

Competition Law Enforcement Trends in the U.S., Europe and China: Looking Ahead to 2018

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Antitrust/Competition

2017 was another year of active enforcement globally—including in the U.S., despite the start of a new Presidential Administration touting an aggressive deregulatory agenda. Transactions in consolidated industries drew enforcement fire in both Europe and the United States (*Dow/DuPont*, *ChemChina/Syngenta*, *Bayer/Monsanto*, *AT&T/Time Warner*). And, in March, the UK government formally started the “Brexit process,” which raises important questions about the enforcement of EU competition rules in the UK.

This Alert looks back at the major competition/antitrust developments in 2017 in the United States, Europe and China and the Covington view of what to expect in 2018.

United States

Leadership Changes at the U.S. Justice Department Antitrust Division (DOJ) and Federal Trade Commission (FTC)

Following a late start, the Antitrust Division ended 2017 with nearly full leadership in place, including Antitrust Division veteran Makan Delrahim as Assistant Attorney General and Deputies Andrew Finch (Principal Deputy), Roger Alford (International), Luke Froeb (Economics), Donald Kempf, Jr. (Litigation) and Bernard (“Barry”) Nigro, Jr. (Mergers/Civil). Marvin Price, Jr., Director of Criminal Enforcement, is serving as the Acting Deputy for criminal enforcement. Delrahim, Finch, Froeb and Nigro previously served together during the Administration of George W. Bush—Delrahim as Deputy for Appellate, Foreign Commerce and Legal Policy, Finch as Counsel to the Assistant Attorney General, Froeb as Director of the FTC’s Bureau of Economics and Nigro as Deputy Director of the FTC’s Bureau of Competition.

Immediately prior to joining the Antitrust Division at the end of September 2017, Delrahim served as Deputy Assistant to the President and Deputy White House Counsel, where he managed the nomination and confirmation of Supreme Court Justice Neil Gorsuch. Of note, Delrahim, who is a member of the patent bar, previously served on the Attorney General’s Task Force on Intellectual Property (during the Bush Administration) and as Deputy Director for Intellectual Property Rights at the Office of the U.S. Trade Representative, as well as a commissioner on the Antitrust Modernization Commission and Staff Director and Chief Counsel to the Senate Judiciary Committee. As discussed below, intellectual property rights are expected to be a key area of focus for Delrahim.

Leadership at the Federal Trade Commission is much less settled. Currently, only two of the five commissioner seats are occupied, one by Maureen Ohlhausen as the Republican Acting Chair, and the other by Terrell McSweeney as a Democratic commissioner whose term expired in September 2017. In October, President Trump announced his intent to nominate three commissioners: Joseph Simons, a Republican and former head of the FTC's Bureau of Competition, who would replace Ohlhausen as Chair; Noah Phillips, currently Chief Counsel for Senator John Cornyn (R-TX), who would fill an empty Republican seat; and Rohit Chopra, a Democrat and currently a Senior Fellow at the Consumer Federation of America, who would replace McSweeney. Although Ohlhausen could remain as a non-Chair commissioner until the expiration of her term in September 2018, in recent years former Chairs have elected to leave the Commission. She has made no public statement about her plans, but her departure would leave two additional seats to be filled, one by a Republican and one by a Democrat or Independent.¹ Democrats could oppose confirmation of any Republican nominee while non-Republican seats remain unfilled. As a result of this political interplay, it remains uncertain when a full complement of commissioners will be in place.

This uncertainty has a cost, as the FTC is unable to take enforcement action without both current commissioners agreeing. Although Ohlhausen and McSweeney have aligned on most matters, there are notable exceptions—for example, the FTC's January 17, 2017, complaint against Qualcomm, which Ohlhausen opposed filing (see discussion below), and the FTC's deceptive advertising suit against DirecTV (McSweeney has objected to a settlement proposed by staff and supported by Ohlhausen). The long and winding regulatory road to The Walgreen Company's ultimate acquisition of Rite Aid Corporation is another example. Walgreen's initial bid to acquire Rite Aid in 2015 was held up for over two years in part by disagreement over settlement terms; in June 2017, Walgreen abandoned the original deal and struck a new one to acquire fewer Rite Aid stores. The re-structured deal survived over McSweeney's objection to allowing the Hart-Scott-Rodino waiting period to expire without further investigation. However, because neither commissioner can approve settlements without the support of the other, the risk of future deadlocks on significant matters will persist so long as the FTC continues to operate with only two commissioners.

