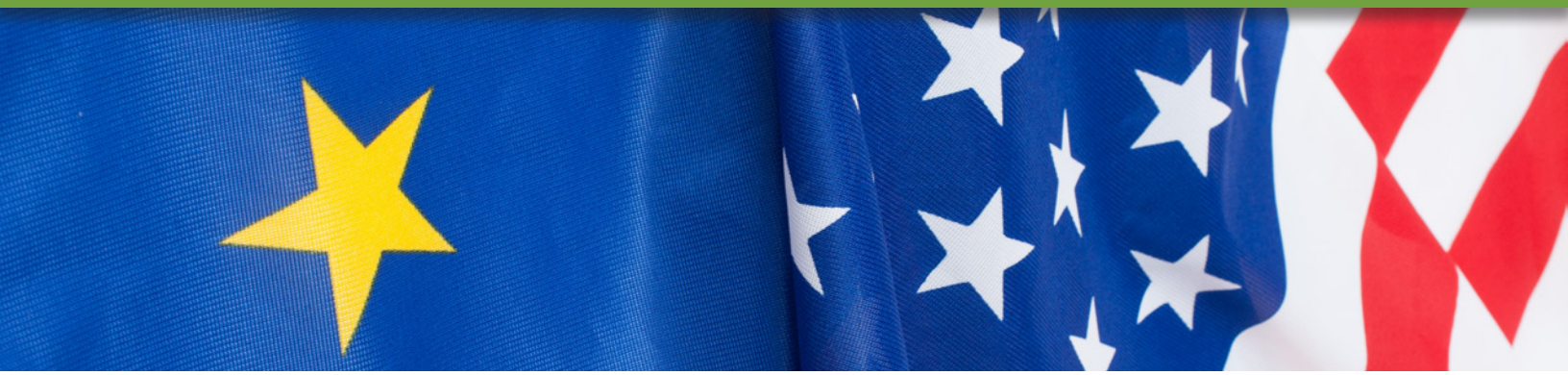
# CHANGING TIMES? THE OUT LOOK FOR ANTITRUST ENFORCEMENT IN THE EU AND THE U.S.



BY RACHEL BRANDENBURGER[1], LOGAN BREED[2], HELEN BIGNALL[3] & PAUL CASTLO[4]




## I. INTRODUCTION

This article considers the outlook for antitrust enforcement in the EU and the U.S. in the next few years, and how Brexit and the new U.S. administration under President Trump could impact that outlook.

## II. THE EU – THE POTENTIAL IMPACT OF BREXIT

Like many aspects of life in Europe, antitrust enforcement in 2017 to 2020 will take place against the backdrop of the UK's exit from the EU ("Brexit"). It is impossible to discuss developments in EU competition law enforcement over the next few years and beyond, as this article seeks to do, without taking account of the impact that Brexit could have.

### *A. The UK's Negotiating Aims*

The UK Government intends to trigger the Article 50 procedure under the Treaty on the Functioning of the European Union before the end of March 2017, beginning a two year period of negotiations.

Precisely what relationship the UK will have with the EU after Brexit will not be known for some time. But on January 17, 2017, the UK Prime Minister said that the UK would not be seeking continued membership of the EU:

1 Senior Advisor & Foreign Legal Consultant to Hogan Lovells U.S. LLP (Admitted in England & Wales).

2 Logan Breed is a partner at Hogan Lovells in Washington, DC.

3 Helen Bignall and Paul Castlo are both Counsel at Hogan Lovells in London.

4 Following the judgment of the UK Supreme Court in *R (Miller) v. Secretary of State for Existing the European Union*, handed down on January 24, 2016, the UK Parliament must first pass an Act authorizing the Government to give notice under Article 50.

> European leaders have said many times that membership means accepting the '4 freedoms' of goods, capital, services and people. And being out of the EU but a member of the single market would mean complying with the EU's rules and regulations that implement those freedoms, without having a vote on what those rules and regulations are. It would mean accepting a role for the European Court of Justice that would see it still having direct legal authority in our country.
> […]
>
> So we do not seek membership of the single market. Instead we seek the greatest possible access to it through a new, comprehensive, bold and ambitious free trade agreement.[5]

In addition, she said that the EU Courts would not have jurisdiction in the UK after Brexit but that the substance of EU law would apply until specifically amended or repealed:

> … we will convert the 'acquis' – the body of existing EU law – into British law.
>
> This will give the country maximum certainty as we leave the EU. The same rules and laws will apply on the day after Brexit as they did before. And it will be for the British Parliament to decide on any changes to that law after full scrutiny and proper Parliamentary debate.[6]

If the UK Prime Minister is successful in achieving this aim, Brexit could have a significant impact on competition law enforcement in the EU.

