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SPECIAL REPORT
SEPT. 9, 2020

COMPETITION CONCERNS IN THE TIME OF COVID-19

The pandemic forced countries worldwide to rejig antitrust, M&A and state subsidy policies. What has been the effect, and where are the new rules likely to endure?

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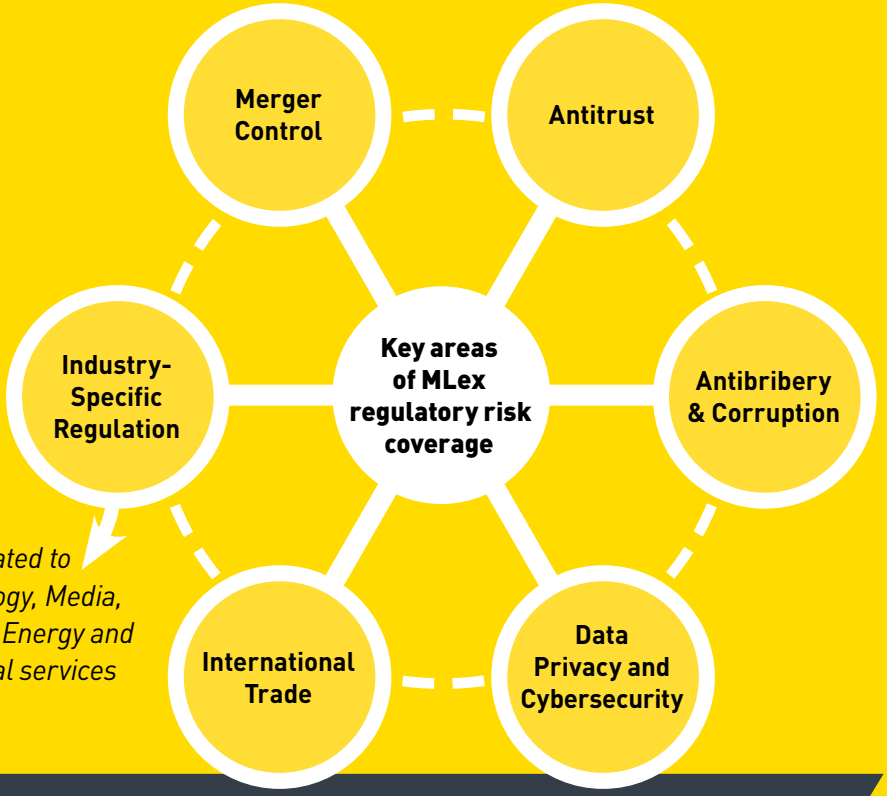

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Introduction

Lewis Crofts
Editor-in-Chief

The toll in human lives and economic hardship brought by the Covid-19 pandemic is evident, and still unfolding, across the globe. Since the start of this year, country after country has been forced to lock citizens and businesses down, order social distancing, fund the jobless and bail out sectors in collapse.

Different governments' emergency responses to keep their economies on life support have varied hugely, but almost all have had to introduce some combination of new antitrust rules or exemptions, regulatory waivers, subsidy packages, tax breaks and debt support. The upshot has been a patchwork of global efforts to protect consumers, help companies survive and keep industries afloat, while safeguarding against market distortion or concentration, unfair subsidies and exploitative acquisitions.

But what happens now? In some jurisdictions, changes have represented an accelerated version of reforms already in the pipeline; in others, regulators have been criticized for not easing up enough on suffering businesses; yet more have experimented with ad hoc changes that they must now choose to unwind, adapt or make permanent.

For example, Covid-19 has allowed France and Germany to move forward their push for an EU regulatory landscape that fosters "European Champion" businesses to counter competitive threats from China; the US is contending with the ever-rising market power of the tech giants Google, Amazon, Facebook and Apple, swollen by a public in lockdown craving escape online; in the UK, Covid-19 adjustments must now contend with the country's Brexit ambitions; in India and China, regulators that largely kept a stiff resolve against easing conditions for companies may need to assess whether this is sustainable.

This special report surveys such responses — from the EU and major European nations to the US, China, Japan, Australia and across the rest of Asia — and looks at the trends and divergences emerging that will have repercussions for businesses and regulators for years to come.

MLex has followed Covid-19's impact since it became evident in February that the spreading novel coronavirus would come to have a global effect, and this report is born of our reporters' in-depth coverage of regulatory responses across key jurisdictions worldwide. It is an example of one of our core pillars: providing our subscribers with forensic and predictive insight, commentary and analysis on antitrust, mergers and acquisitions and state aid.

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Covid-19 changes to European merger control reflect longer-term trends

The pressure on European merger regulators to allow local companies to bulk up and to protect strategic sectors from foreign influence is not new. The wind was already blowing in that direction; Covid-19 just increased the sail. That suggests that many of the changes forged in the crisis are likely to remain in place.

By Natalie McNelis, Arezki Yaïche & Andrew Boyce

Published Sep. 7, 2020

The upheaval of the Covid-19 pandemic has spurred changes to merger control in Europe that could endure beyond the crisis, particularly at the national level but also perhaps for the EU as a whole.

The immediate shock of the outbreak was felt keenly by merger-control authorities across Europe, which were sitting on reviews with hard and tight deadlines. Across Europe, there were immediate procedural adaptations that allowed the authorities to cope.

When a vaccine arrives, perhaps early next year, many aspects of life will go back to normal. That will probably mean an end to procedural innovations in EU merger control, such as allowing oral hearings to take place remotely. While these allowed officials to maintain their strict deadlines, merging companies would likely prefer to have the opportunity to make their arguments in person.

On more substantive questions, however, some changes made in the wake of the pandemic could take root, because they were grounded in long pent-up demand.

ENDURING CALLS FOR CHANGE

Anxiety about Europe's role in the world economy was already high before the pandemic hit, with handwringing in many national capitals over ensuring European companies' place in the upper echelons of industry.

The French and German governments started to call for more latitude for European companies to join forces and more assertive policies against foreign — particularly Chinese — companies already at the start of last year, urging the EU to protect strategically important or innovative sectors of the bloc's economy and strengthen the EU's industrial sovereignty.

The health crisis vindicated their joint political push and played into their warnings, with immediate concerns about security of supply of essential goods and medicines, followed shortly thereafter by a "batten down the hatches" reflex, fearing opportunistic foreign swoops for troubled European companies which would then be "lost forever."

In Europe, the strongest changes have come at the national level, particularly in France and

Germany, where the health crisis served as an accelerator for changes that politicians have been itching to make for some time.

An example: The French state holds veto power over foreign investments in strategic sectors including energy supply, water, transport, telecoms and public health. That power was first expanded in May 2014 to block the sale of Alstom's energy assets to US company General Electric. The GE-Alstom deal was finally approved subject to conditions related to safeguarding jobs and R&D investment guarantees in France. In 2019, the decree was extended again to cover sectors including artificial intelligence, data storage, connected devices and the aerospace industry.

With Covid-19, France's economy minister Bruno Le Maire has taken the opportunity to further expand that tool, to cover other sectors including healthcare and data specialists.

In addition, the threshold to activate a review of a foreign takeover in France has been temporarily reduced from a 25 percent to a 10 percent shareholding, effective from Aug. 7 to Dec. 31. It remains to be seen if that window will really be closed at year-end.

Germany, too, which is chairing talks between EU governments until Dec. 31, has shown itself keen to push for stricter control of non-European takeovers.

Last month in the European Parliament, German economy minister Peter Altmaier reiterated his warning that Europe must protect its critical infrastructure and its innovative startups against foreign takeovers, stressing that the Franco-German push for a more assertive industrial policy has started to yield results.

In the meantime, Germany passed a law last May requiring non-EU companies planning to acquire a stake of 10 percent or more in German healthcare companies to notify the country's regulator. Like in France, Altmaier proposed amending the foreign trade regulation to protect German "medical know-how" as well as supply chains, ranging from drug manufacturers to makers of medical equipment and respiratory devices.

The Covid-19 crisis "shows how important medical know-how and own-production capacities in Germany and Europe can be," Altmaier said at that time, adding that the upcoming amendment was important to maintain the good functioning of the German healthcare system. The legislation is expected to be amended accordingly this summer.

Germany is also currently working on a broader reform of its competition law. Changes are expected to put the regulator's intervention "below the dominance threshold," to clarify that intermediation power is a special factor contributing to market power and to broaden the essential facilities doctrine by explicitly referencing access to data. This law will also strengthen the regulator's ability to scrutinize "killer acquisitions" in the digital space.

A first draft of the government proposal was first leaked in the German press last year. It proposes to apply broader definitions of dependency, new rules on personal data and the more frequent use of interim measures to curb abuses ahead of definitive findings by the regulator.

EU LEVEL

When its two biggest economies are aligned, the EU often moves in the same direction. The Covid-19 pandemic may have swept away much opposition to France and Germany's ambitions.

Europe already adopted EU-level legislation last year to protect against foreign companies swooping in to snap up troubled European companies. While those rules are meant to apply only to assets of strategic value, interpretation of what that covers is open to some interpretation; Covid-19 could certainly be used to justify extensions, for instance to cover producers of medical supplies.

