

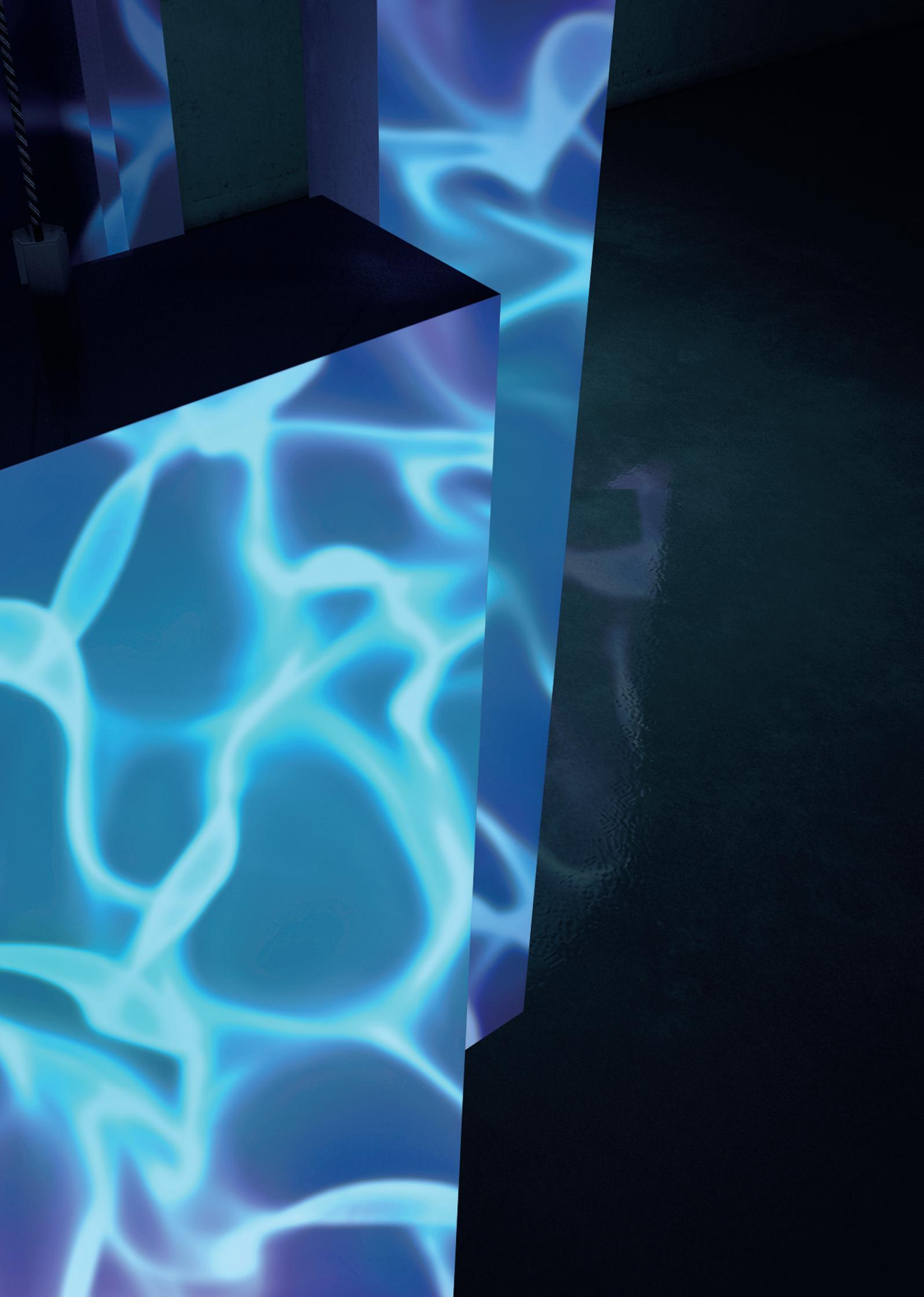
# Global antitrust in 2017

10 key themes

Preparing you for the year ahead



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## Global antitrust in 2017

The impact on antitrust enforcement of changing political dynamics globally is likely to be felt in several material ways through 2017 and beyond. Anticipating and preparing for these changes will be crucial for businesses seeking to limit their exposure to investigation for suspected anti-competitive behaviour, or to carry out cross-border deals in strategic or sensitive sectors.

Strong competition policies remain central to economic growth agendas. However, more antitrust authorities are coming under pressure to help deliver wider political goals of ensuring businesses are behaving responsibly, markets are open and competitive and all stakeholders – including consumers and employees – are being treated fairly.

A number of important themes are emerging that could impact commercial decision-making and risk management in the year ahead:

- **increased risk of political intervention in cross-border deals involving strategic sectors:** separate drivers globally are contributing to increased risks of intervention in cross-border investments in certain sectors and countries. Changes to laws and policies need to be monitored closely;
- **increased scrutiny of new business models and impact on consumers:** authorities remain focused on ensuring consumers are being treated fairly in the roll-out of new services and ways of doing business, with companies engaged in e-commerce or digital platforms remaining in the spotlight;
- **intrusive investigation techniques:** as authorities rapidly build their expertise in data collection, businesses subject to cross-border investigations are facing challenging disclosure and data privacy issues, which must be anticipated well in advance to minimise the risk of challenge; and
- **rise of antitrust litigation:** the increasing number of countries with legal frameworks in place to give rise to credible threats of private damages actions, together with the rise of class actions globally, is heightening the need for co-ordinated defence strategies.

We are delighted to enclose our seventh annual review of key trends in global antitrust enforcement, which explores these and other themes. If more detail on any of the issues discussed would be helpful, please get in touch with us or approach your usual contacts in our antitrust, competition and trade team.

Our best wishes for a successful 2017.



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1.

**Antitrust in a  
changing political and  
economic world**

# Growing and protecting your business in the year ahead

Political changes and shifting economic dynamics globally will have important implications for antitrust policy and enforcement in the year ahead. The full implications for deal planning and antitrust risk will become more clear as the year progresses, but a number of important themes have emerged that businesses should anticipate in their planning.

## Political intervention in key sectors: the role of antitrust authorities in making markets work for all stakeholders

Changes in government in some regions – including the UK and US – are predicted to lead to a less interventionist approach overall to market dynamics. Initial indications, however, suggest that, in 2017, governments across all regions could take a more direct role in antitrust enforcement and public interest review in certain sectors, particularly those with signs of consumer dissatisfaction about price, service levels or responsible corporate behaviour.

In response to increasing populism, Prime Minister May and President-elect Trump have each highlighted the role governments should play in controlling the behaviour of large business to ensure markets are delivering fair outcomes for consumers and employees:

- tapping into an apparent seam of dissatisfaction, Mrs May identified utility firms and retail banks as sectors subject to scrutiny if firms are suspected of abusing their roles; and

**‘Expect more continuity than change with the next US administration – we should anticipate differences primarily on the marginal M&A cases, where we may see a lighter hand in enforcement.’**

- during his campaign, Mr Trump commented about media and high-tech industries, suggesting he wanted the AT&T/Time Warner transaction blocked. Early indications, however, from transition team members suggest that the overall direction of US enforcement could be more lenient towards mergers under his administration.

Mary Lehner, Partner, Washington DC

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At the EU level, recent comments from Competition Commissioner Vestager illustrate how the concept of ‘fairness’ of opportunity and outcome, with all stakeholders having equal opportunity, plays an important role in EU competition policy. She is willing to intervene directly in markets when prices are seen to be excessive, whilst recognising that such intervention should be exercised carefully in order to avoid harming innovation.

In 2017, growth, fairness and consumer protection will remain high on the political agenda globally, and antitrust authorities will come under increasing pressure to help deliver on these goals.

### **Cross-border M&A: implications of increased protectionism and foreign investment controls**

Despite the political rhetoric, most governments continue to advocate the economic benefits of foreign investment and free trade. Some sectors and investors, however, are likely to face increased scrutiny when seeking clearance for investments in certain countries.

Most recently, the UK government announced that it will publish proposals to reform its laws enabling government to intervene in future foreign investments in UK critical infrastructure. Early comments from Prime Minister May about defending sectors that are important to employees, regions and the whole country suggest that the government may widen the range of public interest factors that it may take into account in merger assessments (currently confined to national security, media plurality and financial stability), although a range of options (including a new foreign investment regime) are possible.

In Germany, concerns about high-value technology transferring overseas have led the government to consider extending its powers to block acquisitions in key sectors. The government announced plans to amend German foreign trade regulations in 2017 to allow for the prohibition of foreign investment in certain key technologies such as IT enterprises. There are also calls for stricter rules and more harmonisation in approach across EU member states.

**‘The German government is spearheading a push towards new EU legislation that would allow member states to prohibit acquisitions of EU companies by non-EU entities in certain circumstances. Any such developments at EU or national level will need to be monitored closely in 2017.’**

Frank Montag, Partner, Brussels

Foreign investors in the US should expect close scrutiny by the Committee on Foreign Investment in the United States (CFIUS) for acquisitions involving businesses or services even loosely related to national security. China outbound investment into the US hit a record amount in 2016, but some in Congress have made legislative efforts in recent years to grant CFIUS the power to block transactions for reasons other than those related strictly to national security concerns (which are themselves already interpreted expansively). While these recent legislative efforts have failed to date, the possibility of the CFIUS statute being expanded during a Trump administration cannot be ruled out, particularly given the increasing focus on reciprocity of treatment between countries with respect to trade-related issues.

Compared to the antitrust regime, CFIUS allows much greater scope for direct presidential influence on decision-making, and the Committee is less accountable to public and judicial scrutiny given the lack of transparency and appeal rights. So Mr Trump may use CFIUS to further populist aims in transactions with even tenuous links to national security.

Governments will need to weigh the risks of introducing less predictability and transparency for foreign investors, given the importance of continued investment in infrastructure and innovation for economic growth. They will need to consider carefully the possible impact such action might have on cross-border M&A, inward investment and the prospect of retaliatory action by other countries.

**‘Chinese companies looking to invest overseas in 2017 will need to be particularly mindful of both the heightened scrutiny likely to be exercised by Chinese authorities over certain outbound investments from China and the increased risk for all companies of review by governments in Europe and the US of foreign investments in sensitive or strategic sectors.’**

Nicholas French, Partner, Beijing and London

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### **Brexit: preparing for parallel antitrust regimes in the EU and UK**

As the EU and UK prepare to embark on negotiations for the UK's exit, the implications for EU and UK competition enforcement range from little or no change (if the future UK/EU relationship is modelled on existing EU or EEA arrangements) to separation of regimes with dual-track processes, with or without co-operation arrangements that could minimise the burden on business.

Full separation means business losing the benefits of the EU's one-stop shop for deals having effects in both the EU and UK, as well as the UK being part of the closely co-ordinated system of antitrust enforcement across the EU. This could increase costs and uncertainty for businesses engaged in deals and trade in the EU and UK and companies will need to be prepared to adapt their antitrust strategies, making sure they are able to respond quickly to any changes in regulatory approach.

**'The potential separation of UK and EU competition regimes makes it more important than ever to stay close to agency thinking in both centres to ensure your antitrust strategies adapt to any change of direction in enforcement.'**

Simon Priddis, Partner, London

### **Resource-constrained agencies and impact on case prioritisation: a focus on high-profile sectors and larger businesses**

In a world of parallel regimes in the EU and UK, one immediate effect will be pressure on resources, as the UK's Competition and Markets Authority (CMA) will be required to review a significant number of additional large-scale mergers with, apparently, no increase in budget.

In the US, if Mr Trump follows through on his pledge to impose a hiring freeze on all federal agencies, it may give the Federal Trade Commission (FTC) and Department of Justice (DOJ) staff fewer resources to devote to marginal cases.

The combined effect of these changes is likely to be a reprioritisation of investigative resources to higher profile cases and non-discretionary areas of work, such as notified mergers, with smaller scale and discretionary enforcement cases less likely to be pursued.

In a resource-constrained environment, there may be a tendency for agencies to target high-profile companies in key sectors with quick wins designed to satisfy political and consumer demand for visible results. Longer term, however, politicians will scrutinise these outcomes to ensure that any reprioritisation does not undermine their underlying focus on improving consumer welfare and economic growth.

## Looking ahead in 2017

In an era of political uncertainty and changing regulatory environments, it is crucial for businesses to:

- **stay close to agency thinking at a local level**, being prepared to respond to policy changes whilst ensuring global antitrust strategies remain consistent and highly co-ordinated across all jurisdictions where the business is active;
- **ensure local antitrust compliance policies are able to adapt quickly** to any changes in approach that could place certain commercial activities at greater risk of regulatory intervention than before; and
- **factor these changes into deal-planning and understanding** and anticipating the political drivers that might hinder cross-border M&A or place certain deals under greater scrutiny for longer periods in particular regions.