### *B. Antitrust Investigations*

In relation to antitrust (i.e. cartel and conduct) investigations, one significant change would be that the UK competition agencies[7] would be able to conduct their own investigations in parallel with those carried out by the European Commission ("Commission").

This could complicate matters for both companies subject to investigations and agencies. Of course, parallel investigations of the same conduct by multiple antitrust agencies are not unusual. But post-Brexit, the UK will be an additional jurisdiction, and a UK antitrust investigation an additional investigation, in the multi-national world of enforcement.

The scale of this potential doubling-up is demonstrated by looking at the 28 cartel decisions adopted by the Commission since 2012: seven related to conduct expressly affecting the UK; and 17 related to conduct stated to be EEA or worldwide in scope – so including the UK.[8] In the last four years alone, the Commission has reached a decision in 24 cartel cases that, after Brexit, the UK agencies could have jurisdiction to consider in whole or in part.

In any event, just because the UK competition agencies may have jurisdiction to investigate conduct, that does not mean they will choose to exercise that jurisdiction or have the resources to be able to do so. As a result, although there may be parallel investigations in some cases, this may not happen in all cases.

---

5 The government's negotiating objectives for exiting the EU: PM speech, January 17, 2017, retrieved from: https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech.

6 Ibid.

7 In addition to the main UK competition agency, the Competition and Markets Authority, certain sectoral regulators have competition law enforcement functions in the UK.

8 The European Economic Area comprises the 28 Member States of the EU plus Iceland, Lichtenstein and Norway.

### *C. On-going Commission Cases*

What about the Commission's pipeline of cases? There are likely to be antitrust investigations with a UK nexus already underway that are not completed before Brexit. Also, ahead of Brexit, the Commission may have to decide whether to start any new cases where the main focus of the anti-competitive activity is the UK. There are a number of possibilities, including:

• The Commission could decide to continue on-going investigations after Brexit on the basis that it had jurisdiction when the relevant conduct took place. In other words, it may assert jurisdiction even where the conduct would not have affected trade between EU Member States after Brexit because the UK is no longer an EU Member State.

• Where a Commission investigation is on-going, in the absence of transitional arrangements to the contrary, the UK competition agencies could start a parallel investigation the day after Brexit.

### *D. Impact on Leniency*

A further element of uncertainty may result from the interplay between leniency, enforcement and damages claims. Post Brexit, a court in the UK may take a less sympathetic view to parties seeking to withhold Commission leniency documents from disclosure – on the basis that the effectiveness of the Commission's leniency regime may no longer be a concern to courts as they would no longer have a duty of sincere co-operation.[9] This could affect current Commission investigations on-going after Brexit, as well as those initiated post-Brexit.

All of this creates the conditions for potential confusion, uncertainty and jurisdictional turf wars in European competition law enforcement over the coming years. Much will depend on the nature and extent of co-operation between the UK competition agencies, the Commission and other agencies around the world where more than one agency is investigating the same matter. However, there is no reason to believe that such co-operation will work any less well than it has in very many cases over the past several years between, for example, the Commission and the U.S. Department of Justice ("DOJ") and Federal Trade Commission ("FTC").

### *E. Merger Control*

As to merger control, the biggest practical impact is likely to be on the "one-stop shop" because the arrangement whereby the national competition agencies of EU Member States do not review a transaction being reviewed by the Commission in Brussels would no longer apply in the UK.

Also no longer applicable to the UK would be a number of mechanisms designed to ensure that the best-placed authority in the EU reviews mergers, including the ability of the Commission to refer cases to the UK and *vice versa*, and the "two-thirds rule" which provides that in cases where all of the parties to the merger derive two-thirds or more of their EU-wide revenues from the same EU Member State the merger does not have to be notified to Brussels.

In broad terms, post-Brexit:

• Some mergers which are reviewable by the Commission may also be reviewable, and reviewed, in the UK as well as in Brussels.

