“There is a growing public perception around the world that markets have become excessively concentrated and that some businesses are too powerful. Some are calling for antitrust laws to pursue wider aims, such as fairness and the protection of employment and small businesses. Enforcers are responding with stricter merger control, the use of unusual theories of harm, a focus on excessive pricing and new scrutiny of the gathering and use of data.

In addition, heightened hostility to foreign takeovers has spurred new laws allowing Governments to intervene on ever-broader national security grounds. Many of these themes are playing out in the digital economy, but all sectors will be affected, ultimately. Sophisticated compliance will be required to achieve and maintain a competitive edge in the coming year.”

Thomas Vinje
Partner, Chairman, Global Antitrust Practice
THE TRENDS WE ARE SEEING
PROCEDURAL INFRINGEMENTS

More penalties for gun-jumping, provision of incorrect information and non-compliance with remedies

Gun-Jumping and failure to file

- **EU**: The European Commission (EC) is investigating a number of alleged breaches of the EU Merger Regulation (EUMR) prohibition on pre-clearance implementation of a transaction. The forthcoming judgment of the Court of Justice of the EU (CJEU) in *Ernst & Young* will clarify what pre-closing steps may amount to gun jumping under the EUMR.

- **China**: the Ministry of Commerce (MOFCOM) has strengthened gun-jumping enforcement in 2017 with nine infringement decisions, the highest number since the AML came into force in 2008. Planned reforms would increase the ¥500,000 (US$80,000) fine cap.

- **US**: Firms fined for HSR breaches in 2017 included Caledonia Investments (US$480,000 for vesting of shares acquired after the five year safe harbour following a previous filing), Mitchell Rales (US$720,000 for violations related to open market purchases of voting securities) and Duke Energy (US$600,000).

- **Mexico**: The Comisión Federal de Competencia Económica (COFECE) issued several fines in 2017, including a total of MXN 56.2m (US$3m) on Panasonic and Ficosa for failure to notify.

- **Philippines**: In February 2018, the Competition Commission voided Udenna's acquisition of KGLI Coop's shares in KGLI-BV, and imposed a fine of PHP 19.6m (US$376,000) on the seller and buyer.

Provision of incorrect information

- In May 2017, the EC fined Facebook €110m for providing false / misleading information during the EC’s 2014 investigation of its acquisition of WhatsApp. This is the highest ever procedural antitrust fine by some distance. While the EC has imposed (much lower) fines on companies for providing incorrect or misleading information before, this was the first such fine since the entry into force of the current EUMR in 2004. Several other investigations are ongoing.

Non-compliance with commitments

- The Spanish competition authority (the CNMC) is considering toughening the sanctions for failing to comply with commitments and conditions attached to merger clearance decisions. This follows the difficulties experienced by the CNMC in monitoring compliance with commitments in recent transactions, which have led to significant fines for merging parties.

“Increased use of procedural penalties highlights the need to put in place rigorous compliance protocols, from the initial planning phase through to the final merger control clearance.”

“Latin American antitrust agencies have ramped up enforcement against failure to file and gun jumping in recent years, Mexico and Brazil in particular.”

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Anastasios Tomtsis
Partner, Brussels

Tim Cornell
Partner, Washington
THE TRENDS WE ARE SEEING
REGIONAL MERGER CONTROL DEVELOPMENTS

Filing volumes, information burdens and intervention levels are increasing in most major jurisdictions, making it harder to get deals through

**EU**
- With a high of 380 notifications in 2017, this was the busiest year for merger control in the last ten years. 50% of Phase 2 deals were blocked in 2017, the highest proportion ever in the history of EUMR, with no Phase 2 deals cleared unconditionally.

**China**
- The final quarter of 2017 saw a spike in merger enforcement, with MOFCOM imposing remedies in five cases, more than in the previous two years combined. In total, 80% of all cases in 2017 concluded by MOFCOM were subject to the simplified procedure and cleared within Phase I—a record high for such approvals.

**Australia**
- Increased interaction between the Australian Competition and Consumer Commission (ACCC) and the Foreign Investment Review Board will likely mean that more mergers need ACCC clearance as a precondition of foreign investment approval. The ACCC is also using its compulsory information gathering powers more aggressively, which is likely to result in heavier document requests and longer reviews for some deals.

