A decade at the top

To mark *Global Competition Review*'s 10th birthday, JAMES CLASPER invited some of Washington's top antitrust lawyers to reflect on a decade of practising law in the United States

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What have been the biggest changes in US antitrust law in the past 10 years?

BRIGGS: There have been at least three major changes – one in mergers and acquisitions, another in general litigation, and another in the infrastructure demands placed on law firms. On the merger side, the agencies' demand for empirical data is enormous now, and has shifted from theoretical economic constructs to empirical data in a major way. That, in turn, has required law firms to establish infrastructures that can absorb, understand and analyse data – and present arguments based upon it. On the litigation side, there have been two dramatic developments. The first is that juries are understood far better now than they were 10 years ago; the second is that a great amount of litigation now involves class actions.

MCDAVID: Another major change is the growth of international cartel enforcement. We're no longer dealing solely with the antitrust division in a cartel investigation; we're also dealing with agencies around the world. That requires us to coordinate not only with multiple offices of our own firm in many jurisdictions, but also with local counsel in places where we don't have offices, because it has to be done in a centralised and wholly coordinated way, We also have to deal with the inevitable fallout of US private litigation and, in the future, of European litigation.

KOLASKY: I would broaden Jan's comment to say that the biggest change over the past 10 years has been the globalisation of antitrust. You see it not only in multinational cartels cases, but also in merger control, where any large deal has to be notified in multiple jurisdictions.

KLAWITER: Yes, because of globalisation, cases are bigger and happen faster. Especially in the cartel area, an investigation starts as a 'sprint' the moment the subpoena hits the street or the dawn raid happens. It used to be more of a marathon. There's a very different dynamic today in terms of how we set up our practices; lawyers dealing with these cases must be ready to start the sprint the second the investigation begins. That can be very hard when 10 other cases are going on at the same time. There's far more intensity today than there was 10 years ago.

LIPSKY: International involvement doesn't just extend to cartels and merger cases. If you're challenging the competitive practices of a big firm like an Intel or a Microsoft you're fighting in five or 10 jurisdictions, not just in the US. And, until recently, follow-on class actions didn't start to appear until the government's criminal case was close to resolution. Now, all you need is a single newspaper story anywhere in the world and – kapow! – you've got a hundred treble-damage class actions in the US. It happened in the European magazine paper cartel investigation, it happened in the air cargo investigation and it happened in the graphics processors investigation. The minute

William Kolasky

there's a newspaper story, if it appears on a Tuesday, you can count on there being 50 class actions before the end of the week. Even in civil cases such as *Dentsply*, which is just a garden-variety exclusive-dealing case, there are follow-on class actions – the trick being, if you can find a way to make any kind of a horizontal allegation, you're off to the races.

MURIS: Ten years ago I was practising with Jim Rill in a great boutique firm that handled the universe of antitrust issues. That boutique format could not be nearly as successful now. In today's environment, you need greater scale and increased specialisation. And antitrust is an area of increasing specialisation; it now requires a lot of extremely detailed and arcane knowledge.

BRIGGS: That's absolutely correct – and clients are also much more sophisticated than they were. Clients will go to one law firm for a merger at the Federal Trade Commission, to another one for a merger at the Department of Justice, to yet another one for a criminal matter and another one for a monopolisation matter. Clients view the field as very splintered; they no longer see a single full-service law firm as the obvious choice in all cases.

SIMS: All of these points can be summarised by saying that the practice of antitrust law is much more complex than it was a decade ago. When we were starting our careers, antitrust law wasn't as complicated or as fast as it is today. I suspect that, in addition to doing a lot of law, most of the people around this table end up doing a lot of management. You cannot represent significant antitrust defendants without managing a very complex process that includes the media, Capitol Hill and a whole collection of different fronts that either didn't exist before or didn't exist at anywhere near the same level of intensity – or they were handled by somebody else as opposed to an antitrust lawyer. In addition, it used to be that antitrust cases were about hard assets; today's antitrust cases are more often than not about intangible assets. When you're dealing with intangible assets, such as intellectual property, your analysis is inevitably more complicated than when you're dealing with steel plants. That adds another level of complexity to the process.