• Some mergers involving UK parties or markets may fall below the EU thresholds for review and therefore not need to be reviewed in Brussels, given that UK turnover would not count towards the EU thresholds. This could result in more notifications in individual EU Member States, or maybe more references to Brussels by parties to mergers that are notifiable in three or more remaining EU Member States. In other words, the impact may not be limited to the UK and Brussels – and

9 Article 4(3) Treaty on European Union.

there may be somewhat of a rebalancing of the national and supranational regimes across the EU. It could also trigger a reassessment of the thresholds under the EU Merger Regulation.

• Conversely, some mergers that would not today be notified to the Commission because the parties' UK revenues trigger the "two-thirds rule" may become reviewable in Brussels.

This may give rise to some practical difficulties. The EU and UK merger control regimes are not designed to be run in parallel and doing pan-European deals may take longer and become more expensive. As with antitrust investigations, much will depend on the extent of co-operation between the agencies. Again, there is no reason to believe that such co-operation will work any less well than co-operation between, for example, the Commission and the U.S. antitrust agencies.

Another way in which Brexit could have an impact on the outlook for merger control in the EU is on the role of the public interest in merger reviews. There has been some speculation that the UK may move towards a regime where the public interest plays a greater role in merger review.[10] It seems other EU Member States may also want to give a greater role to public interest considerations, either at the EU-wide or individual Member State level. For example, President Hollande of France has reportedly said that the EU's competition laws should be "adapted" to enable Europe to produce "global leaders" and "support both… public and private investments."[11] Thus, the way ahead may be influenced by the outcome of the French election in May 2017, and maybe also by other elections due in EU Member States this year, and not only by the outcome of the UK referendum last year.[12]

## III. MEANWHILE IN THE EU…

The next few years will not only be about Brexit.

In the first part of her term, Commissioner Vestager has shown that she does not shy away from investigations involving "big name" companies including Google and Gazprom. There has also been a string of high profile State aid decisions finding that EU Member States have made illegal tax benefits available to a number of large U.S. and other companies which the Commission requires be repaid.

There is nothing to suggest that the rest of Commissioner Vestager's term will be less eventful. Indeed, the Commission's Work Programme for 2017 emphasizes that the Commission will continue to focus on the "big things."[13]

### *A. Damages Directive*

The deadline to implement the 2014 Damages Directive by December 27, 2016 was met by only a handful of Member States despite Commissioner Vestager's call in November for a "final push" to meet it. In practice, the Commission is unlikely to initiate lengthy court proceedings against the "late" Member States, although it could threaten to do so to speed things up.

The proposal for a Directive was part of Vice President Almunia's legacy, an objective which he said he "did not spare any efforts to achieve" and which would "establish a higher and more level legal ground in the EU" to facilitate private damages actions by the victims of competition law infringements.[14]

10 See House of Commons Library Briefing Paper Number 05374, Mergers & takeovers: the public interest test, September 1, 2016.

11 MLex, Hollande says competition rules need "adapting" under post-Brexit priorities, June 29, 2016

12 In addition to the French Presidential election, there are pending national elections in Germany and the Netherlands in 2017.

13 Commission Communication – Commission Work Programme 2017, Delivering a Europe that protects, empowers and defends, COM (2016) 710 final, 10.25.2016.

14 Speech by Joaquín Almunia on Antitrust damages in EU law and policy at the College of Europe GCLC annual conference, November 7, 2013.

Will the Directive reduce the amount of forum-shopping seen today? In the short to medium-term at least, a dramatic shift in cases away from the UK, Germany and the Netherlands is unlikely. These have developed reputations as the go-to jurisdictions for private damages actions to date. Judges and lawyers have developed expertise and, most importantly, there is a body of case law that provides some predictability on certain issues – something that is important to a would-be claimant.

Although the Directive has clarified the law in some respects, it also creates new uncertainties. There is an expectation that some Member States will seek guidance on how to interpret certain aspects of the Directive from the Court of Justice of the European Union ("CJEU"). The number of CJEU references may depend on the level of detail the Commission chooses to include in the guidelines that it is required to publish (although without a specified deadline, it is not clear when). Therefore, there could be some further delay before the realization of what Vice President Almunia described as a "milestone in the evolution of competition law enforcement in the EU."[15]

It will also be interesting to see whether the Commission will take further action in the context of facilitating collective redress schemes. In its 2013 Recommendation, the Commission invited Member States to introduce collective redress mechanisms. The Commission has stated that it will assess the implementation of the Recommendation and, if appropriate, propose further measures by the end of July 2017.[16]

### *B. Effective Enforcement at Member State Level*

The results of the Commission's consultation (initiated by Commissioner Vestager last year) on the effectiveness of competition authorities' enforcement powers at Member State level are likely to be published shortly. The Commission is considering framework legislation to be proposed in June 2017 (likely another Directive).[17] Issues for consideration include whether leniency material is sufficiently well protected and whether whistleblowers should be protected from criminal sanctions in certain Member States.