In March, the European Commission called on the bloc's national governments to deploy "fully-fledged" screening systems for foreign investments at national level, watching out for key healthcare and research businesses.

Another initiative — not expressly motivated by Covid-19, but which could turn out to serve as a safety valve — are new rules to block acquisitions in the EU that are backed by foreign money, floated in a commission policy paper in June.

Under the proposal, if a company has been subsidized by a foreign government in the past three years, it would be obliged to get prior approval of its plan to buy an EU asset. If adopted, it would add yet another layer of merger control to systems already in place at the EU and national level.

Anger over the commission's decision to prohibit certain high-profile mergers, notably that of French and German rail companies Alstom and Siemens, but also ThyssenKrupp's bid to takeover Indian Tata Steel's European operations, has led to pressure for changes to the EU's merger control rules.

The EU regulator has so far rebuffed pressure to adapt its merger rules, and Covid-19 doesn't seem to have softened its resolve. But it could find itself making different or more frequent use of the various supplementary tools at its disposal.

For instance, Vestager has pointed out that the EU rules already contain a mechanism that could facilitate a takeover of a struggling company: the "failing firm" defense. While there are no plans to relax the test's strictures, the damages flowing from the pandemic might very well create the conditions that would justify its imposition.

SUSTAINED PRESSURE

The pandemic has served as an accelerator of the French and German EU political agenda. With the bloc's two biggest economies singing from the same songsheet, it could come under sustained pressure to propose changes to its own rules.

What form any eventual changes may take is harder to tell. Modifying the EU treaties is probably not an option, while changing the core merger laws is also likely to be difficult.

Yet the current troubled economic and political context worldwide plays in favor of a stronger and more defensive bloc. There will likely to be less resistance to adding obstacles for foreign companies and governments acting in the EU market, along the lines of the FDI screening rules and new rules vetting acquisitions fueled by foreign subsidies.

Anxieties writ large by the realities of the pandemic mean that the risk of equating EU sovereignty with protectionism has never been so high. ■

Antitrust enforcement in Europe's real economy risks being put on hold

European antitrust enforcers could struggle to take action against collusive companies long after the Covid-19 health crisis has passed, particularly in the sectors hit hardest by the pandemic, those that have received government bail-outs, or those that make essentials such as food and drugs. That could lead regulators to focus ever more on digital companies, many of which have thrived during the pandemic.

By Nicholas Hirst

Published Sep. 4, 2020

In the six months since the Covid-19 pandemic forced a shutdown on large parts of Europe, no EU company has been fined by the bloc's antitrust enforcer. Sanctions against ethylene purchasers in July targeted companies from Mexico, Switzerland and the US, which benefitted from an extended window to pay their fine given the crisis.

The absence of sanctions against EU companies may be coincidence. But it does seem to underline how it is difficult politically for the regulator to sanction European companies — which pay taxes, employ workers and might be propped up by state funds — in a time of crisis. That political question looks set to cast a shadow over European antitrust enforcers for a long time to come.

By contrast, other changes introduced as a result of Covid-19 appear more transitory. By showing flexibility in how they apply cartel rules during the crisis — say, to banks giving consumers a payment breather or carmakers discussing supplies — enforcers have remained a part of the debate. That should make it easier, when the day comes, to call time on crisis cooperation.

PROTECTING THE DRUG SUPPLY CHAIN

Before the crisis erupted, the European Commission was already taking tentative steps to revive powers that allow it to offer guidance to companies on how they can cooperate without breaking antitrust laws and facing sanctions.

That reflected a desire among national competition authorities to ensure enforcement doesn't get in the way of collaboration that would reduce companies' climate footprint, or have other positive effects on sustainability.

Those steps have picked up speed in the Covid-19 era as authorities moved to reassure businesses that cooperation with rivals to ease the pain of the pandemic lockdown would not see them breach competition laws.

On April 8 the commission said it had issued its first "comfort letter" in nearly 20 years — a curt three-page summary of what pharma companies can do to cooperate among themselves and avoid antitrust prosecution, provided they stay within certain parameters. The recipient

By showing flexibility in how they apply cartel rules during the crisis, enforcers have remained a part of the debate. That should make it easier, when the day comes, to call time on crisis cooperation.

was Medicines for Europe, the association representing generics and biosimilars companies across Europe.

Ever since the virus took hold in Italy in late February, the challenges for the pharma sector were apparent: Requests flooded in from hospitals and government agencies for critical medicines used in intensive care units, or ICUs. Companies saw a supply shock on the horizon for medicines such as deep sedatives, neuromuscular blockers, strong analgesics, vasopressors, antibiotics and adjuvants.

To meet this growing demand, generics companies needed to cooperate to ensure they weren't over-producing some medicines while neglecting others. Medicines for Europe sketched out a project to develop a list of products needed in ICUs and clarify the potential shortfalls. It did this in coordination with the European Medicines Agency and the commission's health department, known as DG Sante.

Under the terms of the exemption, companies are cleared to share active pharmaceutical ingredients, or APIs, or even semi-finished versions of a medicine known as "intermediates."

Companies might also need to communicate to decide whether they should switch production of a medicine to a different site, to increase capacity and avoid under-production. Distribution can also be coordinated on a rolling basis.

But while the activities allowed by the letter are broad, it's not a blank check. The project, the letter specifies, must be open to any pharma manufacturer that's willing to participate, and minutes of all meetings must be kept and copies shared with the commission.

UNPRECEDENTED RELAXATION

The pattern is replicated at the national level across Europe.

The Dutch competition authority told health insurers they could team up to provide financial support to those care providers not directly involved with Covid-19 patients, like physiotherapists and maternity nurses. The goal was to ensure levels of care are maintained during and after the crisis.

In Portugal, the competition authority gave guidance to banking industry measures that protected borrowers — such as home-owners — struggling to repay their debts as a result of the crisis. Opticians in France were allowed to join forces to negotiate with their landlords during the lockdown. And Germany's powerful car industry and its suppliers have been given scope to cooperate on the relaunch of production sites, and to broker restructuring deals for companies in the supply chain facing bankruptcy.

"In the complex supply chains, downtimes at individual sub-suppliers can cause even more economic harm by considerably delaying the restart of production processes at many suppliers and manufacturers," Andreas Mundt, the head of the German antitrust authority, said in June.

"To overcome such problems in a specific sector a coordinated approach can be justified. However, such measures must comply with competition law requirements and be explicitly limited to a certain period of time."

ENFORCEMENT

That unprecedented relaxation of the competition rules does not mean all industry cooperation has received a free pass.

Three Italian cinema associations were raided by antitrust enforcers on suspicion they were coordinating to hinder the broadcasting of films at open-air cinemas. The Irish competition authority warned trade associations that price recommendations made during the crisis risked breaching competition rules.

In Lithuania, the national authority threatened action against travel agencies over a purported ban on discounts, despite them being one of the sectors worst hit by the crisis.

Funeral services in Spain are being probed by the Comisión Nacional de los Mercados y la Competencia amid allegations of a price cartel. The inquiry was triggered by complaints submitted to an e-mail address set up in reaction to Covid-19. Spain's authority is also looking into financial institutions requiring borrowers to take out life insurance, to receive loans guaranteed by the state to counter losses caused by the Covid-19 pandemic.

POLITICAL OPTICS

Notwithstanding that spate of activity, it will be hard for the foreseeable future for agencies to issue heavy sanctions to European companies in the real economy. Authorities or courts are already handing out reduced fines to cartelists — ham producers in France or breweries in Germany, for example.

The pressure in favor of going soft on all but the most egregious abusers will only grow as the economic crisis sparked by the lockdown deepens. Or, worse, politics will make it virtually impossible for enforcers to close their inquiries with normal levels of sanctions.

Germany's car industry sold only a quarter as many cars in April as it did the previous month, and sales in the year to April are down 25 percent. Can EU antitrust enforcers really pursue their allegations that the car makers colluded in breach of EU competition laws?

And where does the crisis in Europe's rail sector leave early-stage cartel probes against Austria's Österreichische Bundesbahnen or the Czech Republic's □ eské Dráhy?

Can EU enforcers really pursue Ryanair's allegations that Lufthansa fixed prices, given that the German state has bailed out its national carrier to the tune of 6 billion euros ($7 billion) in return for a 20 percent stake?

Those questions are likely to influence the way authorities across Europe prioritize their enforcement for years to come. It is also likely that more resources will be focused on pursuing anticompetitive practices in sectors that have not suffered a direct hit from Covid-19.

Chief among them is Big Tech. If anything, the sorry state of the real economy is likely to expose the booming tech sector to even more enforcement action in Europe — although their executives might grumble that it's hard to see what more can be done. ■

EU's state aid holiday is a political time bomb

The relaxation of EU state aid rules has achieved its objective of shielding the economy from the worst effects of the Covid-19 pandemic, but problems loom on the horizon. The crisis is unlikely to end as abruptly as it began, meaning there won't be an obvious cue to end the measures — with the distortion of the level playing field becoming ever clearer.

