Freshfields Bruckhaus Deringer

Global antitrust in 2012: 10 key themes

January 2012

Freshfields Bruckhaus Deringer LLP

Global antitrust in 2012

2011 was another eventful year for antitrust laws globally. As the number of antitrust regimes continues to grow, the more mature jurisdictions are adapting their laws and policies to deal with the challenges of rapidly developing industries and increasingly complex commercial arrangements between businesses.

Enforcement of antitrust laws remains vigorous, despite calls for more lenient treatment and greater protection for companies in difficult times. The major authorities are agreed that competition is a key driver of growth and robust antitrust laws are essential to promoting competitive markets. This can be seen in practice across the waterfront of antitrust enforcement globally.

We are delighted to share with you our overview of 10 key themes in global antitrust enforcement that we think are particularly important for 2012. If you would like any further information on any of the issues outlined, please contact us or one of your usual contacts in our international antitrust, competition and trade team.

Best wishes for 2012,

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10 key themes

1. Cartels: cracking down on anti-competitive information exchange

Despite the harsh economic climate affecting business, competition authorities across the globe have not relaxed their hardline stance against cartels. Rather, they remain intent on detecting and deterring the conclusion of naked cartel arrangements and vigorous enforcement in this area can be anticipated throughout 2012. In addition to active enforcement against cartels operated clandestinely in 'smoke-filled' rooms, competition authorities are focusing their resources on more amorphous or indirect mechanisms used by firms to co-ordinate their behaviour with that of their competitors; in particular, through direct or indirect disclosure, or exchange, of strategic information.

2. More aggressive investigation techniques

Enforcement agencies are using increasingly sophisticated technological means to search for and assess evidence. This in turn means that a company under investigation itself needs to obtain and analyse the relevant information within a very tight timeframe, and take key strategic decisions such as whether and where to apply for leniency far faster than in the past.

3. Focus on supply and distribution networks

Restrictions in supply and distribution (vertical) arrangements are the subject of increasingly complex cases. In Europe and in the US, the debate continues over the application of antitrust rules to resale price maintenance (RPM). In addition to RPM, and often in the context of the same investigations, more European national authorities are starting to consider hub-and-spoke theories of harm. Meanwhile, vertical arrangements in online markets remain the subject of antitrust scrutiny. These cases raise difficult questions as to how rules developed for the bricks-and-mortar world should be applied to the digital market-place, and how authorities should apply the rules for agency arrangements.

4. Consumer actions: a growing threat of private claims and class actions

Although 2011 did not see the Commission's promised framework for collective redress in private antitrust claims, which is now expected in 2012, recent court rulings are likely to encourage the continued steady growth of private antitrust damages actions in Europe. First, the European Court of Justice in *Pfleiderer* has ruled that where claimants seek access to a regulator's investigation file, including leniency material, the national courts must weigh the need to protect the leniency regime with the claimant's right to compensation. Similar comments were made in *CDC Hydrogene Peroxide* by the European General Court, which noted that damages actions as well as leniency regimes can make a significant contribution to the maintenance of effective competition in the EU. Second, the German Supreme Court has ruled that the passing-on defence is available in Germany, which potentially paves the way for indirect purchaser claims.

5. Cross-border M&A: going beyond traditional competition rules

Cross-border mergers give rise to increasing challenges as many jurisdictions in the world regulate foreign investment by dedicated legislation, separate from the review of mergers. Foreign investment rules can have far-reaching application in

many sectors of the economy and may ultimately result in major investments being blocked or give rise to considerable delay in the timetable for completion.

6. The challenges of rapidly developing industries

Many of the fastest growing areas in antitrust enforcement involve new and challenging markets. From interoperability remedies in merger control decisions, to the expanding abuse of dominance case against Google, to the increasingly complex relationship between antitrust and intellectual property law, several developments this year will continue to affect the antitrust landscape in 2012.

7. Antitrust scrutiny of financial services

Financial services providers are coming under increased scrutiny from antitrust enforcement authorities throughout the world. This is reflected in the growing number of investigations currently ongoing or completed recently in different areas of the financial services industry investigating both structural and behavioural competition issues. The financial crisis in many parts of the world has been the catalyst underpinning a heightened degree of regulatory interest prompting some of these investigations. Competition authorities are no longer shying away from a sector of the economy long viewed as highly technical and complex.

8. Single-firm conduct in a global market-place

Competition authorities around the world are continuing their vigorous enforcement of abuse of dominance laws, and global economic recession has not resulted in any discernible softening of approach. Enforcers still target incumbents in telecommunications, postal services and energy, and are now increasingly scrutinising high technology and internet-based markets. Traditional types of abuse are still sanctioned, but other categories feature increasingly often. For example, a number of recent cases have focused on exploitative trading conditions.

9. Asia: active enforcement by rapidly developing regimes

Companies doing deals involving China continue to feel the impact of the still relatively young merger control regime. Combined with new, wide-ranging national security rules, experience shows that deal teams must prepare for a long and rather unpredictable process. But the key message for 2012 is that the Chinese authorities' reach extends much further than merger review. Recent cases have removed any doubt that the authorities are prepared to launch investigations into large, Western companies, as well as high-profile state-owned enterprises. Similar developments across Asia mean that 2012 is the year to ensure your business interests in the region are fully compliant with Asia's rapidly expanding competition and merger control laws.

10. Protecting human rights in antitrust cases

In the EU, debate over the question of whether EU competition enforcement procedures are compatible with the European Convention of Human Rights (ECHR) has been escalating, especially in light of the increasing levels of fines imposed by the European Commission for competition law infringements and the EU's impending accession to the ECHR. A 2011 judgment of the European Court of Human Rights has shed light on some of the contested issues in this area, but many remain for resolution in 2012 and in the years beyond.

1. Cartels: cracking down on anti-competitive information exchange

Despite the harsh economic climate affecting business, competition authorities across the globe have not relaxed their hardline stance against cartels. In the EU, as soon as the financial crisis broke, the (then) Competition Commissioner, Neelie Kroes, stated that the Commission would not turn a blind eye to cartels and, indeed, it has proved to be business as usual in EU cartel enforcement. Not only has the European Commission continued to prioritise cartel enforcement and impose colossal fines on those found to be involved, but the current Competition Commissioner, Joaquín Almunia, has also stressed the importance of antitrust concepts and instruments being applied in all weather: 'The discipline imposed by competition is the best tonic for business; it promotes efficiencies; prepares our firms for global competition; and fosters innovation.'

