Financial fairness
The year the tables turn?

Dealing with data
The path to enlightenment –
or the road to ruin?

Responsible working
in a volatile world
Why distant threats may
be closer than you think
Welcome to the 2016 Legal Landscape, our fourth annual look at the legal developments that will affect your business this year.

Last year we predicted issues ranging from increasing political intervention in cross-border M&A to the international growth of class actions.

Many of the topics we covered are still relevant today. And 2015’s most significant macro events — including conflict in the Middle East and instability in commodities prices — will continue to shape the market in 2016.

However, when we examined the legal reforms that will have the biggest impact on business this year, a single theme emerged: the drive by governments and regulators to build greater trust in business.

This is the result of a number of underlying trends — the desire to see corporations pay what is perceived to be their fair share of tax; to ensure businesses handle data carefully; and to encourage multinationals to protect human rights.

In response, the 2016 Legal Landscape focuses on three areas

- Financial fairness
- Dealing with data
- Responsible working in a volatile world

We hope you find the 2016 Legal Landscape useful. We look forward to meeting you to explore these themes — and any other legal issues you foresee — in more detail.

To help you stay on top of these and other issues as they develop, we will be holding a series of seminars throughout the year.

For further information visit freshfields.com/legallandscape
Financial fairness
The year the tables turn?

Governments and regulators are increasingly determined to ensure businesses pay what is perceived to be their fair share. This is forcing companies in all jurisdictions and sectors to rethink how they structure their operations. And new rules recommended by the OECD will keep financial fairness on the boardroom agenda throughout 2016 and beyond.

Even before Pfizer’s recent offer for Allergan, tax was set to be a key theme in 2016. Many countries are introducing new regimes to gain a bigger slice of corporate profits. Others are revising their tax systems to attract investment. Companies are therefore having to rethink how they are organised and how they operate. And this raises a series of legal issues from corporate and financial structuring to tax planning, antitrust, intellectual property and corporate governance.

New tax rules are set to reshape businesses across the world

One of the most significant sets of reforms on the horizon are the OECD’s ambitious ‘Base Erosion and Profit Shifting’ (BEPS) recommendations, which seek to recalibrate international tax rules. The G20 leaders have committed in principle to implement the proposals — and some will start to bite this year.

The recommendations threaten to withdraw beneficial IP regimes except where the underlying R&D takes place in the same jurisdiction. And they challenge the ways in which companies raise finance by imposing a cap on interest relief. They will drive changes in business practices across every sector — not just in tech, but also in industries as diverse as pharmaceuticals, retail, mining, oil and gas, private equity and construction.

Companies are already starting to ask themselves a number of questions in response. How are group structures affected? Should certain business units be separated? Where should IP be held? Will employees need to be relocated? And if financing arrangements need to be renewed, what is the most efficient replacement?

Plans raise risk of investigations and litigation

How the recommendations are introduced — and how quickly — will vary from country to country. Different rules imposed at different times, combined with recommendations aimed at increasing cross-border transparency, are likely to act as a catalyst for regulatory investigations and private litigation (for example in relation to double taxation treaties and businesses structured offshore).

Away from BEPS there are other regulatory and legislative initiatives that will keep financial fairness in the spotlight. We expect more EU state aid investigations, with 300 tax rulings under review and rumours that 20 or more multinationals are being scrutinised.
300

The number of tax rulings received by multinationals that are under review by the European Commission.
Data can create huge value — but it also carries major risk. From cyber security to data protection, a wave of new reforms are set to change the way companies handle information.

The volume of data stored around the world is growing exponentially. KPMG predicts that by 2020 there will be 35 zettabytes in existence; just three years ago the entire world wide web comprised just four zettabytes. Many of the world’s biggest technology businesses are built on data. And it’s becoming increasingly valuable in other sectors, like telecoms, financial services, auto, manufacturing, pharmaceuticals, consumer and retail.

The law is changing – so are you prepared?

In the US, data is governed by a patchwork of state and federal laws, with new reforms added all the time. Europe has a more harmonised regime — and there are big changes planned for 2016. Under the new EU Data Protection Regulation, businesses will need to navigate tougher rules, including by seeking more consumer consents to use personal data. Sector-specific reforms are set to further constrain data innovation in healthcare and insurance.