By Michael Acton

Published Sep. 4, 2020

To save the European economy from catastrophe, the EU has sacrificed the quasi-sacred principle of the "level playing field." Resurrecting it will be a long and painful process.

In normal times, the bloc's state aid rules police government spending to ensure market distortions are kept to a minimum. Officials were quick to adapt their approach as Covid-19 hit, helping to shield vulnerable parts of the economy. But the crisis is likely to fizzle out rather than disappear, giving no obvious cues to return to normal.

The European Commission has triggered two rarely used EU treaty provisions which suspend spending limits under extraordinary circumstances. Each of the 280 or so national support measures hastily waved through have been deemed "necessary, appropriate and proportionate."

But the regulator cannot and does not factor the spending power of national governments into these decisions. At what point could a multimillion-euro support package for, say, car manufacturers in one EU country give them a competitive advantage over rivals in other member states that don't have access to a similar windfall?

HEY BIG SPENDERS

As of the beginning of September, the total amount of aid approved by the EU has surpassed 2.89 trillion euros ($3.4 trillion), comprising a mixture of subsidised loans, grants or direct equity stakes in companies.

But it's not evenly distributed: Germany alone accounts for a whopping 53.7 percent of the total sum, followed by France at 14.4 percent, and Italy at 13.9 percent. Some distance behind them come Spain, at 5 percent, the UK at 2.8 percent, and Belgium and Poland at around 2 percent each.

These figures of course come with a caveat, which is that the sums approved will not necessarily be spent. But more than 90 percent of the aid approved by the EU can be attributed to 6 of its 27 member states, plus the UK. This is not proportionate to their contribution to EU GDP, and points to an uneven recovery — something borne out by the commission's summer economic forecast.

As Europe's economy contracts further, fresh lockdown measures loom and initial support mechanisms are withdrawn, the issue is morphing into one of long-term solvency that pushes the case for the partial nationalization of businesses.

All this feeds anxiety about the stability of the eurozone, the club of 19 countries that use the euro currency. Some have the fiscal space to spend their way out of the crisis and save strategic industries, while others may have to watch their companies go to the wall while public debt soars.

AN ANTIDOTE?

The EU Recovery Fund agreed in July may not be enough to balance the scales. While national leaders agreeing to let the EU borrow and redistribute capital was clearly a landmark moment, the numbers don't quite add up.

The Recovery Fund amounts to 390 billion euros to be spent in the form of grants and 360 billion euros in loans. These are huge sums by normal standards, but they amount to only around 26 percent of all the national support measures that have been cleared so far under the temporary state aid rules.

Nor do these figures depend on how much has already been spent by governments — an idea that Greece's commissioner Margaritis Schinas unsuccessfully floated with colleagues when the commission was devising the plan, according to meeting records.

Instead the sums will be portioned out through a complex mechanism based on factors such as the size of the member state, its GDP per capita, and unemployment rates. Think tank Bruegel has found that the criteria agreed by leaders reduce the amount that will go to lower-income countries, compared with the EU's initial proposal.

The Recovery Fund, then, doesn't fully offset the power of some national exchequers in propping up their own firms. And it won't see the light of day until 2021, pending approval by the European Parliament, which has already raised a number of issues. Meanwhile national spending plans keep flooding in.

NEW PHASE

Much of the aid approved so far has aimed at providing short-term liquidity in the form of broad loan and grant mechanisms for companies of all sizes during the lockdown.

As Europe's economy contracts further, fresh lockdown measures loom, and initial support mechanisms are withdrawn, the issue is morphing into one of long-term solvency that pushes the case for the partial nationalization of businesses.

The OECD's chief economist warned EU lawmakers in June that more expensive equity injections will keep companies afloat better than loans that may never be repaid, which would add to the public debt burden.

As things currently stand, only a few member states such as Germany, Poland and Spain have had major programs approved by the EU.

Further recapitalization measures can be expected in the coming months, spreading beyond the aviation industry, the sector that most immediately felt the crisis bite. German media reports suggest at least another fourteen large companies are asking for similar treatment to Lufthansa, one of the earliest beneficiaries of the new rules.

That case will inevitably draw an EU court challenge from Ryanair, the only company so far to resort to litigation against the regulator over its temporary rules.

The rules on recapitalizations, which will stay in place until at least July next year, create tough conditions such as bans on shareholder dividends and acquisitions. Yet policing individual bailouts to ensure they are indeed proportionate is an imperfect science. As more individual companies get government bailouts, their competitors are likely to cry foul.

FRESH IDEAS

It's clear that national governments needed the fiscal space to weather the crisis. But with no clear exit in sight, there's still no answer to the question of competitive distortions.

Returning to business as usual in state aid will take time. In the case of the 2008 banking crisis, the temporary rules remained in place for three years. Depending on how long the Covd-19 pandemic lasts, it's entirely possible that the current framework could beat that record.

Reining in spending too early will slow any recovery. Yet failing to coordinate it is just as

much of a risk. This is only going to become more of a problem as the crisis deepens, and it demands more creative policies from the EU regulator.

If, as seems likely, the EU is going to extend its temporary state aid framework beyond the end of the year, it would be fair to demand some sort of quid pro quo. In the coming weeks, the commission should be thinking about how it can get a grip on the aggregate effects on competition of each of the hundreds of individual measures it has waved through.

Member states will eventually have to submit annual reports on their state aid expenditures under the temporary framework, which will give a clearer impression of the disparities, since the sums approved by the regulator will not match the figures spent. The commission would do well to pre-empt those reports.

This is something lawmakers in the European Parliament have already urged it to do. In their annual competition report in June, lawmakers called for a "panoptic and detailed evaluation" of national support measures, broken down by sector.

That would be a good first step towards addressing diverging national spending powers and singling out the biggest long-term risks to competition, and would also give an idea of how and where the Recovery Fund should be spent.

It may also provide some pointers for how a future crisis could be managed better. ■

UK competition landscape looks hard for companies expecting Covid-19 largesse

The Covid-19 pandemic has not provoked a top-to-bottom shakeup of the UK's competition regime — even if it arguably should have done in some areas. The Competition and Markets Authority has been generally hesitant to overly relax rules, and has shown it will ask hard questions of merging companies that cite Covid-19 in their rationale. In this, as in the UK's uncertain state aid regime, expect some bold and controversial calls from the regulator.

By Victoria Ibitoye

Published Sep. 7, 2020

As the UK public woke up to the unfolding coronavirus outbreak in March, the nation's competition watchdog was notably quick to take temporary measures to protect consumers from the enveloping disruption.

But if the Competition and Markets Authority's actions then were clear and necessary, there is far less clarity over what significant long-term impact the pandemic may have on the UK's wider competition landscape.

Certainly, there has been no obvious regulatory race to the bottom. But in areas such as the CMA's existing limited consumer-law powers — where Covid-19 should have been a catalyst for change — public lobbying efforts by the watchdog have so far failed to secure any significant reforms.

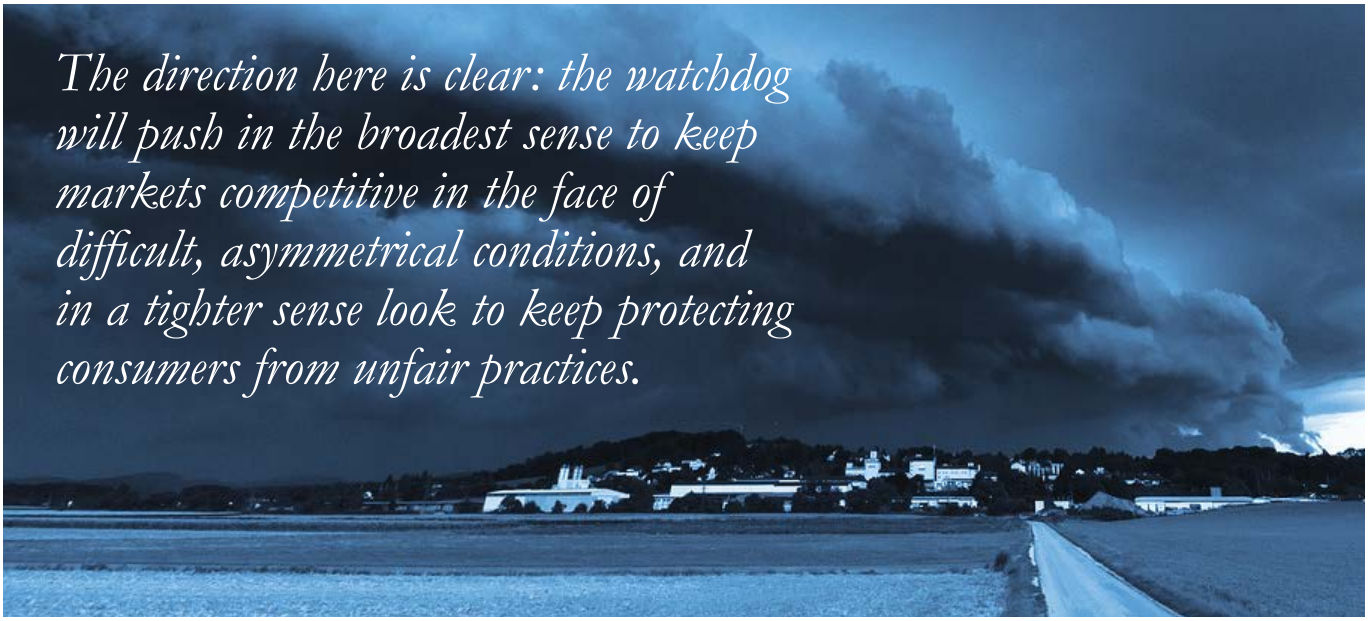
In merger control, there is a concern that Covid-19 will leave smaller companies ripe for acquisition or lead to an uptick in businesses saying they would quit the market without a takeover, both areas that the CMA is keen to scrutinize.

