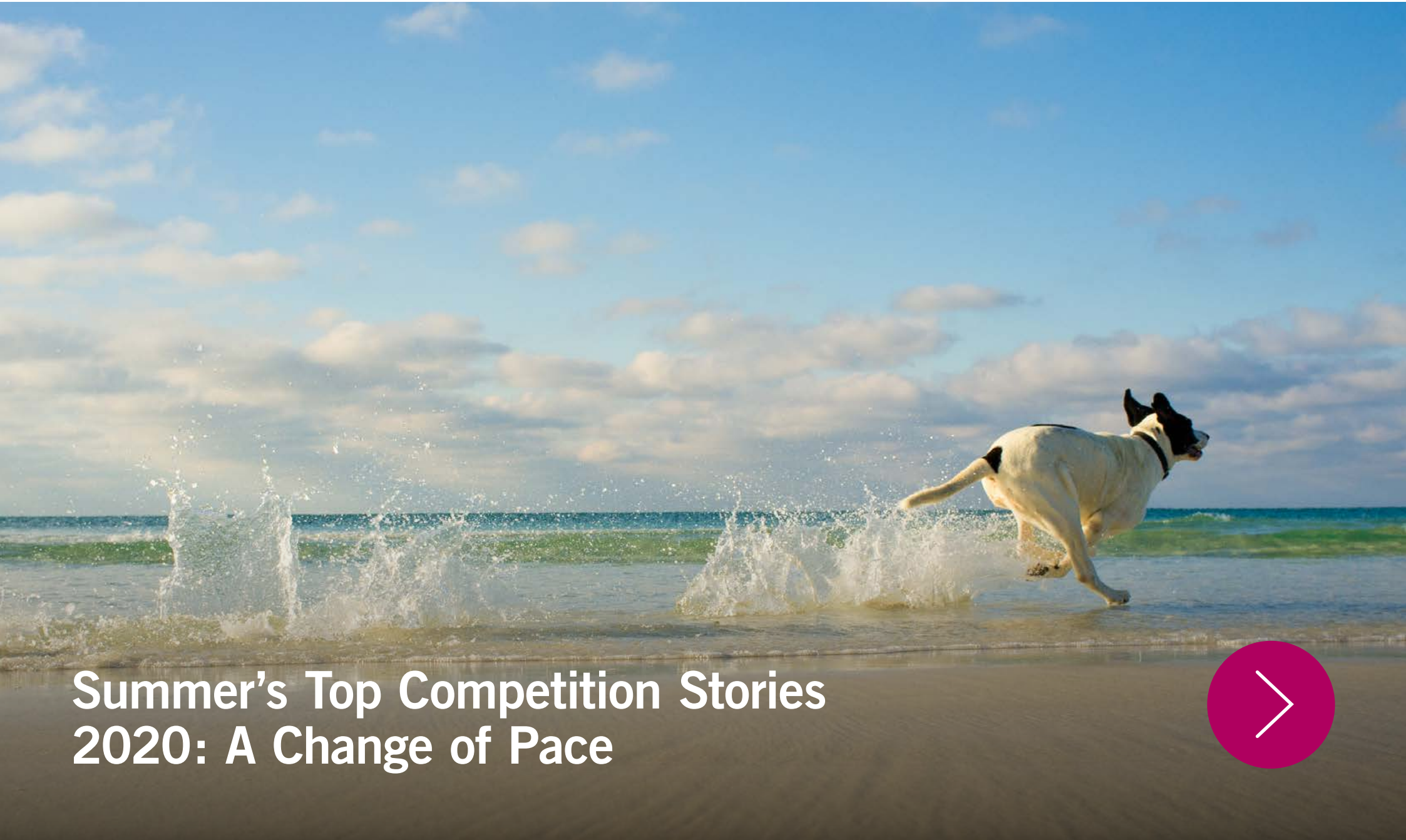

Summer's Top Competition Stories 2020: A Change of Pace

Introduction

The extent of the fallout from the health crisis on our economies and societies is still unknown. But so far its impact has been dramatic and the recovery unequal. While the new normal emerges, competition law will continue to apply.

Debates about the role of competition law were ongoing before the crisis hit – should it protect consumers as more than mere purchasers of goods and services, and consider broader social (non-price) factors such as the innovation process or environmental protections?

But the crisis has shone blinding spotlights on existing areas of concern (especially our even greater reliance on technology during lockdown) and accelerated attempts by policy makers to find solutions. Competition law is a vital part of the recovery – protecting consumers from abusive practices whilst ensuring that enforcement doesn't prevent necessary collaboration.

Thankfully, there is no sign of the progress to tackle climate change – the crisis beyond the crisis – getting left behind as had initially been feared. Especially as green investments outperform markets and rescue packages come with "green strings" attached, designed to both stimulate wounded economies and speed up decarbonisation.

The protectionist march towards de-globalisation – already well underway – has become a veritable sprint over the last few months, with governments rapidly strengthening their foreign investment control powers and intervening more often to decide the fate of crisis-hit companies, in many cases with continuing involvement.

But rapid change comes at what cost? Is there a risk of more haste, less speed? What about the unintended consequences of such rapid and potentially long-term interventions to deal with what may be short-term challenges, especially when they are increasingly politically motivated? Read our Summer Top Stories to find out more.