KOLASKY: Another aspect of case management that is radically different today is the volume of electronic discovery. It used to be the case that in a merger investigation you produced a thousand boxes of documents – and that was seen as a lot. Now, with the heavy use of e-mail and electronic discovery, the volume of information that your contract lawyers and staff attorneys have to wade through is huge.

SIMS: As an indicator of our times, I'm handling a transaction right now where we're doing our standard process of going to the company and collecting its electronic materials. At the start of the process we essentially take everything and sort it out later, because the techniques and software we have for that are so sophisticated now that it is an efficient way to avoid disrupting the client. We did a sweep about 18 months ago for a different client and collected an average of four gigabytes of electronic material per person, which is shocking enough; in this more recent transaction we collected an average of eight gigabytes per person. When you take 30 or 40 people and collect eight gigabytes per person, that's a heck of a lot to sort through.

CALVANI: This means discovery has become much more expensive. One area where increased costs have had adverse consequences, is in reportable transactions at the low end of the spectrum. There the transaction costs associated with a second request – particularly where there are reviews in multiple jurisdictions – may impinge on the value of the deal itself. I fear that costs may be deterring smaller transactions from taking place.

BRIGGS: A quick footnote to Joe's point – not only do you have to know how to collect data and sort it electronically, you also have to understand European privacy law. You can't just go in and collect data from a server in Europe in the way you can in the US, without falling afoul of some very serious criminal laws. Again, that requires management and resources.

What skills are no longer necessary in your practice?

MCDAVID: Clients don't ask for – and don't want – legal memoranda any more, except on the most sensitive issues where it is essentially a

Tad Lipsky


Joe Sims

bet-the-company issue. That places a premium on advice by experienced lawyers and makes it difficult to train young lawyers. All of us all cut our teeth doing legal research and writing memoranda for partners to review and send to clients. How do you give associates the range of skills and experiences that they need to become partners, responsible for counselling clients, when clients simply don't want that any more?

CALVANI: The same thing is true of depositions and court appearances, where young people used to participate and gradually take greater responsibility. Today, clients monitor the number of people that are attending a deposition or a court hearing and are reluctant to pay for junior lawyer attendance.

BRIGGS: It's worse than that. There are many clients who won't pay for first- and second-year associates, period. Firms are on their own in terms of developing that expertise.

SIMS: Those points are perfectly fair – but I can't remember that last time I was in a library. I don't think it's quite as bad as that, but people who have the drive and initiative to learn this stuff learn it. They learn by watching us and seeing how we do things. They learn by doing analysis that we ask them to do for us, even though it doesn't go to a client. You can't do a merger case or a significant piece of litigation without doing some legal research and analysis, and the client either pays for it or it doesn't – but you still do it, because you've got to do what you've got to do. So, yes, it's more difficult to bring people up the learning curve today. But people who have the ability, drive and initiative find ways to get things done.

So what advice would you give to someone starting out as an antitrust lawyer today?

KLAWITER: Jan, John and I have chaired the ABA's antitrust law section, and everyone here would agree that getting involved in the section's committees and task forces, or writing comments, is the best thing that a young lawyer can do. They get exposure to things they wouldn't see in the normal course of their practice and they mix with people with a variety of perspectives. We spend a great deal of time telling associates that they need to get involved in the bar and to learn and appreciate antitrust law and policy. If they don't, they won't be the next generation of lawyers sitting at this table.

> "This work is getting harder and [...] if you don't have a passion for it, you're not going to be good at it"
>
> Joe Sims

SIMS: I agree; there are many people who just want to punch their ticket for a few years. But, for those who really want to become antitrust lawyers, there is an alternative way to get educated – which some of us have taken advantage of – and that is to work at one of the antitrust agencies. Neither of them have the same client cost pressures, but they both require staff to do research; and, if you get in the right place, you receive an education that would take a lot longer to get at some law firms.

KLAWITER: Good young lawyers rise up to where you want them to be. They almost always get there by getting involved with bar activities or by working in the government. You know they're going to learn antitrust law and policy in the bar or in the government, and they will do that only if they have the passion and the interest in really becoming accomplished antitrust lawyers. From my perspective, if you have one of those young lawyers in your practice, you've won the sweepstakes.