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The background features a dark, almost black, space filled with glowing, ethereal blue lines that resemble a network or a map of connections. These lines are thicker and more prominent in some areas, creating a sense of depth and movement. Overlaid on this are several dark, three-dimensional rectangular blocks or planes, some of which appear to be floating or connected by thin, dark lines. The overall aesthetic is futuristic and technological.

## **2. International trade in 2017**

# Opportunities and challenges for multinational companies operating within WTO and bilateral trade arrangements

The political events of 2016 may herald an impending shift away from the trend towards comprehensive trade liberalisation we have seen in recent decades, towards instead a potentially more complex, and arguably protectionist, approach to global trade in goods and services.

Globalised trade and immigration are increasingly perceived by certain political groups and sections of society as the root causes of the economic slowdown in developed nations and the widening wealth gap. Recent developments testify to the increasing prominence of this school of thought and its potentially significant impact on the global trade landscape in the coming years.

## Brexit

Since the result of the UK's EU membership referendum in June 2016, no clear picture of the future relationship between the UK and EU has yet emerged. The EU has taken the stance of 'no negotiation without notification' and the UK government has chosen not to reveal its negotiation strategy.

As a result, it remains highly uncertain what the future post-Brexit relationships between the EU and the UK will look like, and what the precise impact of leaving the EU will be for citizens and businesses. Commentators have mooted a range of options, including:

- **EFTA/EEA:** like Norway, the UK could potentially retain access to the EU's single market by remaining a member of the European Economic Area (EEA) (the UK is currently an EEA member by virtue of its EU membership). This approach would involve the UK acceding to the EEA in its own right. Under this model, the four freedoms (goods, people, services and capital) would continue to apply between the UK and the rest of the EU/EEA. Consequently there would be no tariffs, taxes or quotas on most goods or services traded to and from the UK. However, there could in principle be agreed exceptions to this rule (there is an existing exception for fisheries, for example). Furthermore, mutual recognition of goods and services would be preserved but the UK's influence over regulatory standards is likely to be limited. Non-EU members of the EEA do not form part of the EU's customs union and are therefore free to enter into their own trade agreements with non-EU countries. But there would be customs checks, including to determine the 'nationality' of the goods on the basis of the rules of origin, as only products originating from the EEA would benefit from free circulation;

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- **Customs union:** like Turkey, the UK could enter into a customs union with the EU. In this scenario, the UK and EU would agree to apply the same tariffs to certain goods and services from outside the customs union (such as industrial goods in the case of Turkey). For all goods or services covered by the customs union, the UK would need to comply with EU single market regulations and it would automatically be subject to any (new) free trade agreements the EU concludes with third parties (and would not be free to negotiate its own terms with third countries in relation to those goods or services). The UK would, however, remain free to conclude trade agreements with third countries for goods not covered by the customs union. Services would not be included;
- **Free trade agreement:** alternatively, the UK could pursue a new, comprehensive economic trade agreement with the EU, similar to, but probably more inclusive than, the recently concluded EU–Canada agreement – a solution known as the ‘CETA plus’ model. This strategy would enable the UK to conclude its own free trade agreements with other countries and trading blocs. As with the EEA option, there would be customs and ‘rules of origin’ checks to determine whether the goods traded in the EU can benefit from the preferential terms of the free trade agreement, for example in the form of lower import tariffs. Free trade in services would depend on the terms of the agreement; and
- **WTO:** if none of the above alternative arrangements (or similar ones) is in place by the time the UK leaves the EU, the UK’s trade with the EU (and most likely the rest of the world, in the absence of new bilateral free trade agreements between the UK and third countries) would be governed by the rules of the World Trade Organization (WTO). The UK’s exports to the EU and other WTO members would be subject to the importing countries’ tariffs (applied on a ‘most favoured nation’ basis – that is, without discrimination). Imports into the UK would be subject to the UK’s tariff.

Each of these options could result in substantial changes to the trading relationships between the UK and the rest of the world and could require businesses to make significant adjustments to accommodate these changes. Unless the UK remains part of the EU’s customs union, trade in goods between the EU and UK will become subject to customs formalities and possibly import tariffs. The fundamental freedoms in services, people and capital are likely to cease to apply between the UK and the EU, unless the UK opts to remain a member of the EEA, which at this stage seems unlikely for political reasons (as free movement of people is a pre-requisite).

## Business implications of Brexit

Many businesses in the UK are part of an integrated European supply chain. Many finished products are made up of a multiplicity of parts and components imported from other EU countries. One component can, as part of such a supply chain, travel across borders between EU countries several times before the final product is assembled and ultimately sold. The EU single market allows EU manufacturers to operate quickly and flexibly across all countries of the EU as goods can circulate freely once they are inside the EU's customs union, without being subject to tariffs, duties or customs controls. Goods imported into an EU member state from another EU member state are not technically regarded as 'imports' for customs purposes. No customs duties or import VAT are payable and no formal customs declarations are required.

Services benefit from the EU's single market principle on the 'free movement of services' and mutual recognition. For example, financial services can rely on regulation in one member state to 'passport' their services across the EU without additional authorisations. Similarly professional services firms may rely on a professional qualification gained in one member state to enable an employee to work in another member state with few (if any) additional requirements.

A number of the options above would imply major changes to this situation. For example, UK firms could be limited in or even prohibited from providing cross-border services into some or all of the remaining EU member states and vice versa. As regards goods, the departure

**'British businesses need to ensure their voices are heard by the UK government to optimise the outcome for their businesses in the upcoming UK-EU negotiations.'**

Martin McElwee, Partner, London

from the EU's customs union would mean that burdensome customs declarations would need to be made, and customs formalities complied with. The relevant customs duties and import VAT would be charged on goods going into and out of the UK. In some sectors, such as food, clothing, chemicals and automobiles, import tariffs can be high – ranging from 5 to 15 per cent or more. If, post-Brexit, the UK were to enter into a free trade agreement with the EU, customs declarations would still be required to determine whether UK exports to the EU benefit from the preferential terms contained in the free trade agreement and vice versa. Absent a truly comprehensive free trade solution, services provisions might well also be limited and would be unlikely to replicate the free movement of services enjoyed in the single market.

Whatever the final framework of the new UK-EU relationship, UK-based manufacturing businesses will need to consider the impact on their operations carefully. At the very least, the increased customs clearance costs and potential EU and UK customs duties will become an additional factor, alongside tax rates, labour costs, exchange rates and regulatory burdens, that businesses with operations in the UK will have to take into account in their investment decisions.

**'An end to mutual recognition and an increase in the customs burdens that could apply between the UK and the EU post-Brexit will become important factors for businesses when determining whether to invest in, or migrate from, the UK.'**

Andrew Renshaw, Partner, Brussels

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### **Bilateral or multilateral trade agreements?**

In 2016, the Comprehensive Economic Trade Agreement (CETA) between the EU and Canada was almost scuppered when it was opposed by the Belgian regional governments of Wallonia and Brussels (mixed EU trade agreements require ratification by both the EU and national (and – in some member states – regional) parliaments), while the Netherlands also rejected the EU–Ukraine partnership deal. The length of time taken to negotiate these multilateral agreements – over seven years for CETA – the difficulties inherent in ratifying them and the increasing scepticism with which they are viewed by politicians and electorates alike have brought the recent trend towards comprehensive trade liberalisation agreements into question.

This apparent trend has been seemingly exacerbated by President-elect Trump's calling into question the US's future membership of the Trans-Pacific Partnership (TPP) (between the US and 11 other countries including Australia, Japan and Singapore), the Transatlantic Trade and Investment Partnership (TTIP) (which is being negotiated between the EU and the US), and the North American Free Trade Agreement (NAFTA) (the trilateral North American trade bloc between the US, Canada and Mexico in force since January 1994). Separately, President-elect Trump has threatened to impose big tariffs on imports from certain countries to force concessions to trade deals. Mr Trump has also signalled his intention to protect US employees' jobs, stating that he would use 'tariffs to discourage companies from laying off their workers in order to relocate in other countries and ship their products back to the US tax-free'. This strategy could result in trading partners retaliating by making it more difficult for the US to sell US goods and agricultural products around the world.

Despite these real and potential difficulties, efforts to maintain global trade links are likely to continue. For instance, 23 parties, including the EU, will continue to negotiate the Trade in Services Agreement (TiSA) that aims to liberalise the worldwide trade in services such as banking, healthcare and transport. And there are signs that nations will continue to strengthen trading ties. The UK government has strongly signalled that it would wish to deepen trading links with countries outside Europe in a post-Brexit world. In July 2016, the UK created a ministry (the Department for International Trade) specifically tasked with entering into trade agreements with countries such as the US, Australia and India. And China is currently attempting to persuade other Asian countries that the China-backed Regional Comprehensive Economic Partnership is a viable alternative to the uncertain Trans-Pacific Partnership.

## Looking ahead in 2017

In 2017, the global trade landscape will be reshaped by the new approaches the US and UK take towards their trading partners, with anti-globalisation movements exercising an increased influence. In this shifting environment, businesses should ensure that they take all possible steps to mitigate the potential risks. These actions should include:

- **carrying out a thorough risk assessment of their businesses** to identify the high-risk areas and their exposure to any change in trading conditions;
- **identifying their key 'asks' for any negotiations covering their sectors.** For example, in the UK-EU negotiations 'asks' may include passporting in financial services and the recognition of equivalent regulation in consumer goods and pharmaceuticals, and in relation to professional qualifications;
- **positioning themselves to maximise their influence on future trade negotiations** by engaging with local governments, parliamentarians and trade bodies; and
- **carefully assessing mitigation options** if their key 'asks' are not met.

'2017 will be a significant year for global trade as the effects of the UK's EU referendum and US election begin to be felt and new trade deals start to take shape.'

Anthony Parry, Senior Consultant, London

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# **3. Global M&A**

# Challenges for merging parties in 2017 – anticipating the deal-critical issues in your sector

As the shifting political landscape is likely to complicate merger activity globally, it will be important for merging parties to anticipate changes in enforcement standards – including, potentially, a reduction in multijurisdictional convergence and co-operation. At an early stage of planning, parties must consider:

- a broader range of potentially inconsistent regulatory approaches;
- presenting defences effectively to regulators who will continue to communicate but may diverge on standards; and, if necessary,
- developing a workable global remedies strategy.

## Anticipating regulatory challenges in global M&A

### Increased complexity and diversity

Early indications from the US presidential transition – both policy statements and proposed personnel – suggest both a more lenient approach towards mergers and less interest in international co-ordination. This could lead to the European Commission and US authorities approaching merger reviews with differing levels of scrutiny.

Merging parties will need to anticipate more complex and diverse regulatory reviews. Moreover, some transactions that faced a higher regulatory risk in recent years may be worth re-examining in 2017, particularly regarding transactions with a largely US focus.

### Political intervention in deals: focus on strategic and sensitive sectors

As discussed in Theme 1, authorities are likely to remain interventionist in deals involving sensitive sectors, with a growing focus on foreign investments in strategic sectors also raising hurdles for certain cross-border investments:

- **EU and Germany:** recent Chinese investments in German technology companies have led to calls for tighter controls over foreign investments in key sectors, in Germany and across the EU. Reviews of mergers involving Chinese state-owned enterprises (SOEs) have also faced greater scrutiny from the European Commission, which has recently taken the approach that SOEs do not have independent decision-making power as they are under the control and direction of a single State body. Practically, this means that Chinese SOEs have been required to aggregate turnover and provide information for all SOEs under the State body's control active in the same broad industry. This has increased complexity for merging parties by drawing a greater number of companies into the review process and increasing the amount of information required for a merger filing;

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**‘The new US antitrust enforcement leadership is likely to be somewhat more lenient toward mergers and somewhat less focused on international cooperation. This may create greater opportunity for clearance of certain transactions, but it requires reconsideration of strategies designed for multijurisdictional convergence and coordination. Merging companies need to prepare and present defences – and to devise remedy strategies – to address the new realities.’**

Paul Yde, Partner, Washington DC

- **UK:** proposals are expected in early 2017, as part of the prime ministerial review of industrial strategy, which will likely target foreign investment in UK ‘critical infrastructure’; and
- **US:** a number of recent foreign investment transactions (particularly involving Chinese investors) either were blocked by the Obama administration on national security grounds or faced extensive CFIUS review before obtaining approval. The Trump administration may see the CFIUS process as a tool for addressing trade-related concerns under the guise of a more broadly applied national security standard (see Theme 1).