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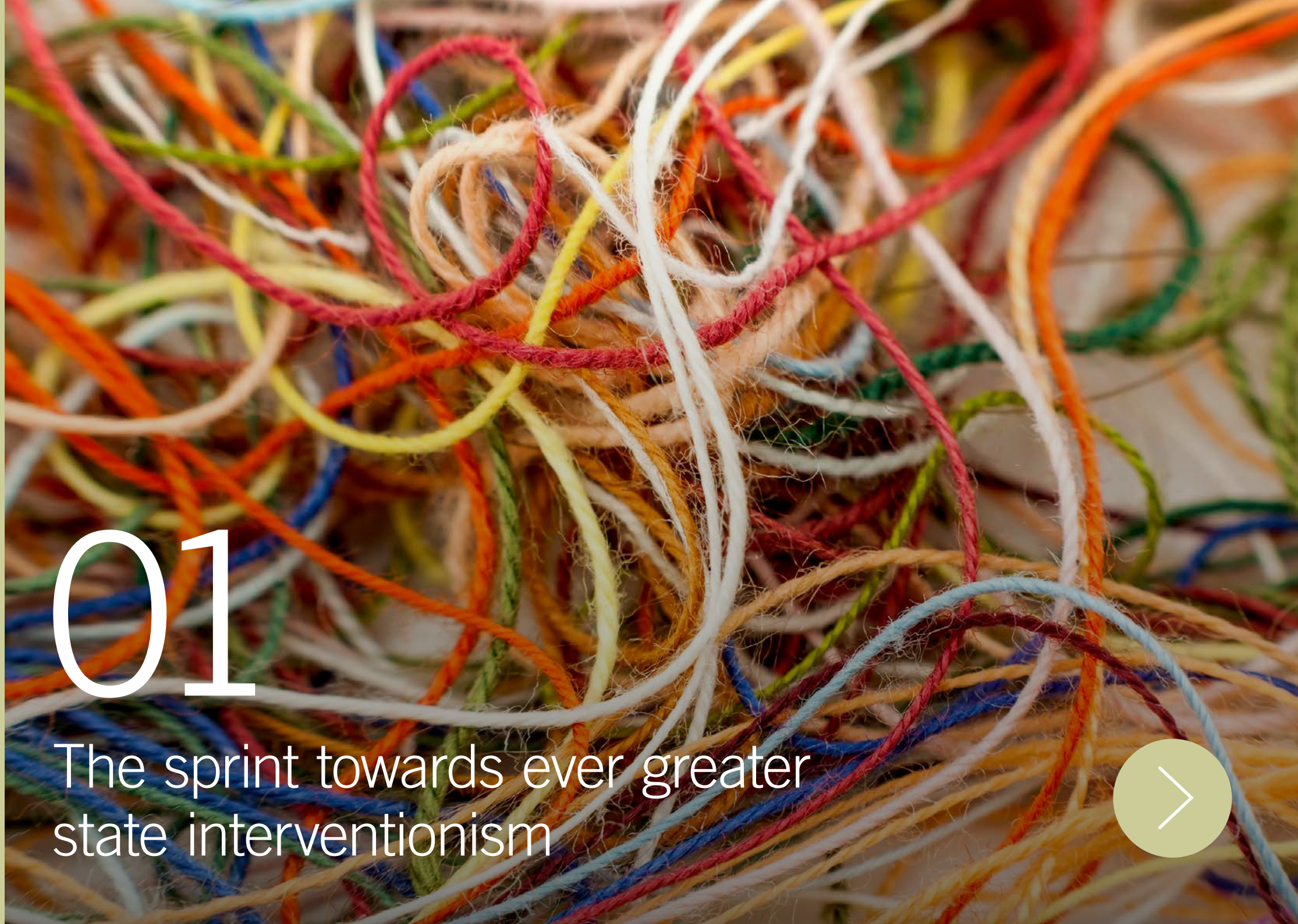

01

The sprint towards ever greater state interventionism

The sprint towards ever greater state interventionism

State interventionism is on the rise globally, but what does this mean for companies, especially in the context of the recovery? We expect more foreign investment control and protectionism especially in the tech and healthcare sectors, companies delivering on governments' sustainability agendas and authorities imposing more invasive commitments. Here's why.

"Since the start of the health crisis, foreign investment control regimes across the globe have rapidly become more burdensome. Investors are starting to see the effects, but there is still more to come."

Christoph Barth

We were already discussing the rise of state interventionism before the pandemic. The introduction and expansion of foreign investment (FI) regimes globally including US reforms to CFIUS, the French-German call for national champions and important projects of common European interest (IPCEIs) are all testament to this trend.

But the health crisis has added momentum to these developments and provided fertile ground for new forms of intervention.

What does this mean for companies trying to recover from the crisis? Here are the key things that we expect to see more of over the coming months:

1. More FI control regimes will catch more deals in more sectors

This expanded jurisdictional reach is part of a global trend, heightened by concerns about foreign rivals making opportunistic acquisitions of strategic assets and "home grown" local champions.

Procedural thresholds have been lowered to capture a wider range of investments via recent reforms in France, Germany, Italy, the UK and Spain. Australia has temporarily reduced its threshold to zero, Canada has broadened the list of investments that may be subject to additional scrutiny from the government for national security reasons, whilst Russia is also considering expanding its FI regime.

