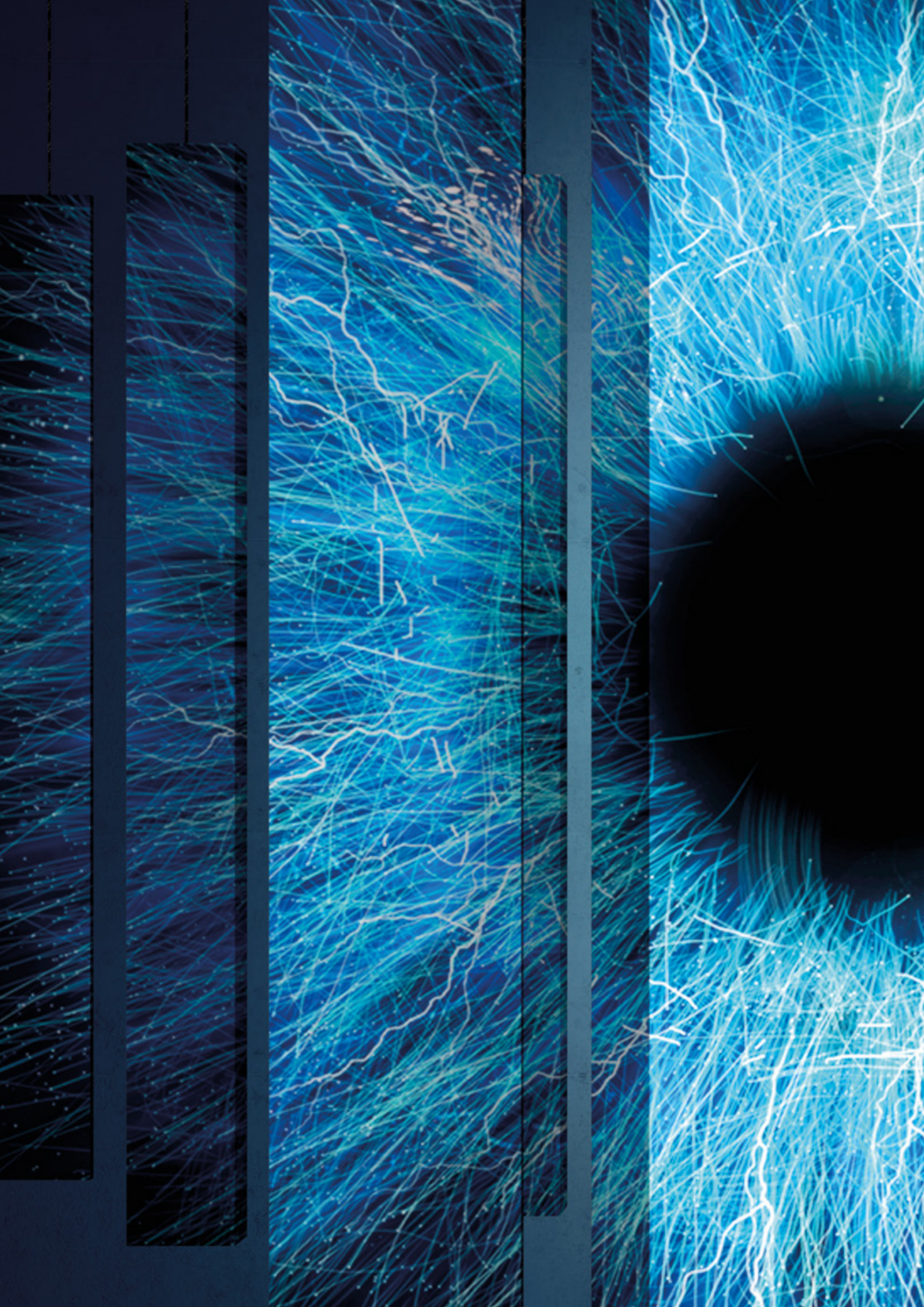


10 key themes

Global antitrust in 2018



Freshfields Bruckhaus Deringer



Global antitrust in 2018

This year, we celebrate the 275th anniversary of our firm and mark our long tradition of looking ahead to anticipate the impact of changing laws and policies around the world on our clients. In global antitrust and trade, we will continue to see political and economic dynamics shape the enforcement of laws that heavily impact transactional activity and commercial conduct.

EU Competition Commissioner Margrethe Vestager has gained international recognition for pushing novel and far-reaching theories motivated by notions of fair competition, with several of her higher profile targets in 2017 being large US multinationals.

In the US, Makan Delrahim has only recently been confirmed as Assistant Attorney General at the Department of Justice's Antitrust Division and Joe Simons has now been nominated to serve as Chairman of the Federal Trade Commission. Both are seasoned political appointees and private sector lawyers. Their prior track records would suggest a more conservative approach than the prior administration and a sharp philosophical divergence from the current direction of Commissioner Vestager.

Could 2018 be a watershed year for trans-Atlantic divergence, the likes of which we have not seen since the early millennium? Several important drivers may compound these tensions:

- **fast-moving technology and innovation** are changing the way companies compete to sell their products and the way consumers interact with business. Antitrust law and practice are developing fast, but concerns are rising as to whether existing tools are adequate to address the scale and nature of industrial change in the digital era. As agencies balance free market economics with choice and fairness, international convergence on antitrust principles will be tested;
- **the rise of emerging markets** is changing the enforcement landscape, as newer, often well-resourced agencies increase enforcement activity in their regions. Many follow EU principles, but important differences in law and interpretation exist. As our recent report* showed, no one can afford to ignore antitrust in Asia in global deal planning or corporate compliance; and

- **geo-politics** continues to shape enforcement policy as regions face very different economic challenges and political pressures. The re-emergence of protectionism within the G7 and changes in international trade agreements are clear examples of developing laws and policies that are already having a major impact on cross-border trade and investment. Perhaps less obvious is the impact of broader public policy and political objectives on the extending reach of antitrust into a wider range of areas.

I am delighted to enclose our eighth annual review of key trends in global antitrust. We start and finish with important areas of potential international divergence in trade, public interest and foreign investment, and State aid, but also explore how these dynamics will play out on the ground in reality as agencies across all regions take action in 2018 in relation to business consolidation and conduct.

We will be updating these themes through the year, and holding a number of events to discuss their implications in more detail. If you are interested in hearing more, or joining our discussions, please get in touch with me or approach your usual contacts in our antitrust, competition and trade team.

Best wishes for a successful 2018.



Thomas Janssens

Global Head, Antitrust,
Competition and Trade Group

E thomas.janssens@freshfields.com
T +32 2 504 7546

*www.freshfields.com/en-gb/our-thinking/campaigns/antitrust-in-asia



As companies innovate to compete in rapidly changing markets, regulators around the world are adapting quickly to ensure consumers are protected. In 2018, it is more important than ever to understand the significance of these dynamics, which raise complex legal issues involving an increasing number of regulators around the world. We look forward to discussing with you the key themes in global antitrust and trade and how they affect your business.

Edward Braham, The Senior Partner

10 key themes



1.

International competition and trade

Will 2018 be the year when the mists clear?

Page 7



6.

Pricing and sales practices

Staying antitrust compliant

Page 33



2.

The rise of protectionism

Impact on deal planning

Page 11



7.

Global antitrust investigations

Protecting your position in an era of tough enforcement

Page 39



3.

Innovative theories in merger control

Getting complex cross-border deals across the line

Page 17



8.

Antitrust litigation

Managing global risk in a rapidly evolving landscape

Page 45



4.

Deal risk

Managing multiple merger reviews as authorities step up enforcement and the risk of third-party challenge grows

Page 23



9.

Employees

Making sure your employment policies are antitrust compliant

Page 51



5.

Platforms in the antitrust spotlight

All eyes on the disruptors

Page 29



10.

State aid

Testing the limits of competition law

Page 57



1.

International competition and trade

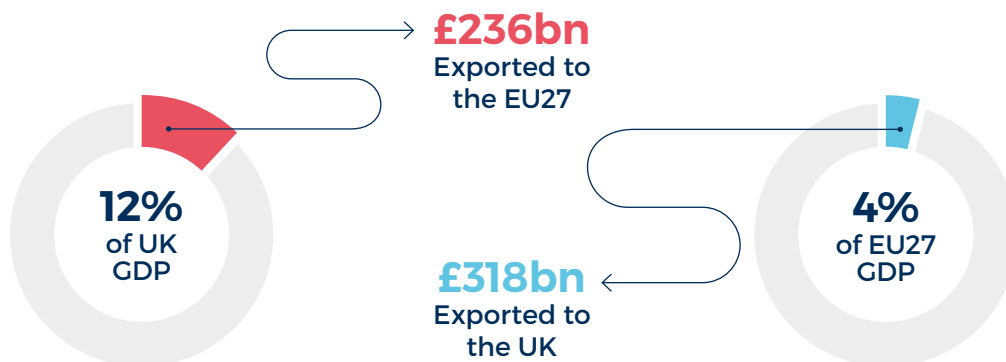
Will 2018 be the year when the mists clear?

2017 saw the future of global and regional trade shrouded in uncertainty, as negotiations towards a new European Union (EU) and United Kingdom (UK) relationship post-Brexit stumbled and President Trump faced challenges in implementing important parts of his manifesto. However, 2018 may see the mists clear to reveal the future direction of global trade more distinctly.

Europe

The European Council's decision of 15 December 2017 to move to the second phase of negotiations with the UK marked a breakthrough following a lengthy period of deadlock.

2018 should now witness more concrete progress towards a transitional agreement (likely to be approximately two years and based on a 'standstill' arrangement, supported by financial contributions) and the emerging bones of the future agreement. Any agreement will be significant to the economic future of Europe – in 2016, the UK exported £236bn (or 12 per cent of the UK's GDP) to the EU27, while the EU27 exported £318bn (or 3–4 per cent of the EU27's GDP) to the UK.



At this point, the agreement's shape is subject to speculation: will it be the 'bespoke' deal promoted by the UK government; something more 'off the shelf' like the so-called Norway model with the UK joining the European Free Trade Association (EFTA); or an enhanced version of the Canadian Comprehensive Economic and Trade Agreement (CETA) that concluded in 2017? In a worst case scenario where talks break down, both parties would revert to trading on the terms set out in the World Trade Organization (WTO) agreements at a time when the WTO is under some stress and struggling for resources, having lost its historic support from the US.

1

2

3

4

5

6

7

8

9

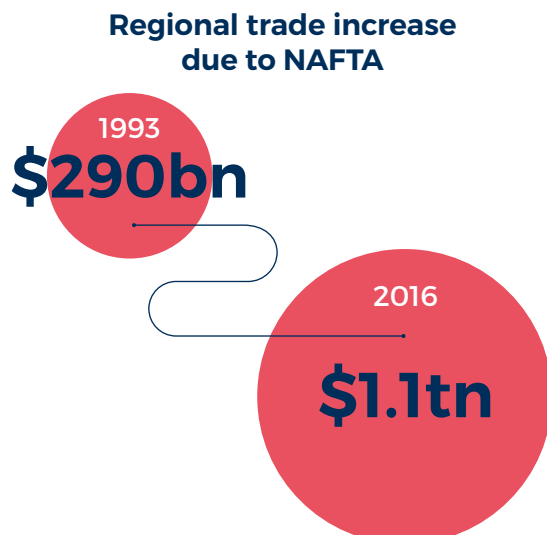
10

Whatever the result, it is a near certainty that businesses will face additional supply chain and trading challenges when dealing with customers or partners in the EU and UK, whether these are tariffs or regulatory hurdles. Businesses will need to make significant adjustments to accommodate these changes:

- manufacturing businesses will need to examine their integrated European supply chains to minimise the impact of paying tariffs and duties and undergoing customs controls multiple times for a single finished product; and
- service-focused businesses will need to ensure that the relevant licences, structures and qualifications are in place to ensure they can continue to service clients effectively.

USA

2017 saw President Trump act on his campaign promise to pull out of the Trans-Pacific Partnership (TPP). Domestic challenges have so far limited President Trump’s further action, although other US deals under negotiation (the Transatlantic Trade and Investment Partnership (TTIP)) and those already concluded are also at risk. This second group includes the North American Free Trade Agreement (NAFTA) (responsible for regional trade increasing from roughly \$290bn in 1993 to more than \$1.1tn in 2016) and the Korea–US Free Trade Agreement (KORUS FTA), worth approximately 0.4 per cent of South Korean GDP.



‘2018 will see the mists clear and key trade developments, including those relating to Brexit and NAFTA, crystallise.’

Martin McElwee, Antitrust Partner, Brussels and London

Pulling, or threatening to pull, out of trade deals has been President Trump’s highest profile trade policy. However, the US executive branch has also used other instruments, such as the imposition of high tariffs on foreign goods to counter alleged State aid and dumping. For instance, import duties on Canadian Bombardier’s aircraft rose to 219 per cent (more than tripling the cost of a single aircraft) after American Boeing complained of an alleged £40m of State aid from the Quebec regional government. The US Department of Commerce also recently imposed anti-dumping duties of 162 per cent on Chinese aluminium foil.

