

The background features a dark, moody palette of deep blues and purples. On the left side, there are vertical panels with a glowing, ethereal pattern of light blue and white, resembling liquid or energy flows. The central area is dominated by a dark, almost black vertical band. Overlaid on this dark band is the text '10. Disruptive innovation' in a clean, white, sans-serif font. The overall aesthetic is futuristic and high-tech.

10.
**Disruptive
innovation**

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

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

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

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

Rafique Bachour, Partner, Brussels

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

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

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

Deirdre Trapp, Partner, London

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

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

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

Looking ahead in 2017

Going forward:

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

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

Winfred Knibbeler, Partner, Amsterdam

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