In state aid, meanwhile, the outlook is clouded by potential conflict between the UK's post-Brexit competitive ambitions and the need to avoid Covid-19 bailouts distorting markets.

TACKLING EXPLOITATION

Early in the UK outbreak, the CMA set out a twin-pronged approach to looking after consumers' interests. It took a firm line against businesses hiking prices for items such as hand sanitizer, baby milk and face masks — including by stressing its powers to control prices and calling on key plays such as Amazon.com and eBay to tackle profiteering by third-party sellers. But it also told supermarkets and other key retailers that they wouldn't face enforcement for coordinating in a genuine attempt to keep consumers supplied (see here).

At the same time, the watchdog set up a coronavirus taskforce to identify harmful sales and pricing practices and to advise the government on policy and legislative measures. It was inundated with reports — 80,000 by the end of June, with a majority involving unfair



practices over cancellations and refunds — demonstrating the CMA's role as the main point of contact for upset consumers.

When it comes to the regulator's long-held wish to beef up its consumer-law powers to bring businesses to heel, though, the CMA hasn't managed to make its bite as big as its bark.

It had expected a government go-ahead for direct powers of consumer-law enforcement early this year — freeing it of the need to chase businesses through the courts as well as giving it fining powers — but this was delayed (see here). When the pandemic hit, it lobbied for extra emergency powers to crack down on Covid-19 profiteering (see here). But these did not materialize. With this lack of enforcement bite, the regulator has relied heavily on companies correcting their own behavior.

Where does this leave its approach to the years to come? The CMA expects the pandemic to lead to long-lasting change to consumer behavior, business practices, supply chains and the regulatory environment; all of which might aggravate rising market concentration, the power of digital players and deepening public distrust of markets.

In a paper in July, Andrew Tyrie, who steps down as the CMA's chairman this month, warned of the challenges ahead (see here). "Among the most important competition policy

challenges over the longer term is to ensure that the temporary subordination of competition to other policy objectives in the context of the coronavirus crisis — public health, security of supply, the protection of jobs — does not become entrenched," he cautioned.

"Taxpayer support to business, and special exclusions from competition law, are liable to create a new group of vested interests, which would stand to benefit from continuing to be insulated from normal competitive forces after the crisis has receded. These will be added to the existing vested interests who have often made it difficult for competition authorities, before the crisis, to intervene in a timely and effective way."

"It will often be the largest businesses that have most at stake, and the greatest capacity to press their case, at the expense of smaller competitors and consumers. Competition authorities like the CMA can and should be a bulwark against these vested interests, by providing robust and authoritative advice to government on when and how crisis measures should be unwound, and on any opportunities that may arise from the crisis to address a number of pre-crisis distortions."

The direction here is clear: the watchdog will push in the broadest sense to keep markets competitive in the face of difficult, asymmetrical conditions, and in a tighter sense look to keep protecting consumers from unfair practices. It won't shy from using existing powers keenly and will keep pushing for stronger ones — in Tyrie's words, it will "provide robust advice to government on how policy or legislation could address weak competition and consumer detriment."

MERGERS

This aggressive stance has been evident, too, in the CMA's handling of mergers during the coronavirus crisis, which has by and large remained in line with existing competition rules — a direction that seems likely to continue. Merging companies in sectors severely impacted by Covid-19 — Viagogo-Stubhub in events, JD Sports and Footasylum in retail, among others — did not benefit from a coronavirus reprieve.

Secondary-ticketing company Viagogo's planned acquisition of rival StubHub, currently under an in-depth probe, saw the coronavirus impact discounted during its phase I assessment after the CMA deemed that there was still considerable uncertainty over the long-term impact on events.

Sportswear retailer JD Sports is challenging the CMA's block of its merger with Footasylum in the courts after the CMA found the pandemic's impact wasn't enough to mitigate its competition concerns.

Signs of a stiffened resolve — after something of a waver — also came over Amazon's investment in online restaurant-food delivery company Deliveroo. This was the only merger to see the pandemic effect factored in, even if just for a short while.

In April, the CMA provisionally cleared the deal, accepting Deliveroo's "failing firm" defense that it would have been forced — by the impact of coronavirus-forced restaurant closures — to exit the market absent Amazon's investment. In June, however, when it published a second assessment along with a second provisional clearance, it distanced itself from that view and stressed that the restaurant food delivery market had recovered more sharply than expected.

Perhaps the most significant and likely lasting impact of the coronavirus pandemic will relate to regulation of government subsidies to business.

Even after the April assessment, though, the regulator had warned companies against seeing Covid-19 as a "get out of jail free" card and that any reaching for failing firm defense would need to satisfy its standard and exacting three-stage test. Nevertheless, it is preparing for a medium-term rise in failing-firm defense cases, and is monitoring data and media reports to help it identify sectors that are under stress or undergoing restructuring.

The CMA has been clear that companies should expect more, not less scrutiny, as a result of the outbreak. Its chief economist, Mike Walker, has said in particular that digital platforms that have seen business soar as locked down families moved online should expect more attention.

"What I think we're going to see is increased concentration in the digital area, reduced product market competition as a result of that, because we've got more commerce going online, increased gatekeeper power … whatever the answer was six months ago, it's not less intervention," he said in June.

STATE AID

Perhaps the most significant and likely lasting impact of the coronavirus pandemic will relate to regulation of government subsidies to business.

The CMA is expected to take control of the UK's state aid regime once the UK fully leaves the EU at the end of this year, although there is still ambiguity over this. A junior business minister said in June that the UK may not need a regulator to control its subsidy regime and is still considering how best to oversee it (see here).

The lack of clarity didn't stop Tyrie from spelling out the CMA's preference for a cautiously

strict approach in his comments in July. He called for a "pro-competitive" approach to bailouts that requires a distinction to be made between companies or sectors facing liquidity problems and those that are fundamentally insolvent.

"That in turn requires careful scrutiny not only of the business sector in the pre-Covid period, but also an assessment of how it will fare in the post-crisis equilibrium where, in a number of sectors, demand may be permanently lower or consumer preferences very different," Tyrie said at the time.

That assessment will be difficult to make, he stressed, and will need to "minimize the moral hazard that comes when the state insures against risk by stepping in to provide financial assistance."

Here more than in any other competition issue, the effect of the UK's Brexit ambitions and Covid-19 response become muddied. The government is keen to ensure both that any new state aid regime marks a clear break from Brussels, and that the economy gets the state handouts necessary to bring it back to life after the battering it has had from pandemic lockdown.

In both cases, this could lead to an easing of rules, in the case of Brexit to boost UK competitiveness and in the case of coronavirus to allow for targeted bailouts. Squaring these incentives with the CMA's caution will require a delicate balancing act.

NO TOP-TO-BOTTOM SHAKEUP

Overall, the coronavirus pandemic has not provoked a top-to-bottom shakeup of the UK's competition regime, even if it arguably should have done in some areas.

The CMA has been generally hesitant to overly relax rules. As a champion for consumer rights it has burnished its credentials but also seen its limited enforcement bite via its lack of fining powers exposed. Its merger control work suggests that it will continue to be skeptical and inquiring when companies cite Covid-19 in their rationale. And the future of state aid, as yet unwritten, promises to be the most interesting and potentially significant impact.

The longer-term economic ramifications of the coronavirus are only just taking shape: Expect some bold and controversial calls from the regulator to come in the interest of wider competition. ■

M&A deals expected to jump in 4th quarter as US backlog loosens in life sciences, tech, industrials

Companies looking to be acquired earlier this year were either overwhelmed by the emergence of Covid-19 or were left struggling to justify their valuations based on an uncertain future. But the US pipeline for deals in attractive industries like life sciences, technology and industrials is healthy, and lawyers expect a jump in deals this fall.

By Curtis Eichelberger & Flavia Fortes

Published Aug. 18, 2020

Companies looking to be acquired earlier this year were either overwhelmed by the emergence of Covid-19 or were left struggling to justify their valuations based on an uncertain future. But the pipeline for deals in attractive industries like life sciences, technology and industrials is healthy, and lawyers expect a jump in deals this fall.

"We are seeing a lot of strategics gearing up for potential auction processes on the sell-side," said Paul Tiger, a partner and head of US corporate and M&A transactions at Freshfields in New York. "We think we are going to start seeing those come to fruition in the next couple months, certainly by year end.