That said, recent remarks made by Makan Delrahim, the newly appointed head of the Antitrust Division at the Department of Justice (DOJ), may demonstrate a more internationalist institutional view. Delrahim has stated that protectionist use of antitrust laws – to discriminate against foreign firms and/or favour domestic firms – is counterproductive to domestic policy objectives as it undermines incentives to innovate and risks domestic stagnation.

‘The coming year will draw out the tension between Makan Delrahim’s comments on non-discrimination, procedural fairness and transparency in competition law enforcement and President Trump’s domestic rhetoric and international trade policy.’

Paul Yde, Antitrust Partner, Washington DC

Delrahim believes regulators that align closely with the interests of ‘national champions’ can ‘sap local economies of energy and entrepreneurship’, harming both domestic consumers and global markets.

Businesses will need to monitor the many messages coming out of the Trump Administration when it comes to US-related M&A activity and US imports. It would also be prudent to assess business exposure under NAFTA and KORUS FTA and build strategies to mitigate the impact of any treaty renegotiations, particularly for sectors where the US has a trade deficit with the trade partner(s).

‘Businesses should be engaging with governments on an ongoing basis to ensure their voices are heard in trade negotiations.’

Thomas Wessely, Antitrust Partner, Brussels

Asia

As the US has vacated its position as champion of trade liberalisation, so China appears to have seized on the opportunity to fill it – albeit arguably on its own terms. China has, of course, failed in many important respects to open its markets up, but its rhetorical stance has become markedly internationalist on trade issues.

Other Asian nations, most notably Japan, have fought to contain China’s trade ascendancy. Tokyo was instrumental in resuscitating the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP, previously the TPP) after the US’s departure. In 2018, negotiators from 11 countries, including Japan, Canada, Mexico and Australia – together representing about 15 per cent of the global economy – will revisit the CPTPP. Some have suggested that the parties could reach a deal as early as Q2 2018. Once concluded, businesses operating within the perimeter of the CPTPP will be able to reshape their operations to take advantage of the multilateral agreement. Businesses should be identifying and planning for any potential opportunities.

Looking ahead in 2018

- **Be ready to react and move quickly in response to trade developments.** Increasingly the future of trade deals, particularly multilateral ones, is unclear even following the deal’s conclusion. For pre-existing trade deals such as NAFTA and KORUS FTA, businesses should be asking themselves the following questions (among others): How could this affect the company (eg production, inventory, financial)? Are there agreements/contracts that are dependent on the agreement? Is the supply chain flexible? What should be changed and how, and what is the timing of any changes?
- **Identify opportunities presented by shifting trade alliances and deals.** Developments may provide profitable opportunities to reshape your business, whether in terms of product and/or geography.
- **Conduct detailed analysis of key trade deals.** These deals may have an impact (adverse or not) on your business’s sector and its interests, and may include provisions affecting market access terms, particularly for services, and tariffs for manufacturing.
- **Engage and influence policy makers to ensure the interests of your company and sector are taken into account in any trade deals not yet concluded.** This may include informing them of the repercussions of a particular approach (including financial and employment impact figures) and suggesting an alternative approach (including potential language for a free trade agreement).

1

2

3

4

5

6

7

8

9

10



2. The rise of protectionism

Impact on deal planning

The rise of protectionism in the world's leading economies is expected to have a significant impact on the regulatory landscape and on cross-border M&A activity in the year ahead. The shift from political rhetoric to regulatory change features across a number of major jurisdictions, with at least the US, EU and UK continuing consultations on more restrictive foreign investment measures.

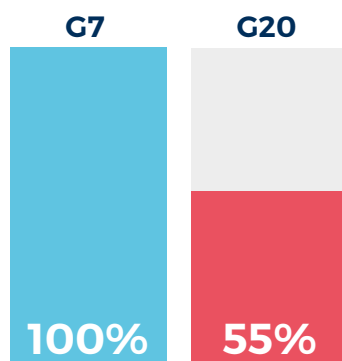
Enhanced regulatory scrutiny will affect deal planning, strategy and execution risk. The main challenge for merging parties in 2018 will be to anticipate and manage political sensitivities as early as possible in the transaction timetable.

Strengthening of foreign investment controls – a global trend

Our analysis shows that all G7 countries and 55 per cent of G20 countries have recently strengthened, or are considering new, measures for government intervention on foreign investment or other public interest grounds. Our own experience advising on recent significant cross-border transactions also reflects this. Since 2014, we have seen a 30 per cent rise in the number of transactions valued at over \$1bn on which we advised that have been affected by foreign investment rules or related public interest intervention.

Western economies in particular are becoming increasingly protectionist, but we anticipate that governments across most regions will take a more direct role in scrutinising cross-border M&A in the year ahead.

- In the US, the Committee on Foreign Investment in the United States (CFIUS) is grappling with a record number of cases and more cases will likely be pushed into second-stage review in 2018. CFIUS is becoming more aggressive and unpredictable in terms of process and substance, and will increasingly be pushing parties to withdraw and refile when faced with concerns.



Countries that have recently strengthened, or are considering new, measures on foreign investment

'In some of these deals, parties should consider early informal engagement with relevant authorities and allow enough time for the review process to run its course. In the US, CFIUS is likely to continue to face significant resource constraints, with an increased workload in 2018.'

Shawn Cooley, Special Counsel (Antitrust), Washington DC

1

2

3

4

5

6

7

8

9

10

- Certain EU member states will be looking at adopting or amending national foreign investment screening measures on grounds of security or public order following the European Commission's proposed regulation. The draft proposal sets out a framework for member states to consider the potential effect of foreign investment on areas including critical infrastructure, critical technologies, security of supply of critical inputs and control of sensitive information, although we expect divergence across member states in terms of national measures. The proposal gives the Commission power to review and opine on investments of 'Union interest', but it stops short of allowing the Commission to block such investments.
- **Germany** is one of the principal forces behind the EU initiative and has recently strengthened its own review procedures. Its new law is broader in scope and contains longer review periods than the previous regime. Within the last few months, the relevant ministry has opened a significant number of in-depth investigations. While, for now, these proceedings have only led to delays, it appears quite possible that Germany could seek to block specific investments in the next year, particularly in industries that the government considers critical.
- In the **UK**, following a period of historically low political intervention, the government has signalled that deals will be examined 'on a case-by-case basis to ensure they are in the national interest'. The government's short-term proposal to expand intervention powers for acquisitions of military or dual-use products and advanced technology is expected to be enacted quickly. Consultations on longer-term reforms, including a potential call-in power and/or a mandatory notification regime, will continue into 2018. We still expect, however, that the UK will in practice focus resources on cases that raise genuine national security concerns.
- **Japan** is another G7 country that has recently introduced more restrictive foreign investment measures. The amended rules include prior review of the transfer of shares in unlisted Japanese companies from one foreign investor to another, and strengthened criminal and administrative sanctions for breaches of regulations regarding the transfer of certain technologies.

'This is an area of increased focus, particularly for the most high-profile M&A transactions. Whilst restrictions and level of regulatory and political scrutiny are increasing, our experience shows that the approaches that you need to get to a successful closing are evolving. Parties can still take a number of steps to improve their chances of successfully navigating these choppy waters.'

Bruce Embley, Global Transactions Partner, London, and Co-head of Global M&A

- **China**, conversely, is relaxing its approach to inbound foreign investment, mostly by introducing measures to raise foreign ownership caps in sectors such as financial services and vehicle manufacturing, and by reducing the regulatory burden and improving the overall transparency of its administrative process. The political climate is welcoming of foreign investment, but parties contemplating deals that affect sensitive or key economic policy areas such as China's cyberspace, information technology and telecommunications sectors, or critical national infrastructure such as the Belt and Road initiative, should continue to expect close scrutiny. Chinese outbound investment, on the other hand, will likely face continued scrutiny as the Chinese government seeks to manage the direction of Chinese capital outflow more proactively.

While these and other anticipated changes can create an uncertain climate for deal making, parties may want to take this opportunity to review planned investments in those jurisdictions and sectors that regulatory change will most likely affect. New rules may start coming into effect from late 2018 or early 2019.

Sectors in the spotlight – sensitive technology and data acquisitions

With national governments emboldened to intervene in deals that many perceive to be politically sensitive, we will see a wider range of industries potentially affected by foreign investment and public interest considerations. Whereas intervention traditionally focused on national security and defence, our research shows the expansion of foreign investment and public interest screening into high-tech manufacturing, energy infrastructure, telecommunications, pharmaceuticals, and food and drink manufacturing.

Increasingly, questions around access to valuable technology, know-how and sensitive data are driving political intervention. In *Midea/KUKA*, political concerns in Germany around the protection of sensitive industrial and corporate data were addressed by implementing complex ring-fencing arrangements.

Some governments, including France's and the UK's, have signalled a willingness to intervene in deals involving 'national champions'. Parties therefore need to pay closer attention to political sensitivities across sectors.

Finally, an Italian decision in November 2017 blocking the proposed acquisition of an Italian software application company by the Italian subsidiary of a French company is a stark reminder that national interest and security concerns are not limited to acquisitions involving non-EU investors.

1

2

3

4

5

6

7

8

9

10

Anticipating potential intervention – deal strategy and planning

Despite increased scrutiny and political intervention, foreign investment into the G20 is at an all-time high and our experience shows that merging parties can take a number of steps to improve their chances of successfully navigating the uncertain regulatory landscape.

- **Early engagement** is crucial to achieving the best possible outcome. Merging parties should identify all forms of ‘political’ sensitivities from the outset to ensure a consistent and compelling deal narrative. As many foreign investment and public interest regimes are voluntary, parties will need to agree if, and how, to engage with authorities, other potential stakeholders (eg representative bodies such as works councils) and the media.
- **Timing strategy** will vary on each deal and requires careful planning. Going too soon can risk jeopardising deal momentum, but going too late can result in pre-emption, leaving politicians or other stakeholders feeling marginalised. We have successfully deployed integrated teams of lawyers, governmental affairs advisers and communications consultants to manage the right level of political engagement at the right time.
- **Appropriate deal structuring** can improve overall transaction certainty and can offer a pre-emptive solution that allows parties to avoid complex or lengthy regulatory processes. Options include dual-listed companies, reverse takeovers and ‘virtual mergers’ (created by contract only), or carving out particularly sensitive parts of the business from the outset.

- Finally, adopting a **co-ordinated global remedies strategy** that covers both antitrust and political concessions continues to pay real dividends in managing complex and sensitive transactions. In our experience, getting early political ‘buy in’ (for example by offering binding undertakings or upfront disposal of certain assets) can significantly reduce overall execution risk and timing pressure.

‘A comprehensive remedies strategy is crucial in complex, sensitive global transactions. We can help identify potential concessions early on to achieve greater deal certainty and a speedy closing.’