**Latin America**
- The proportion of mergers blocked or subject to remedies in 2017 is up in Mexico (5.8% vs. 0.7% in 2016) and Brazil (2.3% vs. 1.5% in 2016).

**US**
- Against speculation that with the administration change US merger control would lessen, stronger merger enforcement policy remains in place. All indications point to increased merger control in 2018, with the current nominee for Chairman of the Federal Trade Commission (FTC) calling for an assessment of whether previous merger enforcement has been too lax, and the head of the antitrust division of the Department of Justice (DOJ) signalling that behavioural remedies are less likely to be accepted. The DOJ and the FTC have also increased their focus on unreported transactions and brought challenges against a number of completed mergers, some of these as a result of customer complaints.

“**The trend towards tougher merger control enforcement is as evident in China as elsewhere, with a recent spike in merger enforcement.”**

**South Africa**
- The first 6 months of the Competition Commission’s 2017/18 reporting period saw a leap in the proportion of notified mergers that were prohibited outright (5.1% compared to 1.4% for the 2016/17 reporting period).

“**Deals that go into a second phase review in the EU now have much less chance of being cleared unconditionally than they used to.”**

**Russia**
- The Federal Antimonopoly Service (FAS) is increasingly requiring pre-closing conditions to clearance. For example, in Bayer/Monsanto the FAS is requiring a transfer of technologies to local players as well as access to data and digital solutions.

Richard Blewett
Partner, Beijing

Tony Reeves
Partner, Brussels
UNUSUAL THEORIES OF HARM
THE CLIFFORD CHANCE PERSPECTIVE

Competition authorities are applying more expansive theories of harm in merger reviews, including innovation aspects

EU

- **Innovation**: while the EC has regularly analysed the impact of mergers on innovation in relation to pipeline products, in Dow/DuPont it extended its assessment further into the future, to potential competition in “innovation spaces” and in J&J/Actelion, it took action for the first time in relation to pharma products which were both at an earlier (phase II) stage of the clinical trials. EC officials have stated that the EC will continue to pursue these issues in merger assessments.

- **Common ownership**: the EC’s Dow/DuPont decision also contains the first reference by a competition agency to a new (and controversial) theory of harm based on the idea that anticompetitive effects may arise where rival businesses share a substantial number of common shareholders, even if none have a controlling interest. The EU Competition Commissioner has signalled that the EC is “looking carefully” at whether this means that “levels of concentration might not always reflect how competitive our markets really are”.

- **Conglomerate and coordinated effects**: in recent years an unusually high number of mergers have been challenged on the grounds that merging parties would be able to foreclose rivals by tying/bundling their products (e.g. Broadcom/Brocade, Qualcomm/NXP, Essilor/Luxottica) or that the merger would create or enhance possibilities for tacit coordination between rivals (e.g. Hutchinson 3G Italy/Wind/JV, TeliaSonera/Telenor/JV and AB Inbev/SAB Miller).

- **Data**: the Microsoft/LinkedIn case is the best example of how the EC assesses data issues (e.g. the aggregation of large data sets) in relation to possible horizontal and vertical effects. It also provides insight into how the EC deals with complex conglomerate issues in technology mergers and remedies to address concerns regarding possible foreclosure.

US

- The DOJ’s challenge to AT&T/Time Warner is the first time the agency has brought court proceedings against a vertical merger in over 40 years. In addition, greater scrutiny of coordinated effects may be in store, following a call by the DOJ’s top antitrust economist for more research on identifying such effects in merger reviews.

China

- MOFCOM has a history of applying conglomerate theories of harm more extensively than elsewhere. A more unusual theory arose in Reckitt Benckiser/Mead Johnson, where MOFCOM reportedly took the view that the buyer’s durex brand was in a related market to the target’s infant formula business.

Japan

- The growing importance of data also led to a report by the Japan Fair Trade Commission (JFTC) on Data and Competition Policy, indicating that data could be a key input for various products and mergers, leading to the establishment of market power, if the channels of collecting data would be limited to a merged entity.

“Predicting whether a deal may be challenged on the basis of an unusual theory of harm requires sophisticated antitrust and economic advice.”

“Common ownership theories of harm have the potential to significantly affect the chances of clearance for deals involving large listed companies, asset managers or sector-focused PE funds.”