01 The sprint towards ever greater state interventionism

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Further reforms are on the horizon or could grow from political sentiment:

> The European Commission recently proposed rigorous scrutiny of investments backed by foreign subsidies. While still some way off becoming law, this would add more complexity to review processes.

> The chair of the US House Judiciary's antitrust subcommittee recently proposed a temporary merger ban and senior European politicians have mooted a similar ban on Chinese takeovers of European firms.

> The UK government's proposals – designed to protect AI, cryptographic authentication technology and advanced materials – are expected to become law next Spring, with further reform ushering in a US CFIUS style review also on the cards.

2. The tech sector will be under intense scrutiny

Major tech companies are facing a perfect storm of increased antitrust intervention, significant legislative change in many key jurisdictions:

> In the US, federal and state antitrust enforcers have opened probes into the major US tech companies, as well as high-profile Congressional hearings.

> The major Chinese online platforms signed a commitment promising fair competition following increased scrutiny of their market power in light of Covid-19.

> In the EU, Apple is in the crosshairs of competition authorities, with the EC recently launching two new investigations and the French authority imposing its highest fine ever on a single company (EUR 1.1bn).

Governments are keen to protect and maintain their technological sovereignty, including via protectionist measures and even bans on inbound investments. France and Germany launched Gaia X, the European response to the rise of US and Chinese cloud service providers. Amid rising tensions in US-China relations, the US plans to ban the messaging service WeChat and force the sale of the video app TikTok on national security grounds (a move being challenged by TikTok). While the UK decided to ban Huawei's 5G equipment in its networks and other countries may follow suit.

New EU rules will increase possibilities for (early) intervention. The P2B Regulation – addressing how online platforms treat businesses on their platforms – came into force in July. The EC also kicked off legislative initiatives on the ex-ante regulation of large online platforms to ensure contestability of markets, and on a new competition tool aimed at remedying structural competition problems. And EC Vice-President Vestager wants national competition authorities to refer more cases to the EC, even when these authorities don't have the power to review these cases themselves. She hinted explicitly at mergers in the tech sector, adding that "a company's importance for competition isn't always reflected in its turnover".

3. Far-reaching commitments will be required in exchange for state support

The Temporary Framework has given EU governments unprecedented flexibility to support Covid-19 ravaged economies via State aid rules. But it has come with strings attached, opening the way for political interference in corporate governance.

Take Lufthansa's EUR 6bn bailout which – in addition to more "traditional" slot divestment remedies – came with a ban on dividends and share buybacks until Germany has exited in full, a ban on acquisitions of competitors, and limitations on management remuneration until at least 75% of the recapitalisation has been redeemed.

Companies borrowing more than £50m under the UK's CLBIL scheme must agree to restrictions on dividend payments, senior pay and share buy-backs.

While in the US, Congress passed the CARES Act, which provides for aid to businesses struggling as a result of the pandemic, including loans with conditions attached around compensation and severance pay for highly paid employees.

As we saw with the Global Financial Crisis, the conditions imposed on struggling companies will have long-lasting effects on them, their shareholders and potential investors. Companies receiving public funds should expect their investment decisions to be scrutinised. And financial sponsors who subsequently take stakes in them will also be subject to greater scrutiny on how they manage their portfolio and how they get paid.

4. Companies may be forced to deliver on policy goals – especially sustainability

"Companies receiving public aid in Europe shouldn't be surprised if they end up implementing the EU's political green agenda."

Annamaria Mangiaracina

The EC tabled an ambitious Green Deal promising a carbon neutral bloc by 2050, approved a EUR 3.2bn IPCEI on sustainable and innovative electric batteries and is fostering European alliances in clean hydrogen and circular plastic. Conditions for benefitting from EU State aid and recovery funds have become intertwined with these political initiatives.

