



COLLECTIVE  
INTELLIGENCE

# Antitrust Enters an Autumn of Change

*As global elections bring new leaders to power, market participants look for continuity in enforcement on both sides of the Atlantic*

Brunswick Regulatory & Political Practice Group

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**The heads of antitrust authorities came together globally along with academics and practitioners in a series of recent conferences to discuss the direction of competition policy and enforcement.**

**Brunswick experts attended each of the gatherings, which included the International Bar Association's antitrust conference in Florence, the Georgetown Law Global Antitrust Enforcement Symposium in Washington, and the Fordham Law School Annual Conference on International Antitrust Law and Policy in New York.**

**Here are our takeaways on the key themes for business leaders from the discussions.**

## Refining merger control

The recent European Court of Justice (ECJ) ruling on the Illumina/Grail merger challenged the European Commission's (EC) attempt to use its existing toolbox to scrutinize so-called "killer acquisitions" that fall below formal review thresholds. The EC's use of that tactic in 2021 had been seen by many observers as a bold attempt to enlarge its authority and subject a much larger set of deals to scrutiny, including by the ECJ, whose ruling annulled the EC's finding of jurisdiction in the Illumina/Grail case.

In response, Margrethe Vestager, the outgoing competition commissioner, emphasized in Florence that while protecting against these acquisitions remains a critical objective for the European Commission, finding the right approach is challenging. Although the EC considered lowering notification thresholds or introducing new powers to call in transactions based on their value, Vestager noted that none of these options seems optimal at this stage.

Over the past three years, the EC reviewed 100 below-threshold deals and found only a limited number of problematic cases, mostly in the pharma and biotech sectors. This experience suggests that a more surgical, focused intervention might be needed to capture the truly problematic deals. The challenge moving forward is to strike a balance between preventing harmful acquisitions and maintaining legal certainty for companies.

The task of refining merger control now falls to the next competition commissioner, Teresa Ribera, subject to European Parliament confirmation later this year.

## Competition policy and enforcement

Competition enforcement is increasingly being impacted by wider policy issues, driven both by supporters and opponents of robust enforcement. In her speech in Florence, Vestager argued that market power is

increasing globally, creating macroeconomic costs through lower growth, societal costs through higher wage inequality and strategic costs through lower resilience.

Meanwhile, the talk at all three conferences was about the landmark report released last week by former European Central Bank President Mario Draghi, who stressed the importance of competition policy to strengthen Europe's competitiveness. One solution he suggested was to allow merging firms that are non-dominant and face ample competition to justify their merger by proving it will increase innovation.

Whatever view you take on competition policy, it is no longer possible to argue it sits in a technocratic silo where broader policy implications can be ignored.

## The impact of global elections

This is a year of change in competition policy, with elections in Europe, the United States and the United Kingdom likely to have a significant impact on enforcement in each of these key jurisdictions.

In Europe, Vestager is stepping down after a decade as the EU's competition supremo. This means there will be personnel change at the top of DG Comp (the EU antitrust agency) and potentially structural changes as well, as Commission President Ursula von der Leyen considers how best to balance the competing demands of competition policy and industrial policy. In the United States, the November presidential election could also lead to change. And in the UK, the recent change of government is not likely to result in immediate moves among the Competition and Markets Authority leaders, who serve fixed terms that are not affected by the general election.

Nonetheless, some participants this week pointed to factors encouraging continuity rather than change in antitrust enforcement on both sides of the Atlantic. They noted that cases do not end when new agency leaders come in; that non-partisan experts continue to make up most of the staff at U.S., European and UK agencies; and that the ability of new agency leaders to make a difference depends on how their predecessors filled the pipeline of cases and initiatives.

## Competition in digital markets

The regulation of the digital sector through competition tools was a key topic at all three conferences, as has been the case for the last few years, with an added focus on generative AI this year.

Across various panels, regulators argued that digital markets present characteristics that require novel and more aggressive approaches to competition enforcement. During a spirited session on ecosystems at Fordham, Olivier Guersent, the EC's director-general of competition, argued the EC's novel approach to platform mergers, as in the Booking/eTraveli case, was correct and reflected a need to adapt horizontal merger guidelines that have been static since 2008, when the platform economy was still new.

Alongside this, regulators are particularly concerned to see the generative AI market, despite its dynamism today, be controlled by the same large tech companies leveraging the market power that regulators have failed to limit over the past decade. In this context, particular interest is paid to large tech companies making acquisitions in adjacent spaces and engaging in partnerships or making large investments in other parts of the technology stack. Industry experts argued on the contrary that existing antitrust tools and theories of harm were sufficient to address any potential problematic behaviours as they are in other parts of the economy.

On generative AI, lawyers and economists insisted on the incredible dynamism of this nascent ecosystem, which is seeing numerous new entrants compete with the large tech firms. In many digital markets, and in AI in particular, big doesn't necessarily mean bad – on the contrary, access to computing power and data sets

makes partnerships between small and big companies a necessity. The first results of regulatory inquiries into various investments by tech firms into generative AI startups over the next few months will shed light on which side of the debate will win.

## To continue the conversation

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