"Everyone had gotten through the first waves of panic and disorder from the virus and people are getting back to focusing on what they intended to do. And a lot of those deals are strategic in the sense that there was a commercial rationale in doing them before Covid," and the companies "are returning to what they planned to do months ago."

That's not to say it's all laughs. There have been changes in the debt markets and no one is making projections about 2021, with so much depending on the development of a vaccine that sends employees to work, kids to school and consumers back to the cash register.

Dealmakers that refrained from entering into transactions and investments during the time of uncertainty now are looking to use that money, which will lead to competition for targets, boosting valuations.

"There is a lot of dry powder that has been sitting on the sidelines waiting for the fog to clear. At some point, that money is going to have to be put to use, so I expect the competition for deals to be intense, which perversely may temporarily inflate valuations," said Curt Hearn, partner at Jones Walker.

Private equity is largely on the sidelines. In the early days of the pandemic, many investors who bought debt or funded acquisitions from debt were bitten hard when the market crashed in March and April. Those who didn't get hurt saw greater upside and lower risk by buying debt in the secondary market where they discovered investment grade debt at low prices,

lawyers say. What all this means is that the credit markets have tightened up for M&A and might remain that way for lesser deals.

ANTITRUST RISK

With the backlog of deals resuming, some transactions are expected to bring antitrust risk.

Strategics are coming back, and a good number of them present antitrust considerations, lawyers say. Companies expecting a political change in the coming year say the antitrust and tax environment would only get worse with a Democrat in the White House. Some say that truly problematic deals wouldn't conclude the antitrust review until after January anyway, so it might be too late for any long shots.

One measure of activity is the number of Hart-Scott-Rodino filings made with the US antitrust agencies. According to the US Federal Trade Commission, there were 140 HSR filings made in February 2020, followed by 138 in March, 79 in April, 73 in May, 111 in June and 112 in July as the market got its legs back.

But for the same period in 2019, the FTC reported that there were 145 HSR filings in February, followed by 156 in March, 163 in April, 191 in May, 161 in June and 170 in July. So while the numbers have risen in recent months, it is far from a return to normal.

While attorneys expect business failures and other changes in the economy to affect negotiations with regulators over competition issues involving market share and failing-firm arguments, the antitrust mechanisms for analyzing those deals are unlikely to change.

Other activity that lawyers have noticed is that solid companies in downtrodden sectors such as travel, food services and entertainment have been addressing the pandemic as an opportunity to eliminate weakened competitors through acquisition, followed by extensive cost cutting.

The risk is that if a vaccine isn't developed that energizes the broader economy, those cheap acquisitions could turn out to be the anchor that sinks both ends of the formerly bold acquisition.

While Covid-19 has permanently changed the landscape in some industries, especially those in bricks-and-mortar retail that may have a harder time competing with online shopping, it's expected that there will still be a place for retail offerings that are unique, and thus not many changes in the antitrust analysis are expected so far.

While attorneys expect business failures and other changes in the economy to affect negotiations with regulators over competition issues involving market share and failing-firm arguments, the antitrust mechanisms for analyzing those deals are unlikely to change.

Lawyers say firms are likely to argue that government market share data is based on pre-Covid-19 analysis, and the post-pandemic shares for companies that have been damaged by the pandemic are significantly smaller. In theory, this will make it harder for the government to either meet its burden of proof or shift that burden to the companies.

The same consolidation that affects market shares could lead to more government challenges of mergers.

MERGER AGREEMENT

There have also been adjustments made during Covid-19 that will reduce some of the risk in deals going forward, lawyers say.

Businesses made adjustments during the past several months to ensure that buyers can no longer use Covid-19 as an excuse to back out of a deal, and where sellers can no longer get away with outsized revenue and valuation projections.

"There has been a lot of attention on … what businesses have done over the past 4-5 months and people are factoring that into their models," Tiger said. "Buyers aren't taking the guided tours anymore, they are kicking the tires." ■

Google, Amazon, Facebook, Apple build market power as Covid-19 accelerates long-term trend

Google, Amazon, Facebook and Apple wowed Wall Street with their earnings results from the first full quarter of the Covid-19 pandemic. Thoe numbers suggest the pandemic is fueling long-term trends that are strengthening those companies' market power. Some trends are clear, such as the growth in traffic. Other impacts are less obvious, such as the competitive benefits of being able to have employees work from home.

By Mike Swift

Published Aug. 20, 2020

The chief executives of Google, Amazon, Facebook and Apple had a tough day when they sweated through more than five hours of questions about their market dominance from a US congressional antitrust subcommittee in late July.

But Sundar Pichai, Tim Cook, Mark Zuckerberg and Jeff Bezos received comforting salve for their wounds just hours later, when the four tech behemoths reported beyond-robust earnings the following day for the first full quarter since the Covid-19 pandemic took hold. Collectively, the four companies' stock added nearly $250 billion in value — in a single day.

Apple stock topped $400 for the first time, fueled by strong revenue growth from its App Store. Amazon's online grocery sales tripled year-over-year. Facebook's user growth is no longer stagnant in its most lucrative markets. Google saw ad revenue on its main social media channel, YouTube, grow by more than $200 million year over year, not counting growing subscription revenue.

Even as the pandemic has savaged the global economy, it has provided a tailwind for the GAFA four, arguably adding to the market power that is being scrutinized by antitrust regulators in Europe, the US, Brazil and elsewhere. The effect won't necessarily be short-term. Covid is accelerating long-term shifts, such as the share of consumer time drifting away from television and toward digital and social media platforms. That and other long-term trends may well provide more lasting market advantages to the GAFA giants after the pandemic ends.

For now, with so many people around the world living online, the pandemic has clearly boosted the traffic of the Internet giants, just as it has benefited smaller Internet companies and the digital businesses of some of the GAFA companies' top brick-and-mortar competitors. Amazon competitor Walmart on Aug. 18 reported a 97 percent jump in its e-commerce revenue over the same quarter in 2019, for example.

Google, which had the most disappointing results of the GAFA companies because of a drop in its search ad revenue, nevertheless saw a $907 million jump, or 43 percent, in revenue from its cloud computing business over the same quarter in 2019. Facebook, which for years saw its user numbers stagnate in North America and Europe — by far its most lucrative market

The pandemic has provided a tailwind for the GAFA four, arguably adding to the market power being scrutinized by antitrust regulators in Europe, the US, Brazil and elsewhere. The effect won't necessarily be short-term.

in terms of ad revenue — gained 30 million daily active users over the past year in those two most wealthy regions of the world. For the first time, Facebook has more than 500 million daily users in Europe, the US and Canada, where an average user is multiple times more valuable in terms of advertising and other revenue than in any other region of the world.

And each Facebook user in North America and Europe, on average, was worth more in terms of revenue than the year before, according to the closely watched metric of average revenue per user, or ARPU. ARPU in the US and Canada was $36.42 in the second quarter, up $3.22, or nearly 10 percent per user over the same quarter in 2019; in Europe, ARPU was $11.03, about 33 cents more than a year ago.

INFLECTION POINT?

But beyond the basic measures of traffic and users, a closer look at the Big Four's earnings numbers and what the executives said about them reveals that the pandemic is giving the GAFA companies new market advantages as the world moves online during Covid. These changes could give Facebook and other large tech companies even more competitive clout against startups and brick-and-mortar competitors over the long term.

During Facebook's earnings call on July 30, Sheryl Sandberg, the company's chief operating officer, noted that the pandemic has shown many thousands of brick-and-mortar businesses that the only way they can survive is to give their businesses a presence online. That isn't a new trend, but Covid has accelerated it.

Facebook launched its Facebook Shops product in the middle of the pandemic in May, allowing small businesses to set up a storefront on Facebook and to ultimately sell across its apps, including Instagram and WhatsApp; the new service is "scaling quickly" during Covid, CEO Mark Zuckerberg and Sandberg said.

"People are spending more and more time online, so businesses need to be online too," Sandberg told Wall Street analysts. "This was true long before the pandemic, but it is especially true now that people can't always get together in person. In the United States before the crisis, one in three companies still did not have a website. Now more and more businesses realize they have to be online."

The new Facebook Shops service, for which Facebook didn't disclose numbers but which Sandberg said is "seeing nice results," allows Facebook to occupy an expanded role in the entire advertising "funnel" — where people move from a desire for something, to identifying a brand and searching for a product, to actually buying it.

"If you think about what we've done for a really long time, we exist in many ways at the top of the funnel, and we help drive people down," Sandberg said on the earnings call. "But, we are a great place on Facebook and Instagram for discovery. And then, increasingly, we're able to drive people down the funnel all the way through to purchase."

Even in the competition for talent, one of the most intense arenas of competition in Silicon Valley, Covid-19 is bestowing new benefits to the GAFA companies. Anti-competitive hiring deals between Apple, Google and other Silicon Valley companies were the focus of a US Department of Justice antitrust complaint and settlement a decade ago

For Facebook employees, working from home isn't going to be just a short-term trend during the pandemic. Zuckerberg said on the earnings call that half of Facebook's employees will be working remotely within five to 10 years. That will save the company money, but it's not the main goal. "This will enable us to attract and retain broader pools of talent regardless of where they live," Zuckerberg said.