The Trump Antitrust Agenda

Both the Antitrust Division and the FTC have continued to pursue fairly aggressive civil and, in the case of the Antitrust Division, criminal enforcement, as demonstrated by the actions discussed below. In general, although antitrust cases are highly fact specific, Antitrust Division enforcement decisions will be guided by traditional Republican antitrust principles: first, that the agency should act with what Delrahim has described as “regulatory humility” and, second, that the traditional consumer welfare standard will be its touchstone. In addition, Delrahim and others have set forth a number of specific enforcement priorities:

- Cartel enforcement will remain a “core priority.”
- The Division will move away in most civil cases from the type of regulatory remedies involving behavioral commitments that were employed during the prior Administration to address concerns raised in “vertical” mergers and seek structural relief instead, where

¹ By law, no more than three commissioners may be affiliated with the same political party.

warranted. Its challenge to the merger of AT&T and Time Warner (discussed below) is an example of that approach.

- Going forward, consent decrees will provide that alleged violations be judged under a preponderance standard, rather than the traditional clear and convincing evidence standard, and parties found to have violated a decree will have to pay attorney's fees and costs to the federal government.
- The Division will seek to establish a "more symmetrical balance between the seemingly dueling policy concerns between intellectual property and antitrust law." In addition to suggesting that prior policies may have inappropriately favored implementers at a cost to innovation and dynamic competition, Delrahim has promised that the Division will "carefully scrutinize what appears to be cartel-like anticompetitive behavior among [standard setting organization ("SSO")] participants," by implementers or innovators, and advised SSOs to regularly review their rules and their application for compliance with antitrust law.
- On the international front, the Division will partner with the U.S. Trade Representative to craft competition chapters in trade agreements to ensure observation of procedural fairness in competition law enforcement and focus more on the interplay of trade and competition law (as evidenced by the appointment of Roger Alford, an international law expert).

Intellectual Property (IP)

- DOJ SSO-related enforcement? Based on early statements by Makan Delrahim, we will be watching for enforcement actions, further policy statements and possible amicus briefs related to SSOs.
- The FTC's *Qualcomm* Complaint. As we previously reported (see [here](#)), on January 17, 2017, the FTC's then two Democratic commissioners (Ramirez and McSweeney) voted out a complaint against Qualcomm challenging its practices relating to the licensing of standard essential patents. Acting Chair Ohlhausen issued a vigorous dissent, opining that the very existence of the FTC's case threatened 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. Since then, Ohlhausen has publicly stated her desire to withdraw the FTC complaint if new commissioners are confirmed who agree with her. It remains to be seen whether and when she will have that chance.
- BMI/ASCAP. We previously reported (see [here](#)) that the Antitrust Division had announced a new interpretation of its BMI and ASCAP music licensing consent decrees, which prohibited performing rights organization ("PRO") BMI from continuing to offer partial licenses to songs in the BMI portfolio. Because there are typically multiple rights holders for any given song, a radio station or music service theoretically could have to obtain licenses from multiple PROs and/or music publishers to play a given song, although the vast majority of songs today are covered by blanket licenses from both BMI and ASCAP. DOJ had sought to use the decades-old BMI and ASCAP regimes to prohibit fractional licensing and compel a "single licensor" scheme, which would among other things tend to lead to lower royalties. However, the Second Circuit found that the BMI decree does not prohibit fractional licensing. DOJ accordingly must seek to amend the decree or bring a separate enforcement action if it wants to try to prohibit such licensing.

Cartel Enforcement

Cartel enforcement was a high priority in 2017 and is likely to continue to be a high priority in 2018, with continuing investigations in the mortgage foreclosure, foreign exchange, container shipping, generic drug, capacitor and other markets. In addition to a number of trials and appeals, we are watching two developments in particular.

- Employee “no poach” agreements. In October 2016, the Antitrust Division 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 the criminal leniency program to self-report such agreements. In September 2017, public statements by Finch and Nigro made clear that the Trump Administration has embraced that policy, and several investigations are underway.
- Chinese air cargo probe. In November 2017, DOJ started contacting Chinese airlines in connection with a probe into a possible airline cargo cartel. This would be the first time ever that DOJ has attempted to proceed against China-based companies and it will be an important investigation to watch given the heavy involvement of China’s Ministry of Transportation with respect to routes and fares and the potential trade law implications. (DOJ has previously prosecuted foreign air cargo cartels from about 2006-2010.)

