

Competition Law Enforcement Trends in the U.S., Europe and China: Looking Back at 2016 and Ahead to 2017

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Antitrust/Competition

2016 was another year of active enforcement globally. It was also a year of big changes of uncertain impact. June saw the dramatic vote by the United Kingdom to withdraw from the European Union—a development which we do not expect will have concrete antitrust implications in 2017, given that the UK government has not yet formally started the “Brexit process,” which is expected to commence by this summer. In November, the United States elected a new President—one who ran a non-traditional, “outsiders” campaign that, among other things, raised questions about the U.S.’s continued commitment to free trade and sounded a populist alarm about consolidation in media.

This Alert provides a look back at certain major developments in 2016 and our view of what to look for in 2017.

United States

- **New Leadership for the U.S. Justice Department Antitrust Division (DOJ) and Federal Trade Commission (FTC).** President-elect Trump will nominate a new head of the DOJ and at least four new FTC commissioners in 2017. However, this new leadership may not be in place for several more months. In the meantime, with Chairwoman Ramirez stepping down February 10, the FTC will have two commissioners, Republican Maureen Ohlhausen, and Democrat Terrell McSweeney. It is not yet known whether Commissioner Ohlhausen will be named the new Chair and thus immediately empowered to appoint new senior staff. The DOJ is likely to be run in the interim by the Deputy AAG for Criminal Enforcement, Brent Synder.
- **The Trump antitrust agenda?** The U.S. has not tended to experience wide swings in enforcement from one administration to another, even with changes to the political party in control. Nevertheless, antitrust enforcement has become increasingly aggressive over the last several years. Citing an asserted popular “surge of enthusiasm” for antitrust enforcement, Obama Administration officials questioned the “unfounded . . . presumption that mergers often benefit competition,” expressed concern that enforcers had been too wary of the costs of over-enforcement, and emphasized notions of “economic fairness.” While it is early days, we do not expect this trend to continue into the new administration and expect enforcement policy to shift back to a more traditional conservative approach similar to that of the George W. Bush administration. We will also be watching the extent to which the new White House becomes involved in the review of significant mergers in key industries and its views on the need to preserve diverse voices in the media.

- **Pending decisions in litigated merger challenges.** There are three pending litigated merger challenges to watch in 2017: Anthem/Cigna, Aetna/Humana, and Deere & Company/Precision Planting LLC. The decisions in these cases could help further shape U.S. merger enforcement, particularly with respect to issues such as market definition and the types of efficiencies that should be considered.
- **Intellectual property (IP) licensing.** 2016 was an eventful year for IP and antitrust. DOJ announced a new interpretation of the ASCAP and BMI music licensing consent decrees (which it will defend before the Second Circuit this year), the FTC issued its study on the activities of patent assertion entities, and the agencies together issued proposed revisions to Antitrust Guidelines for the Licensing of Intellectual Property (final revisions were published January 13). 2017 is also likely to be an active year with respect to both government and private enforcement in the pharmaceutical and high tech industries and with respect to both standard essential patents (SEP) and other IP.
- **The FTC's Qualcomm Complaint.** On January 17, the FTC's two democratic commissioners voted out a complaint against Qualcomm challenging its practice of licensing SEPs directly to cellular handset manufacturers (OEMs) rather than to rival chipset manufacturers and its exclusive supply arrangement with Apple. According to the complaint, OEMs have less negotiating leverage against Qualcomm than Qualcomm's rivals would have, resulting in royalties the complaint implies are excessive. These royalties are an alleged "tax" on Qualcomm's rivals that makes it harder for them to compete and protects Qualcomm's dominance. Commissioner Ohlhausen, who is rumored to be the likely future Chair of the FTC, issued a scathing dissent characterizing the complaint as being based on flawed legal reasoning and lacking in evidentiary and economic support. She also opined that its very existence threatens to undermine the legitimate exercise of IP rights by U.S. companies in Asia, where competition authorities have been pursuing similar claims against Qualcomm and other companies.
- **Cartel enforcement.** Cartel enforcement was a high priority in 2016 and is likely to continue to be a high priority in 2017. Recently, DOJ announced charges involving a generic drug manufacturer. It also announced a new policy to investigate agreements between companies not to "poach" each other's employees as potential criminal violations, inviting companies to take advantage of its leniency program. We will be watching these developments and also whether DOJ seeks to address concerns about "double counting" in the assessment of global cartel fines.
- **Class action litigation.** Courts have given increased scrutiny to class action settlements, and circuit courts have overturned recent antitrust settlements for reasons including perceived conflicts within the class and class members' inability to access important case materials. Parties entering into class action settlements should anticipate continued scrutiny and take steps to avoid potential bases for settlement disapproval.

