announced in December that it would suspend retaliatory tariffs resulting from the Boeing dispute. However, the US responded by saying that the UK had "no authority" to impose the tariffs after leaving the EU in any case...

BREXIT AND THE EU-UK TRADE AND COOPERATION AGREEMENT:

One of the defining moments of the year for UK-based businesses and their trading counterparts arrived at the eleventh hour. After months of fraught discussions, negotiators concluded an agreement in principle on December 24, 2020 which forms a basis of the UK's future trading relationship with the EU. The TCA consists of four pillars: a free trade agreement; provisions for cooperation on economic, social, environmental and fisheries issues; a partnership on citizens' security; and an overarching governance framework. The effects of the TCA and the new UK-EU relationship began to be felt on January 1, 2021, a week after it was signed.

EU FOREIGN SUBSIDIES WHITE PAPER:

In June 2020, the EC adopted a White Paper analysing effects caused by foreign subsidies in the Single Market. The White Paper proposed a new instrument to address a "regulatory gap" in the EU's existing toolkit, which does not fully address all possible distortions caused by foreign subsidies. A public consultation on the White Paper concluded in September 2020 and a legislative proposal for levelling the playing field was adopted on 5 May 2021.

COME JOIN THE (INTERIM) TRADE PARTY

Despite being one of the most used international dispute resolution mechanisms in the world, in recent years the WTO's system for dispute settlement has been crippled by an impasse over appointment of Appellate Body members. Since 2019, the Appellate Body has been inquorate and unable to hear appeals. The term of the last sitting Appellate Body member expired on November 30, 2020.

In order to stop the gap, back in April 2020, 16 WTO members (including the EU, Canada, China and Australia) formally notified the Multi-Party Interim Appeal Arbitration Arrangement (the "MPIA") to the WTO. The MPIA is based on existing WTO provisions for dispute resolution under Article 25 of the Dispute Settlement Understanding and preserves the essential principles and features of the WTO dispute settlement system (including its binding nature and provision for two-tier adjudication). However, its implementation has broken new ground by introducing novel mechanisms to enhance procedural efficiency. For example, arbitrators may take organisational measures to streamline proceedings, including deciding on page limits, time limits and deadlines as well as deciding on the length of and number of hearings needed in a dispute. If necessary, arbitrators can also propose non-binding substantive measures to the parties in dispute, such as an exclusion of claims based on alleged lack of an objective assessment of the facts.

The MPIA by no means addresses all of the concerns that have been aired about the functioning of the WTO dispute settlement system over the years. However its establishment is an important step in the journey to wider reform and follows on from the proposals for reform put forward in 2019 by New Zealand Ambassador Dr David Walker. Implementation of the MPIA signals commitment to the WTO dispute settlement system and a desire for positive change from an important portion of the WTO membership. However, there are notable absences in the list of participants. The WTO membership remains fundamentally divided on key issues relating to reform, for example the question of precedent. The UK is reportedly now siding with the US and Japan in arguments about whether the WTO should be able to create its own legal precedent.

The reality is that, until the Appellate Body becomes functional again, disputes involving members who have not joined the MPIA cannot be resolved and the scope for reform through the new arrangement is very limited.

WTO General Council Director-General Azevêdo commented back in December 2019 that "Rules-based dispute resolution prevents trade conflicts from ending up in escalating tit-for-tat retaliation — which becomes difficult to stop once it starts — or becoming intractable political quagmires". As we noted above, 2020 has clearly shown how retaliatory steps in trade disputes can easily snowball. However, opinion remains divided on the efficacy of dispute resolution panels in resolving international trade disagreements.

With a new Director General at the WTO (who has previously accepted that critiques of the Appellate Body are valid), a new president in the White House and a global pandemic applying even greater pressure to trading relationships, 2021 will have surprises in store for trade dispute resolution. If one thing is for sure, it will not be a quiet year.

> Excellent team – definitely my first recommendation in this area. The team members are very skilful and hard-working, but have a very good way of dealing with fellow professionals as well, of course, as the clients.
>
> LEGAL 500 2021

AUTHORS

CHRIS BRYANT
Partner, London
chris.bryant@bclplaw.com
T: +44 (0) 20 3400 2423
Link to bio

DORAN BOYLE
Associate, London
doran.boyle@bclplaw.com
T: +44 (0) 20 3400 4291
Link to bio

ARE TRADE AGREEMENTS THE WAY FORWARD?