By not having to recruit people and pay them a salary to live in the high-cost San Francisco Bay Area, Facebook will be able to draw from a wider pool and hire the most talented of those people. The goal, said Facebook's chief financial officer, Dave Wehner, "is to is access a greater talent pool, which ultimately might give us more opportunity to grow headcount. So, I think, there's an effect there that's I think in addition to cost in the sense that we would have a greater pool of people that we could recruit from."

That could undercut some of the cost advantages of launching a startup in rural America,

eastern Europe or some other low-cost area. Increasingly, Facebook will be able to recruit the most talented local engineer wherever he or she lives, rather than requiring them to move to an expensive home near its headquarters in Menlo Park, California, as a condition of employment.

RECORD REVENUES

Other tech companies noted additional long-term trends where the pandemic was accelerating their advantage. Google CEO Pichai cited cloud computing and artificial intelligence as areas of benefit due to Covid-19. "An area where I think we are still under-tapped vis-à-vis potential is definitely Cloud. We see the potential there," he said.

Amazon Web Services is the largest cloud business; it is now a $43 billion annualized run rate operation, with annual revenues up nearly $10 billion over the past year. Brian Olsavsky, Amazon's chief financial officer, told analysts on the company's earnings call that Covid is pushing more businesses to Amazon's cloud services.

"If you're in an industry that's been heavily impacted by Covid in the economy, you're looking for ways to save money and you're trying to do a click and we're trying to help in that regard," Olsavsky said. "And one of the best ways to save money long-term is to use the cloud."

It seems unlikely those new customers will return to running their own servers once the pandemic ends.

Apple notched revenue records in its App Store, Apple Music, video and cloud services, recording $13.2 billion in revenue from services, up from $11.5 billion during the same quarter in 2019. Apple's Cook said during Covid-19, mobile apps that run on iPhone and iPad are becoming a central artery of the economy.

"Especially in a time of Covid-19, you can measure economic resilience in the ways in which the App Store supports remote ordering for restaurants, digital commerce for small businesses and an enduring entrepreneurial opportunity for creators and visionaries," Cook said.

This week, based on that economic role, Apple broke another barrier, going where no American company had gone before. It became the first publicly traded US company ever to top $2 trillion in market value. Amazon, Microsoft, Google and Facebook — also at or near joining the trillion-dollar-market-cap-club — are not that far behind. ■

Outbreak prompts Asia into quick, at times controversial, antitrust and M&A regulatory responses

In Asia, calls for regulatory relief over Covid-19 came thick and fast. In most jurisdictions those calls didn't fall on deaf ears, with authorities prepared to bend or suspend rules governing industry competition and mergers to help businesses dealing with production and delivery disruption. But for many regulators, the risk that Covid-19 cooperation could see anticompetitive practices continuing after the medical crisis subsides is a genuine concern.

By James Panichi, Jet Damazo-Santos, Laurel Henning, Wooyoung Lee, Yonnex Li, Phoebe Seers and Xu Yuan

Published Sep. 9, 2020

When the Covid-19 pandemic swept through the Asia-Pacific region, it left vulnerable businesses teetering on the brink of collapse, amid disrupted production and delivery lines and travel restrictions. Meanwhile, companies were coming under considerable pressure to deliver essential services.

In parallel to that upheaval came real concerns that distressed companies would be snapped up by international raiders at bargain-basement prices, in a campaign of mergers and acquisitions that would leave in its wake companies stripped of both their strategic identities and purpose.

The call for government and regulatory intervention in this context was immediate. And in most Asian jurisdictions, changes came thick and fast, either in the form of temporary relief measures, time-limited antitrust exemptions or reassurances about the flexibility of existing laws.

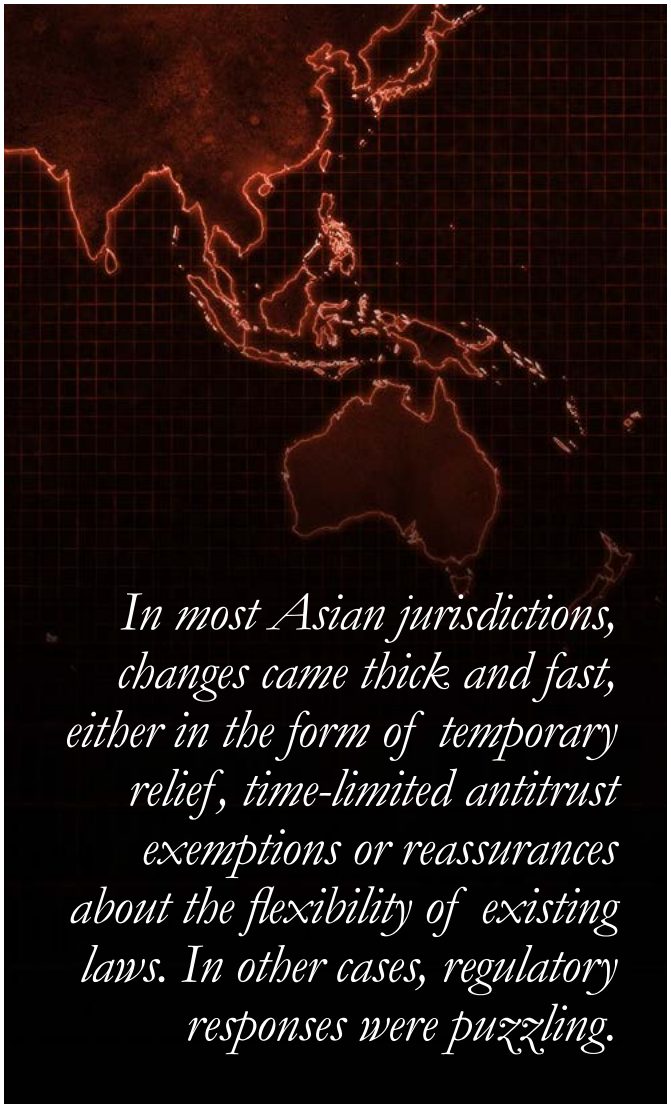
In other cases, regulatory responses were puzzling. In some instances, they even raised the prospect of ongoing damage to competitiveness in certain markets, with the remedy proposed likely to be worse than the temporary disruption it was supposed to address.

Then there were jurisdictions that opted to do nothing, preferring to simply allow the pandemic to take its course and hope that the economy would be able to regenerate around existing regulation.

In Australia, Hong Kong, Indonesia and New Zealand, companies were encouraged to engage with competition regulators to seek and obtain permission to engage in cooperative commercial practices that may have been problematic in normal times.

India's antitrust regulator declined to issue any exemptions from the country's competition law, but the decision was based on its belief that existing laws already gave businesses the flexibility they needed to respond to shortages of goods and supply-chain disruptions.

In mainland China, however, the antitrust regulator said that no requests for special



consideration would be entertained when it came to confirmed offenders. And as for antitrust exemptions for companies wanting to work together in their Covid-19 responses, the Chinese opted for very narrow parameters.

Then there was the case of the Philippines, which immediately sounded alarm bells.

The country's lawmakers put forward a plan to create a special holding company that would bail out distressed "strategically important companies," despite fears over plans to exempt the rescued companies from antitrust and procurement laws for three years — although that idea was eventually rejected.

This was followed by another dramatic decision in Manila: The country's merger-control powers would be substantially curtailed for two years for all mergers and acquisitions with transaction values below $1 billion — a threshold some 20 times higher than existing notification triggers. The new law also blocks the Philippine Competition Commission, or PCC, from using its power to launch self-initiated merger reviews for one year from implementation of the new law — the most recent broadside directed against the PCC.

This suggests that the impact of Covid-19 could be felt by Asian economies long after the medical crisis posed by the pandemic has passed.

'PUZZLING' PHILIPPINE RESPONSE

That the Philippine government would use the cover of Covid-19 to clip the wings of the competition regulator sparked immediate concerns but wouldn't have come as a surprise — the government of President Rodrigo Duterte has made increasingly controversial decisions that appear to favor certain businesses over others.

The Bayanihan to Recover as One Act, the country's second Covid-19 economic response package, will exempt all mergers and acquisitions with transaction values below 50 billion pesos from compulsory notification under the Philippine Competition Act.

The new act, which is now on Duterte's desk awaiting signature, is also significant because, by banning self-initiated reviews — referred to as *motu proprio* probes — for one year after the law comes into effect, the government is stymying the PCC's ability to review deals that don't meet the thresholds.

This would have included the 2018 Grab-Uber merger, which ultimately led to the PCC fining Grab, repeatedly, for violating pricing and service-quality commitments, with penalties so far totaling 46 million pesos ($950,000).

The merger-control restrictions in the ratified act are more severe than those in the initial drafts that the PCC had warned against in July, which would have only exempted deals "involving enterprises engaged in essential businesses" entered into during the quarantine period and for a year after it.