### **Stricter enforcement of the rules preventing ‘gun jumping’**

In large-scale, complex deals, it can be hugely valuable for merging parties to plan well for their first days post-closing. However, integration planning – and the importance of strict compliance with competition laws prior to completion – is another area that has the potential for divergent approaches between authorities in different countries.

In November 2016, in a notable example of the closer attention that authorities are paying to parties’ conduct pre-completion, the French authority appears to have taken a strict approach in fining a company €80m for a series of steps that were interpreted together as meaning the parties were no longer independent. These steps included the purchaser exercising approval rights over certain strategic and operational decisions by the target during the standstill period.

Although the parties went far beyond pure joint planning, this case is a reminder of the need for strict pre-completion conduct guidelines, safeguards and a monitoring mechanism that enables merging parties to demonstrate full compliance to the authorities if required.

Similar issues are due to be considered by the EU courts, following a reference from a Danish court on whether a pre-clearance announcement by KPMG Denmark that it was terminating a co-operation agreement with KPMG International as part of its merger with Ernst & Young infringed the standstill obligation.

**‘Whilst effective integration planning in mega-deals, where the interim period between signing and closing can be long, has become key to the financial success of the transaction, it has also materially enhanced the risk of serious antitrust violations. “Planning the integration planning” is crucial.’**

Gian Luca Zampa, Partner, Rome

### **Presenting your case effectively to regulators**

Changes in regulatory attitudes and shifting market dynamics also challenge traditional approaches to merger assessment. A continuing strategic challenge for the substantive assessment of a transaction remains to, first, convince authorities of the relevance of competitive forces that go beyond market share calculations and, second, ensure that authorities interpret those competitive forces correctly.

In traditional industries, we have seen that even the first of these hurdles can be difficult for merging parties to clear. Waves of consolidation are often the result of tough market conditions and competitive forces such as overcapacity, limited growth, constraints from cheap imports, and emerging new technology and disruptive innovation. However, our experience is that

authorities have still demonstrated a reluctance to accept the relevance of those competitive forces as a defence raised by merging parties to high combined market shares.

As a consequence, a disconnect may result between the competitive forces that drive the business rationale for a transaction and the way in which authorities review that transaction. This is particularly true after a first wave of consolidation that established a set framework of analysis the authorities would be inclined to follow, even in the face of evidence that market dynamics have changed.

Landing on the appropriate market definition has proved particularly challenging in markets where technology is rapidly changing such as telecoms, where questions emerge as to how to treat emerging technologies, and the extent to which these can be considered distinct from earlier generation technologies.

Authorities have been more willing to consider innovation and non-price competitive forces in assessing mergers in technology-driven industries – the challenge is to ensure that the authorities interpret those competitive forces correctly. Two examples are illustrative:

- first, in relation to investment in innovation, authorities have demonstrated a scepticism that consolidation in low-growth industries is necessary for innovation even where the parties sincerely believe it is a key commercial driver for the transaction; and
- second, in relation to anticipating innovation, authorities have shown inconsistencies in the importance attributable to pipeline products. In some sectors, such as telecoms, authorities have largely dismissed the significance of pipeline products even where first-mover advantages were strong. In other sectors, particularly pharmaceuticals, a significant emphasis was placed on pipeline products and this has then been used to extract remedies from merging parties.

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The challenge for 2017 will be to put forward evidence to convince authorities to view familiar markets in traditional industries with ‘fresh eyes’, and in rapidly developing, technology-driven industries to ensure that competitive forces such as innovation are interpreted correctly by authorities. This will require early and careful planning to ensure the parties make an effective case that objective evidence and internal documents would consistently support. Additionally, given likely changes in US enforcement, and the accompanying potential for divergence in international merger review, presenting an effective multijurisdictional defence may be more complex. Companies considering mergers should take account of the potential impact on deal viability in the US if, as we anticipate, the new Trump administration takes a less interventionist approach to antitrust enforcement generally and innovation in particular than the previous administration.

### **Managing global remedies**

Engaging early on a co-ordinated global remedies strategy continues to pay real dividends in managing a complicated transaction successfully. Co-ordination of global remedies remains high in the agencies’ agenda, as demonstrated by the continued focus of the International Competition Network on this area.

Over the last few years, the major shift in remedies cases at the European Commission has been away from the traditional post-closing remedy in favour of upfront buyer cases. Now, however, we are seeing a preference emerging for ‘fix-it-first’ remedies.

In our experience from advising on several ‘fix-it-first’ cases in 2016, merging parties can obtain a simultaneous triple approval (of the main transaction, the remedy deal and the identity of the remedy purchaser) if deal strategy and implementation are well prepared and carefully managed. Where timing of the main transaction is critical, parties should consider whether such a ‘fix-it-first’ remedy would be viable: although challenging, authorities have generally proven themselves flexible in their approach to remedies. Indeed, parties who must complete a transaction under timing pressure could consider local carve-outs, allowing the rest of the global deal to close around isolated divestment arrangements.

New political headwinds leading to potentially diverging approaches between authorities and particularly increasing scrutiny of foreign investments may, however, present challenges in managing such a global remedies strategy, and indeed the predictability of a transaction as a whole.

**‘As authorities around the world become increasingly sophisticated in their approach to merger remedies, a co-ordinated global remedy design that avoids potentially conflicting demands from authorities will become even more pivotal to the success or failure of cross-border deals that raise competition concerns.’**

Thomas Wessely, Partner, Brussels

## Looking ahead in 2017

Companies planning complex deals in 2017 are advised to prepare early and well:

- **stay close to the authorities** as regulatory attitudes become more difficult to predict;
- **invest time in presenting your case effectively** to authorities and support this with internal documents;
- **put in place and police strict pre-completion conduct guidelines,** safeguards and a monitoring mechanism that enables you to demonstrate full compliance to the authorities if required; and
- **develop and test global remedy strategies** throughout the merger review process.

‘Over the last year or so, we have helped clients make use of innovative, “fix-it-first” remedies processes to achieve greater deal certainty and a speedy closing. 2017 looks set to bring new challenges: international divergence in standards of merger review and greater political intervention in M&A. Managing these challenges successfully will be crucial for businesses engaged in complex global mergers in the year ahead.’

Rod Carlton, Partner, London

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The background features a dark blue to black gradient with glowing, ethereal patterns in shades of cyan and light blue. On the right side, there are several vertical bars of varying heights, resembling a bar chart or data visualization, rendered in a semi-transparent blue color.

# 4. Big Data

# Be prepared for closer scrutiny ahead of commercial practices and deals

## Latest developments and trends

In 2016 antitrust authorities continued to focus on the challenges posed by ownership and use of 'Big Data', with Germany's Bundeskartellamt and France's Autorité de la concurrence in the vanguard.

As Freshfields' 2016 survey *Dealing with data* showed, this regulatory focus comes at a time when access to data has become a critical factor for a large majority of companies. At international governmental level, a 2016 Organisation for Economic Co-operation and Development (OECD) ministerial meeting produced a road map for future action on the digital economy, emphasising the economic importance of data stocks and flows.

## Data as an asset

Data is clearly an asset, but what kind of asset is it? Some argue that it is infinite in quantity and easily replicable, and therefore downplay competition concerns. Others stress its potential to raise barriers to entry through the creation or strengthening of market power. The latter fear harm to innovation and to quality competition based, for example, on superior privacy guarantees. Wherever the balance lies in this debate, the importance of data as an asset in any given situation will depend on many factors, neatly summarised as '5Vs' – volume, velocity, value, variety and veracity.

A key concern of competition agencies is potential harm arising from firms acquiring unique data sets that others cannot replicate. If a data set is considered unique and 'essential' for competing businesses, a dominant company may be required to grant access to rivals. Whilst the standard of 'uniqueness' is very high, companies should expect this to be a key area of focus going forward. In December 2016, this issue led to commitments being required from Microsoft, on its acquisition of LinkedIn, to protect competition between professional social networks: for five years, PC manufacturers and distributors will be able to choose whether or not to install LinkedIn on Windows, and competing networks will continue to enjoy current levels of interoperability with Microsoft's products.

In addition, the EU's independent supervisory authority, the European Data Protection Supervisor, has published papers that include a focus on the role of competition law in data protection issues.

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### **The national viewpoint**

National competition authorities are playing an important role in framing the Big Data debate. A report published by the German and French authorities in May 2016 acknowledged that Big Data may benefit consumers through increased investment and better services, but it focused on potential harm to competition from monopolisation of data-related markets. It provides an important insight into the thinking of two of the leading competition authorities in Europe, setting out a framework for assessing competition issues arising from Big Data.

In Germany, Chancellor Merkel suggested that her party's manifesto for 2017's general election would include a new competition law aimed at tackling monopolies in new technology and digital markets.

In the UK, the CMA came to a different conclusion when it investigated the use of data in the insurance sector. In finding that Big Data was producing a range of benefits for consumers and the use of such data was working well, it decided that there was no need to launch an in-depth market study.

**'Ownership of huge data sets may not be new, but what is new is some of today's businesses developing very efficient ways of using the data. Looking forward, it will be important for competition authorities to make sure they do not challenge operators simply because they developed a better mechanism for dealing with data, as this could disincentivise companies from investing and competing on the merits.'**

Jérôme Philippe, Partner, Paris

### **The Facebook investigation: a far-reaching overhaul**

The collection of personal data is a double-edged sword from a competition authority's perspective: on the one hand, it can lead to more individualised, relevant services, but on the other hand, the misuse of this data can lead to antitrust concerns.

The Bundeskartellamt is taking a controversial approach, investigating whether a potential breach of data protection provisions is also an abuse by Facebook of a dominant position.

The case will have important consequences, not least whether a breach of any law by a dominant undertaking can qualify as an antitrust infringement. Whilst there are a number of hurdles that need to be overcome before an antitrust infringement could be found, the action by the Bundeskartellamt signals that competition authorities may be willing to test the traditional divide between competition law and data protection law.

The risk is that such a move could lead to competition law powers and sanctions being exercised beyond traditional remits, including enforcement of data protection laws.

**'Data privacy and cyber security are already high up the corporate agenda. But managing data as a valuable asset requires a joined-up approach that considers everything from antitrust risk to tax, intellectual property, employment law and sector-specific regulations.'**

Giles Pratt, Partner, London

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### Online use of data

France's Autorité de la concurrence is carrying out a sector inquiry into online advertising, gathering information on how data collected from consumers is used. A similar approach has been taken by the Dutch Autoriteit Consument and Markt, launching a market inquiry focusing on online video platforms. The goal is to understand how these platforms work, what their business models are and what effects they may have on consumers. The Dutch authority has put the topic of 'Digitisation – online consumers' on its 2016–2017 agenda.

The clear message from these investigations is that, in the light of the heavy sanctions available to competition authorities, companies with a strong market presence should be focusing compliance on their use of personal data.

**'Competition authorities are focusing on Big Data and, with increased powers, will also look at consumer protection rights more closely. Given their sometimes critical view of Big Data, it will be important to demonstrate the huge benefits for consumers that Big Data can bring.'**

Frank Röhling, Partner, Berlin

### Merger thresholds: beyond revenue

Authorities are now looking more closely at the impact large data sets have on competitive assessment of mergers, with a key issue being whether authorities are capturing all deals that have a competitively significant impact on these markets.

The requirement to notify a transaction to a competition authority currently depends, in the most part, on the revenues of the parties. However, transactions involving Big Data can involve companies with valuable data sets that do not yet generate high revenues – the acquisition of WhatsApp by Facebook is a high-profile example.

The European Commission has launched a public consultation on whether the current merger control thresholds should include a threshold based on transaction value – a legislative proposal is expected in early 2017. Meanwhile, Germany's legislative proposal, incorporating a deal value threshold, is expected to come into force at the start of 2017.

The introduction of a deal value threshold will likely lead to more deals being reportable, including high-profile transactions in the digital and pharmaceutical sectors. It remains to be seen, however, whether there will be any spillover into other industries.

