

# Global Antitrust and Competition

2022



# Global antitrust and competition

Providing strength and depth from our global footprint

Our global competition team provides clients with a one stop legal service for merger strategies, filings and clearances, regulatory and criminal investigations into anti-competitive practices, and litigation including class and group actions. Our global approach informs our design of effective antitrust and compliance protocols for global businesses. Our experience extends from jurisdictions with more extensive and mature antitrust and competition regulatory and enforcement framework, including those in **North America, Europe and Australia**, to more nascent jurisdictions in **Asia, Middle East, Africa and Latin America**.

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Continents: Africa, Asia, Australia, Europe, North & Latin America



55

Partners

180

Lawyers



## Full service global antitrust and competition team

Global service with local expertise

Breadth and depth of expertise

One stop legal service

Partnership approach

### Global Competition Review

Global Elite **TOP TEN** global antitrust and competition practices 2022

**NUMBER 8** legal practice for merger control worldwide 2022

**NUMBER 7** legal practice for competition litigation worldwide 2022

*“one of only two firms to house GCR-Ranked competition teams across five continents”*

*“The team has a great sense of business acumen and is always able to provide pragmatic advice and solutions instead of theoretical legal advice”.*

Legal 500 2022 Asia Pacific – Antitrust and Competition

*“The NRF Competition Team have provided us with consistent and high calibre support for a number of years. They know our business and are able to provide practical, commercial advice and have an excellent understanding of the law in this area and best practice. They are a very personable team with sharp focus and responsive turnarounds. We have found them highly adaptive in responding to questions from different parts of our business and a pleasure to work with. They have been creative and responsive in their training offerings for us.”*

Legal 500 UK 2022 – EU and Competition

*“It has very good client service and is responsive. It has a wide array of expertise across many offices and practice areas.”*

*“The antitrust team is very strong,”*

Legal 500 USA 2022 Texas – Antitrust and Competition

*“Norton Rose Fulbright provided a great service throughout the process. They kept us well informed at every stage, explained the areas we had to focus on and appropriately staffed the work required, using juniors where appropriate, whilst ensuring senior partner focus was there when required and at critical times.”*

Legal 500 Australia 2022 – Competition and Trade 2022

*“One of the best teams you can find on the London legal market. Outstanding subject matter expertise supported by in-depth industry and market knowledge and tailored business-partnering approach.”*

*Not your usual legal services provider but a true business partner.”*

Legal 500 UK 2021 – EU and Competition

# Mergers – Track record

We have a track record of advising on complex, high-value and sensitive antitrust litigation and investigations, having worked for a number of prominent clients across key industry sectors including technology and consumer markets.

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We acted for **Paypal** on its high profile US\$2.2 billion acquisition of iZettle, achieving unconditional UK Phase 2 clearance. We were instructed at Phase 2 in place of PayPal's Phase 1 advisers. This was a high profile transaction in a challenging context given current focus on digital markets, the CMA adopting an innovative approach in its analysis and possible "killer acquisition" concerns.

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We represented **Reckitt Benckiser** in its cross-border acquisition of KY brand from Johnson and Johnson including the merger control filings in the US, Latin America, Europe and Asia Pacific.

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We represented **Gemalto**, a leading international digital security company, in relation to its acquisition by Thales. This US\$5 billion transaction involved merger and regulatory filings in more than ten jurisdictions, including the US, EU and China, and was the first case in which the European Commission accepted use of TAR – Technology Assisted Review – for responses to requests for parties' internal documents.

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We assisted a **multinational technology** company in respect of the merger control procedures world-wide concerning Google's acquisition of Fitbit, leading several authorities including in Europe, Japan, South Africa and Australia to challenge the transaction and imposing remedies

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We acted on a major 50:50 joint venture between **BP** and **Bunge** for production of bioethanol and sugar, bringing together the production activities of two significant players. Brazil is one of the primary global producers of sugar/bioethanol, and this was the largest deal in the bioenergy sector in nearly ten years. Merger control clearances were required in Brazil, the EU, China, South Korea, Turkey and Ukraine.