In a talk last month, PCC chairman Arsenio Balisacan questioned the motives behind the moves to weaken the commission's powers. "It's puzzling that while the country is struggling to address issues of high market concentration and high levels of anticompetitive forces in the economy ... the proposals in congress for economic stimulus ... contain provisions that effectively restrict or even suspend the enforcement of the competition policy during the recovery period," Balisacan said.

"Almost all of these measures — subsidies, bailouts and nationalizations, price controls, cooperation of competitors and mergers — come with the associated risks of distorting the playing field for businesses," he said.

WORK TOGETHER, FOR NOW

In Australia, regulators were quick to issue industry-by-industry exemptions from antitrust provisions that would have prevented them from cooperating to guarantee ongoing services in the midst of significant disruptions.

In New Zealand, by contrast, the advice was broader, with the country's competition regulator saying early on that companies wouldn't face enforcement action if they were cooperating to ensure the supply of essential goods and services during the pandemic. Then, in May, the New Zealand Commerce Commission published competition-law guidance to allow for what would have previously been perceived as anticompetitive mergers to be waved through if otherwise in the public interest.

A quick glance at MLex's case file for Australia points to targeted, often company-specific exemptions for regional airlines, gas and electricity operators, health insurers, grocery

retailers, providers of essential medical equipment and even car-rental companies. Even 7-Eleven convenience stores franchisees were granted leave to agree among themselves on reducing trading hours.

But for all exemptions, the Australian Competition & Consumer Commission, or ACCC, was forceful in reminding affected industries that the exemptions came with a clearly defined time limit and didn't condone collusion on pricing. Any slide towards ongoing, long-lasting anticompetitive behavior wouldn't have been tolerated.

That's not to say the Australians were able to entirely avoid the allure of populist Covid-19 responses. The government's Regional Airline Network Support program pumped A$1.2 billion ($880 million today) into the industry, with the bulk of those funds going to Regional Express Holdings, a carrier known as Rex. This was at a time when the government steadfastly refused to hand a single cent to either Virgin Australia or Qantas, the two national airlines that suffered devastating losses as a result of Covid-19.

In New Zealand, Commerce Commission Chairwoman Anna Rawlings said that the "exceptional circumstances" of the pandemic could "require businesses" to work together to supply essential services.

But in words echoing those of Australian officials, Rawlings warned that maintaining competitive markets in New Zealand would remain a top priority. On both sides of the Tasman Sea, antitrust officials appeared determined not to allow temporary cooperation among businesses to become the post-pandemic norm.

A similar message was coming from Hong Kong, with the territory's regulator saying it was ready to think outside of the box when it came to assessing cooperation among companies in response to the Covid-19 outbreak. "As the commission becomes aware of such arrangements, it could decide to exercise its discretion in ways it ordinarily would not," Competition Commission CEO Brent Snyder told an event in May.

As an example of this discretion, Snyder suggested he may consider permission to collaborate for a finite period of time, with the regulator even providing express comfort or statement of enforcement intention for collaborations, if that's what the parties needed to move forward.

But Hong Kong officials were also adamant that discretion didn't amount to an antitrust free-for-all and said that, even at the height of the pandemic, price-fixing, cartels and agreed reductions of output wouldn't be tolerated.

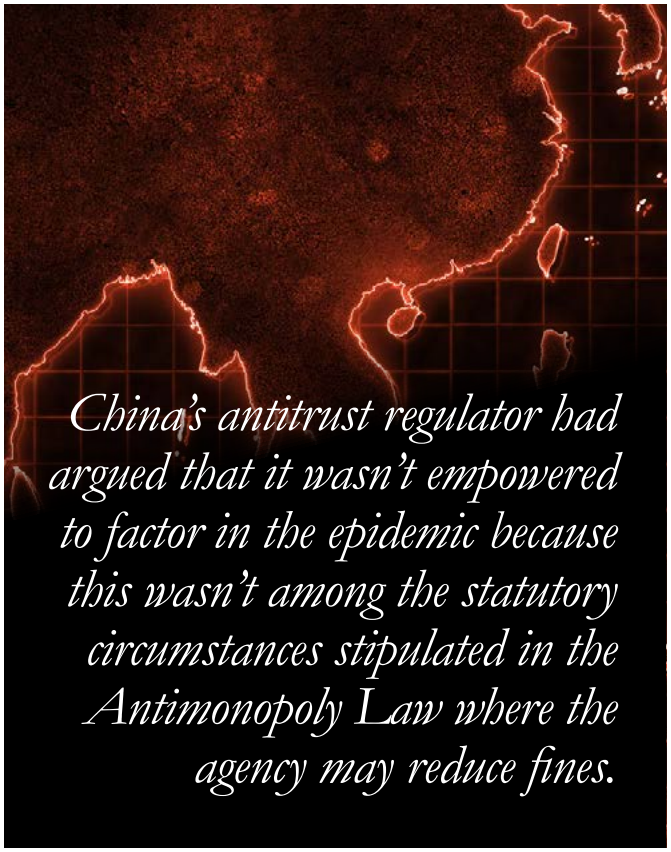
In particular, the Competition Commission argued that private restrictions for price fixing

and managing the decline in demand didn't provide the solutions that market economies need in crisis. Any letter of comfort for cooperating business would have to be embedded in specific challenges posed by Covid-19.

'IN-BUILT SAFEGUARDS'

In India, the country's antitrust regulator avoided going down the Australian path of case-by-case exemptions, arguing that existing competition legislation already provided companies with the flexibility they needed to avoid goods shortages and supply-chain disruption caused by the pandemic.

In an advisory issued as early as April, the Competition Commission of India said that the law had "in-built safeguards to protect businesses from sanctions for certain coordinated conduct, provided such arrangements … result in increasing efficiencies."



The watchdog said that businesses collaborating with competitors to guarantee the continued supply of essential goods and services wouldn't be punished but warned that "only such conduct of businesses which is necessary and proportionate to address concerns arising from Covid-19 will be considered."

Two safeguards were highlighted in the advisory. The first exempts joint ventures from a presumption of harm for certain anticompetitive agreements where the agreement increases efficiency in the production, supply or distribution of goods or services.

The second enables the regulator to take into consideration the benefit to consumers, improvement in production or distribution of goods or services and the promotion of technical, scientific and economic development when it's conducting an assessment of alleged competitive harm.

The advisory suggested that businesses might need to share data on production, stock, timings, distribution network, logistics and research and development to ensure the supply of products like ventilators, face masks, gloves and vaccines as well as services such as logistics and testing.

Meanwhile, in mainland China the national regulator, the State Administration for Market Regulation, or SAMR, didn't consider the economic hardship brought about by the Covid-19 epidemic as a legitimate mitigating factor to reduce fines for confirmed antitrust violations.

MLex learned in May that SAMR had argued that it wasn't empowered to factor in the epidemic because this wasn't among the statutory circumstances stipulated in the Antimonopoly Law where the agency may reduce fines.

SAMR maintained this clear stance despite earlier requests from companies under investigation that the regulator consider their financial and operational difficulties during and after the epidemic, even though their conduct was committed before the virus hit.

But in a sign of some flexibility on the part of SAMR, the regulator announced in April that it would exempt cooperation agreements between operators involved in epidemic control and resumption of production, in accordance with the law. But the focus of the exemptions would be much narrower than those considered in other jurisdictions.

SAMR would target agreements beneficial to technological progress, improvements in efficiency and the pursuit of public interest and consumer interests, such as improving technologies and developing new products in the fields of medicines, vaccines, testing, medical devices and protective equipment.

Those cooperation agreements relating to public benefits such as disaster relief and improving the operating efficiency and competitiveness of small- and medium-sized enterprises would also be offered immunity, SAMR said at the time.

In South Korea, competition regulators appeared to share concerns that the disruptions caused by Covid-19 shouldn't lead to enforcement leniency or entrench anticompetitive practices that may prove hard to eradicate once the disruption caused by the pandemic had subsided.

In fact, Joh Sung-wook, the country's top competition official, warned that companies involved in cartels or engaging in other serious antitrust violations could expect an even more forceful response from the Korea Fair Trade Commission, or KFTC.

Joh's April remarks came amid growing concerns by the KFTC that companies would be more tempted to engage in cartels and other types of unfair conduct because of the imbalance in demand and supply caused by the economic difficulties related to the Covid-19 outbreak.

Joh said her agency would vigorously sanction companies that committed offenses in order to send a strong signal to the market to prevent repeated violations. ■

Court schedules, antitrust enforcement cause Covid-19 upheaval across Asia

From Indonesia to South Korea, the logistical challenges posed by Covid-19 have reverberated through the legal system and created occasionally insurmountable challenges for antitrust enforcement agencies. In Japan, the courts' struggle to implement measures that guarantee social distancing has sparked a deeper debate about the slow pace of digitalization.

By James Panichi, Jet Damazo-Santos, Wooyoung Lee, Sachiko Sakamaki & Toko Sekiguchi

Published Sep. 9, 2020

The Indonesian antitrust case against ride-hailing company Grab had been scheduled to wrap up in March. Then Covid-19 struck, prompting the Business Competition Supervisory Commission to suspend hearings, as the Indonesian government encouraged officials to work from home. The delay was disruptive, but the upheaval was contained: Six weeks later, the competition regulator hit Grab with a $3.4 million fine for anticompetitive and disruptive practices.