SIMS: You just said the key word – passion. This work is getting harder and it requires much more attention; if you don't have a passion for it, you're not going to be good at it. You can take really smart people who just want to practise antitrust as a job, and they aren't that good.

BRIGGS: In terms of advising younger lawyers on what to do, I don't think much has changed. I made a note to myself about the advice I got in 1973 from Jack Howrey and Bill Simon. It said: 'Read as many cases as

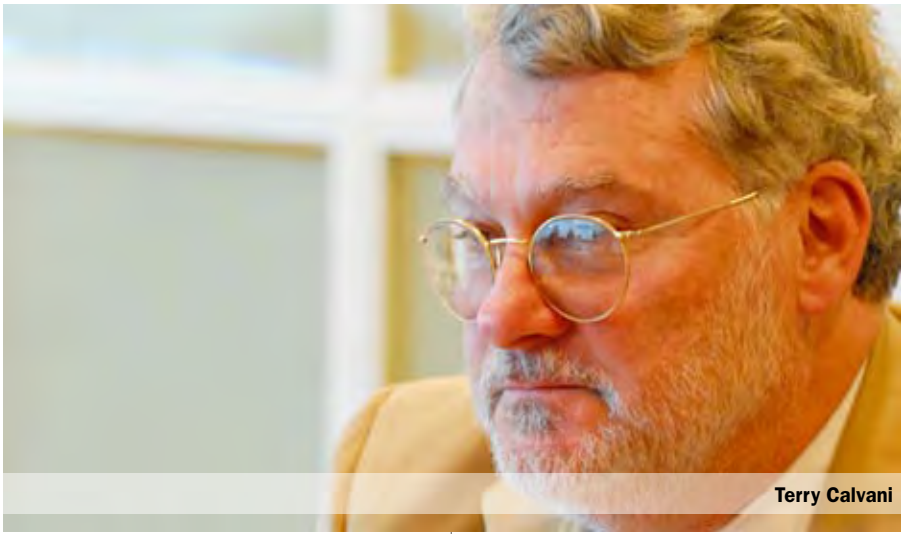

Janet McDavid

you can, whether the client needs you to or not; read the speeches and writings of the leaders of the FTC and DOJ; join the antitrust section, become involved and get knowledge from outside the firm; if you get the chance to write an article, long or short, never turn it down; and know the field as best you can.' That was their advice 30-odd years ago. And it's still pretty much good advice today.

Todd, your firm operates on a different model. How has it changed in the past 10 years?

MILLER: We don't write as many memos – I agree with Jan that clients don't want memos – but that's been our style since we started 12 years ago anyway. Otherwise, though, our world isn't that different from that of the bigger practices. The critical thing, as John commented, is that clients are more sophisticated now and don't necessarily buy the one-stop shop idea. Instead, what most clients tell us is that they hire people not firms, so they're looking for the right person for the right project; and clients are going to have different perspectives on whether certain individuals are right for the particular work. One thing you see at any firm that's doing well is that it has very good people.

KLAWITER: Todd's right. People are key, not firms; most clients are looking for specific individuals. They're very sophisticated and understand who the players are. If they have a billion-dollar deal before the Department of Justice, or a cartel case that is going to cost a billion dollars, they aren't looking for a brand, they're looking for the right person to present the case to the Antitrust Division or FTC staff and the front office, as well as to plan and manage the case. That remains the focus; it doesn't matter whether it's a small firm or a large firm; the real issue is going to be in marshalling the right resources; the key is which person is going to be leading the case, along with his or her immediate group of deputies and assistants. That's what clients are interested in.