Competition authorities therefore remain intent on detecting and deterring the conclusion of naked cartel arrangements and vigorous enforcement in this area can be anticipated throughout 2012. Competition agencies increasingly co-operate together to facilitate the detection and prosecution of global or transnational cartel activity and the extradition of individuals responsible for them, and many are seeking mechanisms to increase the number of cases they can bring and to ensure that punishment is sufficiently severe for those transgressing the rules. In the EU, the European Commission has made increasing use of its settlement procedure, introduced in 2008 to facilitate more rapid resolution of cases, to minimise the risk of lengthy appeals and to free up resources for further investigations. Five cartel cases, resulting in fines in excess of €1bn, have now been settled in this way, and greater use of the procedure can be expected in 2012. In the UK, the government has also engaged in extensive consultation on how it can increase the number of antitrust cases, put in place faster and more efficient decision-making structures and ensure that the UK cartel offence has the intended deterrent effect.

In addition to active enforcement against cartels operated clandestinely in 'smoke-filled' rooms, competition authorities are focusing their resources on more amorphous or indirect mechanisms used by firms to co-operate or to co-ordinate their behaviour with that of their competitors, in particular, through direct or indirect disclosure, or exchange, of strategic information. EU case law establishes that the private reciprocal exchange of strategic information designed to remove uncertainties concerning the intended conduct of the participating firms and facilitating, directly or indirectly, the fixing of prices may, even if only occurring on a single occasion, be enough to establish prohibited collaboration. Indeed, the European Commission has warned that it will ordinarily treat private, reciprocal exchanges between competitors on their individualised intentions regarding future prices or output as cartels and fine the conduct accordingly. Further, it seems likely that disclosure of strategically sensitive information by one firm to a competitor (whether by mail, email, phone or orally at a meeting) in circumstances where the latter requests the information or accepts it will be treated in a similar way.

Businesses also need to be cautious about indirectly disclosing or exchanging sensitive information with their competitors; for example, through public announcements. The question of when such indirect disclosures or exchanges establish or form part of a prohibited concerted strategy between competitors is a complex one. Nonetheless, the European Commission has indicated that even public announcements made by one firm may be enough to establish a strategy for reaching a common understanding with competitors, in

particular when it is followed by public announcements by those competitors. In the US, private claimants have relied on the existence of public communications to provide evidence in litigation that competitors have agreed to collude. In one case, plaintiffs pointed to a series of statements made by airlines during earning calls and industry conferences (which culminated in parallel decisions to implement first-bag fees) to suggest a plausible case of collusion. Although the merits of the case have yet to be resolved, the federal district court declined to dismiss the motion, finding that the plaintiffs had adduced enough circumstantial factors to suggest an agreement to fix first-bag fees. The US Federal Trade Commission (FTC) is also hostile to steps taken by firms to encourage their competitors to collude in setting prices. To deter such conduct, it has used its powers under section 5 of the FTC Act, which prohibits 'unfair or deceptive acts or practices'. In addition to prohibiting anti-competitive agreements between firms, the provision allows the FTC to investigate and prohibit conduct that had not previously been ruled unlawful under other provisions of the US antitrust laws, but that the FTC nonetheless deems as an 'unfair' method of competition in violation of the FTC Act.

Business can therefore continue to expect vigorous enforcement against both direct or indirect mechanisms of co-ordinating behaviour with that of a competitor. Where violations of the competition law rules are found it may also anticipate exposure to follow-on actions for damages (see section 4 'Consumer actions: a growing threat of private claims and class actions').

'2011 has seen no relaxation in the enforcement of the competition law rules against cartels or the penalties imposed on firms engaged in illegal cartel behaviour. Firms can expect competition authorities to continue to seek tough mechanisms for deterring cartel activity in the future. Further, businesses that find more amorphous mechanisms for co-ordinating their behaviour with that of their competitors can anticipate antitrust scrutiny of such behaviour and, where appropriate, for it to be punished in the same way as explicit collusion.'

Rafique Bachour, Partner, Brussels

2. More aggressive investigation techniques

Competition authorities around the world are becoming more aggressive in their approach to cartel enforcement. Some authorities are actively monitoring markets for signs of cartel activity, and international co-operation is increasingly the norm.

Many agencies are also stepping up their technical capacity to detect and prove cartel cases. To an extent these developments are a natural result of technological progress, but they are also a response to cartels becoming harder to detect. Cartelists are now often cleverer about covering their tracks and avoiding creating evidence, and this makes life more difficult for the authorities. However, it can also make it harder for companies themselves, when concerns are raised internally or an authority starts an investigation, to quickly get hold of the information needed to establish what has been going on.

Enforcement agencies are using increasingly sophisticated and quicker means to search for and assess evidence. The European Commission, for example, uses powerful software in dawn raids that allows it to perform extremely thorough and far-reaching searches of vast volumes of data in a very few days. This in turn means that a company under investigation itself needs to obtain and analyse the information within a very tight timeframe, and take key strategic decisions such as whether and where to apply for leniency far faster than was the case in the past, and certainly sooner than is convenient. Given that these decisions may need to be made as early as during a dawn raid, at the same time taking into account the international context and the risk of follow-on damages claims in different countries, the crucial importance of obtaining expert advice that takes account of all these factors is clear.

At the same time, we are now seeing more companies bringing challenges against the European Commission's procedures and methods in dawn raids. In a high-profile example, Deutsche Bahn has brought a case in the European General Court (EGC) questioning whether the Commission was entitled to enter its premises to carry out an investigation without having obtained a judicial warrant. So far the Commission has only sought such a warrant where private homes are concerned, but Deutsche Bahn is arguing that this protection should also extend to company premises. It has also objected to what it considers is the unduly wide scope of the inspection (which it sees as a 'fishing expedition') and has raised other issues based on fundamental rights. We may well be seeing more of these kinds of claims in the future, on issues such as the seizure during dawn raids of copies of hard disks or other computer material.