In other parts of the region, however, where lockdown measures have been tougher, the pandemic has wreaked havoc on legal processes, holding up approvals for important deals and forcing criminal and civil antitrust lawsuits to write off the rest of the year.

In Australia, the first criminal-cartel prosecution of a local company since 1910 had initially been scheduled to take place in the first half of this year, with letters sent out to jury members. But the impact of Covid forced the Federal Court of Australia to hit the pause button.

The delay was more than just an inconvenience. The charges are against a relatively small business from a remote country town, its owner and a former employee. The prospect of having to retain their lawyers for another year — or that the trial may be derailed by a sneezing juror — is now real.

"The potential for that to occur in our case is disastrous," the lawyer for one of the men told the Federal Court in Melbourne, arguing that the additional cost of an additional Covid-19 delay for his client amounted to "potential prejudice."

The problem is even worse for criminal-cartel cases still weaving their way through lower courts, where crammed courtrooms in historically significant buildings have exacerbated the problem posed by social distancing.

In Melbourne, the prosecution of a Vietnamese-Australian foreign exchange company has suffered numerous delays. In Sydney, the prosecution of the Australia New Zealand Banking Group, Citigroup and Deutsche has been transferred to a suburban court complex to avoid a crammed courtroom.

In Japan, the courts' lack of preparedness to face the challenge posed by the Covid-19 outbreak had prompted some national soul-searching about the slow pace of digitalization in the country.

According to monthly statistics published by Japan's courts, the number of civil and administrative court cases decided by the nation's courts in May was about 54,000. That number was less than half of the verdicts rendered in May 2019, which was at 117,000.

The decrease was due to the postponement of most civil and some criminal procedures, imposed in early April in Tokyo and other district courts. The number of new civil and administrative cases in May also dropped from 116,000 last year to 73,800 this May.

In July, media reports suggested that Supreme Court officials and judges from the country's high court held a video conference to discuss the need to accelerate the process of bringing the courts online. According to statistics prepared by the Organization for Economic Cooperation and Development, Japan's levels of court automation are below those of Australia, South Korea and the US.

The upheaval caused by Covid also seeped through to the operations of the Japan Fair Trade Commission, which was forced to delay the publication of its quarterly merger list. MLex was told that merger reviews, especially for complex cases, were significantly disrupted.

Companies planning mergers must consult with the JFTC case handlers by phone or online, and sometimes delay submitting documents and relevant information to the regulator, in the event of an abnormal work environment.

In South Korea, the virus is affecting antitrust enforcement, as well as the courts' timetable. At the end of August, hearings at the Korea Fair Trade Commission, or KFTC, were delayed for a week after an upsurge in the number of confirmed daily cases from double digit numbers to three digits. The KFTC reconvened hearings for the following week.

The courts also closed down for two weeks, to reopen during the second week of September. This put a hold on all court hearings nationwide. The courts decided to close for two weeks after a judge in a provincial district court became the first confirmed Covid-19 case among judges.

Earlier in the year, the KFTC revealed that it had put a hold on dawn raids and interviews involving face-to-face encounters during investigations. But the regulator was adamant that any enforcement delays didn't amount to a laxer stance in the pursuit of serious antitrust violations. ■

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Andrew Boyce

Reporter, Brussels

Andrew is a reporter who covers mergers for MLex in Brussels. Andrew studied history at the University of Liverpool before joining MLex in 2015.

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Nicholas covers EU merger review and antitrust investigations for MLex in Brussels. He previously wrote about EU affairs for Politico Europe, European Voice and PaRR. After earning an LLM in European law from the College of Europe in Bruges, he spent a year working in the competition practice of a leading competition law firm in Brussels 2009-10. He graduated in modern European languages from Oxford University in 2006.

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Michael is a correspondent for MLex in Brussels. He previously reported on EU politics as the Financial Times' Nico Colchester Fellow in Brussels. Michael has a degree in International Relations and Politics from the University of Cambridge, and a degree in History and French from University College London and Paris IV Sorbonne.

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Victoria joined MLex in our London bureau covering Brexit, financial services and competition, and now focuses on UK mergers and acquisitions. Prior to joining MLex, Victoria was a city reporter at the Daily Mail covering transport, retail and writing the daily market report. Victoria holds a law degree from the University of Nottingham.

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Curtis covers mergers and acquisitions for MLex in Washington DC. He was the sports enterprise reporter at Bloomberg News for 16 years where he covered subjects including debt financing, employment contracts, government subsidies, taxes and health. Earlier, he worked for the Rocky Mountain News in Denver. Curtis earned his Master's degree from Georgetown University in 2009 and published "Men of Sunday" about religious faith in the NFL in 2012.

Flavia Fortes

Global Head of Mergers

Flavia writes on merger control, antitrust enforcement and litigation in the US and Brazil. Before joining MLex, Flavia worked as an antitrust consultant in the Federal Trade Commission's Office of International Affairs and as a Research Fellow for the American Antitrust Institute. She has written on the intersection of antitrust law and intellectual property law in technology-driven and innovative markets. Flavia holds a Master of Laws degree in intellectual property from the George Washington University Law School and a Bachelor of Laws degree from the Universidade Federal de Minas Gerais in Brazil. She is admitted to the bar in New York and Brazil.

Mike Swift

Chief Global Digital Risk Correspondent

Formerly chief Internet reporter for the San Jose Mercury News and SiliconValley.com, Mike has covered Google, Facebook and Yahoo closely as he followed trends in search, the mobile web and online social networks. He helps coordinate MLex coverage of privacy and data security worldwide. A former John S. Knight Fellow at Stanford University, he is a graduate of Colby College. He is an award-winning journalist with expertise ranging from the business of professional sports to computer-assisted reporting.

James Panichi

Senior Editor, Asia-Pacific

An Australian journalist with over 25 years' experience, James spearheads MLex's coverage of regulatory risk in Australia and New Zealand. In 2016, James was appointed as MLex's managing editor for continental Europe, overseeing the Brussels bureau's coverage of EU regulatory affairs. Previously he worked for the European Voice newspaper and then at the European operation of US political website Politico as an investigative reporter. In Australia, James spent much of his career at the Australian Broadcasting Corporation. He has degrees in English and Italian literature from the University of Melbourne, a degree in journalism from RMIT University, and an MA in international relations from the ANU.

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Jet Damazo-Santos joined MLex from the Jakarta Globe where she held a senior editorial position. Jet covers South East Asian jurisdictions and works in several local languages.

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Yonnex has an MA in Journalism from the Chinese University of Hong Kong, after obtaining a BA in Translation at the same university. Prior to joining MLex, she worked as a reporter at the English division of the Hong Kong Economic Journal, providing coverage and analysis on China's banking sector, asset management industry as well as currency and financial reforms.

Phoebe Seers

Freelance Correspondent, Milan

Phoebe writes on corruption, antitrust and data security in India and in Italy. Formerly based out of the Hong Kong bureau, she won two Society of Publishers in Asia awards in 2017 for stories on corruption in the energy sector in Indonesia. Prior to joining MLex, she trained as a lawyer in London before relocating to Hong Kong to practice commercial litigation at an international law firm.

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Wooyoung Lee is a correspondent based in MLex's Seoul office, South Korea, covering antitrust, privacy and data security, mergers and acquisitions and financial services. Wooyoung has more than a decade of experience in journalism, public policy and research. She has worked and written for news outlets including The Korea Herald, Al Jazeera International, Bloomberg BNA, Monocle, among others. She worked as a foreign service officers for policy and research at the Ministry of Foreign Affairs of the Republic of Korea. She holds a BA in Linguistics from Kyunghee University and an MSc from the Sociology department of the London School of Economics and Political Science.

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Xu Yuan has an MA in Journalism from the University of Hong Kong, and majored in English Literature and Linguistics at Peking University. She has worked in the Beijing bureau of NBC News, as well as at Asia Pacific Vision Limited and Fleishman Hillard International Communications.

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Laurel is a senior correspondent covering data privacy and security, antitrust and mergers and acquisitions across Australia and New Zealand. Prior to that, Laurel spent a year spearheading MLex's activist investment coverage, looking at boardroom disputes and shareholder campaigns agitating for changes to company strategy. Laurel joined MLex in 2013 and reported for five years on European energy and climate policies from Brussels. In that time, Laurel covered the regulation of emissions and technological developments pertaining to the energy sector within the EU. A graduate of the University of Liverpool, Laurel studied English and French before beginning a career in journalism with MLex.

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Sachiko covers antitrust, anti-bribery & corruption, and privacy & cyber security. She has an undergraduate degree from Waseda University in Tokyo and a master's degree in communications from United States International (now Alliant International) University in California. She previously worked as a journalist for Time magazine, the Far Eastern Economic Review, Bloomberg News, and the Washington Post in Japan.

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Toko is a senior reporter in Tokyo covering antitrust, anti-bribery & corruption and regulatory issues. Before joining MLex, she has worked as a journalist for Dow Jones News, Bloomberg News and Time Magazine.