Alex Nourry
Partner, London

Marc Besen
Partner, Düsseldorf
ENFORCEMENT
THE TRENDS WE ARE SEEING
CONTINUED HIGH FINES AND NEW PROCEDURAL PENALTIES

In the past year, fines for abuse of dominance and procedural infringements in antitrust investigations have broken new records

Record fines in abuse of dominance cases

- In 2017, the EC issued its highest ever antitrust fine (€2.42bn against Google for abuse of dominance – see the "Digital Economy" section) bringing total fines to over €3.6bn, just shy of 2016's record breaking €3.74bn. It started 2018 with its 4th highest ever fine of €997m, imposed on Qualcomm for making exclusivity payments to the detriment of its rival Intel (recipient of the 3rd highest fine in 2009 for its own exclusivity payments).

- Qualcomm was also fined TWD 23.4bn (US$773.4m) by the Taiwan Fair Trade Commission (TFTC) for abusing its market dominance in baseband chipsets, the TFTC's highest ever fine.

But more scope to mitigate risk following Intel

- The Intel judgment of the CJEU clarified that exclusivity rebates are not per se illegal, and must be assessed by reference to their capacity to foreclose equally efficient rivals. However, significant uncertainties remain, which should be addressed when the General Court rules again in the Intel case. Qualcomm also intends to appeal the EC's decision against it (see above) and Unilever has said it will appeal the decision of the Italian Competition Authority (ICA) to fine it €60.6m for illegal ice-cream loyalty rebates, the ICA's first decision on this topic since Intel.

Fines for failure to cooperate

- In December 2017, the French Competition Authority (FCA) fined Brenntag €30m for obstructing the investigation into an alleged chemical cartel, the second highest ever procedural fine in a behavioural antitrust investigation and the first such fine imposed by the FCA. Brenntag provided incomplete, inaccurate and untimely information, and also refused to provide certain information requested several times, such as invoices and account records.

- In China, the National Development and Reform Commission (NDRC) fined a domestic company ¥120,000 (US$19,000) for stealing a USB drive from investigators and substituting one of its own.

- The Competition Commission of India (CCI) imposed fines totalling INR 20m (US$310,000) on Monsanto and three affiliates for persistent delays in responding to information requests made in an abuse of dominance investigation, rejecting Monsanto's claims that the information requested was voluminous, historic and needed more time to be provided.

- The Korean Fair Trade Commission is proposing to increase the penalties for failures to cooperate by introducing a two-year prison sentence and daily fines for companies and individuals that obstruct competition investigations.

“The Intel judgment of the EU Court of Justice mitigates risks for dominant businesses that carry out a legal and economic assessment of their planned rebate schemes.”

Luciano Di Via
Partner, Rome

“While courts have sometimes annulled excessive information requests, the French Competition Authority’s huge fine shows the risks for businesses that take their own view of what is excessive.”

Katrin Schallenberg
Partner, Paris
An increased focus on collective private damages actions in the EU and continued international cooperation by US antitrust agencies

Collective actions

- Since October 2015, antitrust collective actions can be brought in the UK on an opt-in or an opt-out basis (i.e. on behalf of each class member without consent, unless they opt out). There have been two UK collective actions brought to date, both of which failed on certification.

- In *Dorothy Gibson v Pride Mobility* (an opt-out claim on behalf of purchasers of mobility scooters) the Competition Appeal Tribunal (CAT) favoured a certification model involving limited disclosure, shorter hearings, and a focus on assessing whether the methodology proposed could establish loss on a class-wide basis. Following that approach, the proposed class structure was rejected as insufficiently focused on the harm caused by the identified infringements.

- In *Walter Merricks v Mastercard* (an opt-out claim on behalf of 46.2m people who made purchases from businesses accepting Mastercard) the CAT rejected the application because the individual claims were insufficiently similar and the claimants’ methodology for damages provided no way of reaching even a “rough and ready” approximation of the loss suffered by an individual claimant.

- These early cases have not dissuaded others from bringing claims, such as the ongoing claims in the UK, Netherlands and Germany on behalf of victims of the trucks cartel.

International enforcement and cooperation

- In year one of the Trump administration, the DOJ continued to prioritise cartel enforcement and secured penalties in parallel with non-US agencies for cross-border cartels (e.g., ocean shipping, electronics).

