

# Competition Compliance 2020

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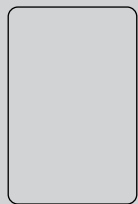
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**Contributing editor****Peter Crowther****Winston & Strawn LLP**

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Lexology Getting The Deal Through is delighted to publish the fourth edition of *Competition Compliance*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Bulgaria, Mexico, Norway and Romania.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Peter Crowther of Winston & Strawn LLP, for his continued assistance with this volume.



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# Global overview

Peter Crowther

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## Introduction

Effective compliance with competition laws remains crucial as competition investigations, settlements with regulators and civil litigation related to compliance issues continue to make headlines around the world. However, although most companies know that they are expected by regulatory authorities to have effective compliance programmes in place to mitigate risk, identifying those risks and guarding against them can be difficult, particularly for multinational companies operating under a myriad of laws and legal systems.

While individual and tailored advice is always of critical importance, this edition of Lexology Getting the Deal Through: Competition Compliance aims to provide legal practitioners, in-house counsel and those in business with an overview of competition compliance in 20 jurisdictions. Each jurisdictional overview considers competition compliance in a number of key areas, including in respect of: attitudes to compliance; requirements of compliance programmes; dealings with competitors; cartels and leniency programmes; dealings with commercial partners; behaviour as a dominant player in a market; mergers and acquisitions; investigations; key development; and future reform.

## Trends

Each jurisdiction faces its own compliance challenges and will react to those challenges depending on the maturity of the legal systems and controls that are in place, their specific economic considerations and cultural attitudes towards compliance. However, there are certain recurring issues that are currently being tackled by different competition authorities around the world. We highlight here some of those trends and broad themes, together with some examples of specific issues that have arisen in certain jurisdictions.

## Antitrust

Digital markets and big data continue to be priorities in terms of global enforcement, with authorities around the world considering whether their existing tools are sufficient to tackle issues relating to digital platforms, technology giants and the use of algorithms. A number of reports and studies have recently been published, including a joint study by the French and German national competition authorities on 'Algorithms and Competition'. More generally, it is clear that greater resources are being dedicated to the challenges posed by digitalisation. Companies operating within that sector or using digital tools such as pricing algorithms should be alert and responsive to developments in enforcement practices.

Various questions have in the past few years been raised over whether the rise of private damages claims have negatively impacted the number of leniency applications that are made in respect of cartels and whether leniency is still an effective tool in detecting cartels. At the same time that leniency applications are down across the globe, national competition authorities are broadening their potential avenues for encouraging the reporting of illicit behaviour by implementing whistle-blowing mechanisms. By way of example, in March 2020,

Brazil's Administrative Council for Economic Defense established an online whistle-blowing channel, which is open and accessible to any citizen and which offers various protections to whistle-blowers. In the European Union, a Directive has been adopted that aims to guarantee a high level of protection to whistle-blowers, with member states being required to implement national measures by mid-December 2021. Global companies, therefore, need to ensure their internal compliance programmes and reporting policies comply with the specific varying demands of local jurisdictions.

On the subject of local jurisdictions, it is clear that in addition to common global themes, competition authorities around the world continue to tackle issues based on their own respective priorities, agendas and local challenges. The Spanish national competition authority has, for example, increasingly focussed on bid rigging and public tenders. India has seen several behavioural orders passed concerning conduct of technology-driven companies. The Mexican national competition authority launched a number of investigations into conduct in petroleum markets. The UK has sharpened its focus on national security issues. Local compliance efforts need to be particularly sensitive to local priorities.

## Mergers

Within the context of merger control, there has been an increased focus on the enforcement of procedural infringements. Most notably, this past year has seen the imposition of a fine on Canon by both the US Department of Justice and the European Commission for the implementation of Canon's acquisition of Toshiba Medical Systems Corporation through the use of a two-step 'warehousing' transaction structure before approval had been obtained. These fines followed similar decisions of the Chinese and Japanese authorities. This focus on procedural infringements has also been seen in the UK. In September 2019, the Competition and Markets Authority (CMA) imposed its largest ever fine for a single breach of an initial enforcement order on Paypal, in the context of its acquisition of iZettle. The CMA had granted a derogation relating to cross-selling pilot campaigns involving Paypal's non-UK businesses on the basis that any international activities did not affect the UK and were confined to non-UK jurisdictions. Despite assurances and contrary to the derogation, PayPal conducted campaigns that led to it contacting potential UK customers. The CMA consequently imposed a fine on Paypal. This is just one illustration to show that the CMA has been developing a tougher stance towards compliance and enforcement, as well as a more interventionist approach towards mergers in general in terms of assertion of jurisdiction, investigation of non-notified deals and referrals to Phase II investigations.

Increasingly, there has also been greater scrutiny over deals involving foreign investment. In the UK (as well as elsewhere in Europe), the government has intervened a number of times over the course of the past year in transactions on the grounds of potential national security concerns, in particular on the basis of the wider jurisdiction granted by legislative changes in mid-2018. In the US, there have also been recent

changes to the process of the Committee on Foreign Investment in the United States (CFIUS) that greatly broaden the scope of transactions subject to review to include non-passive investments in US businesses with critical infrastructure and sensitive personal data. Recent regulations also expand CFIUS review to certain real estate investments.

In addition to an expansion of jurisdiction on foreign investment grounds, a number of jurisdictions (including Germany and Austria) have also amended their merger thresholds (or are considering doing so) to try and capture transactions in digital markets where the turnover of the target may not yet be sufficient to trigger existing thresholds but nonetheless may threaten competition. It is, therefore, important to keep abreast of specific local merger control thresholds as these continue to evolve.

### **Conclusion**

Competition authorities in jurisdictions around the world are continuing to closely monitor markets and are intervening as frequently as ever. Accordingly, it remains vital to continue to have an effective compliance programme in place and to continue to monitor and update processes and policies on a regular basis. Such efforts, executed according to a coherent global compliance plan, undoubtedly help maximise the chances of ensuring smooth and undisrupted business operations on a global basis.

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