Companies are also now more ready to push back on other aspects of authorities' investigative measures. An example at EU level is Holcim's appeal to the EGC against a European Commission request for information. Holcim argues, among other things, that the request was written in the wrong language, gave too short a deadline, was not precise enough and asked for information that Holcim did not have available.

Leniency programmes remain a key weapon in the enforcement armoury, and they raise some of the most difficult questions that have to be decided by companies at an increasingly early stage. For some time, such programmes have been under pressure in the EU as the threat of private damages actions increases (see section 4 'Consumer actions: a growing threat of private claims and class actions'), but another factor has recently come to the fore that must give companies serious pause for thought before they opt to apply for leniency. This is the risk that leniency materials may be disclosed to damages claimants.

The European Court of Justice (ECJ) recently held in *Pfleiderer* that when disclosure of leniency materials – whether the 'leniency statement' itself, or related material – is sought, national courts have to balance the need to protect the effectiveness of the programme against the right of individuals to claim damages for losses caused by a competition law infringement. This requirement to take a 'case-by-case' approach has raised a host of questions that are already starting to come before the courts. To mention just two examples, an Austrian court has asked the ECJ to rule on the legitimacy, under the *Pfleiderer* ruling, of an Austrian law that prohibits disclosure of such material without the approval of the company concerned and the enforcement agency, and the English High Court has sought guidance from the Commission on how the *Pfleiderer* balancing test is to be carried out.

In fact the ramifications of this debate reach beyond the EU, and may come to affect what happens in private damages claims in US courts. So far, US courts, often supported by the Department of Justice (DoJ), have tended, on the basis of comity considerations, to protect European Commission leniency documents from disclosure to claimants. As recently as December 2011, a US court granted a Commission request to protect the confidential version of its *Air Cargo* decision. If and when it becomes clear that courts in the EU do not provide such protection, the US courts may reassess their current supportive approach.

'With the European Commission using increasingly sophisticated and quicker means to gather and assess evidence, companies are being forced to make key strategic decisions – in particular on leniency – fast. And they may need to do this as early as during a dawn raid, at the same time taking into account the international context and the risk of follow-on damages claims in different countries. The demands placed on those involved in these situations are huge.'

Tobias Klose, Partner, Düsseldorf

3. Focus on supply and distribution networks

Restrictions in supply and distribution (vertical) arrangements continue to be the subject of increasingly complex cases.

In Europe, while the 2010 EU guidelines on restrictions in vertical agreements acknowledge that it is possible for the efficiencies arising from resale price maintenance (RPM) to justify an exemption from the general prohibition of anti-competitive agreements, a case has yet to be argued successfully on this basis at EU level. At the same time, some national authorities continue to pursue a strict enforcement policy, applying quasi-horizontal theories of harm to vertical arrangements.

- The German Federal Cartel Office (FCO) is currently investigating practices potentially amounting to RPM in the food retail sector. The FCO has made it clear that it considers that, exceptional circumstances aside, every agreement aiming to fix minimum prices will constitute a breach of the prohibition. In addition, the FCO has highlighted a significant list of types of conduct that it says could lead to increased risk of anti-competitive behaviour – including certain communications that arguably form part of normal day-to-day interaction between retailers and suppliers.
- In the UK, the Office of Fair Trading (OFT) recently lost the appeals on its *Tobacco* decision, where it had taken a strict approach to RPM. Referencing case law relating to horizontal arrangements between direct competitors, the OFT had argued in its decision that no analysis of anti-competitive effects was necessary for a finding of RPM infringement. However, the appeals succeeded because the OFT was not able to explain consistently how its theory of RPM supported a finding of an anti-competitive impact on prices. The OFT has said that it will nevertheless continue to pursue complex cases. It remains to be seen whether its approach to RPM will change in the future.

Often in conjunction with RPM, several national European authorities are increasingly investigating potential hub-and-spoke theories of harm, where two horizontal competitors are alleged to collude through the intermediary of a common vertical relationship, typically a customer. To date, in the EU, the only hub-and-spoke infringement decisions have been in the UK. The OFT's 2011 hub-and-spoke decision in the *Dairy* case, its first in nearly eight years, is currently under appeal. The European Commission has yet to adopt a hub-and-spoke decision, and the correct application of EU rules to indirect collusion remains the subject of much debate.

'It is becoming increasingly difficult for parties to distinguish normal commercial discussions or information exchanges from what some competition authorities consider to be potentially illegal conduct in a vertical context.'

Deirdre Trapp, Partner, London

Finally, vertical arrangements in online markets continue to receive particular attention from competition authorities.

- In 2011, the European Court of Justice clarified the applicable rules on the treatment of restrictions on internet sales. In the *Pierre Fabre* case, the Court confirmed that a distributor could not restrict internet sales through its selective distribution network unless this was objectively justified. Complete bans on internet sales are unlawful as they are seen to partition the European internal market.
- Authorities in the US and (to a greater extent) the EU are also looking at the vertical aspects of agency agreements for the sale of e-books. Although true agency agreements are usually exempted from the prohibition, the rules for what constitutes true agency remain largely untested with regard to digital sales models. More generally, there is little case law to guide online retailers as to what factors would be relevant for assessing pro-competitive efficiencies in a digital context.

Online vertical arrangements are often adopted globally, and it remains to be seen how authorities co-operating on such cases on either side of the Atlantic will apply sometimes diverging national rules governing these arrangements. For example, at the federal level, the US authorities' position is more tolerant of RPM following the 2007 *Leegin* judgment, which abolished per se illegality in such cases. On the other hand, some states – notably New York and California – maintain a strict position on RPM.

'Certain antitrust authorities in Europe and the US continue to take a strict line on resale price maintenance, and are also experimenting with new theories of harm, including indirect collusion. Companies should be mindful of this in managing interactions with suppliers and customers.'