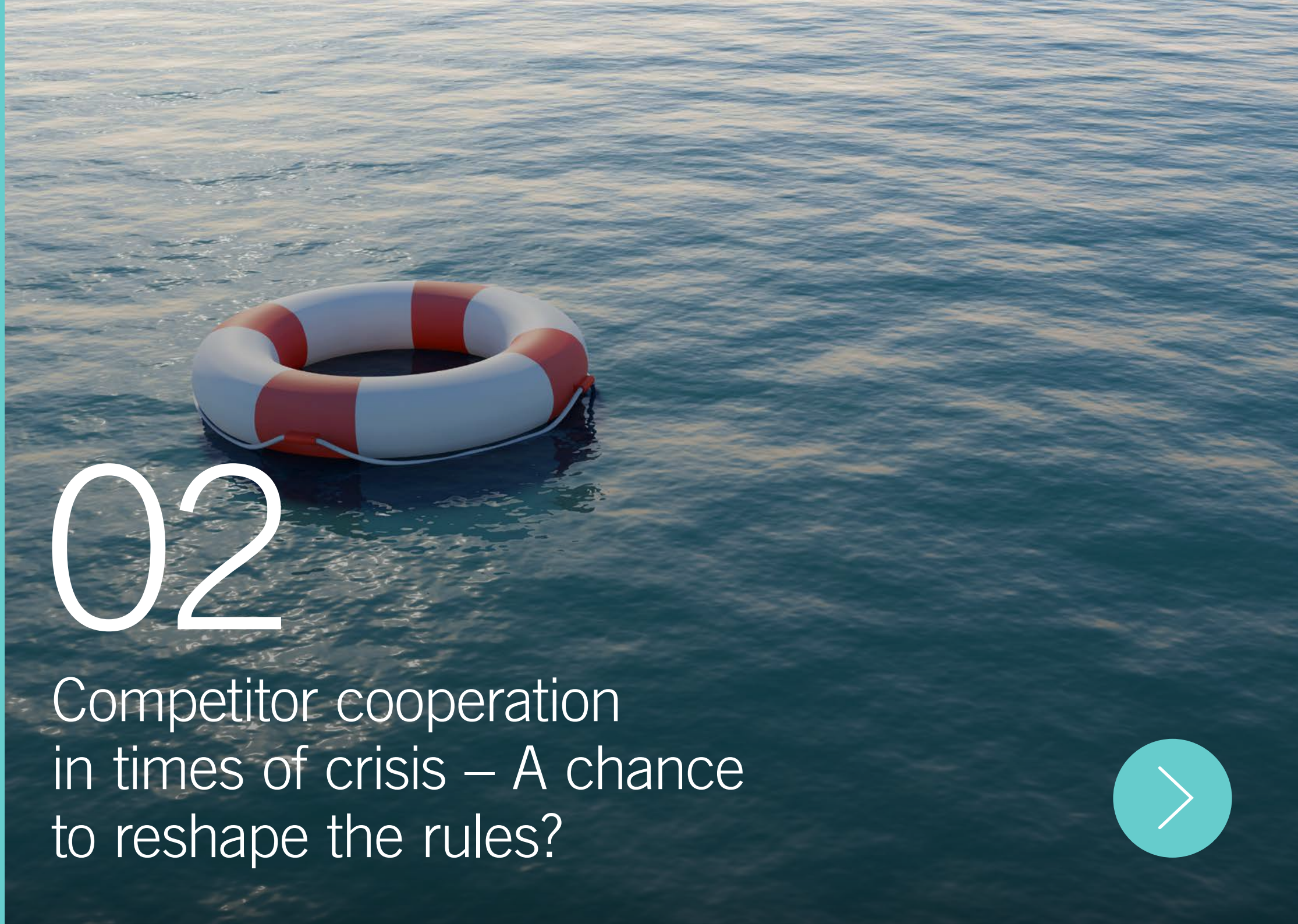
EC Vice-President Vestager has said that recipients of support "need to deliver on the objectives set by the Green Deal". And these so-called "green strings" have already been utilised by Member State governments – a trend we expect to continue. Renault's EUR 5bn guarantee from France was made conditional upon Renault joining the batteries IPCEI. While the Dutch government imposed sustainability conditions on its EUR 3.4bn support to airline KLM.

5. Pressure will mount to create national champions

Political pressure to allow for the creation of European champions is mounting. France and Germany, supported by Italy and Poland, have become bolder in their calls to arms.

And competition authorities faced with the task of reviewing a highly political merger may avoid a prohibition decision by imposing extensive commitments instead. The acquisition of Poland's biggest gas group (Lotos) by its largest refiner (PKN Orlen) is a recent example of a merger to create a "quasi monopoly". Rather than blocking the deal, the EC imposed far-reaching structural and behavioural commitments across a complex set of supply, access, transport and storage agreements. The EC is widely considered to have gone further than it would normally have done. A sign of things to come?

And what about the broader impact on merger assessments of crisis-driven M&A as we move forward into the recovery? We'll be looking at this in more depth in our third story. But as a taster: dealmakers will need to be practical and prepared. Their deals will still be subject to the usually high standards of competitive assessment. But that assessment will take place against a radically different backdrop and, in line with the broader themes we've explored here, in the face of unprecedented political pressure.



02

Competitor cooperation in times of crisis – A chance to reshape the rules?

Competitor cooperation in times of crisis – A chance to reshape the rules?

Throughout the health crisis, businesses have worked together to ensure uninterrupted supply of essentials – often supported by guidance from competition authorities. But as businesses seek to recover from the crisis and adapt to the altered outlook, what role should cooperation play? And what does that mean for the application of the competition rules?

Companies generally have to self-assess their agreements for compliance with competition law. But to tackle the health crisis some businesses have worked together to ensure uninterrupted supply of essentials – often supported by guidance from competition authorities.

Now, businesses are looking at ways to cooperate to ease recovery from the crisis. As declining markets and sudden, non-transitory shocks tend to trigger unlawful collaboration between competitors, they need to remember that competition laws continue to apply.

But the health crisis has highlighted the need to give clearer guidance on competitor collaboration, especially to foster meaningful progress on both sustainability and digital competition.

Lessons learned: Competition law and enforcement can be flexible

In response to the pandemic, competition authorities globally showed a flexible and pragmatic approach to competition law enforcement. The vast majority provided guidance and rapid review processes for temporary and necessary coordination projects (such as the European Commission's Temporary Framework, ECN Joint Statement, US fast track review and joint FTC/DOJ statement). The first sectors to benefit were healthcare, agri-food, transport, and groceries, followed by many others including telecoms, electricity and financial services.

Cooperation mostly took the form of sharing information about sales and stocks, capacity, supply gaps, or joint transport. This was accepted in several countries, provided safeguards were put in place to document and limit exchanges of information to what was strictly necessary. Some authorities favoured exchanges organised through industry associations or platforms.