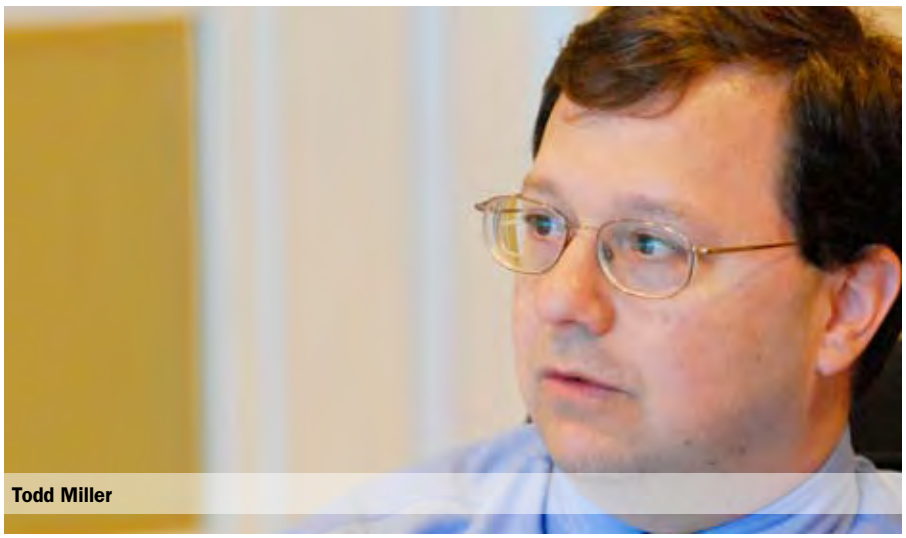

Terry Calvani

SIMS: I'm not sure I agree with that. More clients than ever select lawyers rather than law firms; but there are still plenty of clients who rely on their relationships with law firms. I'd be shocked if most of the people around this table don't have clients with whom they've had relationships lasting 10, 20, 30 years or more. For those clients to go elsewhere for an antitrust problem, it would have to follow an unfortunate incident in a recent deal or something like that. I'd be shocked and disappointed if any of our long-term clients went elsewhere for a matter. Of course, we also try to attract antitrust work from clients of other firms, and I'm sure everybody in this room does too; sometimes we're successful. But I'd rather be in the position where most of my work is coming from people with whom I had built up long-term relationships and who have long-term relationships with other partners in my firm.

CALVANI: I won't quarrel with the proposition that individuals matter, because I think Don's right. But globalisation has made firms more important at the margin. If you've got an international cartel or merger that is being investigated in several different jurisdictions, many clients would prefer to deal with a smaller number of firms. Globalisation has made firms more important at the margin.

BRIGGS: I think that's right. Globalisation might be too broad a term – it's the Brussels-Washington connection that almost everyone here has experienced in the past few years. Although it is impossible to have several transactions without having substantial global presence, or a substitute presence via network relationships with firms who have a presence in various jurisdictions.

MURIS: Yes, the firm matters in many ways. Consider the mergers in which second requests are issued, and look at which antitrust lawyers handled a significant percentage of them – they're frequently from the same firm that did the deal work. Joe's firm [Jones Day] has a major transaction base, which is very helpful, whereas John's [Howrey] doesn't, but it does very well without it. Even so, cross-selling is a very significant part of the modern practice.


Todd Miller

Many US firms have established competition practices in Brussels, yet only one Brussels firm – Freshfields – has a significant antitrust practice in Washington. Why?

CALVANI: Linklaters has launched a US antitrust practice that is getting bigger; Allen & Overy is planning to do something similar. I don't know why they've chosen to do it now


Donald Klawiter

and not before; but we're going to see more of it, not less. Differences between the US and European compensation systems have made it more difficult than it would be if we all used the same system. That may partly explain the reticence of European firms to come to the United States. But that reticence will be overcome.

SIMS: I seriously doubt that it's reticence. I think there's been an inability to attract, recruit and pay people. It's the ability to compete that's been the problem.

KLAWITER: As cases get bigger and more complex on both the merger and the cartel side, firms will need to have the right people – truly excellent people – on both sides of the Atlantic and beyond – in China, Japan, Australia and so on. If they don't, if they're weak in one arena and stronger in the other, it's going to be a problem for them.

CALVANI: Joe may be right, but I can think of several firms that I'm convinced could have come to the US and attracted talent if they'd wanted to do so, but instead decided that, given their referral base, they'd do better staying out. I'm not sure that's a good long-term strategy, but reasonable people can disagree.