Frank Röhling, Antitrust Partner, Berlin

Looking ahead in 2018

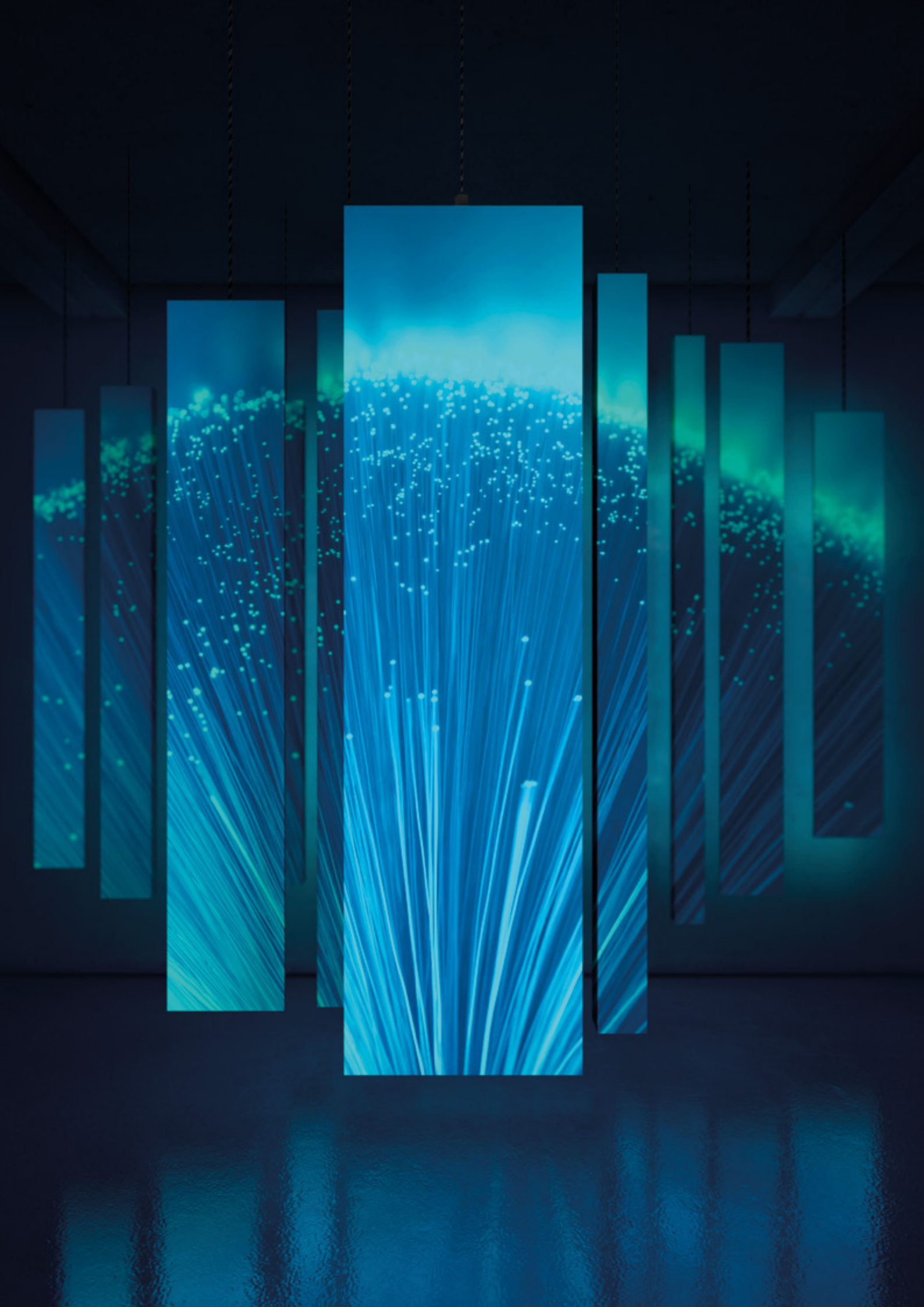
Companies planning cross-border transactions that may implicate national security or public interest issues in any jurisdiction should:

- **Identify political and other national or local sensitivities early** – stay close to local politicians, other stakeholders and the media throughout the deal to anticipate and address any shifts in attitude.
- **Present a consistent narrative** to relevant authorities and invest in laying the political groundwork at an early stage in the negotiations.
- **Carefully consider deal structuring options** to increase transaction certainty and minimise lengthy pre-closing periods.
- **Plan for remedies and potential disposals** to address security and national interest concerns or to increase public support for the transaction.



Navigating stricter legislation is only part of the story. In order to get these deals through, it is crucial to engage with all potential stakeholders and to ensure there is a consistent deal narrative from the outset.

John Davies, Antitrust Partner, Brussels and London



3.

Innovative theories in merger control

Getting complex cross-border deals across the line

As authorities pay more attention to novel competition issues in merger control reviews, or dust off previously unfashionable theories of harm, merging parties need to anticipate and prepare for this additional scrutiny. They should expect and plan for authorities to test high-profile deals from a variety of different angles that go beyond the basic assessment of merger-specific price effects.

We anticipate that 2018 will bring a renewed focus in some jurisdictions on:

- merger effects on innovation competition in R&D intensive industries;
- common ownership of competing companies as evidence of co-ordinated effects; and
- conglomerate effects relating to the ability of a merged entity to leverage a strong market position from one market to another.

Innovation competition

Competition authorities have long recognised that innovation – in addition to price and product quality – is a relevant component of competition. However, they have traditionally limited the analysis of the likely impact of a merger on innovation to the overlaps between the merging parties' marketed and (late-stage) pipeline products.

That is changing. In particular, the European Commission has recently applied more expansive theories of harm involving innovation:

- in the pharmaceutical sector, there are clear signals that the Commission has become less receptive to the argument that it is too speculative to consider early-stage pipeline products in an overlap analysis. In *J&J/Actelion*, for example, the Commission required the parties to offer a remedy for an overlap between two early-stage insomnia pipeline products; and
- in *Dow/DuPont*, the Commission concluded that the merger between two leading agrochemical companies would give rise to traditional unilateral price effects. Of greater note, it added that the parties would find it profitable to reduce their overall R&D investments, resulting in a reduction in the number of new pesticides brought to the market in the future. The US DOJ, on the other hand, concluded that the market conditions in the US did not provide a basis for a similar conclusion (notwithstanding the absence of an established difference in market conditions between the US and the EU).

1

2

3

4

5

6

7

8

9

10

Economists have traditionally considered the relationship between competition and innovation to be too complex to predict whether a merger is likely to reduce or increase innovation. However, a number of recent publications, including some by members of the European Commission's Chief Economist Team, have taken a less nuanced position affirming that mergers between competitors can be expected to reduce the incentive to invest and innovate (in the absence of efficiencies).

Although the debate is ongoing as to whether the Commission's innovation theory in *Dow/DuPont* is based on sound economics and meets the required evidentiary standards, our experience from a number of ongoing cases indicates that, in the EU, mergers will remain subject to close scrutiny as to how they impact innovation, regardless of the industry sector.

Whether competition authorities will consider a transaction as giving rise to innovation concerns will depend on a variety of factors. These include the general industry features (eg concentration levels, drivers of innovation in the industry, any evidence of the impact of past industry consolidation on R&D output, etc) and the closeness between the merging parties in terms of innovation efforts.

'I expect the impact on innovation to remain an important aspect of merger reviews in the EU, in particular in R&D-heavy sectors. Although different agencies are adopting different approaches in this area, merging parties need to be aware of the risk in multijurisdictional filings that there will be additional focus on innovation.'

Frank Montag, Antitrust Partner, Brussels

Common ownership

The effects of common minority investment have been a subject of interest in US competition law in recent years. The theory is that institutional investors with holdings in multiple competing firms may have the incentive to dampen competition, either by facilitating co-ordination among portfolio companies or by pressuring portfolio companies to adopt common strategies. The US antitrust agencies have shown interest in recent controversial empirical studies that have attempted to link the growth of common ownership with reduced capacity and higher prices in several industries, including airlines, banking and retail pharmacies.

Although common ownership has not traditionally featured significantly in merger reviews, there are signs that this is changing, particularly in oligopolistic industries where authorities are starting to evaluate common ownership as evidence of co-ordinated effects.

In the EU, again in *Dow/DuPont*, widespread common ownership in the agrochemicals industry was viewed as an 'element of context' by the Commission that implied a greater level of concentration than traditional concentration metrics like market shares or Herfindahl-Hirschman Index (HHI) calculations suggested. The Commission argued that common shareholdings likely had a negative impact on price and innovation competition in the agrochemicals industry – and used as evidence of this the influence exerted on companies by supposedly 'passive' common minority investors.

The challenge for 2018 will be to anticipate the deals in which common ownership may be an issue and find ways to test the proposition that common ownership softens competition. It remains to be seen whether other authorities will follow the European Commission's lead in this area – in the UK, for example, the apparent reticence of the Competition and Markets Authority (CMA) may change in light of the recent wave of shareholder activism across Europe and particularly in the UK. However, companies will need to follow such developments closely given the considerable scope for application by authorities in the future. In any event, this is another non-traditional element that parties should factor into their merger control risk analysis.

‘The reaction to the US-based literature on common ownership has been far-reaching. The European Commission in *Dow/DuPont* heavily cited this and we know that US authorities consider common ownership issues in their merger investigations. With this backdrop on both sides of the Atlantic, it is important that we recognise common ownership issues early and proactively manage the risk.’

Mary Lehner, Antitrust Partner, Washington DC

Conglomerate and vertical effects

The conglomerate effects theory of harm has fallen out of common use by the European Commission since *GE/Honeywell* back in 2001. However, a series of recent cases in a diverse range of industries indicates that the Commission is looking at issues around conglomerate effects with renewed interest.

In recent cases, the Commission has articulated serious concerns about the relationship the proposed transactions would create between merging parties selling complementary products. In particular, the Commission investigated concerns that the transactions would increase the parties' ability and incentive to:

- bundle complementary products, ‘squeezing out’ competing products; and
- degrade the interoperability between their products and a rival's competing downstream product, in favour of their own downstream product.

In these cases, the Commission required commitments to allay conglomerate concerns. For example, in *Broadcom/Brocade*, clearance was conditional on commitments covering non-discrimination measures and firewalls, to resolve concerns about technical degradation of interoperability and/or misuse of confidential information. In *Microsoft/LinkedIn*, commitments concerned access to Microsoft's application programming interfaces (APIs) and options for customers to disable LinkedIn features, to resolve concerns about the integration of LinkedIn into Microsoft's programmes and denial of access to competitors to its APIs. There is continuing focus on this theory of harm in a number of ongoing cases (including *Qualcomm/NXP* and *Essilor/Luxottica*).

1

2

3

4

5

6

7

8

9

10

Traditionally, US authorities have approached conglomerate effects and other non-horizontal merger theories with considerable scepticism. By way of example and contrast with the European Commission, the DOJ cleared the *Qualcomm/NXP* deal without conditions in early 2017, just as it had cleared *GE/Honeywell* without conditions in 2001. Very recently, however, the DOJ filed in federal court to block the *AT&T/Time Warner* merger, the first time in decades that a US agency has litigated an injunction on a non-horizontal merger theory. Although the role of political influence on the DOJ's decision has been raised in related media coverage, the case would not have been filed without a recommendation from DOJ career staff, and the prosecutorial and judicial precedent will be significant to future conglomerate and vertical transactions.

‘Merging parties operating in complementary markets cannot be complacent about the level of scrutiny regulators will exercise on their deal. A lack of overlap does not mean authorities will necessarily wave the deal through. By their nature, conglomerate concerns can often be difficult to remedy.’

Alastair Chapman, Antitrust Partner, London

Looking ahead in 2018

Companies planning complex deals in 2018 are advised to prepare early and well and should **think outside the box** as authorities test high-profile deals from a variety of different and, in some cases, novel angles.

- Be prepared for an investigation on the **different parameters of competition**; whereas the focus of merger analysis has traditionally been on potential price effects, competition authorities may navigate into more speculative areas and assess the impact of a transaction on overall levels of innovation and R&D in the industry.
- **Analyse common shareholdings in each merging party and their competitors**, particularly in oligopolistic industries with significant shareholdings owned by common financial investors.
- **Anticipate conglomerate effects** in circumstances where the merging parties operate in complementary fields where at least one of the parties has market power.



Merging parties will have to think about how to manage the advent of these new and developing theories of harm in terms of deal planning and risk allocation. Navigating these challenges successfully from both the M&A and the antitrust perspective will be mission-critical for successful complex global mergers in the year ahead.

Rick Georg van Aerssen, Partner, Frankfurt, London and Düsseldorf, and Co-head of Global Transactions

obals.

lse, "In

.expected

deletedGlobals = d

deletedGlob

lse, "De

.expect

4. Deal risk

Managing multiple merger reviews as authorities step up enforcement and the risk of third-party challenge grows

As authorities worldwide step up enforcement of their merger control rules, companies planning deals in 2018 must pay even closer attention to their obligations and conduct throughout the period from early planning up to final merger control clearance.

We are seeing more authorities impose heavy fines for an increasingly wide range of pre-clearance conduct, with accompanying strong signals that authorities will take tough action against any parties that infringe the rules this year.

Wider risks in 2018 include the trend in all regions for more intervention in merger review processes by third parties – whether they are competitors, activists or government agencies (see further in theme 2) – and, for deals affecting the EU and UK, legal uncertainty caused by the UK's impending exit from the EU's 'one-stop-shop' for merger review.

Managing these risks on multiple merger reviews affecting a single deal requires a thorough understanding of often complex rules in each jurisdiction and robust procedures that safeguard against breach of increasingly burdensome obligations.

Gun-jumping – tough enforcement against parties that fail to notify on time or integrate their businesses pre-clearance

Most companies are aware that failing to notify a deal on time or integrating businesses pre-clearance exposes them to risk of fines and other penalties. However, difficulties arise in practice when parties experience lengthy periods between signing and closing, or they pursue more novel deal structures where filing obligations may be less clear. Recent cases have shown that the price for getting it wrong can be very high:

- **Early integration:** following a record €80m fine in France in late 2016 and recent enforcement action by several other authorities in the US and Europe, parties' conduct between signing and closing has come into sharp focus globally. Pending clearance, merging parties must act as independent competitors. This means:
 - no integration, exercise of management control, joint marketing, co-ordination of commercial behaviour or uncontrolled sharing of sensitive information;
 - pre-closing obligations should be strictly limited to non-ordinary course action and legitimate value protection; and
 - robust structures should limit the exchange of commercially sensitive information to information that is strictly necessary for deal planning and to ring-fenced clean teams. Parties should also have appropriate documentation in place to demonstrate the existence and operation of such structures if challenged.

