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By Brad Staples & Rachel Brandenburger | APCO

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Introduction

Businesses are facing unprecedented challenges. Changes in the geopolitical landscape call into question (and even reverse) many of the key assumptions that have been in place for many years. Antitrust, competition and other regulators around the world are reassessing their policies and enforcement priorities in response to these changes. In addition, countries accounting for more than half of the world's population are holding elections this year, which could result in leadership changes that further impact these shifting landscapes.

This paper looks at (1) the shifting geopolitical landscape; (2) the shifting political landscape; (3) the shifting antitrust, competition and regulatory landscapes and then (4) concludes by explaining how business can respond to these shifting landscapes.

I. The Shifting Geopolitical Landscape

The contemporary global landscape is marked by a fragmented world order. It is besieged by crises and discord. From enduring conflicts in Europe and the Middle East, to the resurgence of nativist populism and divergent industrial policies, the global arena is fraught with tension. Human rights, climate change, immigration policy and national security issues are being strategically leveraged to advance geopolitical and domestic political agendas.

Tariffs and sanctions are increasing, complicating international relations and cross-border trade. Debt-related issues persist, casting doubts on economic stability. Fractured supply lines and the lack of resilient trade corridors are hindering trade flows. Ongoing concerns about "big tech" and increasing concerns about AI are adding to the complexity, prompting reevaluations of technological dependencies and the adequacy of existing antitrust, competition and regulatory frameworks.

Geopolitical divides have become more obvious over the past decade, with largely Western liberal democracies – led by the G7 countries – now pitted against an axis of authoritarian-leaning states, including Russia, Iran and China, with the global south – led by nations like India and South Africa - remaining largely unaligned.

Emerging states are increasingly forging economic and security alliances based on strategies mainly devoid of traditional post-imperial affiliations. The expansion of the BRICS grouping to incorporate nations such as Egypt, Ethiopia, Iran, Saudi Arabia, and the United Arab Emirates, demonstrates this new stance and its potential.

A new form of globalization is emerging, centered on national security and economic autonomy. Strategic autonomy, once a European notion, is now being embraced worldwide, reflecting a growing desire to protect vital national interests. These considerations are being prioritized in national and regional political decision-making. Nations are increasingly centralizing their actions based on a vision of strategic autonomy to safeguard vital interests, reflecting a recalibration of policy priorities in response to evolving threats. In parallel, the emergence of regional hubs is fostering closer collaboration and resilient supply chains, promoting economic integration and stability, between neighboring nations.

The emergence of military-industrial complexes in Europe, Japan, Australia, and India highlights the growing preoccupation with regulation and security around the world, as well as in the United States, the traditional base for such military-defense relationships. In addition, pressure will rise to look at the economic impact of security issues. As the Munich Security Conference concluded after its 2024 edition, nations around the world are increasingly pursuing economic security against coercion

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rather than maximizing mutual gains. As a result, capital and trade flows are beginning to fragment along geopolitical lines.

II. The Shifting Political Landscape

In a year of expected political change around the world, strong, confident global leadership is currently in short supply and perspectives are short term. 2024 will see elections in 76 nations representing more than half the world's population - over four billion people[2] - including the European Union (EU), many EU Member States, Brazil, India, Mexico, and the United States. Elections in Bangladesh, Indonesia, Pakistan, Russia and Taiwan have already taken place. Many of these elections are expected to lead to increased protectionism and promotion of national industrial policies, which will include tariff and non-tariff barriers that will likely make some cross-border trade and investment more difficult for businesses.

Relations among and between the United States, the EU and China overhang all these developments. The United States is exerting pressure on companies to restrict or cease their trade activities with China, through various measures, including trade restrictions and tariffs. This is creating challenges for businesses operating in the global marketplace, forcing them to navigate complex and shifting regulatory environments and to weigh the economic and geopolitical implications of their cross country investments and trading relationships. The U.S. House of Representatives' recently-passed bill aimed at forcing ByteDance, the Chinese owner of TikTok, to sell the app to a non-Chinese owner or face a ban from operating in the United States is a high profile example. While the bill passed by a bipartisan vote in the House of Representatives, the outcome of any Senate vote is uncertain. Nevertheless, this move raises important questions, including whether TikTok's broad adoption in the United States and its links to China are reasons for singling it out, or whether other Chinese apps that gather personal data should also be banned; whether new media should be subject to similar bans on foreign ownership as old media such as radio and TV is in the United States; and whether and how the Chinese government would take retaliatory action and what the impact on U.S. companies doing business in China would be. In an election year in the United States, the answers are particularly unclear. Meanwhile, the EU is leading the way with a pioneering regulatory framework, one of whose notable consequences is safeguarding the continent against China's role as a capital provider and open market partner to emerging economies. Indeed, the introduction of the EU's Foreign Subsidies Regulation (FSR) signifies a shift towards protectionism that may affect all foreign companies operating within Europe. Though not explicitly aimed at Chinese enterprises, the FSR's oversight of foreign subsidies and anti-monopoly measures introduces unpredictability and potential disruption, especially in sectors such as solar panels and automobiles where several Chinese firms are prevalent.