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We represented **Vodafone Hutchison Australia**, the third largest mobile telecoms operator in Australia, in its A\$16.6 billion merger with TPG, the second largest fixed telecoms operator in Australia. The matter proceeded to litigation and was approved in the Federal Court without conditions or remedies.

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We have acted for **Delta Air Lines** on a variety of transactions, involving merger filings in a large number of global jurisdictions. This includes Delta/China Eastern taking 10 per cent stakes in Air France-KLM and Air France-KLM purchasing 31 per cent of Virgin Atlantic Airways from Virgin Group. Delta owns 49 per cent of Virgin Atlantic – a transaction we also advised Delta on with numerous merger control clearances.

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We advised **Nomad Foods** in connection with several acquisitions of European frozen food businesses from major competitors across Europe includes its €615 million acquisition of Fortenova Group's Frozen Food Business Group (FFBG), a leading European frozen food portfolio operating in attractive markets new to Nomad, including Croatia, Serbia and Bosnia & Herzegovina, Hungary, Slovenia, Kosovo, North Macedonia and Montenegro.

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We acted for **Linfox** in all aspects of the proposed joint acquisition (with Pacific National) of Aurizon's intermodal rail freight business in Queensland for \$220 million, including seeking competition clearance from the ACCC. This high profile merger was the first time the ACCC took an action in court to prosecute the parties involved.

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We advised **Carlsberg** on its joint venture with British pubs and cask ale firm, Marston's securing unconditional Phase 1 approval from the CMA on 9 October 2020.

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We were retained as "hired gun" counsel to lead buyer's response to investigation by US federal and state antitrust inquiry into non-HSR reportable transaction in the **supermarket industry**. We obtained closure of the investigation after a Second Request with no divestitures or other remedies. The transaction value is greater than US\$100 million.

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We acted for Africa-focused gold producer **Randgold Resources**, at the time listed on the London and NASDAQ stock exchanges, on its \$18.3 billion merger with Barrick Gold. This complex transaction created the world's largest gold- mining enterprise and required merger control approvals from the South African and COMESA authorities.

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We assisted **Life Technologies Corporation** in seeking conditional merger control clearances in Australia, Asia, Canada, the EU and South Africa arising from the US\$13.6 billion acquisition by Thermo Fisher Scientific.

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We advised on **Parmalat's** C\$1.6 billion acquisition of the natural cheese business of Kraft Heinz Canada ULC which was cleared without the need for any remedies.

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We advised **Cathay Pacific** on its HK\$4.93 billion acquisition of Hong Kong Express which secured unconditional approval across a number of 8 Asian jurisdictions

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We advised **GSK** in Australia in relation to a complex global US\$33 billion deal involving an innovative tripartite asset swap and related joint venture between GSK and Novartis. The matter was awarded "Global Matter of the Year" by Global Competition Review.

## Merger Control

**Post-Brexit coordination** Parallel reviews do not necessarily focus on the same potential concerns (or do so at the same time), and the CMA Phase I – Phase II transition complicates coordination.

**Jurisdictional flexibility** Regulators are taking increasingly expansive approaches to jurisdiction:

- ▶ The CMA “share of supply” test applied to combine vertically (Google/Looker) and complementary (Roche/Spark) markets, and the CMA has relied on indirect supply relationships. Recent proposals would also extend jurisdiction to cover circumstances where a single party has a share of supply of 33% and there is no overlap at all.
- ▶ The FCO uses the “substantial domestic operations” limb of the “transaction value” threshold to pick and choose when to take jurisdiction.
- ▶ The EC’s “new” approach to Article 22 enables it to exert jurisdiction at will.
- ▶ Implications for document drafting and negotiations – CPs, break-fees, closing dates and antitrust risk allocations.