### *C. An Increasingly Digital World*

One of the key themes in the rest of Commissioner Vestager's term will be the role of competition law in the context of e-commerce.

#### *1. E-commerce*

The Commission's final report following its e-commerce sector inquiry is due in the first half of this year.

In September last year, the Commission published its provisional findings highlighting business practices that could limit online competition. In relation to distribution agreements, the Commission received responses indicating that retailers were subject to various restrictions in the context of online sales, including being restricted from selling online at all. According to the Commission, these restrictions "may, under certain circumstances, make cross-border shopping or online shopping in general more difficult and ultimately harm consumers by preventing them from benefiting from greater choice and lower prices in e-commerce."[18]

15 Speech by Joaquín Almunia on Antitrust damages in EU law and policy at the College of Europe GCLC annual conference, November 7, 2013.

16 Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law – June 11, 2013 (2013/396/EU).

17 Commission Communication – Commission Work Programme 2017, Delivering a Europe that protects, empowers and defends, COM(2016) 710 final, 10.25.2016, page 8 and Annex 1, page 3.

18 European Commission press release, IP/16/3017, September 15, 2016.

The EU official leading the e-commerce inquiry, is reported to have said that once the sector inquiry final report has been published, "the Commission 'will take more interest' in restrictions imposed in distribution agreements, 'especially when it comes to cross-border' commerce."[19] The Commission has already opened a new investigation into whether consumer electronics manufacturers have restricted the ability of online retailers from setting their own prices for widely used consumer electronics products.[20] More cases may follow at both Commission and Member State levels.

Businesses should keep in mind Commissioner Vestager's comments at a stakeholder conference last year. She said she does not "want to tell businesses how to distribute their products. It just means that however they choose to do it, it shouldn't harm competition, and deny consumers the benefits they expect. The idea of this inquiry is to make sure we get that balance right."[21]

*2. Geo-blocking*

The Commission has also focused its e-commerce inquiry on the issue of geo-blocking (attempts to restrict cross-border sales, for example by restricting sales based on a consumer's address or credit card details) which it has said could restrict competition.[22] This follows the Commission's issues paper published on March 18, 2016 which found that the practice was widespread in the EU. The Commission already has a pending investigation against Sky UK and six major U.S. film studios, a case which Commissioner Vestager recently described as being "about a fundamental principle of the European Union – that businesses must not sign contracts that recreate unjustified barriers between European countries."[23] The Commission has also just opened two new investigations. One relates to whether consumers are restricted on the basis of their location or country of residence in relation to their online purchase of video games. The other concerns agreements between hotels and tour operators which may discriminate between customers based on their nationality or country of residence.[24]

As part of its Digital Single Market Strategy, the Commission adopted a proposal in May 2016 for a Regulation to address unjustified geo-blocking as part of a package of reforms to facilitate e-commerce across the EU. Legislation in this area therefore seems likely.

*3. Third Party Platforms*

As part of its e-commerce sector inquiry, the Commission has also considered whether online marketplace restrictions (for example when a manufacturer restricts a retailer from selling on third party platforms such as Amazon and eBay) are acceptable. In its provisional assessment, the Commission refers to the interpretation of its own guidelines on the issue as well as the debate at Member State level. Its preliminary findings are that marketplace bans do not amount to a *de facto* prohibition to sell via the Internet and that their impact together with the potential justifications and efficiencies for them vary according to the type of product as well as the particular features of a marketplace.

The Higher Regional Court in Frankfurt has referred several questions to the CJEU in the Coty case regarding third party platform restrictions in the context of a selective distribution system. The CJEU's preliminary ruling may provide clarity on this increasingly important area of law in due course.

19 Thomas Kramler speaking at a conference in Brussels on November 29, 2016, as reported by MLex on the same day.

20 European Commission press release – Commission opens three investigations into suspected anticompetitive practices in e-commerce, February 2, 2017.

21 Speech by Margrethe Vestager on October 6, 2016: E-commerce: A Fair Deal for Consumers Online.

22 European Commission press release, IP/16/3017, September 15, 2016.

23 Speech by Commissioner Vestager – Celebrating European Culture, An Evening with Nordic Drama, Brussels, January 24, 2017.