Helmut Bergmann, Partner, Berlin

4. Consumer action: a growing threat of private claims and class actions

2011 saw continued growth for competition damages actions, although it was a mixed year in terms of legislative progress. Although not all developments were necessarily favourable to claimants, they are unlikely to deter the continuing steady growth of litigation brought or threatened against parties found to have infringed competition law by the victims of those infringements. Claimant law firms, often working closely with litigation funders and acting on a conditional fee basis, are actively encouraging such claims, particularly by customers of cartelists. In difficult economic times, the prospect of an apparently risk- and cost-free claim is proving attractive to many potential claimants, including large multinational companies that have traditionally not readily engaged in litigation against their suppliers.

In the EU, the European Commission's promised framework for a common approach to collective redress was not released (as had been expected) in the spring of 2011. Instead, there appears to be an ongoing policy battle between those, including the European Parliament's Legal Affairs Committee, seeking a mechanism to promote collective redress across a wide range of areas, and DG Competition, which apparently favours the introduction of an antitrust-specific mechanism. The Commission is now expected to produce 'general principles' of collective redress in the spring of 2012.

Claimants are, however, making headway in their attempts to access Commission and national competition authority (NCA) cartel investigation files to gain evidence to support their damages claims, including leniency material. In a landmark ruling in the *Pfleiderer* case in June 2011, the European Court of Justice ruled that where a potential damages claimant seeks access to an NCA file, including leniency material, the national court must balance the importance of protecting the leniency regime against the right of victims of infringements to obtain effective redress. Neither consideration takes precedence over the other and the courts must assess each application on a case-by-case basis.

In a similar vein, in December 2011, the European General Court in *CDC Hydrogene Peroxide* annulled the Commission's refusal to allow a damages claimant access to the contents list of the Commission's hydrogen

'2011 has seen some landmark court rulings that are likely to continue to encourage the steady growth of private antitrust damages claims. The *Pfleiderer* decision, which is already being applied in the *National Grid v ABB* case, makes it a real possibility that damages claimants will be able to access documents, including leniency materials, on the Commission's or an NCA's investigation file. Also, the German Supreme Court's decision to recognise the passing-on defence will remove the perceived advantage that Germany had over England as a forum for direct purchaser claims – but at the same time it opens the way for indirect purchaser claims in Germany.'

Bea Tormey, Partner, London

peroxide cartel case file. The Court stated that there is no reason why competition investigation documents should receive special treatment and did not accept that such disclosure would undermine Commission investigations. The Court noted that leniency programmes are not the only means of ensuring compliance with EU competition law and that damages actions before the national courts can make a significant contribution to the maintenance of effective competition in the EU.

In a subsequent application of the *Pfleiderer* principles before the English High Court, in *National Grid v ABB*, the Commission submitted that *Pfleiderer* applies equally to attempts to access Commission files. The English Court is currently considering whether to order disclosure of the confidential version of the Commission decision, the immunity applicant's response to the statement of objections and other documents that contain leniency material. If disclosure is ordered, this could have significant consequences for the willingness of leniency applicants to create any written documents during the Commission investigation process.

Meanwhile, the US courts generally continue to refuse to order disclosure of European leniency material, on the grounds of international comity. Most recently, in December 2011, a New York court declined an application for disclosure by participants in the air cargo cartel of the Commission's confidential version of the decision in that case.

Another key development was the German Supreme Court's decision to recognise the 'passing-on defence', which potentially opens the way for indirect purchaser claims in Germany. To the extent that claimants passed on any increase in prices caused by the cartel to their downstream customers, they will not be able recover those overcharges from the cartelists in the German courts. Although this decision may render some direct purchaser claims less valuable, it also increases the likelihood of indirect purchaser claims by customers further down the supply chain to whom the overcharge has ultimately been passed on. It also puts Germany and England, the two most popular jurisdictions to date for bringing competition damages claims in Europe, on an even footing, as passing on is already believed to be an effective defence under English law.

5. Cross-border M&A: going beyond traditional competition rules

The severe recession that has hit many countries in the world has had a negative impact on M&A activity. Merger control activity has nevertheless been picking up with a large proportion now made up of strategic cross-border deals. Prospects for clearance of such deals is increasingly complex and burdensome as the number of merger control regimes in the world continues to grow. This can result in a series of parallel filings having to be made that may impact on timing for completion and give rise to different outcomes (see for example the *Seagate/Samsung* merger, which was cleared without conditions in the US and EU and required significant remedies in China). This is why the role played by the International Competition Network and other international forums in encouraging closer convergence in merger control regimes is important. International best practices are increasingly taken into account in developing new merger control regimes, as was done for example in 2011 in India and Brazil. In parallel, the closer international co-operation among competition authorities in the form of ad hoc exchanges and bilateral co-operation agreements is a welcome and necessary development. Co-operation agreements have been entered into recently, including revised best practices on co-operation in merger investigations between the European Commission and US antitrust agencies, as well as best practices on co-operation between EU national competition authorities in merger review. The enhanced co-operation between competition authorities can ultimately reduce the risk of conflicting decisions being adopted in relation to the same merger, lessen the burden on parties and lead to greater overall convergence in relation to substantive merger assessments and remedies. Caution must nevertheless be exercised by notifying parties to avoid potential pitfalls relating to enhanced co-operation, notably as regards the exchange of sensitive information.

Cross-border transactions are also subject in many jurisdictions to a separate review process under foreign investment rules. Some of these rules impose a distinct timetable for approval and can impact on the commercial viability of a cross-border transaction. For example, in 2011, China introduced a national security regime imposing a separate approval process for investments into China in potentially sensitive sectors of the economy (see section 9 'Asia: active enforcement by rapidly developing regimes'). In the US, the overall number of transactions subject to more extensive review by the Committee on Foreign Investment in the US (CFIUS) has increased substantially recently. In 2011, the completed acquisition by Huawei of 3Leaf was abandoned following a protracted review by CFIUS that resulted in a recommendation for the transaction to be unwound. Companies should not underestimate the importance of foreign investment rules and should consider both the procedural and substantive requirements for seeking approval, including the impact on timing for consummating the transaction.

'Competition law advice on cross-border mergers must be provided in a comprehensive manner, taking into account all relevant local rules. Companies must be able to rely on international legal advisers capable of assessing global transactional risk resulting from the application of, and interaction between, local rules applicable to mergers.'