Europe

- **Commissioner Vestager.** In 2016, Commissioner Vestager continued to actively enforce EU competition law in all areas, including Article 102 through the ongoing Google and Gazprom investigations. She also recently intimated that the European Commission may intervene in areas that have traditionally received less attention, such as excessive pricing. Finally, she continued to show her commitment to take novel approaches to State aid, with the decision in *Apple* and the ongoing tax ruling investigations.

- **E-commerce.** The Commission published its preliminary reports on geo-blocking and E-commerce in March and September 2016, respectively. While the unilateral imposition of geo-blocking by non-dominant companies is not unlawful, geo-blocking restrictions included in agreements may be, depending on a case by case analysis. According to the E-commerce preliminary report, a number of business practices might restrict or distort competition in relation to on-line trade for both consumer goods and the distribution of digital content (e.g., contractual restrictions related to online market places or cross-border sales, selective distribution networks restricting on-line sales, copyright licenses with excessively long duration, etc.), such that a case by case assessment of such restrictions will be required. The adoption of the final E-commerce report is expected in the first half of 2017 and the Commission can be expected to launch a number of follow-up investigations.
- **Cartel enforcement.** As the Commission closed its price signaling investigation in *Container Shipping* in July 2016 with commitments, the Commission is likely to monitor similar price signaling in the future.
- **Object infringements.** Subject to the outcome of the appeals, the General Court's judgments relating to the *Lundbeck* pay-for-delay case may prompt the Commission to take additional cases that involve "by object" restrictions. The upcoming *Servier* judgments might add further flesh to the General Court's *Lundbeck* analysis.
- **Cartel Fines.** In terms of fines, the Commission imposed a record fine in the *Trucks* cartel. The large fine in *Euribor*, a decision issued three years after the Commission reached a hybrid settlement with most of the involved parties, shows that the financial sector will likely remain in focus. We also expect that the Commission's tough approach to fines will remain unchanged in 2017.
- **Settlements.** Settlements played an important role in 2016 and we expect that they will do so also in 2017. Interestingly, several "hybrid" settlement decisions have been issued this year (that is, settlements reached with fewer than all alleged conspirators). *Trucks* was the first case with a settlement after a Statement of Objections, but it seems unlikely that this will become a common practice. *Altstoff Recycling Austria's* fine reduction in an abuse of dominance probe has opened the door for settlement-type solutions in areas other than cartels.
- **Private damage actions.** Although most Member States still have to implement the EU Damages Directive (the original deadline was end of 2016), a continued increase of private follow-on damages claims can nevertheless be expected. We expect the UK, followed by Germany and the Netherlands, to be confirmed as the plaintiffs' preferred *fora*, mainly due to the wide disclosure rules, the broad approach to jurisdiction and increasing availability of alternative sources to finance litigation. The new UK opt-out class action regime (the first such regime in the EU) will further strengthen the UK's position as a jurisdiction of choice.
- **Merger control.** The Commission is currently evaluating several aspects of the EU merger control regime, both procedural (e.g., simplification of current process for "plain vanilla" cases) and jurisdictional (e.g., the effectiveness of purely turnover-based notification thresholds). It launched a consultation in October 2016, the results of which are expected to be public by the end of 2017. In terms of substantive assessment, we expect that the Commission will continue to focus on innovation effects and that it may attempt to push the boundaries of its current theories of harm across all sectors, particularly technology and life sciences. With the growing focus on data, we expect that

the Commission will increasingly be faced with arguments relating to ‘unique’ data that may be used to exclude competition. The Commission recently concluded in *Microsoft/LinkedIn* that access to the full LinkedIn database was not necessary to compete on the markets in which such data can be used, and that the transaction would not reduce the amount of data available to third parties with respect to online advertising services.