24 European Commission press release – Commission opens three investigations into suspected anticompetitive practices in e-commerce, February 2, 2017.

*4. Parity Clauses*

The Commission has also focused its e-commerce sector inquiry on parity clauses (or most-favored-nation clauses) in agreements between retailers and marketplaces. These typically require the retailer to sell on the marketplace (or list on a price comparison tool) at the lowest price and/or on the best terms offered either on the retailer's own website or on other marketplaces. This kind of clause has been under the spotlight at EU level (the e-book cases) and at national level where there have been divergent approaches (online hotel booking cases). The Commission has provisionally concluded that these clauses need to be analyzed on a case-by-case basis, but hopefully its final report will provide some clarity.

*5. Merger Control Thresholds*

The Commission is considering whether to make changes to its jurisdictional thresholds to capture important mergers in sectors like digital services and pharmaceuticals, where the relevant businesses' turnover is not yet sufficiently high to trigger an EU level review. This proposal stems in part from the *Facebook/WhatsApp* merger which did not meet the EU Merger Regulation thresholds (even though the Commission did ultimately review it following a referral request). The consultation period closed on January 13, 2017.

### *D. Google*

The Commission has three open investigations against Google:

• Comparison shopping: Google received a supplementary Statement of Objections in July last year (having received the initial Statement of Objections in April 2015) setting out allegations that Google is abusing its dominant position by favoring its own shopping comparison services through its search results. There is speculation that the Commission could issue a decision this year following a five year investigation.

• Mobile devices: In April 2016, the Commission sent a statement of objections to Google alleging that it has imposed restrictions on Android device manufacturers and mobile network operators to protect and strengthen its dominant position in relation to Internet searching.

• Search advertisements (the *AdSense* case): In July 2016, the Commission issued a Statement of Objections alleging that Google is protecting its dominant position by restricting the ability of third party website providers to display search advertisements from Google's competitors.

Commissioner Vestager has cited the Google investigations as examples of the need for the Commission to take evidence-based decisions: "The reason why we're investigating Google is very simple. It's because the evidence has led us to the initial view that its actions may have harmed competition. So we'd be failing in our duty if we didn't take a very close look."[25]

### *E. Gazprom*

Commissioner Vestager made a similar point soon after she assumed office when the Commission issued a statement of objections against Gazprom in 2015 alleging it had abused its dominant position by restricting the flow of gas, partitioning the Central and Eastern European upstream gas markets and using unfair pricing. Commissioner Vestager is reported as having said that "the decision to bring charges was an independent one based purely on law enforcement, which treats Gazprom the same as any other company…"[26] It has been reported that settlement discussions with the Commission are underway.[27] So a resolution may be forthcoming in the next year or so.

25 Speech by Margrethe Vestager at the UCL Jevons Institute Conference, June 3, 2016.

26 Financial Times – Brussels risks Russian ire with Gazprom antitrust case, April 21, 2015.

27 Mlex – Gazprom submits offer to settle EU antitrust probe, December 27, 2016.

### *F. State Aid*

Commissioner Vestager has also emphasized the need for impartiality in the context of the recent State aid decisions: "The same goes for all the companies … If they've received illegal State aid from an EU country, they need to pay it back, no matter where the company comes from. It's the only way to enforce our rules impartially."[28]

These cases are politically charged: in its August 2016 White Paper, the U.S. Treasury Department stated that "The Commission's new interpretation of State-Aid doctrine threatens to undermine the well-established basis of mutual cooperation and respect that many countries have worked hard to develop and preserve." The pending appeals in several of these cases, which argue that the Commission has deviated from well-established case law, will be closely followed over the coming years.

### *G. Intel*

The CJEU's judgment in the *Intel* case is likely to be handed down this year. Intel will have been buoyed by Advocate General Wahl's opinion that the EU General Court was wrong to uphold the Commission's decision that Intel abused its dominant position by offering rebates to computer manufacturers for its semiconductors.[29] If the CJEU were to follow the AG's opinion, it would mark a major shift in the EU Courts' position on rebates.