1

2

3

4

5

6

7

8

9

10

Concerns have arisen in practice that authorities may apply different criteria when drawing the fine line between legitimate planning on the one hand and premature integration on the other, with (some) European authorities being more restrictive than their US counterparts. Current uncertainties, compounded by a marked increase in third-party complaints about alleged gun-jumping, are driving some companies engaged in global deals to change traditional approaches. Ongoing cases may provide more guidance on the scope of legitimate planning in 2018, but pending that, companies should exercise particular caution over conduct between signing and closing.

‘As the spotlight in France and elsewhere remains firmly on parties’ conduct between signing and closing, a clear understanding of the fine line between legitimate planning and integration is more important than ever in 2018.’

Jérôme Philippe, Antitrust Partner, Paris

- **Novel deal structures:** recent action in China, Japan and Europe has confirmed a tightening approach to deal structures that enable a seller to dispose of a business quickly and transfer regulatory risk to the buyer. In two-step transactions, for example, where an interim buyer acquires the target before the final deal is approved, the initial step will trigger a notification requirement in most major regimes if the two steps are interlinked and the ultimate buyer bears economic risk from step one. In these cases, implementing step one before notifying the relevant authorities and obtaining approval will amount to gun-jumping. Given the increased focus globally, early engagement with the authorities is a pre-requisite for parties pursuing similar structures in 2018.

False and misleading information – the importance of verifying your facts and evidence

Recent cases have confirmed that merging parties face heavy penalties if they fail to disclose sufficient and correct information during reviews, or if they provide misleading responses to requests for information. This proves particularly challenging when authorities demand voluminous data and internal documents within tight time frames, which then form core parts of their evidence.

Parties involved in complex deals should ensure their document review tools and procedures for preparing and verifying submissions are watertight. Disclosure of facts and evidence must be full and accurate, which includes future plans on product development or innovation. Authorities are often now requiring parties to file, for example, detailed methodology notes alongside substantive submissions to ensure transparency in relation to the way in which the parties collected the information.

Authorities are particularly sensitive to any allegations that the merging parties may have tried to influence the way in which customers respond to market testing. It is customary and legitimate for companies to engage with their customers following the announcement of a transaction, but this process must be managed to ensure that such contacts are not used to influence customers’ feedback to the regulators.

‘Recent European Commission investigations emphasise the need for even greater care to be taken when submitting evidence to the authorities. This continues to be challenging as regulators demand ever-increasing volumes of data and internal documents within tight timelines.’

Sascha Schubert, Antitrust Partner, Brussels

Safeguarding legal privilege in multijurisdictional reviews

As parties face demands for substantial document production by more authorities, it is becoming increasingly challenging to protect legally privileged materials. The scope of legal privilege differs significantly across jurisdictions, with the EU position generally narrower than other jurisdictions (including the US and UK) but going beyond what some EU member states accept (including Germany). In Asia, legal privilege is less established: the concept does not even exist in mainland China, Japan or South Korea.

These differences present challenges in cross-border deals where disclosure in one jurisdiction may amount to waiver and lead to subsequent disclosure to other authorities and courts. Parties are advised to maintain detailed records of privileged materials in each jurisdiction, and be ready to justify such claims to avoid forced disclosure.

Post-closing interventions – by authorities or competitors

Companies should also take account of the growing trend of authorities or competitors challenging completed deals.

The US agencies, for example, can challenge completed deals, even when the mandatory Hart-Scott-Rodino Act (HSR) waiting period has expired without agency intervention or when the deal did not trigger an HSR notification. Recent use of these powers reinforces the fact that the US agencies will not hesitate to pursue consummated transactions when deemed necessary.

Even when authorities do not have such broad powers, where concerns are raised they will challenge parties' assessments of whether a deal required notification, as demonstrated recently in China by Mofcom's investigation into *Didi Chuxing's* acquisition of *Uber China*.

'Mofcom's 300,000 yuan (\$43,000) fine on Canon for its two-step acquisition of Toshiba's medical unit, its investigation of Didi Chuxing's acquisition of Uber China and the possibility of future increases in fines for failure to notify send strong signals to companies that fail to take proper account of China's strict merger control rules.'

Alastair Mordaunt, Antitrust Partner, Hong Kong

In Europe, an increasing number of Commission decisions are subsequently challenged in court, not only by the addressees of a prohibition decision but also by disgruntled competitors unhappy with merger clearances. 2017 saw rare examples of the EU's General Court annulling a Commission clearance decision (*Liberty Global/Ziggo*) and overturning a prohibition decision (*UPS/TNT*). Both cases confirm the importance of procedural safeguards for parties and third parties throughout the investigation, and of well-reasoned Commission decisions.

1

2

3

4

5

6

7

8

9

10

Brexit uncertainty – implications for merger control risk

Through 2018, companies planning deals that affect EU and UK markets will need to take account of the impact Brexit may have on how and where their deal is reviewed. Post-Brexit (or any transitional period), the EU's 'one-stop-shop' for merger reviews will no longer apply to the UK, meaning that deals will be subject to parallel EU and UK reviews if relevant thresholds are met. This will mean:

- the review of more deals in the UK: the CMA estimates up to 50 additional cases per year (almost doubling current numbers), with about six more phase 2 investigations (again doubling the current caseload) – even with additional funding, such increases are likely to present challenges for the authority and merging parties; and
- the review of fewer deals by the European Commission: if current thresholds remain the same, informal estimates suggest that around 100 fewer cases per year will be subject to EU review (notified deals currently number around 360 each year).

To mitigate any impact of parallel reviews on deal timing or outcome, parties will need to ensure that they manage the process effectively across the EU and UK and that all likely concerns (and potential areas of divergence) are understood from the outset.

For deals crossing the Brexit period, parties will need to stay close to developments in both the EU and UK on the transitional arrangements that are needed to resolve current uncertainties, such as which authority gains or cedes jurisdiction at different points. For complex deals likely to face protracted pre-notification and in-depth investigation, parties must factor in these risks from early 2018.

Looking ahead in 2018

- **Plan early** – make sure you have a thorough understanding from the outset of all the rules and your obligations in each jurisdiction, taking full account of any increased risk of regulatory or third-party intervention in deal timelines.
- **Robust procedures** – implement strict procedures and processes that ensure complete and accurate submissions of evidence, while maintaining full business separation between signing and closing and controlling the flow of sensitive information through ring-fenced clean teams.
- **Contractual terms** – pay close attention to any arrangements governing the conduct of the target between signing and closing, making sure that any purchaser rights are tightly confined to non-ordinary course decisions that directly affect target value.



Increased regulatory risk, particularly in cross-border deals where several merger control authorities will be involved, is driving parties to focus heavily on antitrust risk allocation when negotiating transaction agreements. We are helping more clients find increasingly sophisticated solutions, making sure their deals accurately reflect their business goals and legal needs in the current risk environment.

Matthew F Herman, Global Transactions Partner,
New York, and Co-head of Global M&A



5. Platforms in the antitrust spotlight

All eyes on the disruptors

As digital platforms continue to grow in social and economic importance, there can be no doubt about the ever brighter global spotlight directed at their practices. Given the scale of industrial change in the digital era, the challenge facing antitrust authorities in 2018 is whether their competition tools are sufficient to protect consumers and maintain competitive markets, or whether more regulation is needed.

In Europe, Commissioner Vestager's focus on fairness and trust, while recognising the limits of antitrust to meet broader policy objectives, has heightened the international debate on the roles of antitrust and regulation in markets. As more authorities launch investigations into online platforms and their impact on competition and choice, key areas of divergence in approach are likely to emerge.

Inquiries and investigations

Since publishing their joint paper on big data in 2015, the French Autorité de la Concurrence (FCA) and the German Bundeskartellamt (BKA) have continued to take the lead in seeking to develop big data-driven theories of harm that target the business practices of online digital platforms. This includes the FCA's ongoing sector inquiry into online advertising and the BKA's controversial antitrust investigation into *Facebook's* user privacy terms, which has reached the preliminary assessment that these violate data protection law and are an abuse of dominance.

And they are not alone. Data protection authorities have also been seeking some of the limelight. Authorities in France, Spain and the Netherlands have all concluded individual investigations into *Facebook's* privacy terms. In some instances these authorities have combined forces with competition authorities and communications bodies to unpick further the circumstances in which big data translates to a restriction of competition for online digital platforms – for example in Italy where the current three-agency sector inquiry on big data was initiated by the Italian Antitrust Authority along with the telecom and data privacy regulators.

'While authorities are well aware of the fact that online platforms have brought many benefits to today's society, they have also observed that online industries where big data plays a key role often show a high degree of market concentration and, in certain circumstances, that big data might be the source of market power, potentially raising barriers to entry. Agencies are concerned that today's disruptors might hinder the development of tomorrow's disruptors.'

Gian Luca Zampa, Antitrust Partner, Rome

1

2

3

4

5

6

7

8

9

10

Authorities worldwide are replicating these developments, with Asian authorities particularly prominent in taking enforcement action aimed at the business models of global platform businesses. Following the European Commission's record-breaking €2.42bn fine on *Google*, the Korea Fair Trade Commission (KFTC) and Japan Fair Trade Commission (JFTC) continue to develop plans to regulate technology companies with the aim of preventing the monopolisation of data collection and/or any hindrances to market entry.

'The JFTC has not conclusively stated that any particular types of behaviour are a clear risk area, but the authority is definitely mapping out a path for future enforcement action in this space.'

Kaori Yamada, Antitrust Partner, Tokyo

The JFTC appears to be particularly interested in the potential impact of data accumulation. Its 2017 report recognises the innovative and pro-competitive benefits that flow from accumulating large amounts of data, but warns against potential anticompetitive consequences through market foreclosure.

Structural and regulatory changes

The KFTC and the JFTC plans are only part of a wider web of interrelated global regulatory changes affecting digital platforms anticipated in 2018. The provisions of the EU General Data Protection Regulation (GDPR), which come into force in May 2018, will introduce stricter rules on the transfer of personal data, among a number of other changes.

'Just as the GDPR is giving huge new powers to privacy regulators, businesses are also having to prepare for their data use attracting the attention of competition regulators.'

Klaus Beucher, IP Partner, Düsseldorf

And that is just a flavour of what may follow: as well as being mindful of relevant sector-specific regulation, which may be a poor fit for new business models but nevertheless cannot be disregarded, DG CONNECT is currently considering proposals for specific EU regulation of digital platforms to better protect consumers. Its policy proposals include the stimulation of industry-led action, with the hope that this will lead to the creation and adoption of voluntary platform standards. Also under consideration is targeted legislation, in addition to current competition laws, which would include banning problematic business-to-platform commercial practices, or – the most obtrusive option – introducing a detailed regulatory framework accompanied by an EU-level regulator.

The 2016 French Digital Republic Act – which came into force despite the reservations of the FCA – includes personal rights for consumers to recover all posted content and data, control and monitor the use of personal data, and request the removal of all data collected before the age of 18. The extent to which other EU member states and the world at large may be inspired by this and follow suit, either ahead of, alongside or following any further action by the European Commission, remains to be seen.

It is already widely suggested that this approach is anti-American, targeting US West Coast, highly successful firms with innovative products and business models. In the run-up to the Commission's fine on *Google*, a letter published without signatures showed Washington lobbyists rallying support from members of Congress against the EU's perceived 'aggressive and heavy-handed antitrust enforcement action against American companies'. Later in 2017, newly confirmed Assistant Attorney General for the DOJ's Antitrust Division, Makan Delrahim, spoke out about the importance of non-discrimination and expressed concerns that competition agencies in some countries may have used antitrust to 'favour domestic companies or discriminate against foreign firms'. 2018 will be a key year for international enforcement, particularly in these areas as policy and political dynamics play out in practice.

Looking ahead in 2018

Businesses – not only digital platforms but also those affected by their business practices – have much to think about in 2018. Whatever combination of tools (antitrust or antitrust combined with data protection and/or consumer protection) or form (investigations, regulation and/or litigation) is chosen, we expect the following to feature prominently in the year ahead:

- **Increased use of merger control** – facilitated through the introduction of deal value-based thresholds in Austria and Germany (and potentially to follow at EU level and elsewhere) – as authorities seek to scrutinise the business rationale of mergers between platform businesses.
- **Narrow market definitions and a focus on broader conglomerate effects**, both in mergers and behavioural investigations – as seen in the Commission’s decision in *Microsoft/LinkedIn*, which focused on ‘professional social networks’ (excluding less targeted providers) and ‘online social advertising’.
- **A need to get ahead through pro-active engagement** with the competition authorities and to intertwine legal and economic considerations more closely – particularly in relation to engagement with new ‘expert’ teams from the regulators. In particular, note Commissioner Vestager’s September 2017 announcement of the creation of a ‘body of experts’ to advise the Commission on big data cases and the UK CMA’s November 2017 announcement of a new ‘technology team’ comprising data scientists, computer experts and economists.