Companies publicly welcomed this informal guidance and the "return" of ad hoc comfort letters. But some authorities have reported that the uptake of offers to provide informal guidance was lower than anticipated, perhaps indicating that companies prefer to take on a degree of risk rather than engaging in potentially lengthy and burdensome exchanges on the detail of cooperation agreements when they need a quick response.

02 **Competitor cooperation in times of crisis – A chance to reshape the rules?**

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Challenges for now: Bringing capacity back online in the "new normal"

The pandemic has led to a dramatic drop in demand and under-utilisation of production capacity in many sectors.

Although agreements among competitors on capacity and production restrictions are in principle prohibited by competition law, a coordinated reduction of overcapacity (often referred to as crisis cartels) can be justified in individual cases, especially if it's temporary. The logic is that competition will be enhanced if more suppliers survive the crisis. However, companies should not engage without prior legal advice.

As lock-down measures ease, closed sectors will need to re-open (preferably) in an orderly and coordinated fashion. Sectors with complex supply chains have already seen chain reactions and delayed restarts to production. Look at the automotive industry: by the time negotiations between manufacturers and suppliers were concluded, companies in crisis risked already going into insolvency.

This was addressed in Germany where the competition authority agreed with the German Association of the Automotive Industry on framework conditions for restarting automotive production and a model for restructuring suppliers applicable until the end of 2021.

And Brazil's CADE authorised a cooperation agreement between major food and beverage companies to mitigate the effects of the crisis on smaller retailers by helping them to reopen, including by providing PPE and offering special trading conditions to replenish stocks.

Back to reality: The competition rules still apply

"Authorities have shown welcome flexibility and speed to allow temporary and necessary business cooperation in response to the pandemic. As we head into the recovery and competition authorities review their rules, now is a good time for companies to continue the dialogue with the competition authorities on long-term safe harbour rules for positive cooperation."

Daniela Seeliger

Many authorities have expressed concerns that temporary infrastructure and information sharing create familiarity and open the door to ongoing tacit and unlawful collusion.

Although interim authorisations and comfort letters provide some legal certainty, they do not protect companies from investigation. And Covid-19 may not stop them any longer. The German FCO is working on far-reaching protection measures for dawn raids and authorities will generally resume using their investigative powers (including dawn raids). When they do, prime targets for investigation could be companies that have worked together during the crisis. For example, Russia's FAS's traditional interest in the healthcare sector resulted in more than 35 new cases in H1 2020. If in doubt, businesses should carry out spot audits and internal investigations and revisit their compliance programmes now.

From recovery to sustainable and digital competition: Spotlighting the need for guidance

"Despite competition law's inherent flexibility, the pandemic spotlighted the existing need for explicit guidance on two areas of collaboration: to achieve important sustainability goals and to enable data-sharing between tech companies to enhance digital competition. We expect to see accelerated progress in these areas, especially in the EU."