## Looking ahead in 2017

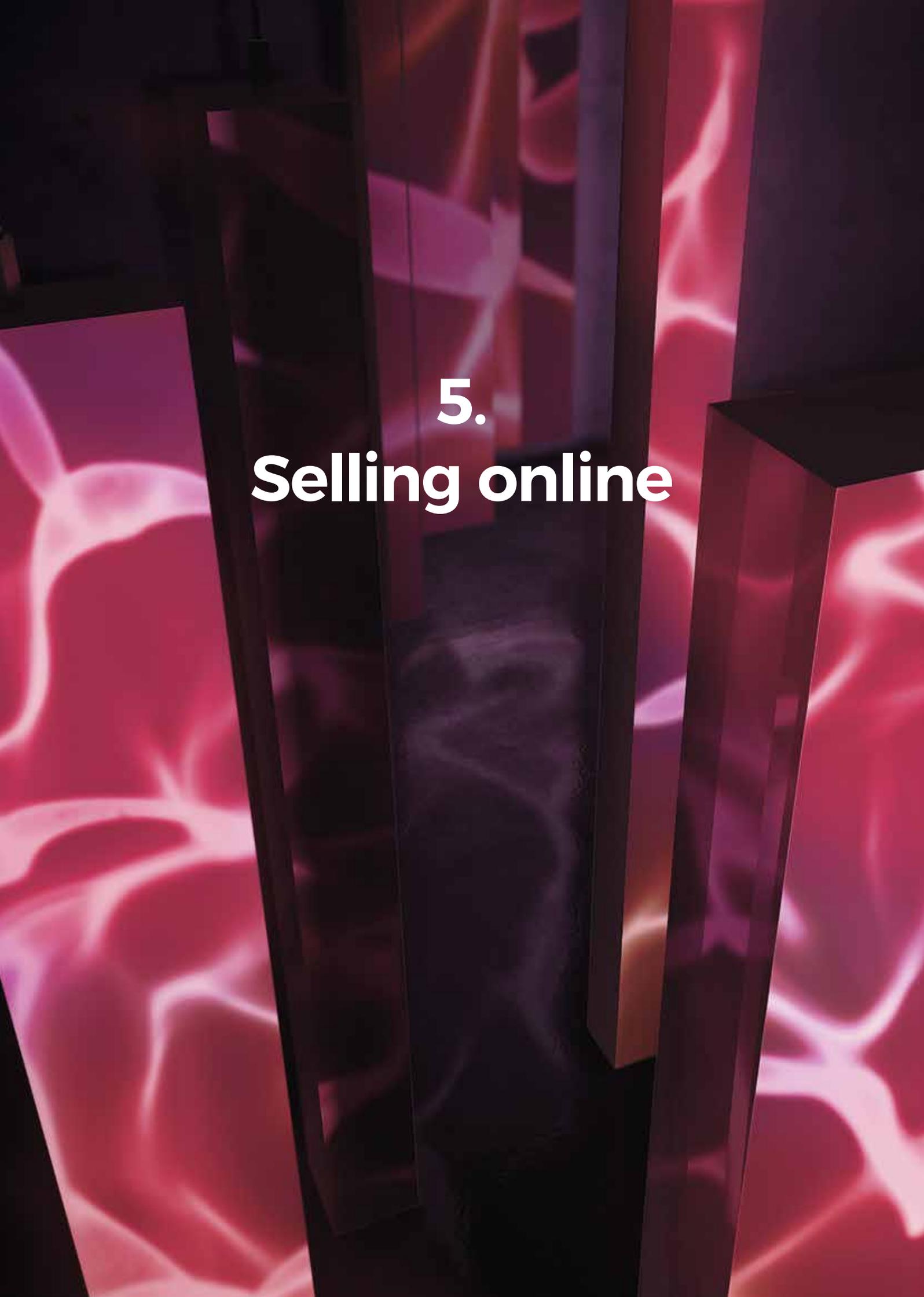
In the year ahead, business should anticipate:

- **enhanced powers for authorities** trying to balance antitrust risks with pro-consumer benefits, such as the German government's plans to strengthen the role of the Bundeskartellamt by granting it powers to fine internet-based companies for breach of consumer protection rights;
- **tougher enforcement of data protection rules:** from May 2018, the General Data Protection Regulation will give EU data protection authorities increased powers, including fines up to 4 per cent of worldwide turnover. In October 2016, France enacted its Digital Republic Act, further reinforcing the rights of natural persons over their personal data;
- **increased co-operation between competition and other regulatory bodies,** such as German proposals to deepen co-operation between the Bundeskartellamt and data protection authorities; and
- **greater scrutiny of data-centric mergers,** with a focus on whether acquisitions may give one company an unmatched competitive advantage based on the combined data sets.

**'More businesses should be aware of data's antitrust implications. Companies are yet to appreciate fully the antitrust risk connected to data, but when enforcement actions begin it will be impossible to ignore.'**

Laurent Garzaniti, Partner, Brussels

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The background features a dark, almost black, space filled with several vertical, dark, rectangular bars of varying heights and widths. Behind these bars, there is a complex, glowing pattern of bright pink and purple light that resembles a network or a series of interconnected, organic shapes. The overall effect is futuristic and high-tech.

**5.**  
**Selling online**

# Assessing the competitive impact of online sales restrictions – business practices at risk of investigation in 2017

E-commerce has become a vital mode of distribution, opening new markets for many businesses. Authorities are, however, still working through a wide range of enforcement issues.

Technological developments continue to bring new challenges, as illustrated by recent cases where price-fixing for posters and frames sold through Amazon was carried out by a computer algorithm.

Continued enforcement activity can be expected in 2017 around the world and perhaps increased clarity as to where the frontier between legal and illegal sales restrictions lies.

## **Online selling and the EU single market: a powerful driver of policy**

E-commerce sales in Europe present many traps for the unwary, not least because of the continuing strong EU political drive to create a single market across Europe. To complicate matters further, in recent years enforcement has occurred predominantly at national level, with different European national agencies approaching some of the issues in different ways, most notoriously in the *Hotel Bookings* cases.

But the European Commission is now much more active and can be expected to provide legal clarity on a number of issues in the next year or two. Its sector inquiry into online commerce will conclude early next year, and it has already identified a number of online business practices that may restrict competition both for consumer goods and for distribution of digital content. It has warned of further investigations of these practices, which include selective distribution networks that exclude or restrict online sellers, restrictions between manufacturers and retailers relating to resale prices, restrictions on cross-border sales or use of online marketplaces, and long copyright licences that may limit entry of new or smaller players.

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Resolution of the European Commission's case on Amazon's e-book distribution arrangements (see below) is expected soon, and it has proposed controversial legislation that would prohibit certain online barriers to cross-border internet selling. The European Court of Justice will also be contributing to increased legal clarity in the area when it rules in the *Coty* case on the legality of online platform bans in selective distribution systems.

**'Diverging national approaches in Europe to issues such as price parity and platform bans have created an increasingly complex regulatory environment for e-commerce players to navigate. Over the coming years we expect more enforcement by the European Commission and decisions by the European courts which will help to clarify and harmonise the legal framework.'**

Sascha Schubert, Partner, Brussels

### **Asia: e-commerce coming into focus**

In Asia, the number of antitrust authorities has grown rapidly, as has online buying and selling, especially in China, and many of those authorities are aware of the potential competition law issues raised by e-commerce. They are starting to develop policy, and are looking at much the same practices that interest European enforcers.

In China, no cases have been made public, but it is believed that the authorities may have looked into 'most favoured nation' clauses (MFNs) in the hotel bookings market. Online selling, including mobile-payments systems, is enormously important to the economy and is likely to be an antitrust policy priority: last year, China's Ministry of Commerce (MOFCOM) announced measures to enable faster adoption of laws on online retail. In addition, the two other Chinese antitrust authorities warned online marketplace platforms against a wide range of behaviours including restrictions on using rival platforms, and the State Administration for Industry and Commerce (SAIC) has also said it would be stepping up enforcement in this area.

In Hong Kong, the antitrust regime is still new but there have already been calls for the authority to look into the conduct of powerful e-commerce platforms. The Japanese Fair Trade Commission is looking into restrictions placed on online sellers by Amazon, and in Singapore there has been a focus on exclusive agreements in online food delivery.

**‘In Asia, as elsewhere, antitrust enforcers are interested in e-commerce; certainly in China, where both business and consumers do a huge amount of shopping by internet, but a number of other Asian authorities are also looking at intervention in this area.’**

Alastair Mordaunt, Partner, Hong Kong

### **The US is another country**

Online sales restrictions is one of those areas where US counsel will need to take into account the very different approach in Europe and other parts of the world. Producers and suppliers in the US are used to relative freedom in the way they get their goods and services to the ultimate user. Provided the business in question does not wield market power, almost any restrictive requirement or practice can be included in a distribution system, if it does not involve agreement or collusion between competitors.

This means that US enforcers tend to focus on e-commerce infringements with a horizontal element. In recent proceedings co-ordinated between the DOJ and the UK’s CMA, the DOJ brought criminal antitrust proceedings and the CMA imposed a fine for an online price-fixing cartel concerning posters and frames sold through Amazon. A novel feature of this case was that a computer algorithm had been set up to co-ordinate changes in price so as to maintain the cartel without ongoing human intervention. Similarly the *E-books* case in the US was essentially a question of whether or not there had been collusion between competing publishers, whereas the European Commission extracted a number of commitments based on vertical concerns.

A little more care is needed around resale price maintenance (RPM). In the US, at federal level RPM is generally evaluated under the ‘rule of reason’, or a balancing of pro- and anti-competitive effects, meaning that in the absence of market power RPM will not normally raise antitrust issues. But several states have enacted contrary legislation, or their state courts have continued a ‘per se’ approach, presenting a concern if a company wants to adopt a national distribution and pricing policy.

**‘US counsel need to be aware that the European approach to restraints in distribution and supply chains is much stricter than the “light touch” they are used to in the US.’**

Terry Calvani, Of Counsel, Washington DC

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### Hot topic: 'most favoured nation' clauses

MFNs will remain an enforcement focus across much of the globe in 2017 and beyond. The European Commission is investigating Amazon's contracts with e-book publishers, which include requirements that publishers inform Amazon about more favourable or different terms offered to Amazon's competitors and make them available to Amazon. National enforcers in the EU continue to be active in this space too: the UK's CMA has just opened an investigation into online auction services, citing suspicions of illegal pricing practices and restrictive clauses including MFNs that may have excluded competitors. MFNs are also raising interest in Asia, as mentioned above.

The *Hotel Bookings* cases illustrate the very different attitudes in the US and elsewhere to MFNs. In the US, class actions based on MFNs imposed on hotels by online booking platforms failed in the absence of evidence of concerted action. In the EU, very similar factual situations led to many national competition authorities requiring commitments by the platforms to change the terms on which they contracted with hotels. But even within the EU, authorities have taken different approaches, with Germany banning these provisions outright, a stance significantly stricter than elsewhere in Europe. And on top of that, in countries including Austria, France and Italy the legislature has intervened, in some cases reversing the settlement concluded by their national competition agencies. Ten national agencies are together now carrying out research into the market effects of their enforcement action and the results should be available early in 2017.

### Looking ahead in 2017

Given the continued regulatory focus in this area, businesses engaged in e-commerce are advised to examine their practices closely:

- **to design compliance programmes** to take into account the significant differences in approach between authorities in Europe, the US and Asia;
- **to ensure that those in the US** know that EU and some other laws limit the ability of sellers to chart their own sales strategy and that e-commerce vendors doing business in Europe need to be very sensitive to these restrictions;
- **for global compliance**, to consider whether the convenience of a 'one-size-fits-all' approach outweighs the benefits available from taking advantage of the lighter touch applied in some jurisdictions;
- **to make it a priority to review any European distribution contracts** in the light of the findings of the EU e-commerce sector inquiry once these come out and keep up with other relevant EU developments, such as the proposed Regulation on online selling; and
- **to keep up with rapidly developing law** and policy on 'most favoured nation' and other price parity clauses between retailers and marketplaces, as these may have far-reaching implications for businesses that either are subject to them or rely on them.





**6.**  
**Antitrust  
litigation**

# Opportunities and challenges for businesses defending claims in Asia, Europe and the US

## Co-ordinated multijurisdictional antitrust litigation: the new normal?

Last year saw continued growth of multijurisdictional – often global – antitrust litigation, fuelled by the introduction of new laws and the emergence of potent new class action regimes.

The number of jurisdictions giving rise to a credible threat of antitrust enforcement or damages claims continues to rise, with regions such as Eastern Europe and South America – previously blind spots to many potential defendants – having increasingly mature systems.

The established multijurisdictional plaintiff firms are increasingly working alongside local firms in these jurisdictions to bring test bed claims – for example to probe the disclosure that may be obtainable from the defendants – as precursors to larger actions in more established venues.

And increasingly, those bringing claims are arbitrating between potentially available jurisdictions and applicable laws, targeting those courts where wide or early disclosure can be obtained, or applicable laws that confer an advantage on limitation or other grounds.

These trends increase the importance of assessing at an early stage the merits of running jurisdiction challenges (including ‘torpedo’ actions seeking to seize the courts in a more favourable jurisdiction, thereby barring actions in other places) or limitation arguments, including arguments that may arise by pleading the applicability of a foreign law. More than ever, the mindset of the antitrust litigator must be truly international.