Bob Schlossberg, Partner, Washington DC

A growing number of cross-border deals are also being held hostage to public interest considerations as part of the merger review assessment. This is the case of the *Walmart/Massmart* merger (announced in late 2010), which admittedly raised no competition concerns in either South Africa or Namibia given that Walmart did not compete with Massmart in these jurisdictions. Nevertheless, the merger is still under appeal in South Africa and subject to ministerial review in Namibia, following the imposition of controversial clearance conditions aimed at addressing public interest concerns relating to labour and procurement. Likewise in China, industrial policy considerations play an important role in the merger review process, as demonstrated in the conditional clearance decision by MOFCOM of Uralkali's acquisition of Silvinit. The relevance of non-competition issues in merger assessments is a growing preoccupation in cross-border deals as they introduce considerable uncertainty as to outcome and timing for completion.

In relation to substantive merger reviews, we can expect merger control filings to give rise to an increasing number of requests for documentary evidence and to sophisticated economic analysis on the part of competition authorities leading to more intricate and demanding remedy discussions. In considering remedies to be offered, notifying parties must carry out a complex weighing exercise to address the competition concern while offering commercially viable remedies. As exemplified by the decision in *Intel/McAfee* and the pending decision in *Deutsche Börse/NYSE Euronext*, the high tech and financial services industries are currently giving rise to difficult conditional merger decisions, notably as regards interoperability and access concerns in increasingly integrated markets (see section 7 'Antitrust scrutiny of financial services' and section 6 'The challenges of rapidly developing industries'). Remedies offered can also delay implementation of deals, as shown in the *Western Digital/Hitachi* merger, where completion of the transaction was made subject to an asset sale agreement being entered into with a suitable buyer.

In parallel, economic analysis has become deeply rooted in the merger review process of the more sophisticated jurisdictions and serves to support in-depth qualitative assessments of mergers. Nevertheless notifying parties continue to face an uphill battle in having their own quantitative analysis and methodology accepted by competition authorities. In addition, reliance alone on economic efficiencies generated from the merger will rarely be enough to outweigh the anti-competitive effects of the merger. To date, arguments based on the merger efficiency defence at EU level have failed given the excessively high burden of proof imposed on the parties.

6. The challenges of rapidly developing industries

The technology and media sectors continue to be a focus for authorities around the world. Tackling these often fast-moving and complex industries involves a very delicate balance between the need to avoid harming innovation as a result of premature intervention and the regulators' concern to avoid the emergence of entrenched market power. At the same time, antitrust decisions in challenging markets can lead to fundamental changes to established industry practice or significant implications for business models that are still emerging.

There have been several potentially far-reaching developments this year.

- European Commission officials highlighted that the interoperability remedies given in the *Intel/McAfee* case could be seen as a model for complex information technology sector deals involving dominant companies. Intel was able to acquire McAfee, an IT security provider, after it committed to safeguard interoperability for rival providers' products running on Intel, and for McAfee products running on other manufacturers' central processing units and chipsets. This type of 'behavioural' remedy – unusual for the Commission, which traditionally prefers so-called 'structural' solutions, such as divestments – may well be used in future cases involving vertical integration by large technology companies.
- Google continues to be the subject of what has developed into a major European Commission investigation into abuse of dominance in the online search segment (by allegedly discriminating against the search results of competing services) and in the online advertising segment (notably through exclusivity agreements with advertising partners). In March 2011, Microsoft – itself formerly the subject of a long-running antitrust battle with the Commission – lodged an additional complaint against Google, alleging inter alia that Google impeded access by rival search engines, and by Microsoft's Windows Phones, to its YouTube video-streaming website. Other parties have since added to the complaints against Google.
- The European Court of Justice's decision in the *Football Decoder Cards* cases appears to overturn established practices in media and content licensing in the EU. In a judgment concerning the complex relationship between antitrust and copyright law, the Court ruled that licence agreements designed to prohibit or limit the cross-border provision of broadcasting services breach competition law. Provisions that granted broadcasters absolute territorial exclusivity within the area covered by their licence were deemed to breach the prohibition against anti-competitive agreements. Although

'Large technology companies should expect another busy year in 2012. Antitrust authorities are becoming increasingly willing to intervene in digital markets. This creates uncertainty, but it also presents an opportunity for technology companies to shape the debate as to how antitrust rules are applied to these new dynamic industries.'

Tom Ensign, Partner, Washington DC

this case concerned broadcasting rights, the broader implications of the judgment are potentially far-reaching, and could affect territorial exclusivity provisions for all services distributed digitally (television, film, music, software, etc).

- Competition Commissioner Almunia made the following statements on intellectual property rights in the tech sector: 'It is totally legitimate for a firm to protect its intellectual property – that goes without saying – but property rights cannot be used to block entry in markets that were not covered by them initially. The digital sector is just the most prominent among the many industries that need an open environment to thrive, and I will continue to promote openness and access to information in all of them.' The European Commission will continue to 'keep an eye' on how intellectual property rights, and patents specifically, are used.
- Non-practising entities, or so-called 'patent trolls', could also form the subject of antitrust cases in the technology sector going forward. Patent trolls acquire intellectual property rights and extract licence fees from companies that they claim infringe these rights. Patent trolls will usually wait for companies to become 'locked in' (ie sufficiently committed to the technology to be unable to switch easily to another standard), before claiming fees under the patent. Some industry players have recently created their own non-practising entities ('corporate trolls') for strategic use in patent disputes. Unlike most commercial entities, patent trolls do not produce any goods so are not generally susceptible to infringement countersuits, and, as a result, are not willing to engage in cross-licensing settlements or other favourable means of resolving litigation. It has been suggested, however, that antitrust rules could be used to tackle unfair practices by patent trolls.

7. Antitrust scrutiny of financial services

As 2011 ended with renewed pessimism for the economies of Europe and the US, and with an enduring sovereign debt crisis in Europe, active antitrust enforcement in the financial services sector is on the rise globally. Long gone are the days when financial regulators in many jurisdictions were regarded as having exclusive or primary supervisory oversight over the financial services industry. Against the backdrop of the financial crisis, competition authorities appear all the more determined to adopt a more interventionist approach to financial markets, with a willingness to scrutinise established business practices and consider whether they could deter innovation or increase barriers to entry. This more aggressive stance on the part of antitrust authorities also arises from increased confidence within the authorities of their understanding of financial services markets and of the competition analysis specific to this industry.