One of the things we hear frequently when the post-Brexit world is discussed is how the UK plans to forge ahead with an array of new trade agreements. The UK is far from alone in dedicating resources to free trade agreements and it does appear that, for most countries, this is the shape of their trade policy for at least the medium-term future.

It hasn't always been this way. Step back 20-30 years and there was a more concerted effort to liberalising global trade through multilateral negotiations at WTO level. However, these negotiations were notoriously slow and failed to make the steps forward that many had hoped, ultimately resulting in the collapse of the Doha Round negotiations.

Many WTO members have therefore focused their efforts on developing considerably more ambitious bilateral trade agreements with key partners, or entering into agreements with several like-minded countries. Perhaps the most ambitious and far-reaching of the latter category is the CPTPP, the Comprehensive and Progressive Trans-Pacific Partnership, an agreement between 11 countries including Australia, Canada and Japan. The success of the CPTPP is underlined by the fact that, despite its geographical distance from the Pacific, the UK has formally applied to join.

In my view, agreements such as the CPTPP and bilateral trade agreements look to be very much the shape of trade policy for the time being. This is certainly where the major economies are focusing their resources, and this approach gives them the possibility to agree something more bespoke and flexible rather than through more unwieldy multilateral rules applying throughout the WTO's membership. Furthermore, when it comes to handling disputes, free trade agreements typically include leaner and more tailored arbitration provisions to enable the countries to resolve disputes quickly, rather than through lengthier and more transparent WTO proceedings. In short, FTAs are very much the shape of the future.

"We like how they work," a client says, explaining: "We liked their preparation skills and their presentation in court.

Chambers Europe 2021

CHRIS BRYANT
Partner, London

chris.bryant@bclplaw.com
T: +44 (0) 20 3400 2423
Link to bio

...WHERE THE ROAD IS TAKING US

CHANGE IN TRADE POLICY WITH THE BIDEN ADMINISTRATION:

President Biden and Katherine Tai (Trade Representative) will have to deal with President Trump's legacy and fashion a new trade policy. Biden has suggested his administration will look to alleviate trade tensions between the US and Europe, but he inherits a fraught trading relationship and disputes dating back many years. Despite optimistic comments from Brussels and Washington officials, old disagreements will likely linger on and certain newer pressure points, such as digital taxation, will come to the fore to test those intentions for increased co-operation. Most eyes, however, will be on how the new administration deals with China. While we can expect less sabre-rattling from the White House than in the last four years, we should not necessarily expect that the incoming administration will take any less tough a stance opposite China.

The breadth and the depth of the team's trade law knowledge is very valuable.

Legal 500 2020

INCREASING ROLE OF COUNTRY OF ORIGIN RULES:

Although the TCA technically came in 2020, the effects on cross-border trade and the new UK-EU relationship will of course be felt in 2021, not least given the fact that businesses and officials alike are having to adjust to the UK being outside the EU customs union and single market. The topic of rules of origin has already been brought into sharp focus, with many businesses that previously used the UK ad a distribution hub for Europe now finding that they have to prove the origin of all goods they ship across borders or face additional tariffs for goods from outside the UK or EU. This complicated area will become one which businesses and their advisors will become increasingly familiar with.

REFORMS TO TRADE LAW TO REFLECT THE DIGITAL LANDSCAPE (DATA FLOWS AND THE FLOW OF GOODS AND SERVICES THAT INTEGRATE AI):

As is the case in most sectors, a big question for trade policymakers in 2021 will be how rulemaking should adapt to cater to the digital world. As cross-border trade in digital products and services continues to grow at speed, policymakers will likely turn their attention to how best to ensure trade in all things digital can flow smoothly, freely and for the benefit of all. As ever, opinion is divided.

GETTING IN TOUCH

When you need a practical legal solution for your next business opportunity or challenge, please get in touch.

ANDREW HOCKLEY
andrew.hockley@bclplaw.com
T: +44 (0)20 3400 4630

PHILIP BARTZ
philip.bartz@bclplaw.com
T: +1 202 508 6022

JULIE CATALA MARTY
julie.catalamarty@bclplaw.com
T: +33 (0) 1 44 17 77 95

DAVE ANDERSON
david.anderson@bclplaw.com
T: +32 (0) 2 792 2421

NIKOLAY VOZNESENSKIY
nikolay.voznesenskiy@bclplaw.com
T: +7 495 287 4444

SANDY AZIZ
sandy.aziz@bclplaw.com
T: +44 (0) 20 3400 3046

bclplaw.com

69685