### *H. Mega-mergers*

At the end of last year, the Commission's Deputy Director General for mergers emphasized the risks associated with concentration in globalized markets. He said merger case handlers need to be "particularly vigilant" regarding transactions that result in "restructurings of global industries that lead to divestitures to eliminate overlaps in different jurisdictions."[30] These comments followed the Commission's review of the *AB InBev/SABMiller* merger last year and were made while the Commission is currently investigating three global mergers in the agri-chemicals sector: *Dow/Dupont, ChemChina/Syngenta* and *Bayer/Monsanto.*

The nature and extent of cooperation between the competition authorities in different jurisdictions is particularly important in this context. Commissioner Vestager recognizes this. In the middle of last year, she commented that competition authorities "do not have magic solutions," but that "we can do our bit: to help create fair conditions in markets," whether through merger control or the enforcement of the antitrust rules in the context of cartels and companies which have abused their market power. And the "secret weapon?" "… cooperation and enforcement on a global scale."[31]

## IV. THE U.S.

### *A. Cartel Enforcement*

No matter who President Trump selects to head the DOJ Antitrust Division, cartel enforcement will likely remain vigorous over the next few years. Both Democratic and Republican administrations have supported aggressive cartel prosecution for the past several decades, including frequent substantial prison sentences for individuals and increasingly large fines for corporations. President Trump's transition team appointments, David Higbee and Joshua Wright, indicate this trend is likely to continue. During Higbee's time at DOJ, the agency consistently emphasized cartel enforcement as its highest priority. Wright wrote a letter to the U.S. Sentencing Commission in 2014 advocating for the "Commission to consider increasing the prescribed range

28 Speech by Margrethe Vestager at the UCL Jevons Institute Conference, June 3, 2016.

29 Opinion of Advocate General Wahl in Case C-413/14 P *Intel Corporation Inc. v. Commission,* October 20, 2016; Judgment of the EU General Court - Case T-286/09 *Intel Corporation Inc. v. European Commission,* June 12, 2014, Commission Decision COMP/C-3/37.990 – *Intel,* May 13, 2009.

30 Carles Esteva Mosso speaking at a conference in Brussels on December 7, 2016, as reported in MLex the same day.

31 Speech by Margrethe Vestager at the UCL Jevons Institute Conference, June 3, 2016.

of jail sentences and to consider as well other individual sanctions, including enhanced individual fines and, insofar as the law allows, disqualification from holding fiduciary positions for a period of years."[32] President Trump's nominee for Attorney General, Alabama Senator Jeff Sessions, also has demonstrated an interest in cartel enforcement. During his time in the Senate, he supported legislation to enhance DOJ's leniency program for companies that self-report cartel activity to DOJ.

### *B. Merger Control*

The Trump administration's likely approach to merger control is much less clear. While President Trump has raised the possibility of antitrust enforcement against deals such as *AT&T/Time Warner* and *Comcast/NBCU*, Republican antitrust enforcement of the prohibition on mergers that may tend to substantially lessen competition, Clayton Act Section 7, has traditionally been somewhat less aggressive than under Democratic administrations.

As an FTC Commissioner, Wright was more willing to accept merging parties' efficiencies arguments in some cases than his Democratic colleagues, and he did not support the FTC litigating or imposing remedies in merger cases where the harm to consumers was not abundantly transparent. For example, in his dissenting statement regarding the *Nielsen/Arbitron* transaction, Wright wrote that "when the Commission's antitrust analysis comes unmoored from … fact-based inquiry, tethered tightly to robust economic theory, there is a more significant risk that non-economic considerations, intuition, and policy preferences influence the outcome of cases."[33] The new administration may also be less likely to challenge transactions involving claims such as loss of potential competition or harm to innovation. In any event, the new leaders of DOJ and FTC will assume their positions with several significant merger cases pending, including the *Anthem/Cigna* health insurance deal, a possible appeal of the *Aetna/Humana* case, and multiple hospital mergers, as well as looming decisions on high-profile transactions such as AT&T/Time Warner, *Monsanto/Bayer*, *ChemChina/Syngenta* and *Dow/Dupont*, so it will quickly be seen how aggressively the new administration intends to enforce Section 7.