III. The Shifting Antitrust, Competition and Regulatory Landscapes

The antitrust, competition and regulatory landscapes are also undergoing several fundamental changes. As the following paragraphs illustrate, these changes are not always uniform around the world thus causing complexity for businesses with cross-border or global reach.

"Politicization" and Greater Intervention

With more authorities investigating cross-border transactions and business practices, the role of antitrust and competition policy in particular being expanded and "politicized" to address non-traditional issues, and authorities taking more aggressive, interventionist stances than previously, the scope for divergent outcomes between jurisdictions has increased significantly in the past few years. Notably, the Biden Administration appointed leaders of the U.S. Department of Justice ("DOJ") and Federal Trade Commission ("FTC") are showing a

[2] *2024 is the biggest election year in history* (Nov 13th 2023) *The Economist*. Available at: https://www.economist.com/interactive/the-world-ahead/2023/11/13/2024-is-the-biggest-election-year-in-history.

willingness to litigate cases (although not always successfully) in place of reaching settlements with the companies being investigated. In addition, the UK Competition and Markets Authority ("CMA") is fast building a reputation as an interventionist authority with its expanded jurisdiction to launch investigations in its own right since the UK's exit from the EU. A result, the balance between the transatlantic authorities has shifted. The European Commission, traditionally seen as more interventionist than the DOJ and FTC, now stands out as having a greater willingness to settle cases than the DOJ, FTC, and CMA. The Microsoft/Activision transaction is the most high profile recent example of these trends which show every sign of continuing.

Regulation of the Digital Economy and AI

Whether and how to regulate the digital economy, "big tech," "big data," and AI is front of mind for many governments and authorities around the world including the United States, the EU and China – but the approaches of these jurisdictions differ markedly. These differences are sometimes referred to as the United States' market-driven model, the EU's rights driven model, and China's state-driven model. This regionally fragmented approach to regulating (or not) ways of conducting business that have global reach creates challenges for businesses that want to operate on a uniform basis.

The EU's various legislative initiatives including the Digital Markets Act ("DMA"), the Digital Services Act and, most recently the Artificial Intelligence Act which was adopted by the European Parliament on March 13, 2024 have spurred similar initiatives in Australia, Germany, Japan, South Korea, and the UK Shortly after the DMA came fully applicable on 7 March 2024, the European Commission announced non-compliance investigations under the DMA into certain practices by Alphabet/Google, Apple and Meta demonstrating the Commission's intention to actively enforce the DMA.

Whether the EU may seek to leverage "the Brussels effect" of these legislative initiatives to play a purposeful role in shaping policy and outcomes globally remains to be seen and will be at least partially determined by the outcomes of the elections being held around the world during this year (see above).

Dialogues about these issues abound at inter-governmental (e.g. G7 and OECD) and inter-agency (e.g. ICN) levels around the world. Reflecting the nature of the issues, these dialogues are also occurring between authorities (e.g. antitrust, data protection, financial supervision) that until now have not usually worked closely together.

Excessive Consolidation

Governments and antitrust and competition authorities around the world are also focusing on what they regard as excessive consolidation in many sectors of the economy including agriculture, airlines, digital platforms, grocery retailing, healthcare, mobile telephony and pharmaceuticals. They consider these sectors are dominated by a few major players and the concentration of market power leads to reduced competition, choice and innovation, as smaller competitors struggle to enter the market. They attribute this situation to "under-enforcement" in prior times and call for more "aggressive" intervention and enforcement to address these issues. Recent examples include the FTC's litigation to block Amgen from acquiring Horizon Therapeutics which was, according to the FTC, "the FTC's first challenge to a pharmaceutical merger in recent time" (The parties subsequently settled with the FTC.). The DOJ's litigation against JetBlue's proposed acquisition of Spirit (the parties terminated their transaction), the in-depth investigations by the European Commission that Lufthansa and IAG are currently facing in relation to their proposed acquisitions and the CMA's recently intention to refer the proposed Vodafone/Three joint venture to a Phase 2 investigation reflect concerns about consolidation in the airline and mobile telephony sectors.

Economic Inequality and Labor Mobility

Antitrust policy and enforcement is also featuring in areas where it has previously not ventured. Economic inequality and labor mobility is one such area especially in the United States, as demonstrated by the DOJ's litigation against no poach and wage fixing agreements and the FTC's proposed rulemaking against non-compete clauses. Other jurisdictions around the world are now following suit, notably the EU and the UK.

Green Transition

Also among the emergence of novel theories of harm in the EU is concern over the allocation and efficacy of state subsidies intended to propel the green transition and a fear that the subsidies might not effectively reach the entrepreneurs and innovators most aptly positioned to spearhead the transition towards a greener economy and achieve critical climate change objectives. In addition, there is a risk that the realization of green goals in Western nations hinges heavily on the importation of new technologies from the lowest cost suppliers, potentially exacerbating the carbon problem and environmental challenges in other global regions.