- In January 2018, the DOJ persuaded the US Supreme Court to review a decision dismissing private antitrust claims against Chinese vitamin manufacturers that MOFCOM had said were obligated to restrain trade under Chinese law. The forthcoming decision could lead to more aggressive international enforcement.

- In November 2017, the DOJ issued its first-ever subpoenas to mainland Chinese companies in connection with a possible air cargo cartel, an industry where China’s Ministry of Transport plays a key role in developing pricing polices.

- In February 2018, senior DOJ and FTC officials met with Chinese competition authorities (including MOFCOM) in Beijing, where they discussed efforts at increased inter-agency cooperation.

- In 2017, the DOJ’s former chief criminal antitrust prosecutor, Brent Snyder, was tapped to lead the Hong Kong Competition Commission (HKCC). The HKCC has since increased its annual enforcement budget, and Snyder—an advocate of international coordination in antitrust enforcement—has called for criminal antitrust liability under Hong Kong law.

“While there have been setbacks for collective private damages actions in the UK, it is only a matter of time before a claim gets off the ground.”

Elizabeth Morony
Partner, London

“Enforcement agencies’ cross-border coordination is not a trend; it is the new ‘normal’, highlighting the need for businesses to maintain a strident compliance regime to detect and remedy cartel conduct, wherever it occurs.”

Robert Houck
Partner, New York
SPOTLIGHT ON EXCESSIVE PRICING
THE CLIFFORD CHANCE PERSPECTIVE

While historically rare, excessive pricing cases are on the rise, particularly in the pharmaceutical sector.

Development in the legal and economic framework for assessing excessive pricing
• Antitrust authorities are likely to continue to pursue these cases vigorously, due to their high profile nature, the negative press attention they attract and increased financial pressure on many healthcare systems.
• These cases also break new legal ground and herald the prospect of antitrust authorities acting as pricing regulators. In the UK, the CMA has been willing to adopt unprecedentedly narrow market definitions (limited to a particular manufacturer’s product); reject the need to assess comparable products (even identical products priced at a similar or higher price); and find that any price above a 6% return on sales could be considered excessive and unfair.

The CMA’s decision against Pfizer breaks new ground in the law of excessive pricing. If upheld on appeal, it is likely to offer a blueprint for other investigations being conducted in this sector.”

“Antitrust agencies are taking an aggressive approach to significant increases in prices of old, off patent pharmaceutical products, in particular where the costs of the product have not increased.”

OUR INSIGHTS INTO ANTITRUST TRENDS 2018
THE TRENDS WE ARE SEEING
THE DIGITAL ECONOMY

Pricing algorithms and businesses with data collection clout will be in regulators’ ever-intensifying focus

Data
- Antitrust authorities are ramping up their scrutiny of the role and use of data in various technology markets. The German, French, Japanese, Australian, and Canadian authorities all recently launched studies or cases on the impact that data could have on competition.
- In its paper ‘Building a European Data Economy’, the EC asked whether firms should be compelled to grant access to their data on, e.g., Fair, Reasonable, and Non-Discriminatory (“FRAND”) terms; this continues to be a vivid discussion. The EC has looked into the impact of data on competition in various cases, including its investigations into Google (see page 14) and its review of the Microsoft/LinkedIn merger (see page 7).
- The Canadian Competition Bureau warned in its September 2017 paper “Big data and Innovation” that exclusively focusing on consumer prices could fail accurately to capture market power created by data.

Pricing algorithms
- Self-learning pricing algorithms, and their potential to collude or facilitate collusion, are of continued interest to global antitrust regulators. At a recent OECD roundtable, the FTC and DOJ stressed that US antitrust law is sufficiently robust to cover algorithmic pricing collusion, pointing to the successful prosecution of an e-commerce retailer who used algorithms to fix the prices of posters sold online in late 2016.

Privacy
- The entering into force of the General Data Protection Regulation (“GDPR”) in May 2018, which will strengthen data protection rules across the EU, is likely further to prompt adjustment of data protection policies of firms targeting EU customers.
- The extent to which concerns around personal data should be regarded as a data protection law issue or also as a competition law issue will be a key question. In an investigation into Facebook, opened in 2017, the German FCO is probing whether Facebook abused a dominant position by conditioning the use of Facebook’s social networking service on acceptance of terms that permit Facebook to collect user data from across various different websites. The FCO takes the view that conduct harming users’ privacy can constitute an antitrust infringement independently from the application of data protection rules.
- Similar investigations by the Australian and Korean antitrust regulators into Facebook’s and Google’s sway over their users’ data illustrate this increased appetite to push the boundaries of antitrust.
- In Japan, the JFTC has suggested it may rely on antitrust rules to pursue companies that use a dominant position to extract user data and in China a 2017 cybersecurity law, which heavily regulates data collection by tech firms, is being increasingly enforced by the authorities.