### *C. Unilateral Conduct*

Republican antitrust enforcers have tended not to focus aggressively on unilateral conduct because of the difficulty in distinguishing between legitimate vigorous competition and anticompetitive exclusionary conduct. The previous Republican administration under George W. Bush issued a report raising the bar for DOJ unilateral conduct cases. The Obama administration rescinded the report on taking office in 2009, but the new administration could restore it. Trump advisor Wright generally expressed more skepticism on unilateral enforcement cases than his Democratic colleagues, particularly in the context of the use of FTC Act Section 5. Another Trump administration advisor who is reportedly playing a role in vetting candidates for the next leaders of the FTC and DOJ Antitrust Division, billionaire venture capitalist Peter Thiel, penned an essay in the Wall Street Journal in 2014 titled "Competition is for Losers" in which he extolled the benefits of monopolies, claiming that they are "not a pathology or an exception. Monopoly is the condition of every successful business."[34]

One case that will be interesting to see develop in the next year or so is the FTC's complaint against Qualcomm. This was filed in federal district court just days before President Trump's inauguration. The FTC alleged that Qualcomm "used its dominant position as a supplier of certain baseband processors to impose onerous and anticompetitive supply and licensing terms on cell phone manufacturers and to weaken competitors."[35] Specifically, the FTC alleged that Qualcomm (1) maintained a "no license, no chips" policy under which it supplies its baseband processors only to cell phone manufacturers that agree to Qualcomm's preferred license terms; (2) refused to license standard-essential patents to competitors; (3) extracted exclusivity from Apple in exchange for reduced patent royalties. The FTC claimed that these activities violated Section 5 of the FTC Act,

32 See: http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140729/Ginsburg_Wright.pdf.

33 See: https://www.ftc.gov/sites/default/files/documents/public_statements/dissenting-statement-commissioner-joshua-d.wright/130920nielsenarbitron-jdwstmt.pdf.

34 Peter Thiel, "Competition is for Losers," Wall Street Journal, Sept. 12, 2014, available at: https://www.wsj.com/articles/peter-thiel-competition-is-for-losers-1410535536.

35 See: https://www.ftc.gov/news-events/press-releases/2017/01/ftc-charges-qualcomm-monopolizing-key-semiconductor-device-used.

which prohibits unfair methods of competition. It is highly unusual for the FTC to make a "standalone" Section 5 claim (i.e. a Section 5 case that does not also involve a violation of Sherman Act Section 1 or 2) in a competition case. Commissioner Ohlhausen, who has been named the acting FTC Chairwoman by the Trump administration, dissented and stated that this was "an enforcement action based on a flawed legal theory (including a standalone Section 5 count) that lacks economic and evidentiary support, that was brought on the eve of a new presidential administration, and that, by its mere issuance, will undermine U.S. intellectual property rights in Asia and worldwide."[36] The suit was filed in federal district court in California, rather than in an administrative proceeding at the FTC, which will make it more difficult for the incoming Trump administration to withdraw the action, although Commissioner Ohlhausen reportedly is considering whether to press the FTC to drop the suit.[37]

### *D. Other Considerations*

Another consideration that could become significant over the next four years is the opportunity the Trump administration will have to appoint at least one – and possibly more – Supreme Court justices, as well as a significant number of lower court appointments. There are no antitrust cases pending at the Supreme Court in the current Term, but future Terms may decide cases involving important issues such as "reverse payment" patent settlements, extraterritorial application of U.S. antitrust law and class certification in antitrust cases. Republican Supreme Court appointees have generally been more deferential to defendants in antitrust cases, with a series of cases over the last twenty years making it more difficult for antitrust plaintiffs to win antitrust judgments.[38]

Finally, it is not clear how the Trump administration will approach international antitrust cooperation and competition advocacy abroad over the next four years. Trump's campaign rhetoric and his post-election comments have frequently eschewed traditional foreign policy positions. His positions on numerous issues have implied a retreat from international cooperation with traditional allies and organizations such as NATO as well as international trade agreements such as NAFTA. These comments raise the possibility that the Trump administration may adopt an isolationist posture rather than continuing the United States' traditional role as a strong advocate for the view that the antitrust laws should be used only to protect consumers from conduct that threatens to stifle competition and innovation, with the DOJ and FTC being active participants in the global antitrust policy and enforcement dialogue.

## V. CONCLUSION

Antitrust policy and enforcement faces extraordinary challenges and uncertainties in the EU and the U.S. in the coming few years. These are indeed changing times, but to what extent and in what direction or directions is less easy to forecast.

36 See: https://www.ftc.gov/system/files/documents/cases/170117qualcomm_mko_dissenting_statement_17-1-17a.pdf.

37 See: http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=860400&siteid=191&rdir=1.

38 See, e.g. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (creating a new, stricter standard of specificity required to plead a proper Sherman Act conspiracy).