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### **Continued rise of class actions**

Antitrust class actions are expanding globally beyond the traditional common law jurisdiction strongholds of the US, Canada and Australia.

The most high-profile new system is the UK's antitrust-claims-only class action regime, introduced in late 2015. While restrictive transitional rules meant that a number of waiting claims had to be redrawn, litigation is now starting to flow. The most eye-catching claim, an opt-out interchange fee consumer claim against Mastercard for over £14bn, is the largest damages claim ever brought in the UK courts. According to public statements by claimants, further large claims are expected in relation to the trucks cartel that was recently sanctioned by the European Commission. These early claims will test the scope of the regime, in particular on the extent to which potentially disparate claims share sufficient common issues to be certified as a class action, and on what funding arrangements will be deemed acceptable.

A potentially important new Dutch opt-out class action regime, global in scope, is being debated by the Dutch parliament, which would accompany the significant mass settlement regime already in place in that country. And in European jurisdictions, such as France, Belgium, Italy and Austria, where existing formal class action mechanisms exist but are limited, claimants are increasingly using creative approaches to bring claims, such as by collecting clients through claims websites.

Israel continues to be a class action-heavy jurisdiction, with multiple antitrust class actions filed in ongoing global cases, in parallel with similar claims in other jurisdictions. Where claims are brought on an opt-out basis on behalf of end consumers, the potential exposure value of these claims can be eye-watering.

## Implementation of the EU Antitrust Damages Directive will encourage European claims

After a two-year wait, the EU Antitrust Damages Directive was to be implemented into the national laws of all 28 EU member states by the end of 2016, although some countries are late in doing so. The Directive is designed to facilitate antitrust damages litigation by providing minimum standards on a range of matters such as the availability of document disclosure, limitation rules, and the treatment of arguments concerning the pass-through of losses and the disclosure of whistle-blower leniency materials.

There are likely to be a number of questions as to the interpretation of the Directive's provisions, which will give rise to national litigation and references to the Court of Justice of the European Union (CJEU). In combination with the growing number and global reach of plaintiff firms, the increasing recognition by corporates of the existence of a duty to consider bringing antitrust claims, and pressure from regulators on regulated entities to do likewise, it is likely that there will be a further upturn in antitrust litigation. This will be fuelled by the rapidly increasing range of litigation funding options, which are now at the cutting edge of sophistication in Europe.

**'Even though the EU Directive and any member state law transposing it into national law may not have retroactive effect, courts might still be guided by it to some extent as far as the interpretation of current law is concerned. This, in combination with ever more claimant activity in Germany, will mean that the legal landscape might look very different next year. We will have to watch that space.'**

Tobias Klose, Partner, Rhineland

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## **US courts will continue to wrestle with the application of US antitrust law to foreign conduct**

Sherman Act damages claims were excluded in *In re Refrigerant Compressors Antitrust Litigation* on the basis that the cartelised product was purchased overseas, incorporated into a finished product overseas, and only then sold into the US as a finished product. However, in *In re Capacitors Antitrust Litigation* the same claims were allowed to proceed. Such discernible splits between courts in different circuits are likely to result in increased forum shopping by claimants until the Supreme Court squarely addresses the issue of which claims are in fact excluded from private damages actions by the Foreign Trade Antitrust Improvements Act.

International ‘comity’ emerged as a potential defence in cartel claims when the Second Circuit Court of Appeals vacated a \$147m award against Chinese vitamin C manufacturers on the basis of statements made by China’s regulator, MOFCOM, in an *amicus* brief. However, the US courts are likely to apply this defence narrowly.

Meanwhile, the availability of private damages to financial services claimants has been the subject of recent decisions. Following the Second Circuit’s reversal of a district court decision dismissing LIBOR claims, courts have allowed financial services claims to proceed, resulting in very material settlements. The often very significant sums transacted in financial services areas create risks to the defendants, such that in some cases settlements have occurred soon after, and in some instances before, courts have ruled on motions to dismiss.

**‘Although the attractiveness of trebled damages and broad global discovery will maintain the US courts as a popular choice for claimants’ counsel, the limited scope of extraterritorial claims in the US courts requires global risk assessment and strategic planning before the first claims are filed.’**

Richard Snyder, Counsel, Washington DC

## The impact of political challenges on antitrust litigation

Broader geopolitical developments will inevitably impact on the evolution of antitrust laws, including antitrust litigation.

Post-Brexit, whenever that may be, the strong view of antitrust plaintiff firms is that they will continue to bring claims in the UK for pan-European losses, and that there is no legal or other barrier to doing so. However, it is likely that, over time, EU and UK competition litigation procedures and laws will begin to drift apart, leading to a greater likelihood of parallel litigation.

**‘In the short term, there appears to be a rush by claimants to bring EU-wide damages claims in the UK before the rules on jurisdiction and the binding effect of EU Commission decisions may change. But claims will be able to be brought on the basis of such EU decisions for many years, given the delay until Brexit takes effect and the lengthy UK limitation period after that. And even in the event of a “hard” Brexit, the common law rules on jurisdiction and recoverability of non-UK losses that would come into play are if anything wider in scope than the current provisions. Claimant firms are well aware of this, and firmly intend to continue bringing claims in the UK.’**

Mark Sansom, Partner, London

## Looking ahead in 2017

As antitrust litigation continues to increase, the key focal points in 2017 are expected to be:

- **EU: the meaning of provisions in legislation** implementing the Damages Directive will likely be subject to early challenge across the EU. Suggestions for a collective redress mechanism at EU level may see their revival;
- **UK: far from signalling a decrease in competition damages claims** in the UK courts and Competition Appeal Tribunal, including in respect of EU losses, Brexit may even increase them. The new collective actions regime will be tested, shedding light on how any certification criteria are to be met for claims to proceed on a collective basis; and
- **US: application of antitrust laws** to foreign conduct will remain a key concern in many cartel matters and it may not be resolved until a Supreme Court ruling on the issue.

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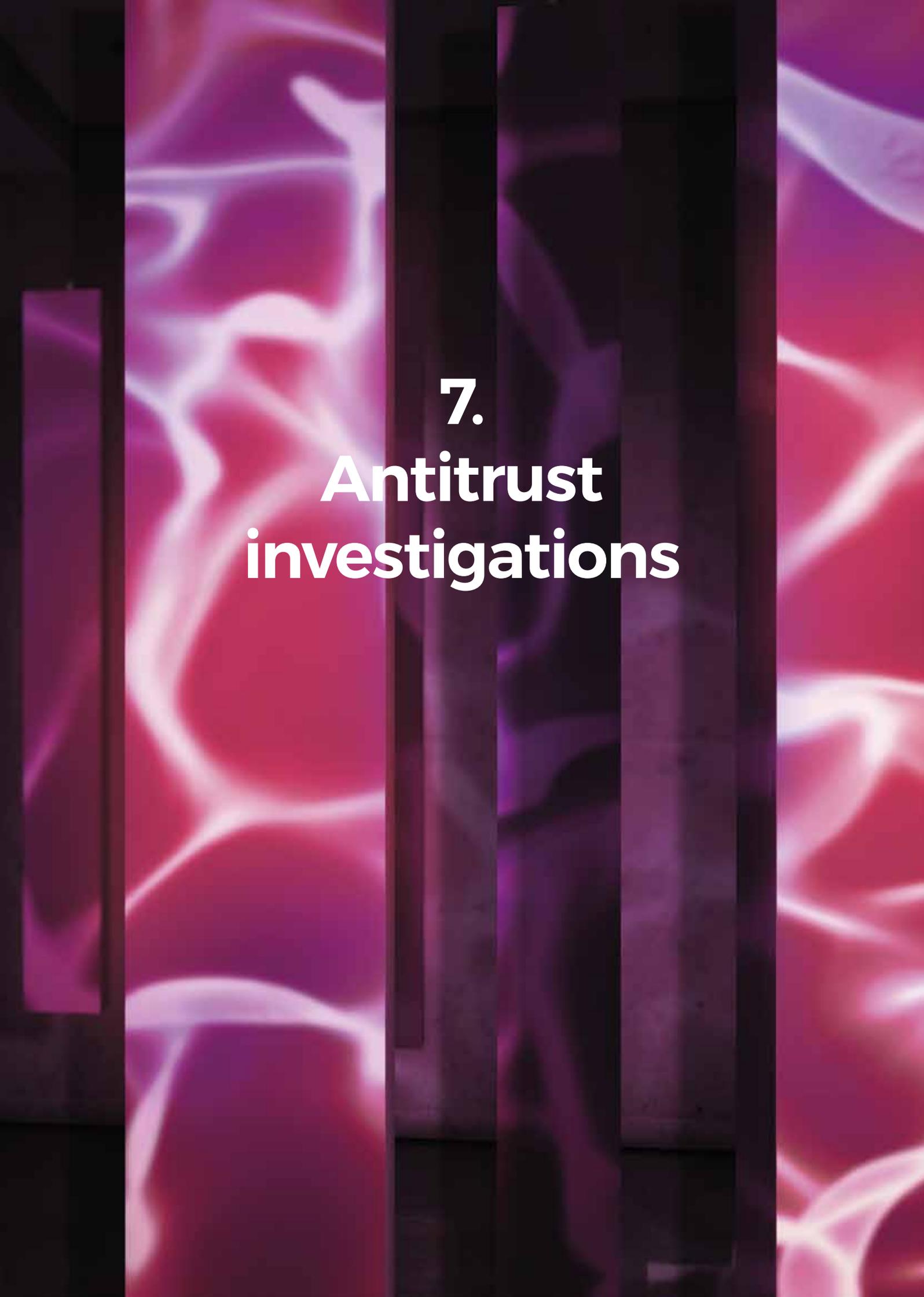
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# **7. Antitrust investigations**

# Staying ahead of rapid developments in investigation techniques – how to mitigate risk

As the nature and scope of global antitrust investigations continue to develop and expand, companies need to keep abreast of and anticipate issues they may face when under investigation. A combination of increasingly active agencies and sophisticated investigative techniques has seen changes in approach to a number of issues, including the types of media that agencies may want to access, legal professional privilege, data protection and even the types of conduct treated as cartels.

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In Europe, the trend towards settlement of cartel cases looks set to continue, bringing shorter proceedings, reduced fines and fewer appeals of European Commission decisions. However, it also raises potentially contentious due process issues, not least in so-called ‘hybrid’ cases when some parties settle and the Commission continues its investigation against non-settling parties. At some point these may be tested in court, as may the Commission’s claim to be able to require production of documents stored outside the EEA but accessible within it.

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In Asia, the number of antitrust authorities has grown rapidly and they are steadily increasing their investigation capacity and activity. In the past, Japan, South Korea and Taiwan were at the forefront, but agencies in China and Singapore have recently shown considerable appetite for pursuing international cartels, often mirroring investigations in other jurisdictions. Notably, the region’s latest antitrust enforcer, Hong Kong, carried out its first dawn raid in its first year of full operation.

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Global companies caught up in investigations need to be aware of jurisdictional differences, which extend beyond legal differences. Cultural factors, such as the strong preference in China for a co-operative rather than a confrontational approach to resolving cases, with the duty to co-operate enshrined in law, must be understood. Officials expect incriminating documents to be flagged, and though this may go against the grain for those from some other cultures, respect for the local approach can pay off, often resulting in a quick and lenient outcome depending on the degree of co-operation.

**‘Those accustomed to EU or US proceedings will be surprised by the extent to which Chinese officials expect, and indeed push for, a confession from companies involved in a cartel, after which they may drop the case or reduce the fine. Companies need to understand and respect the fact that for the Chinese an important aspect of the process is the education of wrongdoers.’**

Ninette Dodoo, Counsel, Beijing

### **Technology: a driver of change**

Illicit conduct taking place electronically means that evidence is mainly found in electronic form, so authorities have developed increasingly sophisticated and intrusive tools for searching and analysing the data. The European Commission is now extending its focus from ‘unstructured’ material, such as email archives, to ‘structured’ sources, such as the databases and spreadsheets that companies use to organise and monitor their business. They know that employees are increasingly aware of the need to avoid writing incriminating emails, and that relevant data (for example evidence of systematic increase or reduction of tender prices in specific bidding situations) may instead be found in these business tools.

The European Commission made it clear in its 2015 Explanatory Note on dawn raids that it expects companies to provide a significant degree of co-operation in respect of IT issues, including being able quickly to block individual email accounts, disconnect running computers from the network, remove and re-install hard drives from computers and provide administrator access rights support. Given the significant penalties for obstruction, companies may wish to test in advance their capacity to respond to these requests, particularly where their IT capacity is located remotely or in the cloud or operated under contractual provisions with an outsourced IT service provider.