In Europe, several sectors of the financial services industry have come under review by the European Commission, amid concerns that access to certain services or data may not be fair and efficient. In 2011 alone, the European Commission has opened investigations in relation to:

- credit defaults swaps;
- the setting of the Euro Interbank Offered Rate (EURIBOR);
- data access and dissemination targeting Standard & Poor's and Thomson Reuters; and
- e-payments.

The alleged anti-competitive practices range from collusion between some industry players to abuse of dominant position in relation to pricing or access to services or data. One of these investigations has resulted in binding commitments being accepted from Standard & Poor's to abolish licensing fees paid by banks for the use of international securities identification numbers (ISINs). The case against Thomson Reuters, which is alleged to be restricting its customers' access to competing financial data feed suppliers, also looks likely to be resolved with commitments. EU merger control rules are also providing the European Commission with the opportunity to address structural competition concerns, notably in the context of the proposed merger between NYSE Euronext and Deutsche Börse. As certain sectors of the financial services industry mature, competition authorities are especially vigilant in scrutinising increased concentration. The potential expansion of 'vertical silos' concentrating the trading, clearance and settlement functions in the hands of one player and thereby potentially reducing access to the different levels of the financial services chain is a growing competition preoccupation. The European Commission's review of the proposed merger between NYSE Euronext and Deutsche Börse has resulted in several proposed packages of structural and access commitments being offered to address concerns over the parties' combined strengths in certain areas and its vertical silo model for the downstream exchange and clearing of securities. The European Commission is expected to decide on the fate of this transaction early in 2012.

Competition authorities in the US and Asia are also actively pursuing similar investigations in the financial services sector. The US Department of Justice (DoJ) identified financial services in 2011 as one of the five industries subject to greater antitrust scrutiny. The DoJ's investigation of credit default swaps market data is being conducted in parallel with the European Commission's process. In addition, investigations into the setting of the London Interbank Offered Rate are also ongoing in the US, Japan and the UK. Turkey is also investigating a number of banks over the setting of loan rates. The municipal bond market is another area that has come under antitrust scrutiny in the US. In turn, these investigations are already giving rise to follow-on damages actions (see section 4 'Consumer actions: a growing threat of private claims and class actions').

2011 also saw further action by the European Commission concerning payments systems, with the opening of an investigation concerning standard setting for e-payments by the European Payments Council. The setting of interchange fees also continues to attract scrutiny around the world, with antitrust investigations ongoing in several countries and regulatory intervention taking place in others. In Europe, antitrust authorities are eagerly awaiting the judgment of the European Court of Justice in an appeal by MasterCard from a 2007 decision concerning the setting of multilateral interchange fees. In addition to competition investigations, DG Competition has been increasingly involved in actual and potential regulatory measures, working with colleagues in other parts of the European Commission; for example on the analysis of inter-bank payment fees for Single Euro Payment Area (SEPA) credit transfers and direct debits, the green paper on electronic payments and the communication on e-commerce. These issues will be high on the European Commission's agenda for 2012. Some question whether action by antitrust authorities – seeking to lower barriers to entry and inject further competition to financial services – is always consistent with the objectives of financial services regulators, who are concerned with ensuring higher prudential and capital adequacy standards. So far, major conflicts between antitrust and financial services regulators have been avoided, but it remains to be seen whether this will continue to be the case in relation to the various ongoing multi-jurisdictional investigations referred to above.

In this period of continued economic uncertainty, the European Commission has also renewed its state aid 'crisis regime' for banks into 2012. First adopted in 2008, the crisis rules have played a valuable role

'In these times of economic uncertainty, competition authorities throughout the world see themselves as playing a critical role to ensure that financial services providers continue to operate in a vigorous and competitive market environment and appear more inclined than ever before to seek to use antitrust processes to try to inject further competition into financial services markets.'

James Aitken, Partner, London

in allowing the European Commission to examine state aid to banks quickly and efficiently, ensuring that financial markets continue to operate efficiently, soundly and on a level playing field while maintaining the Commission's ability to intervene to address potential distortions of competition arising from state subsidies by imposing stringent restructuring conditions. The first major set of cases arising from the crisis of 2007/8 has largely now been dealt with; 2012 will see further steps taken in implementation of conditions then imposed by the Commission, such as the sale of the Verde business by Lloyds Banking Group. An interesting question will be whether, and to what extent, a further round of state aid may now be required in the European banking sector as a result of the current tensions in European sovereign debt markets. At the end of 2011, the Commission gave temporary approval to state guarantees for Dexia in Belgium, France and Luxembourg, and it is now examining whether restructuring of Dexia is realistic. The same tensions are also leading to pressures for further consolidation in some countries.

8. Single-firm conduct in a global market-place

Competition authorities around the world continue their vigorous enforcement of abuse of dominance laws. Although some authorities are of course more active than others, global economic recession has not resulted in any discernible softening of approach, and authorities are still investing significant resources in this area. The range of types of abuse being identified by authorities also continues to develop, and this is due at least in part to the fact that many enforcers are now extending their attention beyond incumbents in telecommunications, postal services and energy, and increasingly scrutinising the high technology and internet-based markets.

The traditional types of abuse such as discrimination, predation, exclusivity and rebate schemes, refusal to deal, and tying and bundling continue to be sanctioned, but other categories feature increasingly frequently. Price squeeze, for example, though not recognised as an independent form of infringement in the US, has recently been confirmed as a stand-alone infringement under EU law. Abuse of intellectual property rights has also come further to the fore, not least because of the importance in the digital economy of patent rights and their role in technical standards, with cases at EU level and elsewhere. In addition, types of abuse such as the imposition of exploitative trading conditions, which have traditionally been avoided by many authorities, are being tackled more frequently.

The digital economy raises difficult issues all of its own, and such cases not only call for a full understanding of these complex markets, but also sometimes involve creativity from enforcers in defining precisely what behaviour is abusive in these contexts. The various investigations around the world concerning Google provide a good illustration of the challenges posed.