- **Abuse of dominance.** Both *Google* and *Gazprom* continue to be at the top of the Commission’s agenda. Google has so far received three Statements of Objections, as a result of which it is alleged to have abused its dominant position in conduct relating to Android, comparison shopping service and AdSense. In addition, Gazprom is expected to submit a settlement plan to the Commission by the end of 2017 and Amazon may also reach a settlement with the Commission in the *e-books* case. Finally, the *Qualcomm* investigation is ongoing and the judgment of the Court of Justice in *Intel* is expected next year.
- **State aid.** As was shown by its decision against Apple, the Commission is determined to heavily scrutinize tax rulings applicable to individual undertakings and national tax schemes across the EU. The Commission’s Guidance on the notion of State aid published this year should help public authorities and companies to identify whether public support measures fall within, or outside, the scope of EU State aid control. Moreover, in the energy sector, the Commission published its report on the sector inquiry into capacity mechanisms, which was the first sector inquiry under state aid rules. This sector inquiry complements the Commission’s Clean Energy for All Europeans Package which is amongst others aimed at making European electricity markets more integrated.
- **EU National Competition Authorities (“NCAs”).** The public consultation launched by the Commission as a part of its ECN+ project, to gather views on how to ensure that NCAs better enforce EU competition rules, showed that there is a clear need to ensure that NCAs have effective enforcement tools to investigate and take decisions. A legislative proposal by the Commission is expected in the course of next year.

China

- **Merger Control.** Despite efforts by China’s Ministry of Commerce (MOFCOM) to streamline merger review, clearances in China continue to lag behind those in other major jurisdictions. On January 4, MOFCOM fined Canon, Inc. approximately USD 43,000 for failing to notify the first step of its acquisition of Toshiba Medical Systems Corporation. This was the first such fine issued with respect to a foreign-to-foreign filing. We expect that enforcement against parties that fail timely to notify reportable transactions will continue to be a priority for MOFCOM in 2017.
- **State Administration for Industry and Commerce (SAIC) investigations.** In 2016, SAIC concluded a four-year long investigation against Tetra Pak by fining the multinational food packaging and processing company USD 97 million (7% of its relevant turnover in China) for abuse of dominance through tying, exclusivity requirements and royalty rebates. SAIC may initiate additional investigations in 2017 in the banking, insurance and public utilities sectors.
- **National Development and Reform Commission (NDRC) probe into automotive, pharmaceutical and medical devices sectors.** Following several years of investigation

in these sectors, in December 2016 NDRC fined U.S. device manufacturer Medtronic USD 17 million for engaging in resale price maintenance (RPM), which is illegal per se in China. We expect NDRC's industry probes to continue in 2017.

- **Fair competition review system.** China formally introduced its Fair Competition Review system in June 2016, led by NDRC. The program is designed to subject governmental policies and regulations affecting markets to competition review—for example, to better ensure against preferential treatment for some market participants and eliminate barriers to entry and internal trade.
- **Agency guidelines.** The three Anti-monopoly Law (“AML”) agencies—MOFCOM, SAIC and NDRC—are expected to finalize six highly anticipated guidelines in 2017. These guidelines relate to alleged abuse of intellectual property rights (“IPR”), leniency programs, commitments in merger review process, exemptions related to anticompetitive agreements, the calculation of illegal gains and fines, and antitrust rules applicable to the automobile sector. Among them, the guidelines related to IPR are most controversial and are expected to have a major impact on companies’ licensing practices in China in the future.

If you have any questions concerning the material discussed in our trends report, please contact the co-chairs of our Antitrust & Competition practice group:

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