**‘The European Commission is rapidly becoming better equipped in terms of technology and expertise, which means companies should manage their data and documents in such a way that they are equipped to respond to the kinds of demands that will be made on them in the event of a raid or investigation.’**

*Katrin Gaßner, Partner, Rhineland*

## Privilege: no international convergence

Attitudes to legal professional privilege differ across the globe. This creates difficult disclosure strategy issues if a document is sought in two or more jurisdictions and different privilege rules apply: authorities in a jurisdiction where it is legally privileged may argue that privilege has been waived because it has been produced or seized in a different jurisdiction.

Hong Kong, Singapore and Thailand have a concept of legal privilege but most Asian jurisdictions do not. Privilege is not recognised by the Chinese authorities and the position is broadly similar in Indonesia, Korea and Japan. While in many of these jurisdictions lawyers owe a duty of confidentiality to their clients, it is far less extensive than legal privilege.

## Data protection: avoiding the rock and the hard place

Data privacy issues arise because what an investigating authority demands may conflict with what a company is allowed to disclose, and because the rules vary hugely across jurisdictions. The US DOJ is particularly aggressive in requiring disclosure of communications and documents: the US position is essentially that a company owns

whatever is on its computers and servers – and not even personal correspondence of employees is protected on grounds of data privacy. At the other extreme are countries such as Germany, where data protection rules are strict and backed by criminal sanctions including prison terms. In Europe, the trend is towards stricter protection, with a new EU regime entering into force in 2018 under the General Data Protection Regulation.

These differences raise more acute difficulties in cross-border cases. If anti-competitive conduct in the EU has effects in the US then US authorities may require production of documents related to the EU business, or they may object to the withholding of information through the redaction of material submitted. While the US demand is legal under US law, the company may be infringing the law, and even committing a crime, as well as opening itself up to claims for redress, in Europe.

In some cases disclosure may be justified on the basis that it was required by law, but this does not help where voluntary disclosure is made, as in the case of a leniency application.

There may be other difficulties, even within a single jurisdiction. For example, if the law provides that the authority may have access to certain data, but that the company itself cannot have the same access, the company faces extra challenges in preparing to defend itself.

**‘Data privacy has to be handled carefully in the US, because the kind of protection that applies in much of Europe simply doesn’t exist in the US. A leniency applicant or cooperating party in the US may not be able to disclose certain European information to the Department of Justice for fear of violating data privacy laws which could result in a jail sentence for someone in Europe.’**

Bruce McCulloch, Partner, Washington DC

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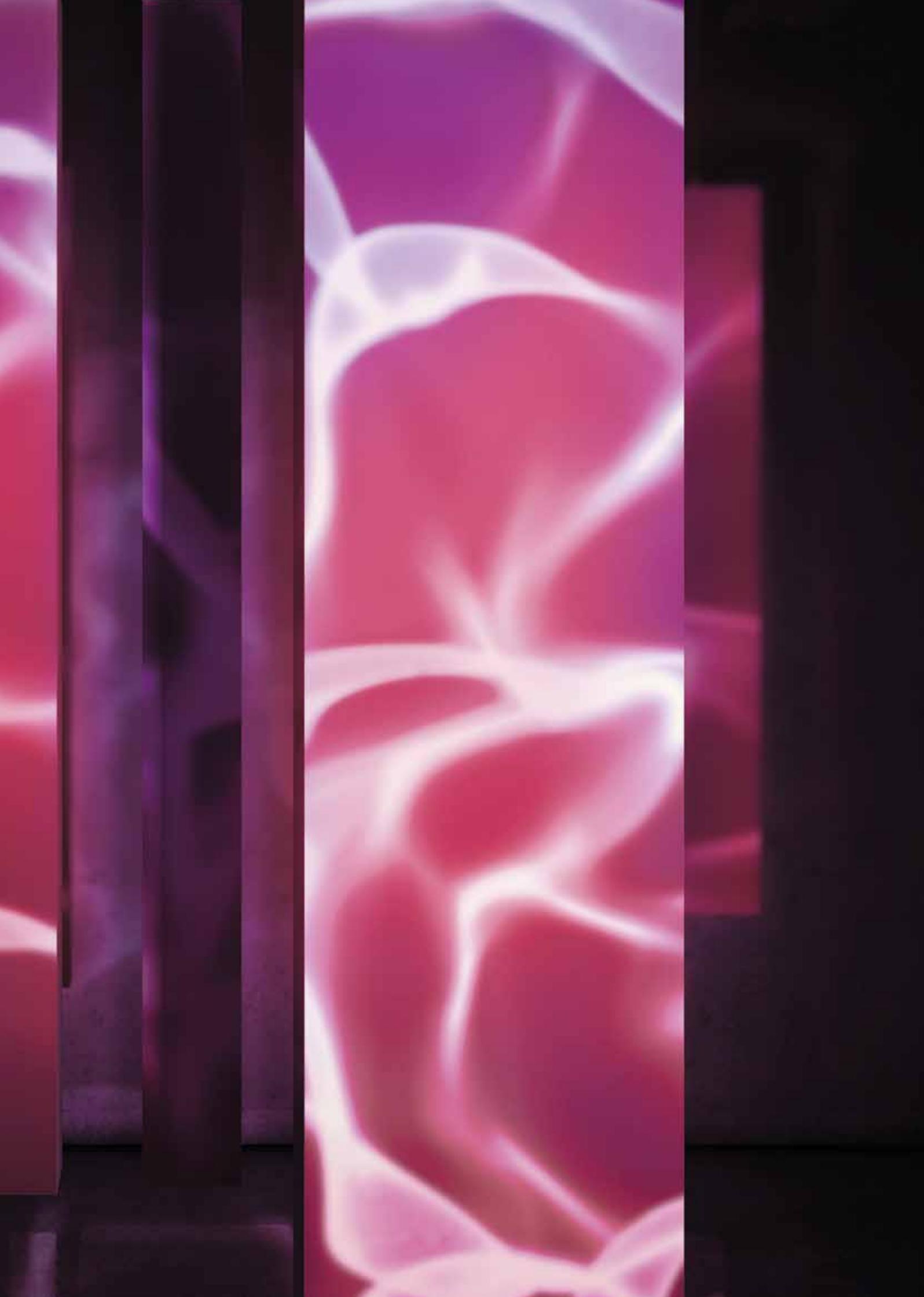
## Looking ahead in 2017

To keep ahead of these rapidly developing issues and challenges, a number of practical steps can be taken:

- **check that your IT systems** facilitate quick and appropriately refined responses to document requests in the event of an antitrust investigation. Extremely large amounts of data may need to be downloaded very quickly – not always easy with ‘cloud’ storage – and split up so that only the relevant documents (for example relating only to specific countries or products) are handed over to the authorities;
- **ensure that you always know** where your data actually is to be able to assess which law applies (again not easy with ‘cloud’ storage);
- **put in place internal local guidance** in each relevant jurisdiction to ensure that legally privileged documents are clearly labelled when they are created;
- **put in place appropriate data retention guidance** – save the data you need, and delete data that is simply not necessary anymore;
- **ensure through compliance training** that employees are aware that, in the event of an investigation, the authorities may gain access to any of their documents or communications, regardless of their means of creation or storage – including messages stored on handheld devices or communications on social media platforms;
- **ensure through compliance training** that employees are aware of internal policies in place on use of social media, chat rooms and the like;
- **as far as local law allows, draft employment contracts** so as to limit the data protection issues that may arise in the event of a document request from the authority and get local advice before responding to requests; and
- **if you face a cross-border investigation**, ensure that your response is fully co-ordinated and at the same time appropriate in the light of local laws and cultures.

‘Differences in approach between jurisdictions also extend to different views as to what constitutes a cartel. In the EU, uncertainty as to what kind of information exchange constitutes a cartel may hinder companies in deciding on their strategy. There is great risk in applying for immunity if you do not even know whether the conduct you have uncovered is classed as a cartel and so eligible for immunity.’

Bea Tormey, Partner, London





**8.**  
**Extending the  
reach of antitrust into  
new policy areas**

## Lessons from the State aid cases – anticipating the impact on your business

In August 2016, the European Commission adopted a decision holding that tax rulings issued by Ireland had given Apple a benefit of approximately €13bn in illegal State aid. This followed earlier decisions in which the Commission deemed that a Netherlands tax ruling for Starbucks, a Luxembourg tax ruling for Fiat Finance and Trade and a Belgian excess profits scheme all constituted illegal State aid. Further investigations, notably in relation to Luxembourg tax rulings regarding Amazon, Engie and McDonald's, are pending.

Decisions that tax rulings may be illegal under State aid rules came as a surprise to many. The fact that the illegality in question could be viewed as operating retroactively, and that the alleged benefit would have to be repaid in full, has made this a story of global interest.

In the post-financial crisis world, in which individuals have been exposed to austerity measures, public anger at perceived tax avoidance by multinationals has intensified. Some view the Commission's actions as a response to, and acknowledgement of, that anger.

Critics argue the Commission is using State aid enforcement as a means of pushing its political goal of tax harmonisation across the EU. Ultimately, however, the scope of the Commission's powers in this area will be decided by the European courts. In the meantime, businesses will want to make sure that the approach they are taking is not going to fall foul of the Commission's position.

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## The story so far

The State aid cases the Commission has brought so far combine a number of common themes. As a reminder, the basic concept of State aid requires there to be aid granted by a member state through State resources, in any form whatsoever, that distorts or threatens to distort competition, favours certain undertakings or the production of certain goods, and affects trade between member states.

The Commission argues, in the fiscal State aid cases, that the tax rulings member states issue grant an advantage (since, in the Commission's view, they allow for a lower tax bill than should be the case). These rulings favour the individual company with whom they are agreed (since these companies are deemed to pay lower tax than comparable companies that do not have tax rulings). Those companies in receipt of a tax ruling that is viewed as giving a selective advantage are therefore seen as recipients of illegal State aid.

The Commission insists that it is not trying to police tax harmonisation – it is not suggesting the corporate tax rate should be the same in all EU member states – but the alleged effect is to harmonise corporate tax assessments on an EU-wide level. The Commission sees State aid as a tool it can use alongside the ongoing legislative reform at the EU level to fight harmful tax practices, arguing that if black letter tax laws were applied fairly to all companies, there would be no State aid.

Multinationals argue that, as a matter of good tax governance, they want to avoid disputes with tax authorities. Therefore, taxpayers and tax authorities alike prefer upfront certainty in the form of tax rulings, for example in relation to profit allocation between related companies operating across borders. The Commission acknowledges this, although the current challenge for businesses is the relative lack of guidance on how to ensure that tax rulings are compliant with EU laws.

In relation to transfer pricing, the Commission claims only to be examining 'outliers' – cases where there is a manifest breach of an EU arm's length principle. There is limited guidance on this principle, although the Commission states that a transfer pricing arrangement that complies with the arm's length principle as set out in the OECD guidelines is 'unlikely' to give rise to State aid. This has given rise to concerns about lack of legal certainty.

Many argue that this uncertainty is compounded by wider political pressures, illustrated by suggestions that the Commission is focusing on so-called 'stateless income' (income that is not subject to current tax by reason of a mismatch in national tax rules, often due to rules in US tax law).

## Practical implications and steps to reduce risk

Tax rulings have never been simple. Companies seeking to reduce risk should ensure that any tax ruling, such as on transfer pricing arrangements, can be justified not only under the domestic laws of the country where the ruling is obtained, but also under international guidance.

Some practical steps can be taken:

- first, companies should investigate their current tax arrangements and in particular assess whether they have any tax rulings and/or tax planning structures in European countries. They should identify whether these rulings/arrangements are similar to the ones being currently investigated or are likely to be of interest to the Commission as so-called ‘outliers’. Any ‘stateless income’, although arguably not relevant for State aid purposes, may well be a trigger for the Commission to investigate;
- second, any transfer pricing arrangements currently in place should be re-examined and the underlying supporting analysis should be tested to see if it would withstand further scrutiny; and
- third, if any problems are discovered, companies should determine whether the structure or tax ruling should be changed or terminated. Although terminating the structure is not a safe harbour – as the Commission might still argue the ruling constituted illegal State aid during the years it was in effect – it would limit the potential recovery amount going forward.

**‘Many question whether the Commission’s interpretation of State aid law around tax rulings is impinging on national sovereignty. Ultimately, the courts will provide the checks and balances that are needed for these kinds of situation.’**

Andreas von Bonin, Partner, Brussels

Finally, companies may want to work with local national tax authorities to seek certainty in relation to their tax arrangements.