“As the uptake of data driven technologies across sectors accelerates, more and more competition authorities around the world will be focusing on the antitrust risks posed by data – it’s by no means a passing fad.”

Dieter Paemen
Partner, Brussels

“The ACCC’s inquiry concerns the impact of Google and Facebook on news quality and their gathering of users’ personal data. It is said to be the first ‘deep dive’ by an antitrust regulator into Google’s operations.”

Dave Poddar
Partner, Sydney
Platforms, fintech, online sales restrictions and IP licensing are recurring themes of antitrust enforcement in the digital economy

Platforms
- Consumers’ dependence on a few large internet companies, including Google, Apple, and Facebook, is inspiring calls for tougher antitrust enforcement against such companies, as network effects and economies of scale may leave little room for competitors.
- Antitrust agencies around the world have investigated online intermediaries, including in India, Mexico, Taiwan, Korea, Australia and various European jurisdictions. However, the EC is arguably taking a lead role. It is soon expected to rule that Google has abused a dominant position by conditioning smartphone makers’ use of Google Android on acceptance of anticompetitive restrictions that exclude Google’s rivals in the mobile space. The EC also completed its long-running investigation into Google’s preferencing of its own shopping service in its general search results - imposing a record €2.4bn fine - and has said it is actively considering applying that precedent to other digital markets. A third investigation into Google’s AdSense online advertising service is pending.

Fintech
- The Dutch Authority for Consumers and Markets (ACM) recently concluded in a study that fintech companies risk being foreclosed by existing banks. It proposes to team up with other regulators to ensure that these drivers of modernisation are not hindered unlawfully by others. The ACM is exploring both ex ante regulatory solutions as well as ad hoc competition enforcement options.

E-commerce
- The EC’s e-commerce sector inquiry (completed in May 2017) found that many suppliers impose anticompetitive restrictions on online retailers. There have been a number of subsequent investigations and infringement decisions, such as the £1.45m fine that the UK CMA imposed on Ping for banning online sales of its golf clubs, despite recognising that the ban pursued a legitimate commercial aim of promoting in-store fitting.
- In its Coty judgment, the CJEU ruled that suppliers who prohibit retailers in their selective distribution network from selling their products using online third-party marketplaces do not necessarily act contrary to the competition rules.

Standards
- Competition authorities around the world continue to take an interest in ensuring that owners of standard essential patents (SEPs) honour their commitments to license on FRAND terms and do not unilaterally prevent others from implementing the standard. Qualcomm, a major holder of SEPs, has been subject to enforcement action by competition authorities in the US, Korea, China, Taiwan and the EU.
- The EC published guidance on interpreting FRAND principles in November 2017. The debate on what constitutes FRAND terms is likely to intensify as SEPs are incorporated into a host of interconnected devices that form part of the Internet of Things, including cars, smart TVs, and home appliances.

“The Coty judgment shows that there are antitrust-compliant ways to control online selling. However, they are limited and difficult to implement.”

“While cooperation in the fintech sector has not yet attracted enforcement action, projects should be planned with an assumption that they will be scrutinised at some point.”

David Tayar
Partner, Paris

Greg Olsen
Partner, London
What Next for Antitrust in the Digital Economy?

The Clifford Chance Perspective

A new paradigm for antitrust law applied to digital juggernauts?

- Increasing public and policy concerns about high levels of concentration (see the “Politicisation” section) are having a particular impact in the technology sector. Some view antitrust laws’ current focus on effects on consumer harm – in short, prices and innovation – as ill-suited to deal with consumers’ dependency on a few large online technology companies, such as Google, Facebook and WhatsApp, many of whose products are free: could consumers’ dependency on large online companies be harmful even if prices do not increase and even if there is sufficient innovation? Should antitrust laws be amended – or additional legislation enacted – to empower enforcers to address dependency issues?