**DMA** Introduces an obligation to “inform” the EC (from 2024).

**Regulatory priorities** Merger reviews are not carried out in a vacuum. industrial policy is reflected in reviews (e.g., increasing focus on accumulation of data that may differentiate the acquirer as a result of its aggregated data sets, with ex ante regulation imposing access obligations in parallel) and assumptions about potential greenfield entry absent the transaction are becoming more aggressive.

**Focus of review** shifting in the sector:

- ▶ Data-driven deals – CMA has called in 40% of data-related transactions reviewed in last six years
- ▶ Killer acquisitions
- ▶ “Dynamic and “potential” competition, not just static – Meta/Giphy CAT judgement and Illumina/Grail.
- ▶ Remedies – data silos in Google/Fitbit (“quasi-structural”), APIs in Facebook/Kustomer and other access remedies

**Simplified Procedure** Scope expanded and streamlined further

- ▶ Expansion of types of JVs and increase in market share threshold for vertical deals, within scope
- ▶ Procedural changes include the ability to issue SSOs and Letters of Fact, and formalising hearing of third parties, and early submission of commitment proposals
- ▶ EC discretion to flip between normal and simplified procedures
- ▶ Super simplified procedure
- ▶ Changes to Forms, and submission procedures etc.

## Foreign Subsidies

**Levelling playing field** Siemens/Alstom was catalyst; intended to mirror effect of public procurement and trade defence instruments vis-à-vis recipients of foreign subsidies.

**Financial contribution concept is broad** Catches fiscal incentives, compensation for burdens imposed by public authorities, provision of goods and services to involving government authorities/entities whose actions can be attributed to non-EU countries.

**Notifiability** At least one party established in EU and generated at least EUR 500 million in EU; parties combined received aggregate non-EU financial contributions of at least EUR 50 million in last three years.

**Procedure** Modelled on EUMR procedures, with Phase 1 of up to 25 working days (and Phase 2 lasting up to a further 90 days, with potential for extension by 15 working days). No time limits for transactions that were not notified. EC has power to send binding RFIs, conduct dawn raids, impose fines and interim measures.

**Broad ramifications** Will need to be reflected in due diligence, transactional due diligence, CPs and closing dates:

- ▶ Transactional due diligence will require deep dive on target's contractual counterparties, tax and other incentives etc.
- ▶ Transactional documents will require new covenants, CPs, termination provisions, remedies etc.
- ▶ Serial acquirers will need a new compliance process to inventory and quantify financial contributions received.

## FDI

**Proliferation** Ever growing number of regimes, leading to review of large numbers of transactions (OECD indicate \$1.426 billion of deals reviewed in 2019).

**Thresholds** Many European jurisdictions triggered by acquisition of more than 25% of voting rights of domestic entity (or 10% for critical infrastructure), with potential for further notifications on increases in holding. In some jurisdictions, acquisition of "atypical acquisitions of control" (through influence on supervisory bodies, veto of certain decisions and rights to sensitive information) are subject to review.

**Sectors covered** Strategic sectors requiring mandatory notification in most European jurisdictions include R&D re cybersecurity and AI, advanced robotics, communications, computing hardware, critical supply to government, data infrastructure, quantum technologies, and dual use products. Mandatory review can also be required for cross-sector transactions involving critical infrastructure. Other sectors may be subject to voluntary notifications (and can be called in if not notified).

**Substantive assessment** Reviews consider whether acquisitions likely to impair public order or security.

**Interaction with other regimes** In many European jurisdictions, parallel application of merger control regimes with potential for national interest intervention further reinforces need for close coordination (to manage the so-called double veto mechanism).

The logo for Norton Rose Fulbright, featuring a stylized upward-pointing arrow above the text "NORTON ROSE FULBRIGHT".

## NORTON ROSE FULBRIGHT

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**Law around the world**

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