The European Commission is investigating Google's business practices (see section 6 'The challenges of rapidly developing industries'), and some EU member state authorities have already investigated and reached settlements with Google. Google also faces antitrust scrutiny in the US, where it is now being investigated by the FTC and by several states, and there is also private litigation. It remains to be seen to what extent entirely new categories of abuse will be developed to deal with these cases, or whether in most cases it will be possible to frame the conduct in question in terms of already existing classifications.

Since 2008, China has had a prohibition on abuse of dominance closely modelled on the EU's abuse of dominance provisions. The first significant antitrust fines were imposed in November 2011, on two vertically integrated pharmaceutical companies, for raising the price of an intermediate chemical used in a blood pressure drug by a factor of 14. Around the same time, it was reported that two state telecommunications companies, China Telecom and China Unicom, were under investigation following allegations of price discrimination towards their competitors in the broadband access market. They swiftly offered to settle the investigation (see section 9 'Asia: active enforcement by rapidly developing regimes').

In India, 2011 saw the first final decisions since the 2009 entry into force of the abuse of dominance provisions in the Competition Act of India. Two of these decisions concerned the use by a property company of exploitative clauses in its contracts for sale of apartments, and the Indian authorities found abuse consisting of discrimination as well as unfair terms. Another decision involved a fine on National Stock Exchange of India for predatory pricing.

The most interesting steps to promote international convergence in this area are being taken within the International Competition Network (ICN). The ICN working group on unilateral conduct has to date adopted reports on a range of issues, including various types of abuse: predatory pricing, single branding/exclusive dealing, tying and bundling, single-product loyalty discounts and rebates, refusal to deal and margin squeeze. It is considering producing further reports of this sort, possibly on excessive pricing and price discrimination, and all of this work makes its contribution to convergence. Nevertheless, companies with strong market positions face a continuing need to remain on top of a variety of local laws and enforcement trends that, though in many cases containing a common core, all have their own specific characteristics.

Finally, in a number of jurisdictions, abuse cases are often closed on the basis of formal commitments entered into by the companies concerned. This has the advantage for companies and authorities of reducing demand on resources and achieving a quicker end to cases. On the other hand, because there is no finding of infringement it makes it more difficult for private litigants to claim damages, and the absence of an infringement decision also reduces the amount of guidance available to others through fully reasoned decisions. Another concern is that commitments are sometimes used to achieve regulatory policy aims in a way that goes somewhat beyond correcting the abuse originally identified.

'Abuse of dominance appears in many guises, and the range of conduct targeted by enforcers around the world continues to expand. The strong EU influence in many of the newer competition regimes means that we can usefully draw on our EU expertise when advising our clients internationally.'

Thomas Janssens, Partner, Brussels

9. Asia: active enforcement by rapidly developing regimes

China: act now to ensure antitrust compliance across your businesses

China's still-young merger regime continues to impact timing of the vast majority of deals meeting the review thresholds. In complex cases, MOFCOM has demonstrated growing sophistication in its review and in its approach to remedies. MOFCOM imposed conditions on three deals in 2011. These included the first intervention involving a state-owned enterprise (*GE/Shenhua*) and a divestment remedy with profound implications for any financial (including private equity) or trade buyer that is active in the target's area of business through minority shareholdings (*Alpha V/Savio*).

Companies involved in any notifiable deal should prepare for lengthy and unpredictable review periods. Much of the uncertainty results from the authorities' wide discretion to take account of non-competition factors in their reviews. The level of intervention throughout the process may not be obvious in the final published decisions, but in practice, a significant proportion of cases are impacted by MOFCOM's approach. MOFCOM is currently managing to approve only 20 to 30 per cent of filings during phase 1, with the vast majority being subject to a phase 2 review. Straightforward cases typically take at least three months to be approved.

In a further extension of the government's influence, China's revised National Security Review rules came into effect in September 2011. The rules apply to foreign acquisitions (including some minority interests) of Chinese entities in 'key' agricultural products, energy, infrastructure, transport, technology and equipment manufacturing, as well as military facilities and neighbouring facilities. Purchasers must apply to an inter-ministerial committee for national security clearance and third parties have the right to petition for a review. Given the rules' application to a wide range of industries and extensive scope for political intervention, deal teams are strongly advised to consider carefully the application of the rules early on so as to manage timing and risks to implementation.

Beyond mergers, China's competition authorities have extensive reach over the full range of potentially anti-competitive business practices. Over the past year, the National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC) launched investigations across sectors as diverse as pharmaceuticals (fines for excessive pricing) and concrete (market sharing). The focus to date has been on Chinese domestic businesses, but this is changing. After two years of preparation, the authorities are clearly ready to challenge behaviour by large, international companies, as well as high-profile state-owned enterprises.

'The strong message from China is that, as well as preparing for heavy intervention into deals, companies should be increasingly vigilant to manage the risks associated with an antitrust investigation and the possibility of follow-on damages actions, given the apparent appetite for private actions from Chinese individuals and companies.'

Michael Han, Partner, Beijing

In May, the NDRC imposed fines on Unilever for making public statements of planned price increases. The NDRC conducted an investigation into major consumer goods companies, following widespread reporting in China's media of planned price increases and panic buying by consumers. Given the Chinese government's goal of controlling inflation, and the NDRC's focus on pricing practices, companies should exercise extreme caution before making any announcements on future pricing intentions.

In November, the NDRC confirmed an investigation into China Telecom and China Unicom, the country's two main fixed-line operators, over alleged price discrimination in the broadband access market. This high-profile case rapidly led to settlement offers, including a commitment from China Telecom to reduce its broadband costs by 35 per cent within five years.

India: a new regime but vigorous enforcement across the board

In India, since the law on anti-competitive agreements and abuse of dominance entered into force in May 2009, the Competition Commission of India (CCI) has made over 100 orders in respect of potentially anti-competitive behaviour. Cases such as that against DLF (a large Indian real estate developer), for abusing its dominant position by undertaking certain unapproved developments, indicate the broad approach that the CCI is prepared to take to the application of the Indian Competition Act.