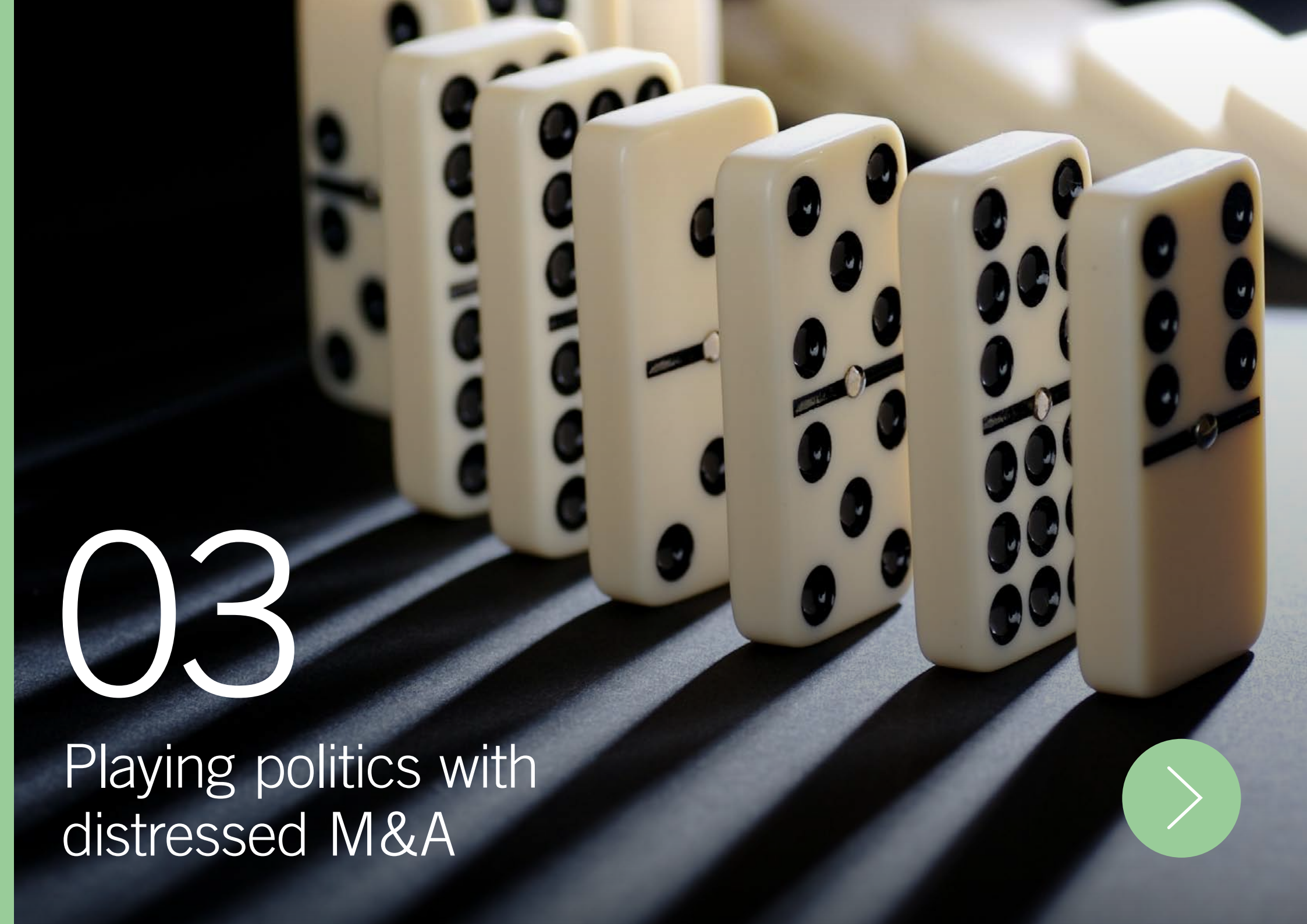
Thomas Elkins

The pandemic clearly brought to light what we've already seen before: a growing consensus on the need for more guidance on certain forms of collaboration. The winners could be ESG and digital cooperation – two topics that top the EU agenda.

Our survey confirms that companies want explicit guidelines on cooperation to achieve meaningful progress on sustainability. The Dutch authority has taken the first step, issuing draft guidelines which explicitly state that benefits to society as a whole such as lower carbon emissions could outweigh any harm to direct consumers. The EC fully endorsed the need for clear guidance and is looking into this as part of its ongoing review of Horizontal Cooperation Agreements. Meanwhile, the CMA – which has listed sustainability as one of its top priorities – intends to use its consumer law powers to help achieve progress, in addition to communicating more clearly about what is lawful cooperation in this space.

Similar calls have been made to provide more guidance on digital cooperation and to ease data-sharing between businesses. China's SAMR signalled that it would be open to exempt agreements that are conducive to technological progress. The EC's industrial strategy acknowledges the need for "a framework to allow businesses to create, pool and use data to improve products and compete internationally".

We expect that with Germany chairing EU talks between national governments until the end of the year, at least in the EU there will be significant progress on giving companies more guidance on lawfully collaborating in these key areas.



03

Playing politics with distressed M&A

Playing politics with distressed M&A

The checks and balances of the merger control process are never more important than in times of crisis. But we are already seeing signs that crisis-driven M&A reviews will face intense political pressure. Meanwhile, authorities have been bracing themselves for a surge in failing firm defence claims. Traditionally met with scepticism, will they gain traction through the Covid-19 lens?

In the aftermath of the pandemic, companies in almost all sectors could find themselves in severe financial distress, having to decide between exiting the market and merging. Some of these will be under-performing "zombie" companies. Others will fall victim to reduced demand which may never come back.

On the flipside of the obvious challenges, there will be significant opportunities for well-placed incumbents, financial investors and challengers too – especially in "winning" sectors post-Covid such as tech and healthcare.

The checks and balances of the merger control process are never more important than in times of crisis. But we are already seeing signs that, while remaining subject to high standards of competitive assessment, reviews will face unprecedented political pressure. Meanwhile agencies must grapple with the challenges of applying an inherently prospective and potentially lengthy assessment in times when market circumstances can change quickly and unpredictably, and when delay risks value depletion.

Political threats and opportunities

"Governments will become ever more involved in deciding the fate of M&A deals, keen to rescue strategic companies and "de-risk" global supply chains. They will be more wary than ever of perceived predatory deals – especially by foreign buyers in important sectors like tech and biopharma."

Thomas A. McGrath

03 Playing politics with distressed M&A

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Political intervention in the merger process and criticism of agency permissiveness in certain sectors were already on the rise before the crisis hit. But as part of a broader trend, governments are becoming ever more involved in M&A – keen to push through deals which pursue public policy goals (like protecting employment) and more wary than ever of perceived predatory (foreign) deals, especially in sectors like tech and biopharma.

The pandemic has also shone a very public light on the risks of relying on global supply chains. Look at healthcare, where policy makers have learned hard lessons about the importance of domestic sources for essential drug ingredients and PPE. Beyond State aid and subsidies, governments will likely go further to "de-risk" supply chains and rescue strategic companies. Following Germany's 50Hertz example in 2019, EC Vice-President Vestager recently urged EU Member States to take stakes in European companies to prevent foreign takeovers.

But there are lessons from the 2008 Global Financial Crisis. Some mergers like Lloyds/HBOS, waived through on public policy grounds, were heavily criticised as permanent fixes for temporary problems. And private players found themselves to be public property, subject to ongoing and often uncomfortable levels of control.