- Antitrust enforcers will want to be seen as being responsive to these concerns. While we do not foresee a fundamental overhaul of antitrust laws in the near future, we do believe that incremental changes to antitrust laws are likely, and that enforcers will want to make maximum use of their existing powers to deal with perceived issues of digital “bigness”.

- An example of incremental changes is the recent amendment to German and Austrian merger notification thresholds to capture deals that exceed a certain transaction value. This change could capture big-ticket purchases of successful technology companies that have already amassed a large number of users and data but that do not yet generate significant revenue. The EC is also looking into the possibility of relying on a transaction value-based threshold.

- Another example is found in the priorities of the newly formed government coalition in Germany, which include efforts to “modernise competition law” to respond to the 4.0 digital world and, in particular, “abuses by platform companies”. They call for antitrust procedures to become quicker and for more aggressive use of interim measures at an early stage of investigation.

- In terms of using existing enforcement tools, in a recent speech the EU Competition Commissioner, Margrethe Vestager, emphasised the EC’s power to scrutinise dominant companies’ “exploitative” abuses, or abuses consisting of dominant firms imposing unfair terms on consumers. Although the EC has historically not relied on its power to prohibit pure exploitative conduct, its renewed interest in this category of conduct – which includes a focus on excessive pricing cases (see page 11) – may well be driven in part by the perceived harm caused by online dominance.

2018 - Looking Ahead

“We expect the continued push on big tech to combine antitrust enforcement with targeted non-antitrust legislation and new policies.”

Miguel Odriozola
Partner, Madrid/Brussels

“If the German Government proceeds with proposals to modernise antitrust law for the digital era, it could create stricter scrutiny of the technology sector and a template for other legislators around the world.”

Joachim Schütze
Partner, Düsseldorf
4

POLITICISATION
THE TRENDS WE ARE SEEING
THE POLITICS OF THE DEAL

Recent and proposed legislation in a number of jurisdictions will increase the risks of political interference in foreign takeovers

A new European framework

• Proposed EU legislation would preserve the patchwork of differing national foreign investment reviews of foreign takeovers (see overleaf), but with greater coordination between EU governments and the EC. It would also clarify the factors that EU law permits to be taken into account (including State funding/control of the investor, impact on critical infrastructure/inputs and access to sensitive information) which may prompt some of the 16 EU countries without foreign investment screening laws to introduce them.

Expanded scope of CFIUS

• In the US, a bipartisan initiative backed by the White House would reform national security reviews performed by the Committee on Foreign Investment in the United States (CFIUS). Key changes include expanded CFIUS jurisdiction to cover non-controlling interests or arrangements involving the sharing of “critical technology” by a US company (including overseas JVs with no US sales), extended review timing and the introduction of mandatory filing and fees for some deals.

• CFIUS is increasingly interventionist, with a number of deals blocked or withdrawn in 2017 following CFIUS opposition, and reviews becoming longer and less predictable. At present, over 70% of cases handled by CFIUS result in an investigation (up from 4% in 2007) and nearly 20% of cases result in remedies (over double the rate in the 2008-2015 period).

New UK powers

• The UK government plans to strengthen its powers to intervene in foreign takeovers. Imminent reforms include expanding its jurisdiction to review acquisitions of businesses with military/dual use and advanced technology products (e.g. computer hardware IPR, quantum computing/communication technologies). Longer term plans include mandatory filing for deals involving “critical” infrastructure (e.g. in the energy, transport and TMT sectors) and powers to review investments in new projects, bare assets, IP and real estate. When the UK ceases to be bound by EU law following Brexit, it will have freedom to define national security more broadly.

Stricter controls in Australia

• New restrictions on foreign investment in agricultural land and electricity infrastructure have been introduced, including a 30 day window within which farmland must be offered to domestic buyers first.

Greater discretion in Russia

• In July 2017, legislative amendments to the Russian foreign investment regime became effective. While previously there was a relatively exhaustive list of so-called strategic activities falling under the regime, the Prime Minister now enjoys discretion to require pre-closing clearance for any transaction considered sensitive from a national security perspective.

“These new legislative initiatives are ostensibly focused on national security issues, but they have the potential to be misused for more nakedly protectionist aims in the future.”

Torsten Syrbe
Partner, Moscow

“Some jurisdictions are overtly taking non-competition factors into account when assessing foreign takeovers. Others do so in more subtle ways.”