In June 2011, India's long-awaited merger control regime came into effect. As a result, qualifying transactions that meet certain turnover or asset-based tests must be notified to the CCI for clearance before completion. The Commission has so far reached 12 merger decisions, one of which related to a foreign-to-foreign case. However, if foreign investment in India continues at recent levels, the CCI is likely to have to manage a significant caseload. When combined with the potentially wide scope of the legislation and the continued ambiguity around certain key issues, such as the CCI's treatment of joint ventures, the CCI will do well to maintain the promising start it has made in reviewing cases within short timelines.

Asia Pacific: new and rapidly developing regimes across the region

Across Asia Pacific, authorities have been enacting new merger control laws, and developing and strengthening existing rules. The result is that more global transactions that impact Asia Pacific will require pre-closing approval. Mature regimes in Japan, Korea and Singapore, together with new and rapidly developing agencies in Hong Kong and Indonesia, are paying ever closer attention to the global aspects of transactions and the need for effective cross-border merger control. Early 2012 has already seen Malaysia join this group when it implemented its new regime on 1 January.

The signs for 2012 are that more multinational companies will have to seek approval for their deals from one of these authorities, or otherwise face the prospect of an antitrust investigation. Keeping on top of these rapidly developing laws and enforcement policies is becoming ever more challenging and important.

10. Protecting human rights in antitrust cases

An important question that has arisen in the EU is whether the EU's competition enforcement procedures sufficiently protect investigated firms' rights of defence and are compliant with the European Convention on Human Rights (ECHR); especially Article 6 ECHR, which provides for a right to a fair trial for firms subject to civil or criminal investigations. The debate on this subject, which has been escalating recently in the EU in light of the more prosecutorial nature of competition proceedings, the increasing levels of fines imposed by the European Commission for competition law infringements and the EU's impending accession to the ECHR, is also of acute significance in a number of European jurisdictions that have modelled their competition procedures on those adopted in the EU. Of particular importance have been the questions of whether: (1) the right to a trial before an independent and impartial tribunal provided for in Article 6 ECHR can be satisfied where an administrative body (such as the European Commission), which does not itself qualify as an independent and impartial tribunal, adopts initial infringement decisions following its own investigation of the case, but where an independent and impartial tribunal is able to review that decision and any fine imposed; and (2) even it is correct that the an administrative body may decide on an infringement and fine as a preliminary matter, whether the European Commission's proceedings are governed by sufficiently strong procedural guarantees and whether the review conducted by the EU General Court (EGC) is broad and intensive enough to constitute effective review and to ensure a full, fair, impartial and timely protection of the individual rights at stake.

In 2011, some light was shed on the debate by the judgment of the European Court of Human Rights (ECtHR) in *Menarini*. In this case the ECtHR confirmed, in the context of proceedings involving a fine imposed on a pharmaceuticals company by the Italian competition authority, that 'administrative' antitrust proceedings, which may culminate in the imposition of punitive fines, are to be treated as de facto 'criminal' charges within the meaning of Article 6(1) ECHR. Nonetheless, the ECtHR accepted that a criminal penalty could be imposed by an administrative authority so long as the substantive decision it adopted, and the fine it imposed, was subject to judicial review by a court of full jurisdiction, that is with capacity to review and substitute judgment on all issues of law and fact.

The *Menarini* judgment has been welcomed by officials at DG Competition as a confirmation of the legitimacy of administrative competition systems involving an integrated decision maker. Although some commentators may still continue to question how an administrative system can provide a fair trial and enough respect for the presumption of innocence that antitrust defendants benefit from under Article 6(2) ECHR, the force of such arguments will clearly be undermined if the *Menarini* judgment is not appealed to the ECtHR's Grand Chamber. The judgment will also undoubtedly have an impact on the outcome of appeals currently pending before the EGC in which it has been argued that a fine imposed by the European Commission, which holds simultaneously powers of investigation and sanction, infringes the right to a hearing before an independent and impartial tribunal and right to respect for the presumption of innocence.

Menarini is, however, likely to fuel the debate over the questions of whether the administrative stage before the European Commission provides high enough standards of due process and whether the EGC conducts sufficiently vigorous review of all issues of law and fact determined by

the European Commission. The Commission will be hoping that the publication of its procedural package in October 2011, best practices for antitrust proceedings and the submission of economic evidence and the enhanced role of the Hearing Officer, will quell due process concerns by enhancing transparency and procedural guarantees. In particular, the Hearing Officer's role has been strengthened to guard procedural rights throughout the entirety of the Commission's antitrust and merger proceedings. In addition, it seems likely that the EGC will accept the challenge to ensure, as the ECHR requires, that it conducts a full, broad and deep review of all aspects of the Commission's competition decisions – including of economic evidence submitted to the courts and of fine levels. Indeed, it is increasingly requested to do so and in *KME v Commission* the European Court of Justice stressed that effective judicial protection is a general principle of EU law, enshrined in Article 47 of the EU Charter of Fundamental Rights, requiring the EGC to carry out a full and unrestricted review, in law and in fact, of the Commission's decisions.

Although developments in 2011 may have clarified some of the issues raised in the debate, there are many left to be resolved in 2012 and in the years beyond. For example, the ECtHR has been asked to rule on the compatibility with the ECHR of Finnish rules on the admissibility of hearsay evidence, the testing of evidence in court and the standard of proof in competition cases. In addition, the question of whether the scope and standard of judicial review satisfies the requirements of Article 6 ECHR is likely to be an ongoing one. In the meantime, it can be anticipated that the EGC will adopt increasingly rigorous review of all aspects of Commission decisions – law, fact and the level of fines.

'Complaints by firms that the EU administrative system of antitrust enforcement does not sufficiently safeguard their rights of defence and right to a fair trial have been escalating in recent years. Although it is now clear that antitrust proceedings, which may culminate in the imposition of punitive fines, are to be treated as de facto 'criminal' charges within the meaning of Article 6(1) ECHR, the full consequences of this characterisation are still to be worked out in the cases. A core question will be whether the EU courts will continue their practice of only allowing key witnesses to be examined in court in exceptional circumstances.'

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