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Annual Compliance  
Conference 2022

# **Antitrust Compliance**

Key Takeaways from the Annual Compliance  
Conference 2022

## In Brief

In this week's sessions, we delve into notable developments in Antitrust Compliance, including:

- Global Antitrust Hot Topics
- Information Exchange in the Supply Chain
- Evolving Risks in Antitrust Enforcement and Litigation

## Session 1: Global Antitrust Hot Topics

27 September 2022

As we emerge from the worst of the pandemic, the world is faced with a uniquely challenging landscape with implications for antitrust law. We are facing an economic downturn, a climate and energy crisis, and increased geopolitical uncertainty, which are all causing competition authorities to focus on high-profile enforcement and reflect on shifting competition policy to fit the future. We have identified three Cs:

- Compliance** - the post-pandemic antitrust enforcement landscape is heating up.
- Complexity** - especially in the context of more rigorous merger control enforcement and how to react to the extending tentacles of merger and foreign investment control. Confronted with practical or legal complex issues, many antitrust agencies are teaming up. In some cases, agencies are thinking about how new regulatory regimes might complement traditional antitrust enforcement, such as the new EU foreign subsidies regime, which will add an additional layer of complexity and regulatory burden in the transactional space.
- Climate** - the COVID crisis showed that distant nations are connected, underlined the need for a globally coordinated response, and revealed health inequality in poorer economies and communities. It also showed that agencies could be part of the solution – developing guidance and sometimes temporary exclusions from the antitrust rules to ensure positive societal outcomes.

### Compliance trends and enforcement:

US:

- **More aggressive enforcement:** The Biden administration has ushered in a new antitrust era with the Department of Justice (DOJ) and the Federal Trade Commission (FTC) announcing plans to ramp up progressive enforcement efforts, committing to take investigations to court and further developing antitrust law aggressively. Its ambitious goals are shown in the DOJ's intention to treat monopolization as a criminal offense, which represents a revival of a strategy and policy not seen in decades.
- **Greater scrutiny of mergers:** The FTC and DOJ are revising their merger guidelines to address the perceived disconnect between existing merger control law and market realities.
- **Pharmaceutical sector is in the spotlight:** Greater scrutiny is placed on nascent competition, broad consideration of post-merger R&D incentives, and a heightened interest in companies with large product portfolios that may be leveraged to harm competition.
- **Labor issues:** The DOJ continues to bring no-poach and wage-fixing cases, recently breaking its streak of losses with its first ever win in a criminal labor antitrust case.

EU:

- The EU Commission intends to focus on labor market competition including no poach and wage-fixing agreements, but there are no investigations to date.
- As in the US, there is close scrutiny of the pharmaceuticals sector and a focus on keeping generic markets competitive by cracking down on excessive pricing in the off patent sphere and denigration tactics by originators who are undermining the entry of new generics in the market. An EU study on killer acquisitions and other innovation theories of harm are underway, as well as proposals to introduce stricter rules on joint R&D collaborations.
- The EU Commission is also tackling cartels with renewed vigor, entering new territory in the Car Emissions case, which is the first cartel case on limiting technical development. The Commission is likewise back on track with dawn raids.





Latin America:

- **The change in political landscape impacts antitrust enforcement.** There has been a shift towards left-wing governments in Mexico, Argentina, Colombia, Peru, and Brazil. Despite the changes in the political landscape, enforcement is not expected to decrease significantly. In Brazil, the antitrust regulator announced plans to increase enforcement on both merger control and cartel enforcement. In Argentina, antitrust and data protection are focus areas for investigation. In Colombia, authorities have surprised companies with virtual dawn raids, with enforcers requesting company personnel to provide inspectors control rights to employees' laptops on the spot without any prior notice. Turning to Mexico, the regulator published a strategic plan for future competition, and is focusing on monopolization.
- Authorities continue to be very active in cartel enforcement, as well as in hub and spoke cases, no poach, and bid rigging.

South Africa:

- **A regulatory focus on price gouging since the COVID period:** The regulator is focusing on temporary dominance, where the pandemic created short term market power.
- **Reinstitution of dawn raids post-pandemic:** After a long lull of little activity, the regulator has started to conduct dawn raids again, e.g., in the insurance sector.
- **Scrutiny of concentrated markets.**

## Complexity in the transactional space:

Market concentration and innovation competition are in focus.

The European Commission is tough on mergers and is taking third-party complaints very seriously over concerns that certain deals impact customers. It now actively encourages the referral of transactions to it, especially in the pharmaceutical, biotech and technology sectors - even if a transaction falls below national filing thresholds, and even if the deal has since closed. In increasingly complex cases, many antitrust agencies are teaming up. Ironically, we see coalitions of antitrust agencies, but there is a real fragmentation of the laws which brings complexity and commercial uncertainty.

In the UK, the CMA has been thinking seriously about international cooperation on merger cases, especially with the US and EU. However, this does not always lead to a common outcome in parallel reviews. There have been a few cases with divergent outcomes, where a merger is approved by the EU but prohibited by the UK CMA (e.g., Cargotec/Konecranes). When faced with parallel reviews, it is important to consider the impact on the deal timetable.

The global merger control landscape is further complicated by the interplay with foreign investment review. These broad foreign investment regimes are designed to enable countries to ensure that strategic assets do not fall into what the jurisdiction considers to be "undesirable" foreign ownership. As a result, merger control and foreign investment filing strategies need to be carefully considered and aligned as part of a risk analysis.

## Climate:

The pandemic and the European energy crisis have highlighted the interdependence of economies and the need for a globally coordinated response to future crises. Agencies are eager to position themselves as part of the solution and are developing guidance and considering temporary exclusions from the antitrust rules to ensure positive societal outcomes, particularly regarding energy transition and sustainability. Climate change and other global issues are becoming board-level issues and causing companies to collaborate in efforts to be more sustainable. This collaboration also helps cushion against a phenomenon known as the first mover disadvantage, where the first companies to make the shift to greener, more sustainable practices often see their product becoming more expensive and in turn, experience a loss in market share as consumers turn to cheaper, less green products. While there has been some encouraging guidance by regulators supporting collaboration among competitors to further sustainability efforts, the general policy thus far is that there is no sustainability exemption from the usual application of competition rules.

In a merger context, we can expect regulators to scrutinize parties' claims that the transaction will bring about a more sustainable outcome and look into whether sustainability in product development or R&D is a key parameter of competition. Any practice that leads to higher prices for consumers (be it merger or antitrust) is unlikely to be blessed on the basis of environmental benefits if those environmental benefits are not something that the affected consumers are willing to pay for. Companies should be aware that offering ESG policies, net zero commitments, or sustainability arguments is not going to get an otherwise illegal transaction cleared. Competitor collaboration – even if for ESG reasons – may violate antitrust rules and so, like all projects involving competitors working together, needs to be considered carefully in advance.

# Annual Compliance Conference 2022

Our popular Annual Compliance Conference, which attracts over 6,000 in-house senior legal and compliance professionals from across the world, took place across five weeks from 6 September - 6 October 2022. These sessions virtually delivered our cutting-edge insights and guidance on key global compliance, investigations and ethics issues.

The sessions provided practical insights and analysis on significant developments across:

- Anti-bribery, corruption and economic crime
- Customs and FTAs
- Export controls, sanctions and foreign investment
- Antitrust and competition
- ESG, supply chain and product compliance



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