Iwona Terlecka
Head of Polish Competition Practice, Warsaw
The EU remains a region that is very open to foreign investment. However, dealmakers should inform themselves of the diverging approaches and political sentiments in individual countries, and the latest ‘direction of travel’.

### THE EU'S FOREIGN INVESTMENT PATCHWORK

<table>
<thead>
<tr>
<th>Country</th>
<th>Sensitive sectors</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Czech Republic</td>
<td>Defence, telecommunications, energy</td>
<td>Remains very open, and staying that way</td>
</tr>
<tr>
<td>France</td>
<td>Defence, healthcare, infrastructure, energy</td>
<td>Traditionally open, may be starting to close</td>
</tr>
<tr>
<td>Germany</td>
<td>Defence, energy, telecommunications</td>
<td>Traditionally open, now starting to close</td>
</tr>
<tr>
<td>Italy</td>
<td>Defence, transportation, TMT, energy</td>
<td>Traditionally open, now starting to close</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Telecommunications, infrastructure</td>
<td>Traditionally open, may be starting to close</td>
</tr>
<tr>
<td>Poland</td>
<td>Energy, media (i.e. tv, newspapers), banking</td>
<td>Traditionally cautious, staying closed</td>
</tr>
<tr>
<td>Spain</td>
<td>Defence, telecommunications, energy</td>
<td>Traditionally open, and staying that way</td>
</tr>
<tr>
<td>UK</td>
<td>Defence, energy, transport, TMT</td>
<td>Traditionally open, may be starting to close</td>
</tr>
</tbody>
</table>

The EU is traditionally open to foreign investment despite calls for stricter rules. The Government has expressly voiced a preference for foreign investment in sophisticated sectors with higher added value.

### THE TRENDS WE ARE SEEING

- **Czech Republic**: Sensitive sectors: Defence, telecommunications, energy
  - Remains very open to foreign investment despite calls for stricter rules. The Government has expressly voiced a preference for foreign investment in sophisticated sectors with higher added value.
  - Traditionally open, and staying that way

- **France**: Sensitive sectors: Defence, healthcare, infrastructure, energy
  - To date the Government has limited the use of its powers to block foreign investment to defence assets or iconic national champions. However, it has announced that it will add AI, data storage, semiconductors and aerospace to the list of sectors where it can intervene.
  - Traditionally open, may be starting to close

- **Germany**: Sensitive sectors: Defence, energy, telecommunications
  - New laws have given the Government greater powers to restrict foreign investment. This will result in greater scrutiny but is not expected to lead to more blocked deals, given potential political impact on desired FDI from China.
  - Traditionally open, now starting to close

- **Italy**: Sensitive sectors: Defence, transportation, TMT, energy
  - Government tends to favour foreign investment although this traditionally open approach has been criticised and now the Government has become more cautious.
  - Traditionally open, now starting to close

- **Netherlands**: Sensitive sectors: Telecommunications, infrastructure
  - While still very open, authorities are taking greater interest in foreign investment in strategic sectors and will likely introduce measures to tighten control on foreign takeovers in key sectors.
  - Traditionally open, may be starting to close

- **Poland**: Sensitive sectors: Energy, media (i.e. tv, newspapers), banking
  - Government is becoming more concerned about protecting national security and its national champions, so is becoming more interventionist. Recent appointment of a former bank CEO as prime minister may act as counterweight to this shift.
  - Traditionally cautious, staying closed

- **Spain**: Sensitive sectors: Defence, telecommunications, energy
  - Government tends to favour foreign investment and has limited powers to intervene. However it has voiced its disapproval over the sale of privatised national champions to state-owned foreign buyers.
  - Traditionally open, and staying that way

- **UK**: Sensitive sectors: Defence, energy, transport, TMT
  - While Government has exercised ‘soft power’ to intervene in foreign takeovers, it is seeking greater powers to intervene formally on national security grounds, as well as mandatory filings. Particular focus expected on critical infrastructure and advanced technology.
  - Traditionally open, may be starting to close
WHAT NEXT FOR POLITICS IN ANTITRUST?
THE CLIFFORD CHANCE PERSPECTIVE

There is growing political pressure for a fundamental change in the approach to antitrust enforcement

The aims of antitrust are being questioned

- At present there is a broad global consensus that antitrust enforcement should have as its primary aim the maximisation of consumer welfare through lower prices, improved quality and increased output. However, spurred by increasing public perception that many markets have become excessively concentrated, a growing movement is calling for antitrust laws to pursue broader aims. The most prominent example is the US Democratic Party’s “A Better Deal” policy manifesto, which calls for antitrust agencies to scrutinise mergers’ impact not only on prices, but also jobs, wages and small businesses.