There will also be challenges with addressing market distortions brought about by subsidising some companies/sectors and not others. The EC is looking at foreign subsidies – but it remains to be seen how effective its plans will be in practice.

The CMA will be another important authority to watch here given its particularly economics-focused approach to merger assessment. It can also be expected to be interventionist: recent decisions to intervene in non-UK centric cases (e.g. Sabre/Farelogix and Thermo Fisher/Roper) have attracted significant attention globally. They reflect the CMA's keenness to demonstrate its credentials as a leading global authority ahead of the end of the Brexit transition period (and the One Stop Shop under the EU merger rules) in December, when many deals will become subject to parallel EU and UK review.

Derogations may provide procedural breathing space

Opportunities to acquire distressed assets will go hand in hand with requests to allow merging parties to close before their merger clearances are in place. We saw this during the 2008 Global Financial Crisis, when the European authorities showed that they can act swiftly, granting derogations within a few working days. We expect them to again respond rapidly to any requests over the coming months.

In other jurisdictions like the US, derogations aren't possible. But the suspensory period is shorter for acquisitions of targets in bankruptcy proceedings.

Some authorities have gone further. For example, a new exemption from Brazilian notification is available until 31 October (or for as long as Brazil's state of emergency lasts) for otherwise notifiable cooperation agreements related to mitigating the consequences of the pandemic.

Failing firm defence: don't get your hopes up

"To succeed with a failing firm defence and overcome authorities' scepticism, it remains key, even in current market circumstances, for dealmakers to put forward compelling evidence – consistent with past and future financials and also reflecting on deal alternatives – to substantiate that the target's exit is inevitable absent the deal."

Isabel Rooms

We could be forgiven for thinking that the failing firm defence – traditionally rarely invoked or accepted to allow clearance of an anti-competitive deal – would become much more prevalent over the Summer and beyond.

But in contrast to supportive moves by authorities to "soften" some competition rules, traditional scepticism of perceived attempts to flout the merger rules persists. Authorities have made strong statements that their approaches will remain unchanged. Take the CMA's Covid-19 guidance, put into practice when it rejected FFD arguments in JD Sports/Foot Asylum despite the shutdown of UK highstreets (now on appeal).

The FTC has expressed great scepticism of claims that one of the merging parties is a failing firm, making it clear that the FTC would not alter its strict requirements. By contrast the DOJ confirmed that it is taking the impact of Covid-19 into account. And the ACCC has acknowledged that "very hard calls" will need to be made in respect of potential failing firms of strategic importance to Australia.

It will be vital for merging parties to quickly provide – and for agencies to properly interrogate – credible and compelling evidence of the need for relief, based on several possible counterfactuals. The CMA's controversial U-turn in Amazon/Deliveroo is a cautionary tale of what can happen otherwise. Parties will also need to show long-term effects: a short-term hit that will pass won't be enough.

Dynamizing market definition

Companies have shown real dynamism by switching production during the crisis – from fashion to face masks, and from gin to hand sanitiser. Supply-side substitutability could play a more important role when defining product markets, feeding into the substantive assessment of mergers as well as the ongoing consultation on the EC's market definition notice.

What about remedies?

Where divestments are required to address concerns, potential purchasers – especially private equity firms – should expect intense scrutiny from competition agencies. In some jurisdictions like the US, it is now nearly always necessary to line up an upfront buyer.

Recent remedies packages are notable for their stringency. But the more stringent the remedy requirements, the smaller the pool of suitable buyers. Finding the type of perfect buyer that was required in Takeda/Shire (independent, no competition issues, plus sufficient financial resources, expertise and incentives to bring a pipeline product to market) will be hard if not impossible when capital is constrained, especially in badly affected sectors like transport.

Agencies are already extending remedy deadlines to ease the pressure. But it is likely that we'll see more waiver requests. More remedy failures seem likely too. Like Safeway/Albertsons in the US where the buyers went bankrupt shortly after acquiring the divested businesses. Or Outokumpu/Inoxum in the EU where ultimately the divestment business was reacquired by the seller (Thyssenkrup) due to the lack of suitable buyers.

04

Capitalising on a crisis – Competition, market power and exploitation

Capitalising on a crisis – Competition, market power and exploitation

With our increased reliance on technology and concerns around access to essential products, competition policy is tasked with urgently answering fundamental questions about consumer welfare and fairness. In a way that we haven't seen before, consumer interests are having an immediate impact on political agendas – with major consequences for competition policy and enforcement.

The orthodoxies of competition law and its remit, already under siege, have been further challenged by the health crisis. In particular, the traditional notion of consumer welfare was already being criticized as too price-focused, without taking proper account of other competition factors like innovation, quality, and long-term investment.

During the recovery, with even more reliance on "free" technology, plus new concerns around access to essential products and the impact on employment and other social goods, competition policy is tasked with more urgently addressing its perceived deficiencies in the face of attempts to take advantage of the crisis.

When businesses think about the competition rules, they will need to think more broadly, in a way that we haven't seen before. Price may need to make more room for innovation, sustainability, the environment, employment, privacy and social and economic inequality which have become the focus of political agendas.

Digital platforms, fairness and collective bargaining: A world tour

"The pandemic has catapulted the digital revolution into warp speed. Emerging from the crisis, there is new urgency and focus to address the market power of global tech platforms. The outcomes of this battle will have important ramifications for many other sectors".