MILLER: It all goes back to a comment Tim made about the large firm set-up. For all of us it's about networking. We [Baker & Miller] have no internal market, Howrey has a different internal market than firms with big corporate practices. I agree with Terry that some 'magic circle' firms have traditional relationships – with New York firms, for example – so the second they move to the US it's going to affect their referral and relationship affiliate network.

LIPSKY: There is also a scale and scope aspect and the evolution of US antitrust to consider; it heavily favours those with American background and training. We've had an antitrust law for over a hundred years, and an enormous amount of antitrust litigation, too. You can be sure the man in the street in America knows that there is something wrong with price-fixing. The reason he knows that is because of antitrust litigation, the most populous category of civil litigation in the entire federal system – and we have the most litigious society on Earth. What's more, the dominant antitrust philosophy is no longer the European ordoliberal approach, but the US-driven economic efficiency approach.

KOLASKY: Another factor which several people have alluded to, one that we haven't focused on much but need to, is the important role that litigation plays in the US antitrust practice. To have a full-service US antitrust firm you need to have a very strong litigation capability – up to and including the ability to win trials, and to try and win jury cases. Most of the UK firms have much smaller litigation departments, and litigation hasn't been a large part of their practice. Even in the case of Terry's firm [Freshfields], having come to the United States, it hasn't built up the litigation infrastructure to support its antitrust practice. For a UK firm to move into the US market, partly because of the geographic scope of that market, it requires a much larger investment than is required for a US firm to open an office in Brussels. The other important factor is that, frankly speaking, antitrust is now a much hotter practice area than it was 10 years ago. Until recently you didn't see many of the New York 'magic circle' firms trying to establish a strong Washington presence. Now you see firms such as Paul Weiss and Weil Gotshal investing in their DC antitrust practice.

MCDAVID: If more European firms were to try to enter the United States market, I suspect they would do what Freshfields did, which was to poach, rather than try to grow organically. They wouldn't bring British or Brussels-based lawyers to Washington; they would hire Washington-based lawyers. That's certainly how some New York firms developed large practices.

BRIGGS: Sure, when Howrey opened a Brussels office in 2001 we didn't have a single American lawyer there, and we still don't. But, on the question of what brings foreign firms here, it seems they come here for the same reason that most US firms went to Brussels; it was largely defensive, to make sure they kept all those clients that Joe says they had for 30 years and that they might have lost if they couldn't service their European needs, which were mostly mergers and possibly cartel-related. But I don't think a firm can just bring five or six lawyers in and have any hope of managing the process we talked about earlier. I would be sur-


Tim Muris

prised to see others come over here in great numbers.

Finally, what trends are likely to shape the practice of antitrust law in the years ahead?

KLAWITER: Much of the focus in the future is going to be on multi-jurisdictional coordination. Clients are going to need a European or a US firm in Brussels and Washington, with the ability to handle a single transaction or deal with multiple enforcers in the cartel area. Take the air cargo cartel investigation. Six jurisdictions coordinated the launch of their investigations on the same day. Law firms have to be able to do that, too; that's where the opportunities are going to come in the future. Firms must be able to pull together a seamless transatlantic – or global – team.