This approach may also include encouraging lobbying at national and EU levels to strive for that certainty.

From a broader perspective, the Commission’s enforcement action in the State aid taxation cases could increase uncertainty in other areas of taxation. The Commission has broadened its investigation from just transfer pricing arrangements in relation to McDonald’s (questioning Luxembourg’s interpretation of the US–Lux double tax treaty) and Engie (financial transactions between related companies being treated both as debt and as equity). Moreover, investigations may not be limited to tax rulings; also tax settlements or *de facto* acceptance by tax authorities of certain tax positions taken by multinationals may be investigated.

Ultimately, it will be for the European courts to decide the scope of the Commission’s powers in this area. However, pending any such development, member state decisions specific to an individual company will be subject to some State aid uncertainty.

**‘One thing is clear, now even more than ever tax advisers have got to make sure they are giving clients advice which incorporates State aid (and what we would consider “political”) risks. Reliance by companies on their interpretation of black letter tax law is no longer sufficient.’**

Eelco van der Stok, Partner, Amsterdam

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## Looking ahead in 2017

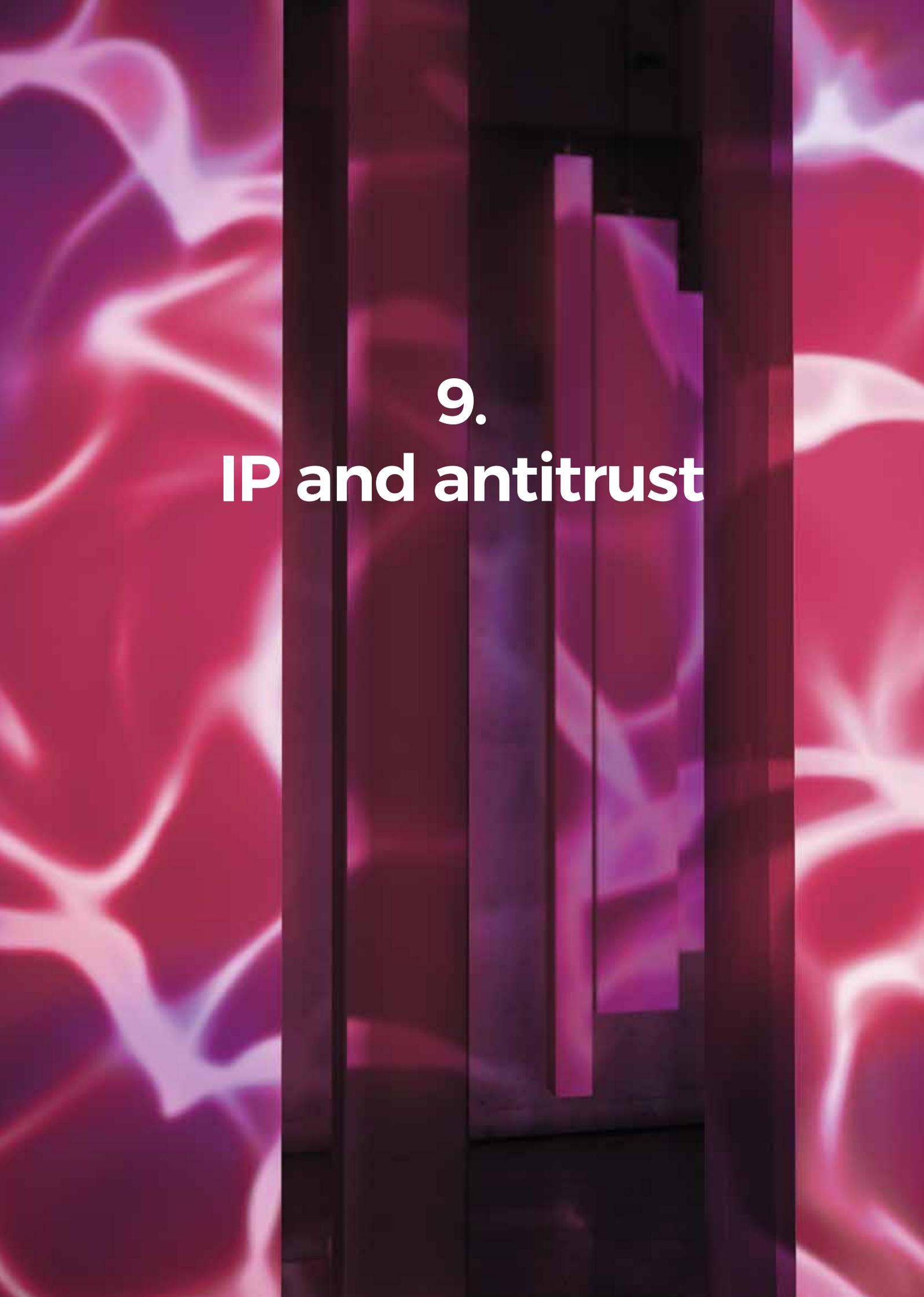
In 2017, companies will need to consider:

- **areas of uncertainty:** the appeals against the completed State aid decisions are unlikely to be ruled upon until 2018 at the earliest. And the Commission claims to have further cases in the pipeline. As such, 2017 will continue to see uncertainty. We are already seeing a shift from tax rulings to relying on opinions or 'soft' comfort given by tax authorities, neither of which gives full certainty;
- **US reaction:** with a new administration in the US, and given that any State aid recovery from US multinationals means that US corporate taxes that should be paid to the US Treasury are instead being paid to European governments, there is a possibility that the US will try to intervene in the (political) sphere. Also, the new administration may facilitate repatriation of offshore profits back to the US, which may mitigate State aid or recovery risks. And although at the moment unlikely, there are legislative tools in the US to retaliate with punitive measures on European corporates in the US;
- **new tax claims:** some governments in Europe believe they have lost out on tax revenues as a result of the allegedly unfair tax deals agreed between corporates and countries such as Ireland, the Netherlands and Luxembourg. Countries (such as the UK, France and Germany) with large volumes of 'sales' that received relatively low amounts of corporate tax – as corporate taxes, contrary to VAT, are not due where the sales are realised, but where the value is added – are likely to come under public and media pressure to pursue new claims for back taxes; and
- **ongoing legislative reforms:** in 2017 and beyond, we will see further implementation of the base erosion and profit shifting (BEPS) recommendations, including the European Anti-Tax Avoidance Directive (ATAD) directives. The Commission has also re-proposed a European Common Consolidated Corporate Tax Base (CCCTB), which has the potential to impact the GDP of many member states and furthers the Commission's aim of taxation being paid where sales are realised.

**'For a long time, State aid was not a weapon in the European Commission's armoury that would raise major competence and sovereignty issues. The recent State aid tax ruling cases have completely changed that. Fundamental questions will need to be answered by the EU courts.'**

Onno Brouwer, Partner, Amsterdam and Brussels





# 9. IP and antitrust

# Implications of recent cases and likely policy developments in 2017

Rewards for innovation through the existence and protection of intellectual property (IP) rights are crucial in today's technology-based economy, which is highly dependent on R&D. Exclusive rights conferred by patent law can, however, create tensions with goals pursued by competition laws. Indeed, competition agencies across the globe are acutely interested in matters arising at the interface of IP and competition law.

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Recent enforcement in the sphere of standard essential patents (SEPs) and pharmaceuticals, in particular, is significantly affecting the legal landscape for patent owners; it is clear that patentees must now, more routinely, consider how competition law may impact on the exercise of their patent rights. Developments in 2017 will test how far the law permits competition authorities to go in this respect.

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## Standard essential patents

Standards are critical to innovation in many industries, especially where compatibility and interoperability between manufacturers' products or components within a system are required. The last few years have seen antitrust agencies worldwide focus on standardisation, especially 3G/4G mobile communications standards, amid concerns that SEP owners may have been exploiting market power, and holding up innovation, through unreasonable or discriminatory licensing demands.

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Considerable attention has been concentrated on the impact of a 'FRAND' obligation: a commitment given by patent owners in the standardisation process to license their SEPs to all third parties on fair, reasonable and non-discriminatory terms. The European Court of Justice's landmark ruling in 2015 confirmed that, in the EU, a dominant SEP holder, which has given a FRAND commitment, would infringe competition law if it sought an injunction in patent litigation against the user of standardised technology if the user acted in a way that was consistent with being a 'willing licensee'.

This ruling has been influential globally and many jurisdictions, including China and India, are exploring how to deal with issues as SEP owners seek injunctions and other ways to monetise the value of their patent portfolios. Disputes and private litigation between private parties are also occurring. Important further questions raised include: What does each party need to do to establish it has been engaged in good faith licensing negotiations? How should FRAND rates be determined? How does FRAND relate to the requirements of competition law in some antitrust systems that dominant firms may not charge excessive or exploitative prices for their products or discriminate in prices between their customers? Can patent portfolios be split and, if so, what impact does such a split have on FRAND licensing obligations? Can SEP holders sue not only manufacturers for infringement but also retailers? Do the same principles apply where the patent owner has not given a FRAND commitment?

Resolution of these issues will be critical to the relationship between patent owners and innovators/implementers of standards (implementers) as future standards, such as 5G, are developed and implemented.

**'The Court of Justice's ruling that FRAND-encumbered SEP holders may violate antitrust law if they seek injunctions against willing licensees has determined some issues but unleashed a host of other complex matters for resolution. Many of these, including the scope of the obligations for the patentee/implementer and the question of whether acts necessary to assert/avert injunctive relief can be rectified at a subsequent point in time, such as during infringement proceedings, are working their way through the German courts. Solutions to these issues are crucial if disputes are not going to break out between SEP holders and potential licensees as 5G technology is developed.'**

Wolrad Prinz zu Waldeck und Pyrmont, Partner, Rhineland

## Pharmaceutical products

In the field of pharmaceuticals, there has been, for some time, antitrust concern about practices of pharmaceutical companies that might be delaying entry of new, innovative and cheaper generic medicines onto the market – particularly product hopping, in which a pharmaceutical company makes non-therapeutic changes in drug formulation to prevent generic substitution rather than to improve the quality of the product, and settlement agreements.

Settlement agreements may be designed to resolve, without recourse to costly litigation, disputes concerning the validity or scope of IP and are common in patent-intensive industries. They can be an entirely legitimate and economically rational means to settle genuine disputes in relation to rights that are uncertain. Nonetheless, competition agencies, including the US FTC and the European Commission, have made clear that such arrangements, especially where they involve payments from patentees to generics in return for not entering the market, may go beyond the legitimate exercise of patent rights to prevent alleged infringements. Although the US Supreme Court and the General Court in the EU have recognised that such ‘pay-for-delay’ or ‘reverse payment’ settlement arrangements may infringe antitrust laws, they take a different approach to the question of how a violation is to be established.

The US courts have held that, given the complexity and variability of the practices, a claimant needs to demonstrate likely anti-competitive effects. The European General Court, in contrast, affirmed the Commission’s finding in *Lundbeck* that a restriction of

**‘In the US private litigants have been targeting the conduct of pharmaceutical companies, including patent settlements and product hopping, which is alleged to prevent consumers from benefiting from generic drug competition. The FTC is also taking a close interest in conduct in the pharmaceutical sector and is keen to ensure that firms do not obstruct the entry of generics into the market.’**

Thomas Ensign, Partner, Washington DC

competition could be assumed without need to demonstrate restrictive effects. Consequently, in the absence of the parties demonstrating a valid efficiency defence, the conduct was prohibited.

Another emerging issue of controversy is whether pharmaceutical companies are seeking to extract ‘too high’ prices from their proprietary medicines. Competition agencies have generally been reluctant to bring excessive pricing cases in the past – such allegations are difficult to establish, cut across parties’ rights to price their products as they see fit and may create disincentives to innovation. Although the US and EU agencies have not so far been willing to intervene in this sphere, the Italian antitrust authority imposed €5m in fines for such behaviour and, in December 2016, the UK’s CMA issued its highest ever individual fines on Pfizer and Flynn Pharma (nearly £90m) for charging excessive prices to the National Health Service for an anti-epilepsy drug.