‘The agencies are beginning to upskill their approach to data and technology so companies may face more far-reaching probes than in the past.’

Deirdre Trapp, Antitrust Partner, London

- **A greater willingness by platforms to challenge novel and controversial theories** being developed by the agencies and to seek validation of their business practices in court. For example, *Agents Mutual* was successful before the UK Competition Appeal Tribunal in July 2017 in demonstrating that its terms and conditions, restricting suppliers from using other platforms, were in fact pro-competitive on the basis that they helped a new platform break into a concentrated market featuring a number of well-established platforms.
- **More consumer class actions and strategic litigation** from competitors, particularly following the EU Antitrust Damages Directive – which shifts the balance in favour of claimants by requiring the consideration of final decisions from competition authorities as evidence of an infringement. We anticipate a number of claims against *Google* following the Commission’s recent decision, with more expected to ensue in relation to the pending *AdSense* and *Android* investigations. These cases will likely spur claimants to pursue litigation based on ‘abuse of dominance’ theories in future.

‘In an increasingly interconnected world, and with potentially large commercial rewards expected from the “internet of things”, digital platforms and technology companies face ever-increasing scrutiny from antitrust authorities competing among themselves to develop novel enforcement strategies and the likelihood of an increased use of antitrust law as part of litigation strategies in commercial disputes.’

James Aitken, Antitrust Partner, London

1

2

3

4

5

6

7

8

9

10



6. Pricing and sales practices

Staying antitrust compliant

In 2018, distribution and pricing of goods and services will remain a hot antitrust topic, throwing up compliance challenges but also bringing more clarity to the rules. Although the US continues mostly to exhibit a light touch on distribution issues, Europe and Asia are experiencing waves of enforcement.

We expect cases in 2018 to apply existing principles to new practices and to shed light on lesser-explored corners, such as how antitrust law can tackle potential concerns arising from pricing algorithms. As European Commissioner Vestager put it: 'it's not easy to know exactly how those algorithms work' but 'companies can't escape responsibility for collusion by hiding behind a computer program'.

However, internet distribution is by no means the whole story, with practices such as resale price maintenance (RPM) attracting plenty of attention and more enforcement against excessive pricing, so far mainly in pharmaceutical and technology markets.

The issue of rebates and other commercial terms used by dominant companies is also at the fore in Europe and Asia – in the former case with the EU Court of Justice at last endorsing the need for an analysis of effects before exclusivity rebates can be considered to be anti-competitive.

Pricing, the internet and other restrictions

The European Commission's 2017 e-commerce sector report found that pricing restrictions or recommendations were by far the most common types of restrictive clauses reported by retailers, with 42 per cent of those surveyed saying they were subject to these clauses. But other restrictions are prevalent too: 18 per cent were restricted in their use of online market places, and a surprisingly high 11 per cent cited territorial restrictions.

As the internet grows in importance and online sales methods become ever more sophisticated, authorities, courts and lawmakers are racing to monitor and control business practices. Globally there is much similarity of approach across jurisdictions, though the US remains generally more permissive of most distribution arrangements provided they are not made between competitors. But, even in the case of jurisdictions with broadly similar rules, there can be significant differences in enforcement.

Restrictions reported by EU retailers



1

2

3

4

5

6

7

8

9

10

Markets subject to recent enforcement action in Europe have included, among many examples, golf clubs and mobility scooters in the UK and food supplements in Germany. The European Commission's ongoing post e-commerce sector inquiry investigations into films, fashion, brand licensing, hotels, video games and consumer electronics may provide guidance on a variety of issues. Several of these cases involve online pricing restrictions, on which enforcers are especially vigilant. These restrictions often originate in physical outlets seeking protection from the lower prices that internet sellers are able to charge. Suppliers wanting to maintain both types of sales channel face a challenge.

Selective distribution – a model where goods may only be sold to authorised resellers that comply with specified quality criteria, or to end users – provides some room for manoeuvre. Even here, the long-established approach that these systems could exclude pure internet resellers was coming under sustained assault by the enforcement authority and courts in Germany. However, in 2017 the tables turned back in favour of manufacturers. Early in the year, an EU Advocate General opined that manufacturers do not have to allow distributors to sell through third-party platforms. This was followed in the latter half of 2017 by a Dutch court upholding *Nike's* restrictions on the use of certain third-party platforms on the basis that they served to protect the brand image of a luxury product, and *Caudalie* winning a similar case on its skincare products in France. Finally, in December the EU Court of Justice ruled firmly in the *Coty* case to uphold certain restrictions on distributors' use of third-party platforms to sell luxury goods.

'For many brand owners, distribution via digital platforms is an essential part of any growth strategy. However, if pricing models are not right, bricks-and-mortar retail customers may be consistently undercut by their digital competitors. This often leads to pressure on brand owners to seek to influence online resale pricing. In many parts of the world, succumbing to that pressure would be the wrong choice. Brand owners should explore other solutions, such as incentivising appropriate levels of investment in customer service by the online players.'

Alex Potter, Antitrust Partner, London

For many companies Asia and especially China are important growth areas for their products. Given that they cannot be directly present in each jurisdiction, companies will often work with independent distributors and agents, and so face pricing issues. As volumes of online sales continue to grow (a 2017 PwC report found that 52 per cent of Chinese consumers shop daily or weekly by phone), the enforcement focus, and the tensions this causes between traditional bricks-and-mortar retailers and online sellers, is bound to increase.

Asia is a particularly challenging region in which to ensure compliance because of the widely varying approaches to RPM and other vertical restrictions found in the different jurisdictions:

- in China, RPM is a hot topic and the approach is strict, verging on a per se prohibition before China's antitrust agencies (with US medical devices company *Medtronic* recently fined RMB 118.5m (c €15m)), but a 'rule of reason' analysis before at least one Chinese court;
- in Singapore, non-dominant companies are for now effectively free to impose any preferred restrictions in their relations with distributors and sales agents; and
- the Japanese authorities have been particularly vigilant in the area of online restrictions, recently forcing *Amazon* to adjust its online most favoured nation (MFN) practices.

Faced with such a variety of laws in Asia, companies are often best advised to adopt a high standard across the board, providing for limited exceptions where that is feasible.

'As approaches to RPM and other vertical restrictions vary widely across Asia, hard decisions have to be made when crafting a strategy across the region. Companies need to remain on top of regional developments, as some jurisdictions get tougher with enforcing against restrictions in sales and distribution arrangements.'

Ninette Dodoo, Antitrust Counsel, Beijing

Excessive pricing: 'It's not fair!'

In 2018, we are likely to see a continued trend towards more enforcement against companies that are pricing 'excessively' and demand for more guidance as to exactly what 'excessive' means. Although the law is not new, the appetite for bringing cases is, so far focusing on the pharmaceutical industry and technology sector:

- *Pfizer* and its distributor *Flynn* are currently contesting UK authority fines (£84.2m and £5.2m) for excessive pricing of *Pfizer's* epilepsy medication. Following de-branding and *Pfizer* increasing its price 2,600 per cent, the UK CMA found that in the presence of such a significant increase, there was no need to carry out an international comparison, which might have showed similar high prices elsewhere;
- in Italy, *Aspen* has been fined for excessive pricing of cancer medicines and it is now under investigation by the European Commission in respect of the rest of the EU; and
- in Asia, the recent fines against *Qualcomm* – first in China, then South Korea and most recently in Taiwan – show that the interest in excessive pricing is not limited to Europe, and highlight the increasing risk of excessive pricing claims in the technology sector in Asia.

1

2

3

4

5

6

7

8

9

10

This renewed enthusiasm for excessive pricing cases is part of a broader interest in the fairness of commercial dealings, a concept that has so far not been satisfactorily linked to the normal theories of competitive harm deployed by enforcement authorities.

Rebates: companies with market power must still tread carefully

In Europe, the *Intel* case on the legality of exclusivity rebates granted by dominant companies continues on its way through the EU courts. A recent Court of Justice judgment introduced flexibility in this area, which had previously been subject to a more or less absolute prohibition. The case was sent back to the General Court, whose next judgment should bring further insight. More generally, this case is expected to spur European authorities into a more economic approach to other types of conduct by dominant companies.

But while *Intel* certainly moves the law away from knee-jerk illegality for exclusivity rebates, dominant companies are directed instead towards the murky waters of effects analysis. Murky not because of an absence of economic tools – there are well-understood techniques to deploy. However, the fact that both Intel and the European Commission undertook detailed economic analysis on the same rebate scheme and reached diametrically opposed conclusions illustrates the challenge facing those who seek to use this greater freedom.

Finally, China's case against *Tetra Pak* – a virtual replay of 1992 proceedings brought against the same company in Europe – sheds light on how rife the question of rebates is in some parts of Asia.

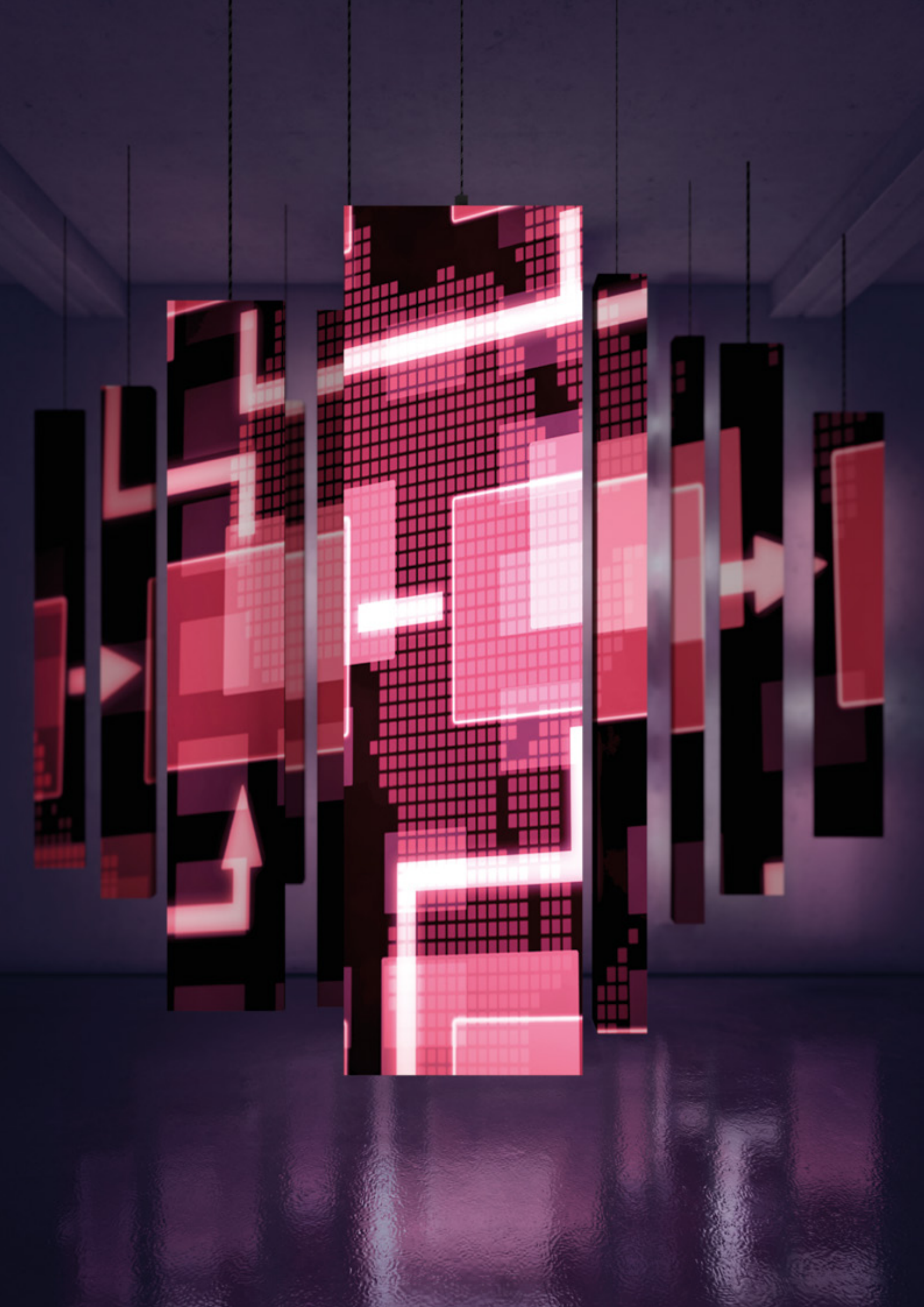
Looking ahead in 2018

- **Increased scrutiny of distribution and pricing arrangements** – be prepared for more vigorous enforcement in many jurisdictions, notably from the European Commission and some Asian authorities. This certainly applies to online selling but also extends to more traditional sales models.
- **Beware of differences between jurisdictions** – in the case of businesses based in places where restrictions imposed on distributors are subject to relatively relaxed rules (such as the US and Singapore), build awareness that in other jurisdictions you need to check carefully what is and is not allowed. For example, in many parts of the world, RPM remains close to a per se infringement, with clear enthusiasm for enforcement spreading to Asia.
- **Watch the current EU investigations** – the results of the ongoing European Commission cases are likely to bring new clarity to some of the many issues that it left open in its e-commerce report, and may inform approaches in other jurisdictions.