Companies will face much larger fines if they suffer a data loss, while the new EU Network Information Security Directive will regulate how ‘critical infrastructure’ businesses and digital service providers handle cyber breaches. Away from Europe, the recent Trans-Pacific Partnership requires signatories to make corporate hacking a criminal offence.

This year we’re also expecting the successor to the EU/US Data Protection Safe Harbor Agreement, which will affect how businesses send personal data from Europe to the US. The original agreement was invalidated by the European Court of Justice, which ruled it did not sufficiently guard personal information from state surveillance. But the data continues to flow, and we’re likely to see regulatory enforcement if a new deal can’t be reached. Similar restrictions apply elsewhere. Indonesia and China, for example, require multinationals to store their citizens’ data on local servers and not transfer it overseas.

But wise use of data can create competitive advantage

In these complex times, the companies that protect data will build public trust. A recent survey by Columbia Business School shows that consumers globally will share sensitive data with trusted businesses in return for better products and services. The companies that succeed in the digital age will be those that handle data with care.

Changing technical and geopolitical landscape brings new risks

Increasingly sophisticated cyber attacks have highlighted the need for businesses to protect data from hackers. Meanwhile, government surveillance of data is set to increase as the threat of terrorism grows. And we’re seeing increasing regulator and court requests for confidential business information. Major corporations are now restructuring their data arrangements, partly to keep information out of the reach of the US government and courts. We expect this trend to continue.

The Americans are in the lead, they’ve got the data, the business models and so the power

Günther Oettinger, EU Commissioner for Digital Economy and Society
23%

The cost of the average data breach has risen by almost a quarter since 2013, according to IBM.
Global crises have sparked a wave of migration and human rights abuses. In an age of volatility, operating globally is more challenging than ever – particularly when the public demands higher standards of corporate behaviour than at any time in history.

Across the world, economic inequality, conflict and climate change are driving people from their homes. Refugees are vulnerable to being trafficked by criminal gangs — and to other forms of exploitation. According to the International Labour Organization, more than 21 million people worldwide are held in conditions of forced labour.

The problem is particularly acute in Asia, but the effects of war in the Middle East make an already difficult operational environment even more complex for multinationals.

Boards are well aware of the risks of bribery, corruption and money laundering in far-flung jurisdictions. But they must now take an even deeper look at their working practices to ensure they are not contributing to human rights abuses.

Increased focus on human rights transparency

Human rights have long been an issue for multinationals, particularly since the UN endorsed its Guiding Principles on Businesses and Human Rights (UNGPs) in 2011. They aim to drive higher standards by demanding businesses investigate their human rights performance and take action to remedy any deficiencies.

One of the ways the UNGPs try to improve corporate behaviour is by encouraging transparency, and this is the first aspect of the principles to be enacted in hard law. The latest example of this is the UK Modern Slavery Act (MSA), which will affect all major businesses with operations in the UK. It requires companies to publish an annual ‘slavery and human trafficking statement’ showing how they mitigate against worker exploitation in their supply chains. And risk is not limited to tier-one suppliers — it will often come from the very bottom of the chain and involve entities with which a business has no contractual relationship.

The MSA is one of a series of reforms that bring aspects of the UNGPs into hard law. Further developments are expected in 2017 via the EU Accounting Directive, which will require mandatory reporting of human rights matters and other non-financial information. Other countries have similar regimes — the US government, for example, requires certain outbound investors to disclose their human rights performance in Myanmar.

Businesses need to respond by taking a risk-based approach to due diligence, focusing on the ultimate victims of any breach. Get this wrong and they face a range of issues — from investigations and litigation to a loss of public trust.

Today more than two-thirds of the world’s 50 largest companies have a specific human rights policy. However, we continue to see business-related human rights abuses

Zeid Ra’ad Al Hussein, United Nations High Commissioner for Human Rights
21m

The number of people around the world working in conditions of ‘forced labour’, according to the International Labour Organization
What’s on your horizon for 2016?

We would be delighted to explore these topics with you in more depth – and any other issues you face in the coming year. For more information or to set up a Legal Landscape planning session, please get in touch with your usual Freshfields team.