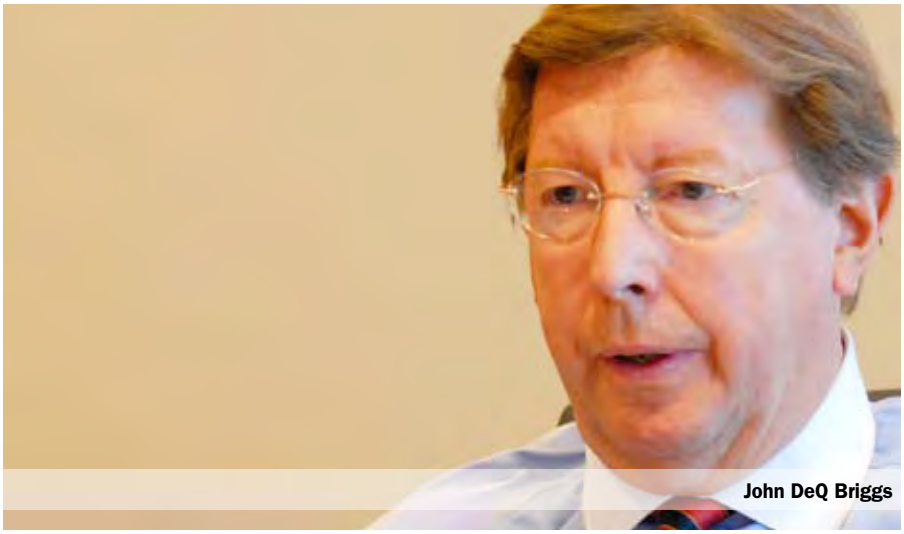
MCDAVID: Yes, and it's going to go beyond the Washington-Brussels axis; it's going to include the major European capitals; and both China and Japan are going to be critically important in the future.

BRIGGS: Indeed, AMD is pursuing its case against Intel in Japan, Korea and Europe, as well as in the courts in California.

SIMS: Korea may well be the next market that firms have to participate in, because Korea is close to opening up its market to foreign lawyers; and, if it does, to do this work, firms are going to have to be present there.

KLAWITER: On the enforcement side, the KFTC and JFTC are now much more aggressive and enthusiastic about their cases. Look at the leniency programme in Japan. When it first launched I asked the secretary-general of the JFTC whether he was worried; he said he feared that nobody would apply for leniency. Well, on the first day, they had something like 40 applications.

SIMS: Leniency is the single biggest development in antitrust over the past decade, because it has completely transformed the cartel side of the practice and has turned it into a global practice, which it wasn't previously. And we're about to see the next stage of that, which is to take the US litigation model and move it to Europe, and probably to other places after that. And it will further make Terry's point that firms are going to have to have the capacity to deal with both the regulatory side and the litigation side in the major jurisdictions – which are at least going to be Europe and the US, and almost certainly China, too.



John DeQ Briggs

MCDAVID: Indeed, when you see the major plaintiff firms opening in London, you know life as you have known it is about to change in a big way.

> "The biggest change over the past 10 years has been the globalisation of antitrust"
>
> William Kolasky

KLAWITER: The European Commission has determined that private antitrust litigation is going to happen in Europe, but it's going to be difficult because they've got the 'Tower of Babel' problem – different legal systems and languages. But the UK is the obvious candidate for this style of litigation, and, when it happens, it's going to be another transforming moment for antitrust.

SIMS: And follow the money. If there is money to be made, people will do these things; as soon as people see that there is money to be made there will be enormous pressure, both from lawyers and from consumer groups, as well as other people with stakes in the money that can be made from this. Once it gets started, it's going to be very hard to slow down.

KOLASKY: I agree that the country that is likely to play the leadership role in Europe on this is the UK. John Fingleton and Philip Collins at the Office of Fair Trading in London have been investing a great deal of effort in thinking about what a private-remedy regime should look like; and they have received a great deal of input from members of the bar over there. So there is every reason to think that the UK is going to take the leadership role.

SIMS: Combine that with the public ownership of UK law firms and you have all the ingredients for one heck of a change.

BRIGGS: I may be wrong, and in a minority, but I'm somewhat skeptical about the UK leading the way as much as people think. The system there is certainly compatible with claims for damages in a follow-on basis, where liability has already been established. But, because we are all English speakers, we tend to be unaware that most of the private action these days is actually going on in Germany, and is being reported in German magazines that none of us read.

LIPSKY: I'd be hesitant to designate a 'best in show' at this point, too. Private antitrust litigation has been going on for some time in France in a somewhat different format. There are also very effective private follow-on damage remedies under Italian law. It's difficult to get a sense of exactly how frequently these remedies are being invoked. I suspect there's a lot of underground activity in a number of European jurisdictions which hasn't been brought to light yet for various institutional reasons. It may just be more visible in the UK and Germany.

Thank you.

Global Competition Review *would like to thank Hogan & Hartson LLP for hosting the roundtable.*