US businesses are especially vulnerable to mistakes in the areas of distribution and pricing practices, in part because US law generally provides firms much greater latitude. As a result, although a natural instinct, simply extending distribution and pricing policies developed originally in the US into Europe and Asia can leave US firms exposed to underappreciated competition law risks.

Thomas Ensign, Antitrust Partner, Washington DC



7.

Global antitrust investigations

Protecting your position in an era of tough enforcement

Recent developments in global cartel enforcement – raising the stakes

With around 130 competition authorities across the world, and extensive co-operation arrangements in place, firms that engage in cartels face a risk of both public and private enforcement actions in an ever-increasing number of countries.

As an example, in the past five years, more than 50 companies involved in the global auto parts cartel have faced public and/or private prosecution in 10 different jurisdictions (Australia, Brazil, Canada, China, the EU, Japan, Korea, Mexico, Singapore and the US), while other agencies, including in South Africa, continue to investigate.

In spite of these developments, a number of competition agencies remain concerned that cartel activity may still be underdetected and insufficiently deterred, leading to enhanced detection techniques and demands for increased sanctions.

New means of cartel detection

Since the 1990s, the burgeoning use of leniency or amnesty programmes has proved to be a highly successful means of enabling competition agencies to find direct evidence of antitrust infringements. More than 50 jurisdictions now have such programmes in place.

Recognising, however, that they should not be over-reliant on leniency applications, many competition authorities are developing a range of other detection mechanisms to collect evidence, particularly through:

- encouraging complaints and whistleblowing from employees, purchasers, procurement officers and/or the general public (while at the same time seeking to ensure that whistleblowers are protected from retaliation in the workplace);
- using structural and behavioural screens; and
- honing their own intelligence and information gathering procedures.



50 companies involved in the global auto parts cartel faced prosecution in 10 different jurisdictions

1

2

3

4

5

6

7

8

9

10

The European Commission recently developed a whistleblowing tool (similar to that introduced in Germany in 2012), encouraging any individual to provide it with information about cartel behaviour or other anti-competitive business practices. In the UK, regulators offer financial rewards to informers, and the Korea Fair Trade Commission (KFTC) uses a Bid Rigging Indicator Analysis System (BRIAS), which automatically quantifies the statistical likelihood of collusive tendering in public procurement markets. The KFTC has used BRIAS to bring a number of successful bid-rigging prosecutions, including in the construction sector.

‘As competition agencies increase their range of detection techniques, the risk of cartels being uncovered grows. In Germany, the FCO has stated that it has received more than 1,400 pieces of information under the whistleblowing tool it introduced in 2012, and that the information received has led it to initiate a number of proceedings.’

Tobias Klose, Antitrust Partner, Düsseldorf

Greater sanctions for cartelists and their employees

As well as working together to co-ordinate their investigations and to bolster enforcement, many competition authorities are carefully considering how best to sanction infringements. Although corporate fines are continuing to escalate (the European Commission imposed nearly €2bn in cartel fines in 2017), a view taking hold is that fines may not be sufficient on their own to deter cartel behaviour.

A growing number of jurisdictions also provide for criminal or civil sanctions for responsible individuals (eg imprisonment and fines), non-monetary civil sanctions for both individuals and corporations (eg individual director disqualification orders and debarment), and/or are encouraging private damages litigation by those that have suffered loss in consequence of an infringement.

In the US, for example, not only have companies been fined more than \$2.9bn in relation to the auto parts cartel, but more than 65 individual executives have been charged as a result of their connected activity, and private settlements are likely to result in more than \$2bn in damages paid to class action plaintiffs.

The increased risk of detection and the broader array of penalties are raising the stakes in cartel proceedings, highlighting the need for firms to ensure that:

- their compliance programmes are robust, and not merely a box-ticking exercise;
- they are prepared for agency investigations; and
- they give careful consideration to leniency applications, which offer the prospect of immunity from (or reductions in) fines and other sanctions but raise the risk of increased exposure to damages actions.

Although the benefits of successful leniency applications are growing, the wider enforcement picture creates greater complexity and risk for such applicants.



Effective compliance programmes are not optional

Businesses must ensure that they operate a carefully constructed competition compliance programme, backed by audits, monitoring reviews and risk assessments, which will both prevent illegal conduct from occurring and ensure that prohibited practices are detected quickly. Although not all jurisdictions reduce penalties for companies that maintain effective compliance and ethics programmes, the US Sentencing Guidelines reduce criminal fines for such firms, and the German Federal Supreme Court has held that compliance efforts are to be taken into account in the setting of a (criminal) fine in Germany.

The US DOJ recently granted a defendant a 40 per cent reduction in fine, based on both the company's co-operation with the DOJ and its institution of an effective compliance programme. In its sentencing memorandum, the DOJ emphasised that the company's compliance programme: (i) was directed by senior management, making antitrust compliance 'a true corporate priority'; (ii) included both classroom training and one-on-one training for personnel at high risk for antitrust violations, such as sales personnel; (iii) required prior approval of contact with competitors where possible, and required reports of contact with competitors, which were audited by in-house counsel; (iv) required sales personnel to certify that all prices had been independently determined; and (v) established an anonymous hotline for employees to report possible violations.

Companies must be prepared to respond decisively during investigations

Companies must prepare their officers and employees to defend corporate rights in the event of agency investigations, such as dawn raids. Moving beyond phone lists and printed checklists, companies are increasingly utilising dawn raid apps that allow secure, real-time, privileged communications with external counsel and help counsel to co-ordinate their defence across different sites and continents.

Assessing the pros and cons of leniency applications

Although intuitively the attractiveness of a leniency application increases in line with the increased risk of severe penalties for cartel infringements, the rising stakes and developing enforcement picture mean that such applications are not without some risk and cost. Firms that uncover unlawful cartel activity must carefully consider the question of whether to make co-ordinated leniency applications in all jurisdictions where a violation might have been committed, taking account of those risks and the possibility of a hidden price tag. In particular, firms should be aware of a number of issues.

- Inherent in most leniency situations is the requirement to make admissions to the agencies concerned about the commission of infringing conduct. Although in a number of jurisdictions immunity recipients may be protected from punitive damages, and/or joint and several liability, these admissions of course facilitate **private damages actions** and potential claims in multiple jurisdictions as appetite for antitrust litigation continues to grow (see further in theme 8).

'DOJ is increasingly focused on corporate compliance programs, including in the antitrust context. In addition to preventing or detecting crimes, adopting and implementing an effective program can lead to reduced fines where misconduct nonetheless occurs.'

Brent Wible, Dispute Resolution Counsel, Washington DC

1

2

3

4

5

6

7

8

9

10

- **There is some risk that authorities will share leniency evidence** with other competition agencies or disclose the details in private litigation. There is an absolute bar on the disclosure of leniency statements in civil litigation in some jurisdictions, but authorities have not adopted a uniform approach to this issue globally.
- The question of **where to apply** for leniency can be a complex one. Failing to seek leniency from a jurisdiction that might investigate the conduct will be a costly mistake. For example, there are a number of instances in which, following leniency applications made in the US and the EU, competition authorities in Brazil and South Africa opened investigations. Conversely, seeking leniency from an authority that might not otherwise have investigated the conduct may also prove problematic. In the EU, for example, a category of information sharing is treated, and sanctioned, as hard-core cartel conduct. Such conduct may, however, not be treated so severely (or even prosecuted) in the US.
- Although the European Commission is seeking to address some of the complexities and hazards associated with multiple leniency applications in the EU, the Commission is not currently envisaging a **'one-stop-shop' EU leniency regime** (in which, for example, a party makes a single leniency application to the Commission).
- Current and former employees of firms seeking leniency may remain exposed to **individual liability**, including the risk of extradition to, and criminal prosecution in, the US. Indeed, in addition to detaining many foreign executives who are in, or who have travelled to, the US, since 2010 the DOJ Antitrust Division has successfully extradited a number of defendants (including from Bulgaria, Canada, Germany, Israel and the UK). These risks often create

conflicts of interest between companies and employees and might well reduce an individual's appetite for co-operating either with the authorities or with a company's internal investigation. Companies may therefore need to consider the introduction of internal amnesty programmes to incentivise individuals to come forward.

'In multijurisdictional proceedings, companies must take into account employee considerations when deciding whether to seek leniency or to co-operate with cartel enforcers. Unless the company has first-in leniency status in criminal jurisdictions such as the US, co-operation in the investigation likely places its culpable employees at risk of criminal prosecution. This risk, which must be understood by the relevant employees, could impact on the level of co-operation that the company can provide.'

Bruce McCulloch, Antitrust Partner,
Washington DC

- The **time and cost** of complying with different agency demands during the leniency process is significant. Indeed, the time from marker request to completion of the leniency process can span more than a decade.
- Finally, successful leniency applications protect the applicant from antitrust liability, but not from **liability for other violations**, such as bribery, that are not typically deemed to be 'integral to' the underlying antitrust offence. Most recently, in financial services investigations, successful leniency applicants have paid hundreds of millions of dollars in plea agreements with the DOJ's Criminal Fraud section for related conduct. Companies must therefore assess the impact of the conduct more broadly, and beyond its compatibility with antitrust or financial services laws.

Looking ahead in 2018

- Deciding whether to apply for leniency from an antitrust authority is an increasingly difficult calculation, particularly when these decisions must be taken under tight time constraints.
- Take particular care to ensure you understand the full implications of private damages actions that are likely to follow, possibly in multiple jurisdictions.
- Ensure you take account of all possible areas of civil and criminal exposure for your business and its individuals from the outset.

'As the risk of detection grows, companies which become aware of misconduct are increasingly having to grapple with the complex decision of whether, and if so where, to apply for leniency. Any decision to do so must be taken with a full understanding of the costs, risks and obligations it will entail, as well as the undeniable benefits.'

Bea Tormey, Antitrust and Dispute Resolution Partner, London

1

2

3

4

5

6

7

8

9

10



8. Antitrust litigation

Managing global risk in a rapidly evolving landscape

As appetite for antitrust litigation continues, defence strategies must increasingly cater for co-ordinating proceedings in multiple jurisdictions. Understanding the position in different jurisdictions is key to deciding how to challenge or defend cases.

In the EU, implementation of the EU Antitrust Damages Directive was intended to aid recovery of damages for breach of competition claims. However, the legislation has not yet created the anticipated level playing field across the region. Meanwhile, class actions regimes within the EU are developing (if slowly). Although in some countries, such as the UK, the first claims have not succeeded, we expect potential claimants to learn from these cases and continue to use the regimes.

And across Asia, we are seeing a trend of more antitrust damages litigation. Businesses operating in China and Japan, for example, need to be aware that the landscape – and risk level – is changing.

The UK Competition Appeal Tribunal's judgments in *Pride* and *Mastercard* – a mixed start for antitrust class actions in the UK

The claims against *Pride* (relating to mobility scooters) and *Mastercard* (concerning bank interchange fees) in the UK Competition Appeal Tribunal have been the first to test the limits of the UK's opt-out and opt-in class action and class settlement regime for antitrust claims, introduced in 2015. In judgments given in 2017, neither claim continued past the class certification stage, leading some to question the prospects of the regime.

However, despite the slow start, the door remains very much open for future claims. By providing the proposed class representative with the opportunity to reformulate her claim, *Pride* showed that the Tribunal would be flexible at the certification stage if the claimants can reasonably overcome any obstacles. The claimants later withdrew the claim. And in the £14bn claim against *Mastercard*, although the Tribunal dismissed the claimants' application for certification, it found that third-party funders could, in principle, be paid from any unclaimed damages – a significant pro-claimant outcome.

£14bn claim against Mastercard

1

2

3

4

5

6

7

8

9

10

Both claims brought to date were difficult ones given the nature of the infringements and the broad classes proposed. Now that the Tribunal has clarified the expectations, the ground is ready for a suitable case. However, a cautionary note: future applicants should be prepared to take a rigorous approach to their proposed expert methodology, which the Tribunal will scrutinise carefully to test the viability of the claim as a class action.