**‘Although the EU and US antitrust agencies have, to date, been unwilling to intervene in relation to complaints about excessive pricing of blockbuster pharmaceutical products some national competition law agencies in the EU have been taking an interest in the matter. The question of whether competition law should curtail pricing of patent holders is coming to the forefront both in relation to pharmaceutical products and SEPs.’**

Thomas Lübbig, Partner, Berlin and Vienna

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## Looking ahead in 2017

Developments internationally demonstrate the importance for patent owners to take account of competition law when devising their pricing, end-of-life and patent enforcement strategies. The actions of competition authorities, and the outcome of litigation, are creating a fast-moving and challenging landscape for patentees and their customers and licensees – particularly in the areas of mobile communications and pharmaceuticals. Key developments expected during 2017 include:

### Outstanding issues relating to the availability of injunctions

- **What constitutes good faith negotiating?**

Can a SEP holder comply by offering a licence of all its SEPs on a global basis and/or can a licensee insist on only taking licences of certain SEPs in a jurisdiction in which they have been proved to be valid and infringed? Can a licensee require the licensing of SEPs held by affiliated companies?

- **When do SEP holders/implementers have to fulfil their obligations** to be able to assert/avert injunctive relief and is it possible to rectify missing requirements and actions in the course of proceedings? This key question is still working its way through the courts, with the courts in Europe's biggest market, Germany, likely to be a key battleground on this critical issue.

### Clarifying FRAND terms

- **What should a FRAND licence look like?**

Should licensing rates be calculated by reference to the value of the patent before or after standardisation and/or before or after the validity of the patent is ascertained? Should licensing rates relate to a percentage of net sales of the final product or a 'smallest saleable unit' or some other measure? To date, few courts outside of the US and have tackled these questions.

- **EU Commissioner Vestager has recently indicated** that she will be willing to act against exploitative behaviour of SEP holders, balancing the rewards of innovation with the interests of consumers. Other antitrust agencies are also engaging with these matters and many are likely to pay close attention to the behaviour of SEP holders as 5G technology develops, together with the Internet of Things.

### Splitting SEP portfolios

- **Given that courts are generally only prepared to consider** a small number of patents, an important issue is whether dividing a SEP portfolio constitutes an infringement of competition law. Although an English court has suggested, in litigation between Unwired Planet and Samsung and Huawei, that it might, a German court has held that targeting a fair remuneration for a patent portfolio is a legitimate and legal objective.

Although an English court has suggested, in litigation between Unwired Planet and Samsung and Huawei, that it might, a German court has held that targeting a fair remuneration for a patent portfolio is a legitimate and legal objective.

- **One vexed question, likely to arise in further litigation**, is whether the principle of non-discrimination requires a purchaser of a patent portfolio – especially where the purchaser does not itself produce standardised equipment (ie it is a non-practising entity) – to adopt the same approach to licensing as the vendor or whether that principle only obliges a patent owner to treat its own licensees in a non-discriminatory manner.

### Patent enforcement and pricing strategies in the pharmaceutical sector

- **A particularly important issue is** whether, and if so when, it is legitimate for a competition agency (or other claimant) to rely on an assumption that a patent settlement agreement restricts competition. Lundbeck has confirmed it will appeal the General Court's controversial judgment to the Court of Justice. A similar appeal is pending before the UK courts.

• **Parties entering into a settlement agreement**

should ensure that they take antitrust advice prior to entering into it in order to minimise the risk of an antitrust infringement. Factors to consider are likely to include whether the agreement is aligned with the scope of the patent in dispute; the agreement permanently settles the dispute; and any payments made reflect the strength of the patent and likely cost of litigation.

**Pricing of pharmaceutical products**

• **Competition agencies seem likely to continue**

to take a close interest in the pricing of drugs on which people's health, or lives, is dependent. Commissioner Vestager has indicated that competition agencies should act when drug prices increase above a level that cannot be 'justified'. Further, the CMA has indicated, following its decision in Pfizer and Flynn Pharma, that it has a number of other pharma cases in the pipeline.

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**'It is clear that patentees need to pay close regard to antitrust law, particularly when devising their pricing and enforcement strategies for pharmaceutical products and SEPs. Implementers will continue to look to antitrust law to protect them in patent litigation and recent history shows that it is the parties that pay closest attention to the competition – as well as patent – law aspects of their strategies that are the most effective in securing their commercial objectives.'**

James Aitken, Partner, London



**10.**  
**Disruptive  
innovation**

# Application of competition law in the sharing economy in the year ahead

It started off as an easy way to be able to afford their San Francisco pad. With the internet providing access to millions of potential renters, the creators of Airbnb had an immediate global reach to market a couple of nights' stay in a saturated hotel market. Ten years later, Airbnb is outpacing large hotel groups in guest bookings. Its rapid growth illustrates how traditionally infrastructure-heavy industries can easily be disrupted if underutilised privately owned assets are put on the market in competition with traditional goods or services. To disrupt, all that is needed is a platform connecting supply and demand.

Traditionally, regulators have welcomed platforms on the basis that they are meeting a consumer demand, thereby increasing consumer welfare. Especially in sectors where demand and supply are fragmented, e-platforms provide the immediate scale and reach at low cost to allow new entrants to offer their services sustainably. However, in regulated industries, such as the taxi and hotel industries, traditional market players perceive platforms as not complying with local laws and regulations and thus competing on an unfair footing. That raises another question regulators are grappling with: to what extent is not complying with the law unfair competition by nature, and could it by extension be an abuse of dominance?

**'With the public debate centering around how disruptive business models fit within existing regulatory frameworks, so-called disruptors risk facing moving regulatory goalposts, especially when they grow exponentially.'**

Rafique Bachour, Partner, Brussels

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Disruptors on the other hand are challenging existing regulations that deter, or potentially preclude, the entry of new services to existing markets, claiming these are no longer appropriate in an increasingly digitalised world. This forces legislators and policymakers to rethink how public policy objectives are balanced against increased consumer choice, and whether it is time to hit the ‘reset’ button on existing, and potentially dated, policy objectives and the expression of those policy objectives in legislation that is no longer fit for purpose.

Most of the enforcement actions against sharing platforms have until now been based on local laws and sector-specific regulation, such as licensing or health and safety laws. However, competition issues have been raised in situations where the platform influences the prices suppliers charge for the products or services they are offering. A notable example is the antitrust class action brought earlier this year against Uber’s co-founder and CEO, Travis Kalanick, in the federal district court of New York. The claimant alleges that Uber’s platform, and specifically the app which shows the price for the journey, facilitates a conspiracy to fix prices among taxi drivers. The mechanism by which such co-ordination is supposed to have taken place is obscure to say the least. However, vertical arrangements between platforms and their supplier partners do need careful consideration, as outlined in Theme 5. Clauses harmonising prices, imposing fixed tariffs or preventing suppliers from freely pricing their product or service may well come within the ambit of antitrust laws.

**‘Despite the rapidly changing nature of these markets and platforms, “traditional” antitrust considerations remain relevant and hardcore restrictions will continue to face regulatory scrutiny.’**

Deirdre Trapp, Partner, London

Apart from blatant antitrust violations such as price-fixing, antitrust regulators face the question of whether they need to be concerned with competition *within* digital markets at all, when competition *for* the market is what drives innovation. Arguably, market shares are not relevant in markets that can be disrupted readily. That in turn begs the question whether platforms underpinning the sharing economy constitute entry barriers in and of themselves. Is there a tipping point creating network effects so strong that competing platforms can no longer disrupt the disruptor? And if so, are platforms behaving in ways to entrench their newly gained market position to preclude competition from newcomers? This underpins a good deal of the Big Data debate outlined in Theme 4.

We expect the antitrust notion of *potential competition* and associated questions relating to the burden of proof to become more prominent in many cases in the coming years. Under what circumstances can a competition authority block the acquisition by an incumbent of a promising new platform with limited turnover and market share and what should be demonstrated to back up a legitimate theory of harm? What evidence should be collected to demonstrate the market power of a digital platform on a lasting basis? When should an agreement between two e-platforms to focus on different areas be considered prohibited market sharing, because in the absence of the agreement they could compete? And how will all these issues interplay with the existing, and likely developing, regulatory environment that applies to such industries?

Use of data generated by e-platforms enables regulators to base any antitrust investigation on actual information on how consumers use the products and services (as well as competing products and services). We expect regulators to tap into that more and to rely more on behavioural economics when studying disruption to determine if consumer welfare is served. In markets where disruptors have built a solid market presence, we expect regulators to focus on ensuring these markets remain contestable, and disruptors remain disruptable.

**‘We expect future competition cases to focus on potential competition, and, crucially, whether access to data is relevant for any competition analysis.’**

Winfred Knibbeler, Partner, Amsterdam

## Looking ahead in 2017

Going forward:

- **the distinction between disruptors and incumbents** will only become more blurred as disruptors capture large shares of the market, while incumbents fight for survival by extending their offerings in new business areas and evolving their product and service offering. Both are likely to face a changing and uncertain regulatory landscape, with moving goalposts as legislators are weighing in to protect the public interest;
- **there is, however, no clear indication that antitrust regulators** will tackle the sharing economy in unexpected ways. Restrictive practices, such as price-fixing or resale price maintenance, as well as abuses of dominance will continue to face scrutiny – whether in the physical world or online.

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**Our international  
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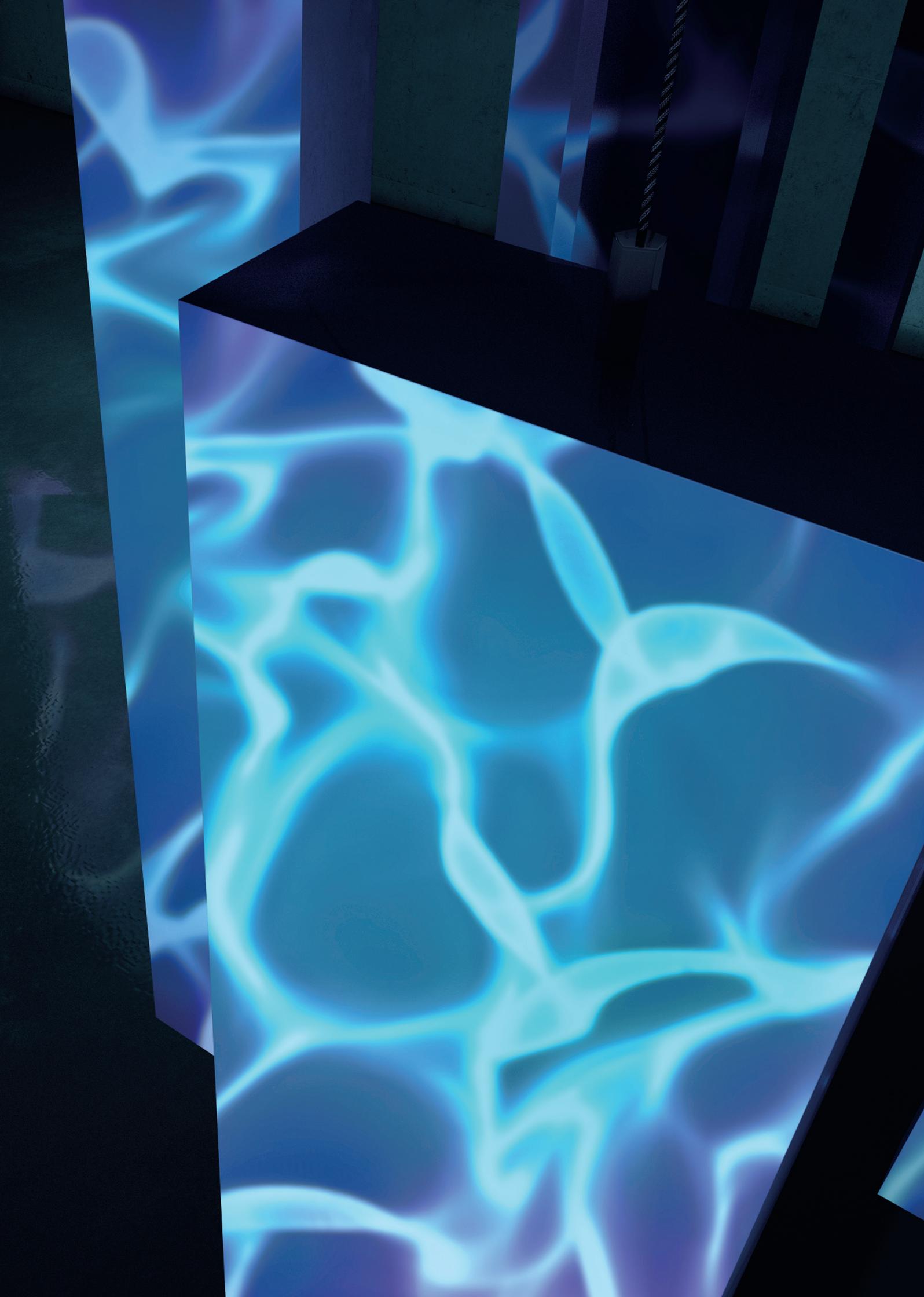
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