Fay Zhou

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Lockdown pushed even more of us online. The ever-increasing importance of technology means that ensuring that these markets function and evolve competitively is the top priority for many competition authorities.

The concerns are not new: authorities were already worried that markets will tip and that existing platforms will use acquisition strategies to kill emerging competition before it can gain a foothold. But the potential scale of the consumer harm is larger than ever before. And the traditional focus on assessing short-term price effects has limits when so many digital services are offered for free.

For its part, the European Commission's top priority is to inject fairness and market access into the digital economy. Beyond enforcement against Big Tech and a Sector Inquiry into the Internet of Things, it has proposed new regulatory and competition powers:

- a New Digital Services Act to stop platforms misusing their position as both the platform owner and a competitor (self-preferencing) and imposing data portability requirements (interoperability);
- a new competition tool to carry out market investigations and impose market-wide remedies to tackle structural problems like gatekeeper-platforms using their power to drive out competitors; and
- new regulations or guidance to ensure that competition rules do not prevent self-employed workers, especially in the gig economy, to collectively bargain with their platform employers.

Similarly, the UK's Competition and Markets Authority has proposed regulating the behaviour of digital platforms. A new Digital Markets Unit would enforce a code of conduct governing platforms with "strategic market power" and impose a range of remedies including data-related interventions, enhanced consumer choice, ending default settings, and the separation of platforms.

The US Federal Trade Commission is holding a series of hearings into how antitrust law can adapt to the digital economy, while the House judiciary antitrust subcommittee is investigating online platforms and market power. The FTC has also announced that it is investigating past acquisitions by GAFAM, focusing on how deals were reported, and whether they made anti-competitive acquisitions of potential competitors that fell below the merger filing thresholds.

The German Federal Court of Justice has found that Facebook is abusing its dominant position by not providing users with a choice over its use of data generated outside of Facebook. And ongoing German competition law reforms will further tighten the rules for large digital platforms – barring them from self-preferencing or pooling data from multiple sources.

China is also increasing its scrutiny of tech platforms. Following an online meeting in which SAMR raised concerns over unfair competition and abuses of dominance in the digital space, China's biggest players (including Alibaba, Tencent and Baidu) signed a high-level pledge to compete fairly. And SAMR is reportedly preparing an investigation into alleged abuses of dominance by the most widely used mobile payment platforms (including WeChat Pay and Alipay) following a complaint by the People's Bank of China (China's central bank).

And the Australian competition agency continues to investigate tech platforms with a "wider lens", bringing together competition, consumer law, privacy and media content policy. It has recommended a new prohibition against "unfair trading practices".

Capturing benefits for the many

Beyond assessing price vs. non-price effects, the traditional notion of consumer welfare focuses on short-term benefits for direct consumers of specific products.

We've discussed previously the need to acknowledge wider benefits to society as a whole when companies work together on genuine sustainability projects. We expect to see progress here following the Dutch authority's significant first step (endorsed by the EC) in providing clarity that it intends to consider these wider benefits when assessing sustainability agreements.

And a Biden win in the US presidential elections will mean similar trends in the US as progressive politicians increasingly press merger control policy as a tool to ameliorate inequality, for example by looking at effects of a merger on employment, impacts on small businesses, and incentives for long-term investment, including for innovation.

Finding ways to tackle price gouging

Even where consumer harm *can* be felt via short-term price effects, the health crisis has shown that we can't always use existing competition tools to solve the problem. Price hikes on essential items like face masks and hand sanitisers have been a major theme of lockdown. Tackling them under competition laws can be difficult since most regimes only allow intervention against unilateral conduct when a dominant firm "abuses" its market power by charging "excessive" prices.

Despite the CMA's pro-activity (setting up a taskforce to gather evidence of harmful commercial practices and investigating several pharmacies and convenience stores), it has advised the UK Government on the need for "emergency time-limited" legislation to properly tackle excessive pricing.

South Africa has done just this, with 25 excessive pricing investigations brought under both existing competition law and new consumer protection regulations which prohibit charging prices above a certain threshold linked to a product's cost of production and the seller's margins pre-crisis. Meanwhile France has capped prices of sanitising gels and US Attorneys General have expressed their determination to prevent price gouging of essential products.

China's SAMR already has the existing Price Law at its disposal, which prohibits price gouging even without collusion or dominance. It has published guidelines to ramp up enforcement concerning supplies essential to preventing infection.

As lockdown measures ease and consumers venture out again, ensuring that competition law and enforcement protects them against exploitative practices will doubtless stay a top priority. And let's not forget that there are some major pre-Crisis excessive pricing investigations still ongoing in the EU.

How to navigate the rapids

> "Navigating in a Covid era, consumer interests through a political lens and new competition policy and enforcement priorities will require companies to stay on top of fast-moving developments. They will need to be agile, politically savvy and engaged in their communities."
>
> **Nicole Kar**

The evolving definition of consumer welfare will lead to increasingly political and socially focused enforcement priorities and outcomes. It will be vital for companies to stay on top of fast-moving developments. They should:

- expect increased scrutiny of their activities in all spheres – including those not traditionally regarded as relevant to competition law;
- engage early with competition agencies and wider interest groups; and
- be ready to present well-evidenced efficiency rationales for strategic business decisions and deals, including in respect of non-price factors such as environmental and innovation benefits.

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