‘Although the first two UK class actions failed at the certification stage, the Tribunal has gone out of its way to encourage future claims in more suitable cases, for example by allowing third-party funders to be paid from unclaimed damages.’

Mark Sansom, Antitrust and Dispute Resolution Partner, London

US class actions – a rougher road for class claimants in the years ahead

Recent court decisions in the US make plaintiffs’ task of certifying their class increasingly difficult. First, new precedent requires courts hearing motions for class certification to give plaintiffs’ damages models a ‘hard look’ to assess: (i) consistency with their liability theory; (ii) whether plaintiffs have affirmatively proved the class criteria through rigorous analysis; and (iii) whether statistical models adequately satisfy the requirement that the questions common to class members predominate over any questions affecting only individual class members.

Second, the Supreme Court’s application of the Federal Arbitration Act gives companies the opportunity to avoid class actions entirely through incorporating mandatory non-class arbitration agreements. The provisions do not allow a class to bring arbitrations. US courts recently confirmed the enforceability of clauses requiring non-class arbitration in antitrust cases, even where the cost of individually arbitrating makes the bringing of such claims unlikely.

Where guilty pleas, or even active cartel investigations, make it unlikely that defendants will win a motion to dismiss (challenging the sufficiency of the allegations) or a motion for summary judgment (challenging the sufficiency of the evidence), contesting class certification may represent the defendants’ best chance to win the case.

‘Despite recent judgments favouring defendants in high-stakes antitrust litigation, opposition to class certification will in many cases still offer defendants in cartel follow-on cases the best opportunity to exit the litigation quickly.’

Rich Snyder, Antitrust Counsel, Washington DC

The EU Antitrust Damages Directive is implemented across Europe, but what now?

Since December 2016, 25 EU member states have implemented the EU Antitrust Damages Directive (2014/104/EU), which seeks to facilitate claims for breaches of competition law. The Directive has, to some degree, levelled the procedural and substantive playing field between EU member states by, for example, harmonising limitation periods, prescribing certain minimum levels of disclosure and establishing a presumption that cartel infringements cause harm. However, uneven implementation has also created disparities that could affect where in the EU parties bring antitrust damages claims.

For example, the Directive states that only procedural provisions can have retrospective effect but it does not define what is substantive and what is procedural for this purpose. Different member states have therefore taken different, and inconsistent, approaches in implementing the Directive at the national level. In Ireland, both procedural and substantive changes apply only to competition law infringements that occurred after 27 December 2016. In comparison, in Germany, the new disclosure regime applies to litigation begun after 26 December 2016 even if the infringing conduct occurred before. Even when all the provisions of the Directive are in force across the member states, there will continue to be differences as some jurisdictions' existing provisions go beyond the requirements of the Directive; therefore, some member states will continue, for example, to have longer limitation periods or more generous disclosure regimes than others. In every case, parties must carefully assess jurisdictional strategy both during and after the transition period.

'With the Damages Directive now in force across Europe we expect to see a rise in the number of antitrust damages actions as claimants seek to take advantage of the new presumption of damage, more generous limitation rules and new disclosure regimes.'

Thomas Kreifels, Dispute Resolution Partner, Düsseldorf

1

2

3

4

5

6

7

8

9

10

Antitrust mass damages claims initiatives bolstered in the EU

In 2018, we expect EU legislators to pave the way for further large-scale antitrust litigation, particularly in the field of mass (consumer) damage claims.

According to the responsible European Commissioner, Věra Jourová, the Commission will adopt measures in 2018 enabling consumers to ‘defend themselves better in cases of mass harm’. These are likely to build on the Commission’s 2013 Recommendation on which a report of its implementation is expected imminently.

The Netherlands, already a very active jurisdiction for antitrust damages claims, is in the meantime seeking further to facilitate and streamline mass damages claims procedures through a legislative proposal that we expect to be adopted in 2018. The new rules would allow class actions seeking monetary damages, including in follow-on antitrust claims.

The legislative proposal would also allow the courts, where there are parallel claims, to assign a leading plaintiff (with the possibility of opting out for those who wish to pursue their claims separately). If adopted, the law would apply globally yet simultaneously tighten existing admissibility requirements to try to ensure a nexus to the Netherlands and avoid abuses of the procedure.

‘Cases such as “car emissions” have captured the attention of legislators at EU and national level. They wish to see a better system, both for claimants and defendants, of dealing with mass claims and we are likely to see further moves in this area.’

Martin Klusmann, Antitrust Partner, Düsseldorf

The emergence of antitrust damages claims in Asia

A growing number of Asian jurisdictions are now providing a forum for antitrust damages claims, with an increasing trend towards more antitrust damages litigation.

In China, the courts are becoming an increasingly important battlefield for companies and individuals seeking antitrust damages, especially in those cases that involve intellectual property or consumer disputes. In 2014, Chinese courts heard around 70 antitrust cases; in 2016, this number was 161 in Beijing alone.



Although at this time the size of the claims remains generally small, many expect claims' sizes to increase over time. China has established dedicated courts for antitrust cases across its major administrative regions, leading to increased sophistication and confidence in adopting complex competition analysis in trials. Follow-on claims are also developing, with China's first case having received final judgment in 2016. Despite the high standard of proof, as Chinese courts become an increasingly popular avenue for seeking antitrust remedies, we expect more damages claims to occur.

Japan has traditionally seen limited antitrust damages claims beyond bid-rigging cases brought by public bodies. This is evolving, however, driven by rising shareholder derivative actions against listed companies and their directors for failures to claim antitrust damages, prevent antitrust violations, or file antitrust leniency applications with regulators. This evolving pressure to litigate is expected to lead to more damages claims in a country with a traditionally less litigious culture.

The Hong Kong Competition Ordinance came into force in 2015. Although the regime still does not permit stand-alone actions, one can expect an onset of follow-on damages litigation, once the first investigations have proceeded to enforcement action and appeals have been heard. In time, Hong Kong could become another important venue in Asia for antitrust damages claims.

Looking ahead in 2018

- **Asia** – as antitrust damages claims are on the rise in Asia, companies doing business in the region should be ready to manage the increasing antitrust litigation risks, on top of the growing enforcement activity of antitrust agencies.
- **EU** – expect continued advances in class actions regimes including in the antitrust litigation arena. Differences in the implementation of the Damages Directive across the EU will favour continued 'forum shopping', allowing claimants to initiate proceedings in countries where the most favourable rules enter into force at the earliest date. Businesses must take this into account when considering litigation strategy.
- **UK** – the UK Competition Appeal Tribunal has laid down the ground rules for certifying antitrust class actions, with further claims publicly announced as being imminent. Expect further testing of the regime, possibly through some opt-in cases.
- **US** – class action defendants will rely on recent favourable class certification decisions to press their advantages in cartel follow-on litigation. The aim will be to defeat class certification as early in the process as possible.

1

2

3

4

5

6

7

8

9

10



9. Employees

Making sure your employment policies are antitrust compliant

Did you know that your employment practices could violate antitrust law? Firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services. In this context, the job market is, like any other market, subject to antitrust law.

Failure to consider carefully the relevant antitrust and employment risks of a transaction at an early stage may trigger expensive injunctive actions, fines and damages, and may affect the reputation of your company. In the US, it may now even result in criminal prosecution.

No-poaching agreements – be aware of the risks associated with recruiting competitor talent

Employees are important firm assets and firms have legitimate interests in retaining valuable employees and minimising employee turnover. No-poaching agreements (ie agreements that restrict a firm from recruiting or hiring a competitor's employees) are a relatively common practice that should, however, be carefully analysed. When companies agree not to hire from each other to keep wages down for employees, this becomes an anti-competitive exercise that adversely affects both employees and the market.

In the US, the DOJ recently conducted a high-profile investigation involving some of the major Silicon Valley companies and found that their 'no cold call agreements' – to refrain from contacting employees at competitor companies with job offers – breached the antitrust rules. This resulted in private follow-on damages cases that had multimillion-dollar settlements (reportedly in excess of \$435m), on top of legal fees and serious reputational damage.

1

2

3

4

5

6

7

8

9

10

Following that case, the DOJ issued its Antitrust Guidance and Red Flags for HR Professionals according to which, naked no-poaching agreements among employers are per se illegal under the antitrust laws. That means that if the agreement is separate from or not reasonably necessary to a larger legitimate collaboration between the employers (eg an R&D JV), the agreement is deemed illegal without any inquiry into its competitive effects.

The Guidance also makes clear that the DOJ will investigate such no-poaching or wage-fixing agreements using its criminal powers. In September 2017, Deputy Assistant Attorney General Barry Nigro stated that the DOJ was currently examining a number of such cases. He was widely quoted as saying that he was 'surprised' by the large number of such investigations, further observing 'the fact that we have so many investigations in this area highlights how seriously the division takes these sorts of allegations'. It would appear that the DOJ is making good on its promise of much more vigorous enforcement in this area.

The legality of no-poaching and wage-fixing agreements is also receiving considerable attention in Europe. No-poaching agreements are not per se illegal. However, agencies normally view no-poaching agreements as unlawful horizontal market allocations when they negatively impact competition by: (i) diminishing competition among firms to attract skilled employees; (ii) decreasing employees' access to other, more lucrative employment opportunities; or (iii) limiting employees' ability to change jobs readily within their chosen fields. This means the agreements are illegal if agencies can show these effects.

'In today's world with increasing concerns over jobs and benefits, it is expected that agencies will be much more likely to accept that the anti-competitive effects of these no-poaching agreements have been or can be shown.'

Alan Ryan, Antitrust Partner, Brussels

As an example, in Spain the National Commission for Markets and Competition (CNMC) imposed total fines of €14m for a cartel in the freight forwarding industry, citing a no-poaching agreement as one of the elements of the anti-competitive conduct that infringed both EU and Spanish law. Authorities have also struck out several other no-poaching agreements in countries such as France, Germany and the UK based on non-competition grounds.

‘Very often HR departments assume that since they neither market nor sell products or services, competition law compliance is not a matter of concern. While it is true that most antitrust cases involve allegedly impermissible concerted action among sellers, many fail to appreciate that the antitrust laws in most jurisdictions also proscribe price co-ordination among buyers. Having defended companies in both government HR investigations and private litigation, I can attest that this can be a very hard lesson to learn.’

Terry Calvani, Antitrust Of Counsel,
Washington DC

The antitrust risk of exchanging HR information

Following the issue of the US Guidance, the exchange of HR information among companies has also become an increased risk. In particular, antitrust concerns may arise if a company exchanges company-specific information about employee compensation or terms of employment with another company.

This also applies to the EU and other countries, where exchanges of confidential information can give rise to an infringement of competition law and to potential fines for the companies involved. In the EU, even the unilateral disclosure of information could constitute a prohibited concerted practice for the purposes of EU competition law. An undertaking that receives information relating to an anti-competitive arrangement, without manifestly opposing it, will be taken to have participated in a concerted practice, unless that undertaking puts forward evidence to establish that it had indicated its opposition to the anti-competitive arrangement to its competitors.

This means that companies should review their HR benchmarking studies. In order to avoid liability for information exchanges, parties should consider: exchanging information through a neutral third party that only publishes aggregated information, which shields the identity of the underlying sources; or only exchanging older, historic data (usually at least one year old).

‘The key point to remember is that, in the EU, the mere receipt of information concerning competitors may be sufficient to give rise to a prohibited concerted practice.’

Uta Itzen, Antitrust Partner, Düsseldorf

1

2

3

4

5

6

7

8

9

10

Whistleblowing - navigating the changing landscape

We are seeing that whistleblowing continues to make the headlines and the role of the whistleblower has become even more prominent in recent times.

We believe that there is a clear business interest in ensuring that the right whistleblowing framework and culture are in place to encourage employees to speak up without fear of retaliation. This can allow businesses to identify problems, investigate internally at an early stage and resolve any issues, all while retaining control of the process – something that may be lost if the employee feels they are not being taken seriously and goes to a regulator or the press with their complaint.

Last year, we carried out a whistleblowing survey*, publishing the results in November 2017. We gathered opinions from 2,500 business managers across Germany, France, Hong Kong, the UK and the US on the attitude to whistleblowing across different jurisdictions.

Our key finding is that there has recently been an increase in employee involvement in whistleblowing: whistleblowing is becoming more the ‘norm’ (47 per cent of business managers are either witnessing or engaging in whistleblowing). However, the case remains that a significant proportion of managers polled (55 per cent) think employees believe that blowing the whistle would have a negative impact on them personally.

Organisations continue to have a clear interest in ensuring that the right whistleblowing framework and culture are in place in order to deal properly with an issue and prevent further damage more quickly, rather than leave an employee with no option but to raise the issues externally, most likely at a later stage, by which time matters may have escalated.