Significant Litigation

- Ohio v. American Express. In October 2010, DOJ and several states sued Visa, MasterCard and American Express challenging their rules prohibiting merchants from using discounts, awards or other methods to “steer” consumers to cash or other cards less expensive to the merchant. While Visa and MasterCard settled, American Express fought on, losing at trial but winning in the Second Circuit. The Second Circuit ruled that the trial court had erroneously focused exclusively on effects on the merchant side of the two-sided payment card market, ignoring the net effect of the anti-steering rules on merchants and consumers together. The Supreme Court accepted certiorari in October 2017.

Petitioners and amici asked the Court to consider several issues, including how to apply the rule of reason in practice, how to define relevant markets and assess competitive effects in “two-sided” industries, which party bears the burden of establishing “off-setting” benefits on one side to harms on the other, and how to balance benefits and harms. While it is unclear which issues the Court will address, its decision could have a profound effect on the conduct of antitrust rule of reason cases generally and especially with regard to two-sided industries, which account for a major part of the U.S. economy, including healthcare, software, e-commerce and digital services.

- Animal Science Products Inc. v. Hebei Welcome Pharmaceutical Co. Ltd. (“Vitamin C”). In November 2017, DOJ urged the Supreme Court to grant certiorari in this case on the issue of whether principles of international comity require U.S. federal courts to give conclusive weight to a foreign government’s characterization of its own laws. In 2005, private plaintiffs sued four Chinese manufacturers that produce more than half the vitamin C sold in the world for price-fixing. The defendants argued that they had been compelled by the Chinese government to fix prices and China’s Ministry of Commerce intervened in the case on their behalf. The trial court allowed the case to proceed to trial and plaintiffs won, but the Second Circuit reversed, finding that the lower court should have abstained from exercising jurisdiction. Given that the Court had specifically invited DOJ’s view, there is a strong possibility that it will grant certiorari.

- United States v. AT&T. In November 2017, DOJ sued to block the merger of AT&T and Time Warner. This “vertical” merger would integrate control of Time Warner’s news, sports and other video content with AT&T’s national broadband and video distribution platforms. DOJ’s complaint alleges two concerns: (1) that AT&T could harm competition from competing distribution platforms by denying them reasonable access to Time Warner programming, especially the innovative on-line distributors who were the heart of DOJ’s concern in challenging *Comcast-NBCU* and *Comcast-Time Warner Cable*; and (2) that the merger would create an enduring oligopolistic market structure dominated by vertically-integrated AT&T/Time Warner and Comcast-NBCU. According to DOJ, the merger would result in higher prices to consumers and slow or deprive their access to new video distribution products. DOJ rejected the possibility of a decree like that imposed on Comcast when it acquired NBCU. (See discussion of Delrahim’s views on behavioral decrees above.) This is DOJ’s first litigated challenge to a vertical merger since its successful challenge in 1968 to Ford’s Motor Company’s acquisition of assets of the Electric Autolite Company, although DOJ has settled several vertical merger challenges since then. To enhance its litigating position, AT&T has offered other distributors 7-year licenses to Time Warner content entitling them to arbitration in the event of an impasse over terms. Trial is set for March 19, 2018.

Europe

In 2017, the European Commission continued to actively enforce EU competition law in all areas. We saw an Article 102 TFEU decision in the first of the three ongoing Google cases (with a €2.4 billion fine), with the *Gazprom* and *Qualcomm* investigations also continuing. The Commission closed a number of high-profile cartel investigations and used the settlement procedure more broadly and creatively. In view of the decisions taken this year and Commissioner Vestager’s recent commitment to create a “fair taxation system in Europe,” State aid will remain an essential tool for challenging tax measures.

Merger Control

- Procedure. In 2017, the Commission imposed fines for alleged failure to provide complete and correct information in filings relating to transactions. The General Court upheld the Commission’s fine for “gun-jumping” against *Marine Harvest*. We can expect a sustained focus on procedural aspects of merger reviews in 2018, with a number of procedural cases still underway. In addition, the Commission continues to evaluate modifying procedural and jurisdictional aspects of the EU merger control regime, including further simplifying the procedure used in “plain vanilla” cases and introducing non-turnover-based notification thresholds. The Commission published a summary of the replies to its public consultation mid-2017 and a staff working document is expected to follow in 2018.
- Substance. The Commission’s theory of harm in *Dow/DuPont*—focusing on the potential reduction of innovation in an industry “as a whole” (not just the elimination of competition between the merging parties)—has triggered a broader discussion about the appropriate assessment of innovation in merger reviews. The Commission will also continue to focus on the role of data in competition, but it has not yet had a case that turns on data that would support challenging a merger. Finally, the Commission prohibited two transactions in 2017, considering that the proposed remedies were insufficient (*Deutsche Börse/LSE*; *Heidelberg Cement/Schwenk/Cemex Hungary/Cemex Croatia*).