- This movement has not yet gained traction with antitrust authorities, partly because such broader aims can often be achieved only at the expense of higher prices for consumers. However, it has increased pressure on antitrust agencies to improve public perception of their work and to enforce antitrust laws more strictly, for fear that governments may impose regulatory solutions if enforcement is viewed as ineffective.

- In our view, this trend is likely to lead to increased enforcement levels in the coming years - particularly in relation to merger control – irrespective of the outcome of elections. Indeed, the recent emphasis of the EU’s Competition Commissioner on enforcement as a means to achieve “fairness”, and the focus on excessive pricing cases in a number of EU jurisdictions, suggest that this is already happening.

Adverse effects on wages may be a future focus

- A concern for wages is evident in the DOJ’s recent targeting of “no poach” agreements between competitors, with a senior DOJ official recently indicating that it has a substantial (and “surprising”) number of ongoing investigations into such arrangements. Some jurisdictions regularly consider the impact of mergers on employment.

- However, recent economic studies could prompt a more extensive assessment of the impact of competitive conduct on wages, particularly in the area of mergers. The studies suggest that in areas where there are fewer firms offering a particular type of job, wages tend to be lower. Accordingly, competition agencies could seek to adapt the consumer welfare standard by taking issue with mergers that lead to significant concentration in any local purchasing market for labour, even if they would not reduce competition in respect of the products or services supplied by the merging parties.

- That would be a significant extension of the scope of merger control and is unlikely to happen any time soon, if at all. But agencies have shown willingness to take up new and untested theories of harm before they have been fully tested and peer reviewed (e.g. the new “common ownership” theories – see page 7) and the current nominee to lead the FTC recently highlighted “harm to workers” as one of the adverse effects of excessively permissive merger control.

2018 - LOOKING AHEAD

“Enforcers are under increased pressure to show that their tools are fit for purpose and so to justify their existence. This is likely to lead to stricter enforcement, particularly against mergers.”

Nelson Jung
Partner, London

“If political pressure succeeds in making antitrust laws pursue wider social aims, politicians will need to be ready to explain why those aims justify higher prices.”

Michel Petite
Of Counsel, Paris
RESOURCES AT YOUR FINGERTIPS

Clifford Chance Dawn Raids App
Our Dawn Raids App provides you with specialist, step-by-step advice on effectively managing a dawn raid, covering over 80 different authorities across Europe, Asia Pacific and the United States including antitrust, tax, employment, data protection and anti-bribery.

The app is available on the Apple and Google stores in multiple languages and gives you what you need to effectively deal with urgent situations, with the ability to contact a local Clifford Chance specialist immediately from your smart phone.

Global M&A Trends
Our global report provides a snapshot of the risks and opportunities for global M&A in 2017, including Interactive investment flow maps.

Our interactive maps show current M&A flows into and out of each major investment region of the globe giving you insights into the latest trends in cross-regional M&A. The maps are easy to use, simple and effective. Available through the Global M&A Toolkit at:

www.cliffordchance.com/GlobalM&ATrends

Clifford Chance Global M&A Toolkit
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Talking Tech
Clifford Chance Talking Tech is a one-stop-shop for the latest legal trends and changes in the fast-moving technology sector. Talking Tech contains a range of articles and information on upcoming events from our global network. These are available online for you, whenever you need them. It is compatible with mobile devices and tablets:

www.cliffordchance.com/TalkingTech

Brexit
Our new dedicated Brexit site helps you to make sense of the latest developments and access our latest publications on the implications of Brexit and what it might mean for Britain’s ongoing relationship with Europe.

www.cliffordchance.com/microsites/Brexit-hub/home.html

Online antitrust training
Together with Thomson Reuters we offer online training on competition law through a series of modules that focus on helping businesses generate awareness and familiarity of their employees of what comprises anti-competitive behaviour. The interactive competition course covers a range of legal areas, including: dealing with competitors, exchange of information, cooperation agreements, distribution and supply arrangements, misuse of market power, and document creation and retention.
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