Looking ahead in 2018

- Make sure you update your competition compliance programmes and include training for your HR teams.
- Do not agree employee salaries or terms of employment with another company or refuse to solicit or hire that other company’s employees.
- Do not exchange company-specific information about employee compensation or terms of employment with another company.
- Review whistleblowing procedures in your company.



of managers witnessed or engaged in whistleblowing



of managers think employees believe whistleblowing could have a negative effect

*www.freshfields.com/en-gb/our-thinking/campaigns/whistleblowing



It can be invaluable to take a proper look, with the benefit of hindsight, at why the incident leading to the investigation came about, why the risk management process was compromised on that occasion, what lessons can be learned, and what could be improved for next time. This type of review can set the business on the right track for any future issues that might come along.

Caroline Stroud, Partner,
London, and Global Head of People and Reward



10.

State aid

Testing the limits of competition law

We expect the phenomenon of competition authorities making an expansive interpretation of their competition law remit to continue in 2018. National competition authorities are increasingly investigating policy areas more traditionally addressed by legislative efforts, demonstrating a willingness to use competition law tools to investigate areas where regulation is lacking or inadequate.

State aid and taxation – the story goes on

Nowhere is this trend more obvious than in the European Commission's continued State aid investigations into the taxation of multinational companies. Events such as the leak of the 'Paradise Papers' have only served to increase the spotlight already being shone on the tax affairs of multinationals.

While tax legislative reform at the international and European level is ongoing, the Commission wants to see results more quickly. Commissioner Vestager has in particular highlighted the taxation of digital companies, noting that European tax systems based on a company's physical assets are not well designed for modern ways of doing business. Claiming that domestic digital businesses pay less than half the effective tax rate of their offline equivalents, the Commissioner recognised that competition rules alone could not fix the issue. However, it is clearly an important part of her agenda.

The Commission has continued apace in relation to its fiscal State aid investigations with: (i) the conclusion of its investigation into Luxembourg's tax treatment of *Amazon*, resulting in recovery amounting to around €250m; (ii) the announcement of enforcement action against Ireland for failure to recover monies in relation to the Commission's August 2016 final decision in the *Apple* investigation; and (iii) the opening of a new investigation into certain UK tax rules.



€250m
recovered
from Luxembourg
tax investigation

1

2

3

4

5

6

7

8

9

10

The UK provisions subject to scrutiny allow certain exemptions from the application of the UK Controlled Foreign Company (CFC) rules, targeting tax avoidance for certain financing income (ie interest payments received on intercompany loans). The Commission is investigating whether these rules allow multinationals to pay less UK tax, in breach of EU State aid rules.

The Commission's launch of the UK CFC investigation shows that Brexit has not dampened the Commission's enforcement appetite vis-à-vis the UK. Moreover, it shows that the Commission is examining a wider range of tax scenarios for potential State aid than ever before.

It is also clear from the UK CFC investigation and the ongoing *McDonald's* and *GDF Suez/Engie* investigations that the Commission has broader concerns than transfer pricing rules. Wider taxation issues such as double taxation treaties, exemptions from anti-avoidance rules and the qualification of certain hybrid debt instruments are of interest to the Commission.

In addition, public statements from Commission officials on the *Amazon* decision highlight that the Commission believes it does not need a formal tax ruling to be in place in order to investigate the tax treatment of a multinational company. Rather, it claims that the mere agreement of a tax situation through the acceptance of a tax return may be sufficient for a finding of State aid.

Wider than taxation

While the use of State aid to achieve wider reform goals is currently most apparent in relation to taxation, the European Commission has used State aid as a tool of reform in other key focus areas – energy and banking. The Commission has used State aid rules, in the absence of (comprehensive) legislation on the financing of renewable energy projects, to diversify the EU's energy mix and to facilitate energy market liberalisation. In banking, State aid rules were used as a crisis management tool paving the way for extensive legislation leading to the Banking Union.

In 2017, the European Commission approved an aid package for an orderly wind-down of Italy's *Veneto Banca* and *Banca Popolare di Vicenza*, and allowed a state-backed rescue to bail out *Banca Monte dei Paschi di Siena*. This use of the Commission's State aid arsenal notwithstanding the existence of far-reaching banking legislation is a clear indication that State aid rules are seen as a fallback if concerns are perceived, in these cases regarding the consequences of the bail-in of creditors. The key takeaway from this is that even when legislation is adopted, companies should not discount the possible impact of State aid rules.

'The uncertainty for companies and their tax advisers continues. It is now more important than ever that companies focus on not only the results of legislative reform and their structures going forward, but also analyse past structures and identify any potential risks. Adherence to black letter tax law may not be enough to avoid State aid investigations.'

Elco van der Stok, Tax Partner, Amsterdam

‘The Commission is continuing to see State aid as a flexible tool to be used where legislation is absent, or is in the Commission’s eyes insufficient, particularly in areas important to wider Commission policy drivers.’

Andreas von Bonin, Antitrust Partner, Brussels

Wider than State aid

This expansive view and use of State aid can be seen as part of a general trend to push the boundaries of what competition law has achieved in the past. Other examples include how privacy and data protection issues may drive larger scrutiny of data in merger control. In addition, the ongoing investigation by Germany’s Bundeskartellamt into *Facebook’s* user privacy terms shows a willingness to use all competition tools available to drive a broader agenda – endorsed openly by Commissioner Vestager.

Limitation on such an approach

The Commission’s expansive view of its competition law remit will likely face its first big test in 2018 with the General Court expecting to hear the first of the appeals in the fiscal State aid investigations. It is impossible to predict which way the General Court will go but the Court of Justice’s judgment in the *Intel* case and the General Court’s overturning of the Commission’s prohibition of the *UPS/TNT* merger may be a sign that the European Courts are willing to apply a more critical eye to the Commission’s activities.

International effects and Brexit

While State aid is a European concept, we are increasingly seeing State aid-like arguments in a world displaying more protectionist tendencies. As discussed in theme 2, EU foreign investment proposals single out purchasers benefiting from government funding. In addition, as seen in 2017 in the *Boeing/Bombardier* case, WTO rules are being used to combat potentially problematic state funding and we would expect to see more cases like this.

2018 will shed more light on the shape of any State aid regime in the UK post-Brexit. So far the UK government has been tellingly quiet on this. State aid rules are included among the list of treaty provisions that regulators envisage would continue to have direct effect and therefore still apply post-Brexit pursuant to the European Union (Withdrawal) Bill. While the exact shape of any regime is yet unknown, the UK will at a minimum have to comply with WTO rules and will more likely have a more advanced regime if recent EU trade agreements are to serve as an indication. The Ukraine–European Union Association Agreement contains nearly identical State aid provisions to those in the EU, and the EU–Singapore Free Trade Agreement extends WTO subsidy rules to cover services and not just goods.

1

2

3

4

5

6

7

8

9

10

Looking ahead in 2018

In 2018, companies will need to consider:

- **New areas of uncertainty** – companies should continue to review their tax affairs to identify possible State aid issues, especially in relation to tax avoidance schemes. It is clear that adherence to the black letter rules of tax law may not be enough to escape State aid scrutiny. We have yet to witness the fallout from the most recent Paradise Paper leaks and the Commission may seek to investigate new areas. Therefore, while 2018 hopefully will deliver some guidance in the form of new legislation and potential court decisions, uncertainty will persist.
- **US and international reaction** – the current US administration's tax reform plan may ease some State aid concerns by removing the aspect of 'untaxed' income. However, the global reach of the State aid rules and the Commission's willingness to open investigations against high-profile multinationals mean that reactions and retaliatory actions from the US in particular may be more likely. State aid-like cases such as disputes under WTO subsidy rules are set to grow in importance, as seen by the *Boeing/Bombardier* dispute.
- **Brexit** – no matter the shape of the UK's post-Brexit State aid regime, the EU will not want the UK to be able to grant advantages to companies operating there and so State aid will remain an important topic post-Brexit.
- **Ongoing legislative reforms** – 2018 and beyond will see further progress on a European Common Consolidated Corporate Tax Base (CCCTB), the implementation of the second Anti-Tax Avoidance Directive, country-by-country reporting and likely legislative proposals on taxing the digital economy. Therefore, digital companies in particular should actively monitor any developments and audit their existing structures.



2018 will bring more clarity as to what a post-Brexit State aid regime will look like in the UK. Current signs point to State aid being a part of any post-Brexit UK competition regime and the EU will not want the UK to be able to skew the playing field post-Brexit as demonstrated by the Commission's new State aid investigation into UK CFC rules.

Michele Davis, Antitrust Partner, London

Our international antitrust, competition and trade group

Your contacts

Amsterdam

Onno Brouwer
Winfred Knibbeler

T +31 20 485 7000

Beijing

Ninette Dodoo
Nicholas French

T +86 10 6505 3448

Berlin

Dr Helmut Bergmann
Dr Thomas Lübbig
Dr Frank Röhling

T +49 30 20 28 36 00

Brussels

Rafique Bachour
Onno Brouwer
Rod Carlton
John Davies
Angélique de Brousse
Laurent Garzaniti
Thomas Janssens
Martin McElwee
Dr Frank Montag
Alan Ryan
Sascha Schubert
Dr Andreas von Bonin
Dr Thomas Wessely

T +32 2 504 7000

Düsseldorf

Dr Katrin Gaßner
Dr Uta Itzen
Dr Tobias Klose
Dr Martin Klusmann
Dr Peter Niggemann
Dr Ulrich Scholz
Prof Dr Gerhard Wiedemann
Juliane Ziebarth

T +49 211 49 79 0

Hong Kong

Alastair Mordaunt
William Robinson

T +852 2846 3400

London

James Aitken
David Aitman
Rod Carlton
Alastair Chapman
John Davies
Michele Davis
Nicholas French
Nicholas Frey
Jon Lawrence
Martin McElwee
Alex Potter
Simon Priddis
Mark Sansom
Bea Tormey
Deirdre Trapp

T +44 20 7936 4000

Madrid

Francisco Cantos
Álvaro Iza

T +34 91 700 3700

Moscow

Alexander Viktorov

T +7 495 785 3000

New York

Hiram Andrews

T +1 212 277 4000

Paris

Jérôme Philippe

T +33 1 44 56 44 56

Rome/Milan

Tommaso Salonicò
Gian Luca Zampa

T +39 06 695 331

Tokyo

Akinori Uesugi
Kaori Yamada

T +81 3 3584 8500

Vienna

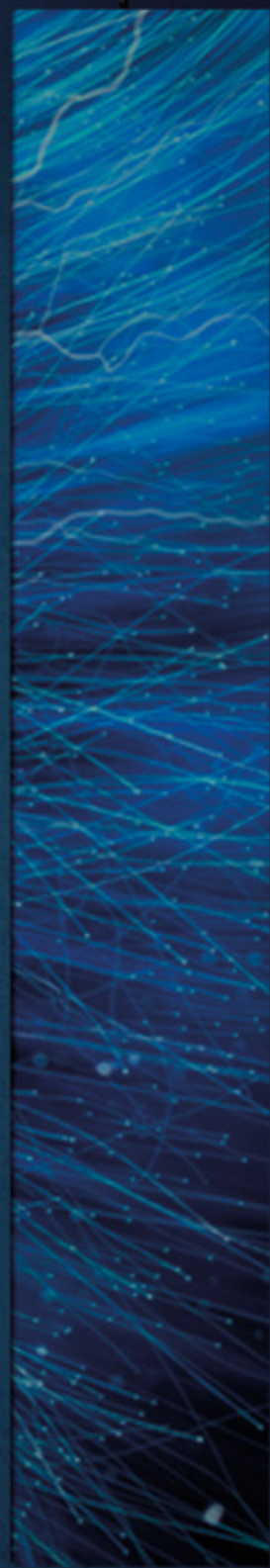
Dr Thomas Lübbig

T +43 1 515 15 0

Washington DC

Terry Calvani
Shawn Cooley
Tom Ensign
Christine Laciak
Mary Lehner
Bruce McCulloch
Robert Schlossberg
Richard Snyder
Paul Yde

T +1 202 777 4500





Freshfields Bruckhaus Deringer

275
— YEARS —

freshfields.com

This material is provided by the international law firm Freshfields Bruckhaus Deringer LLP (a limited liability partnership organised under the law of England and Wales) (the UK LLP) and the offices and associated entities of the UK LLP practising under the Freshfields Bruckhaus Deringer name in a number of jurisdictions, and Freshfields Bruckhaus Deringer US LLP, together referred to in the material as 'Freshfields'. For regulatory information please refer to www.freshfields.com/support/legalnotice.

The UK LLP has offices or associated entities in Austria, Bahrain, Belgium, China, England, France, Germany, Hong Kong, Italy, Japan, the Netherlands, Russia, Singapore, Spain, the United Arab Emirates and Vietnam. Freshfields Bruckhaus Deringer US LLP has offices in New York City and Washington DC.

This material is for general information only and is not intended to provide legal advice.