Abuse of Dominance

In 2018, Google will continue to be at the top of the Commission's agenda, with the debate over the efficacy of the remedies being implemented in the *comparison shopping* case, and the ongoing *Android* and *AdSense* investigations. Two other abuse of dominance investigations will continue to dominate the Commission's agenda: *Gazprom* (commitments are being market tested) and *Qualcomm*. The EU Court of Justice also played an important role in Article 102 enforcement this year, issuing its long-awaited judgment in the *Intel* case. The judgment confirmed the Commission's jurisdiction over conduct that is part of an overall strategy capable of producing an immediate effect in the EU. However, the case was sent back to the General Court to assess whether Intel's loyalty rebates were capable of restricting competition. Lastly, the Court of Justice clarified the concept of excessive pricing in *AKKA/LAA*, upholding the use of comparator markets by national competition authorities (NCAs) and confirming the absence of a minimum threshold above which a price difference is indicative of abuse.

E-Commerce

- Final report on Sector Inquiry. The Commission published its final report on the E-Commerce Sector Inquiry in May 2017, identifying market trends such as growing sales via suppliers' own websites, increasing use of selective systems and introduction of contractual restrictions (e.g. pricing, territorial and online sales restrictions). The report expressed concern that some practices may unjustifiably restrict consumer choice or reduce price competition. As expected, the Commission launched a number of investigations in e-commerce markets during the year (e.g. video games, licensors of merchandising product rights, consumer electronics). We expect developments on these investigations—and potentially new cases—in 2018. Moreover, reflecting the Commission's broader focus on data, the report notes that the increasing use of data in e-commerce and risks linked to exchanges of sensitive data. In parallel to the Sector Inquiry, the Commission continues its legislative efforts: in 2018, we can expect the regulation on "unjustified" geo-blocking practices to be adopted (following political agreement on the measure in November), the proposals to regulate the terms of B2B contracts remain on the table, and the Commission is due to start its review of the Vertical Block Exemption Regulation (which expires in May 2022).
- Marketplace bans. In *Coty*, the Court of Justice found that a supplier of luxury goods may prevent its authorized retailers from using third-party platforms "in a discernible manner", to preserve the products' luxury image. Although this judgment was welcomed by many, it may not end all discussions at the national and European levels about online platform bans. The German FCO, for example, takes the view that the judgment does not impact similar restrictions on goods that are not "luxury" products.

Cartel Enforcement

- European Commission's 2017 track record. In 2017, the Commission imposed the second highest fine of its history on Scania in the *Trucks* cartel (the highest fine was imposed on Daimler in the same case in 2016). We expect that the Commission's tough approach to fines will remain unchanged in 2018. In *Car Battery Recycling*—a rare purchasing cartel—the Commission fined companies for colluding to reduce the purchase price for used car batteries, to the detriment of dealers. As the cartel presumably resulted in a lower purchase value, the Commission increased the purchase value by 10 percent when calculating the fine to keep the fine level in line with the economic significance of the infringement. The settlement procedure continues to be a successful tool for the

Commission and investigations have been moving more quickly. Finally the EU Courts continue to closely scrutinize the Commission's decisions. In *ICAP*, the Court assessed the evidence in detail and confirmed the necessity for the Commission to sufficiently reason its decisions, in particular by providing enough information to understand the methodology for calculating the fines (as it did in *Printeos*).

- Immunity. For well over a decade, the overwhelming majority of the Commission's decisional practice has been sparked by immunity applications—for example since 2011, 32 of 34 cases were based on leniency applications. But it has been reported that the number of EU leniency applications has declined by almost 50 percent between 2014 and 2016. The Commission faces a challenge to demonstrate the effectiveness of its other detection methods to compensate for this apparent reduction. These methods include the recently launched anonymous whistle-blower tool, which appears to gain quite some traction with more than 9,000 monthly online hits.
- Private damages actions. Twenty-five Member States have implemented the EU Damages Directive and the three remaining Member States are in the final stages of adoption (the original deadline was end of 2016). A continued increase in the number of private follow-on damages claims can be expected, particularly arising from the *Trucks* cartel (above). However, following the Brexit negotiations, a key question will be whether the UK remains the plaintiffs' preferred jurisdictions or whether that will shift. Germany and the Netherlands have also been popular fora for competition litigation, primarily as a consequence of their willingness to embrace and validate novel procedures for the grouping of individual claims and what may be perceived as a less rigorous/more pragmatic approach to quantum.