Sustainability

Against this backdrop, sustainability is emerging as a priority for antitrust enforcement in some jurisdictions. For example, the European Commission, The Netherlands Authority for Consumers and Markets and the UK CMA have each recently published guidance on sustainability agreements – although with differing positions on the permissible purpose and scope of the agreements, thus creating complexities for businesses that operate across jurisdictions.

This is not only a European development. In 2023, the Japan Fair Trade Commission issued guidance on how and whether the concept of "sustainability" would impact their regulatory enforcement. In Singapore, the Competition and Consumer Commission is proposing guidance on business collaborations pursuing environmental sustainability objectives in view of growing competition concerns about such activities. In the United States, sustainability is a highly "politicized" issue with sharply differing views at State level and in Congress. The DOJ and FTC have not sought a role for antitrust enforcement in this field.

Protectionism

The global landscape is also witnessing a surge in protectionist measures, including a proliferation of foreign direct investment ("FDI") regimes around the world. This is no longer the preserve only of the United States' CFIUS (Committee on Foreign Investments in the United States), Australia's FIRB (Foreign Investment Review Board), and Canada's Investment Canada's regimes. Most EU member states and the UK (National Security and Investment Act) now have active FDI regimes. The EU has also established a foreign subsidies regime ("FSR") aimed primarily at Chinese state funded purchasers of EU businesses (see above). In China, national security and the protection of domestic industrial champions are paramount considerations during merger reviews. The Chinese antitrust authorities are notably stringent on mergers in the semiconductor industry, often imposing prolonged review timelines and rigorous remedies. Such prolonged delay may cause the parties to terminate their proposed transaction (e.g. Intel's proposed acquisition of the Israeli chipmaker, Tower Semiconductor).

FDI's approach is also becoming overtly protectionist as Nippon Steel's proposed acquisition of U.S. Steel and the United Arab Emirates ("UAE")-backed consortium bid for the UK's Telegraph newspaper show. U.S. Steel, founded by Andrew Carnegie in 1901, is regarded as an American icon. The acquisition by Nippon Steel is agreed between the parties but opposed by the United Steelworkers labor union. President Biden has stated that it is "vital" for U.S. Steel to remain "domestically owned and operated." As an ally of the United States, an acquisition by a Japanese company would not normally raise CFIUS concerns. It remains to be seen how the protectionist sentiments that have been expressed play out in this case. Although the UAE and the UK have close economic connections, the UAE-backed consortium bid for the Telegraph has also engendered protectionist reactions. The UK government has tabled legislation, which could be adopted in a matter of weeks, to block "foreign powers" from owning UK newspaper assets.[3] The bid, as currently structured, therefore appears to be unable to proceed. The UK government has stressed that the proposed new law applies only to newspaper assets: “We believe in this country in the free press. The media’s job is to hold power to account and it’s, therefore, inappropriate for the UK government to own a newspaper and it’s, therefore, also inappropriate for a foreign state to own a newspaper.”[4] The government has emphasized that the UK is “very much open for business in terms of foreign investment in other spheres, like football.”[5]

IV. How Business Can Respond to these Shifting Landscapes

Given these shifting landscapes, it is unsurprising that Corporate Affairs professionals identify geopolitical risk and uncertainty (50 percent), climate change (47 percent), and the impact of macroeconomic issues (44 percent) as the most significant short-term risks facing global businesses, according to research by the Oxford-GlobeScan Global Corporate Affairs 2023 Survey Report.[6]

In response to the prevailing geopolitical challenges, proactive measures are imperative. Corporates must acknowledge that geopolitical risk management needs to be entrenched in their day-to-day operations. The complexity, novel grounds for investigations, changes in long established directions of travel, prolonged investigation timelines, and divergent and uncertain outcomes that are being experienced all reflect a shifting landscape where decisions are becoming increasingly politically motivated.

Thriving in this environment necessitates companies striking the right balance between short-term decision-making and long-term vision. Public and global affairs functions emerge as essential business partners, tasked with enhancing and widening policy monitoring and intelligence gathering to navigate the evolving landscape. Engaging early, staying engaged, building awareness, explaining market dynamics, and conducting thorough geopolitical risk assessments are imperative.

Developing new business alliances and partnerships internationally while anticipating hostile action from competitors will be critical in fostering resilience and adaptability, and will also buffer businesses from being weaponized by political actors.

Staying alert to current developments and strategizing for the future has never been more important.

[3] The current UK regime for reviewing changes in control of UK newspapers (which is also relevant in this case) focuses on “media plurality” concerns but not foreign ownership.

[4] UK Culture, Media and Sport Secretary, Lucy Frazer.

[5] For example, Manchester City football club is owned by the Abu Dhabi United Group.

[6] The Corporate Affairs Academy, Saïd Business School, University of Oxford and GlobeScan (2023) *Oxford-Globescan Global Corporate Affairs Survey 2023*. Available at: https://globescan.com/2023/07/19/oxford-globescan-global-corporate-affairs-2023-survey-report.