State Aid

The Commission will continue to heavily scrutinize tax rulings available to individual undertakings and national tax schemes across the EU, with the *McDonald's*, *Engie*, and recently opened *Ikea* cases ongoing. In the *Apple tax ruling* case, the Commission recently referred Ireland to the EU Court for failing to recover the illegal tax benefits from Apple. In the energy sector, the Commission issued a number of clearing decisions concerning plans to support the development of renewable energy technologies in several Member States. And, in the financial sector, the Commission, together with the Single Resolution Board, adopted its first resolution decision of Banco Popular, illustrating the EU financial supervisors' readiness to use the resolution tool where required by the individual circumstances of each bank.

National Competition Authorities (“NCAs”)

The Commission issued a proposed directive designed to ensure more effective enforcement by NCAs acting independently, in particular through investigative authority and decision and sanction powers. Other key elements include the ability to impose deterrent fines, harmonization of the leniency programs and measures to support mutual assistance among NCAs. The Commission expects the proposal to be adopted in the Spring 2019 and implemented by 2021.

Brexit

While it is clear that EU competition rules will continue to apply to agreements and conduct having an effect in the EU, the nature of Brexit's impact on enforcement in the UK will depend on the model adopted for UK's relations with the EU. The UK CMA has already made clear the importance to it of consistency with EU enforcement: it wishes to remain a member of the ECN in order to ensure cooperation and information exchange with the Commission and NCAs continue.

Therefore, we do not expect that the UK's enforcement will, in the short term, change substantially. Nevertheless, a number of issues currently remain uncertain. In the merger review context, companies may have to file their transactions in both the UK and the EU, thereby increasing costs and risking diverging outcomes. The status of State aid rules also remains uncertain, although the EU is likely to require the UK to maintain a State aid regime. In this case, the main question is whether State aid rules would be enforced by the CMA or another (newly created, independent) entity. Finally, we expect a number of issues to arise during the transitional period, such as how to address investigations into conduct that took place before Brexit, application of commitments, relevance of EU Courts' case law, etc. Indeed, some of those same issues will also arise post-Brexit.

China

Merger Control

China's Ministry of Commerce (MOFCOM) in 2017 conditionally approved seven mergers subject to remedies, including significant global transactions in the technology and chemical sectors, such as *Dow/DuPont*, *Brocade/Broadcom* and *Agrium/Potash Corp.* MOFCOM has coordinated with enforcers in major jurisdictions such as the EU DG Comp, U.S. FTC/DOJ and South Korea's KFTC in the review process. In 2018, we expect that MOFCOM will continue to play an important role in scrutinizing global deals and enhancing cooperation with agencies in other key jurisdictions. MOFCOM also fined companies in nine transactions that failed to notify reportable transactions in time and this enforcement effort is likely to continue to be a priority for MOFCOM in 2018.

State Administration for Industry and Commerce (SAIC) Investigations

In 2017, SAIC concluded 13 investigations involving anti-competitive agreements or abuse of dominance, mainly in the pharmaceutical, energy, financial services and public utilities sectors. Most of the investigations involved only domestic players in China. SAIC reportedly expects to initiate additional investigations in 2018 in the financial services and public utilities sectors.

National Development and Reform Commission (NDRC) Probe into Pharmaceutical, Chemical and Logistics Sectors

Following several years of investigation in the pharmaceutical, chemicals and logistics sectors, in 2017 NDRC fined eighteen domestic PVC manufacturers RMB 457 million (approximately USD 69 million) for their price fixing cartel. NDRC also fined two domestic pharmaceutical companies for abuse of dominance, including for charging excessively high prices and refusal to supply active pharmaceutical ingredients to downstream drug makers. We expect NDRC's industry probes to continue in 2018. This year, NDRC also published pricing conduct guidelines for trade associations. We expect NDRC to scrutinize the conduct of trade associations, particularly in industries where excess capacity exists and companies theoretically have more incentive to collude through trade associations.

Fair Competition Review System

China published its detailed implementation rules for the Fair Competition Review system in October 2017. The review program is being led by NDRC and is designed to subject governmental policies and regulations that have the potential to affect market competition to review. In the past year, a large number of provincial and municipal governments' regulations have been subject to

scrutiny and in several cases, the regulations containing illegal preferential clauses have been removed or revised at the suggestion of antitrust enforcers. We expect this review mechanism to be expanded to cover even more government policies and regulations in the years to come.

Agency Guidelines

The three Anti-monopoly Law (“AML”) agencies—MOFCOM, SAIC and NDRC—completed public consultations with regard to a number of highly anticipated antitrust guidelines in 2017, including those related to the alleged abuse of intellectual property rights (“IPR”) and the antitrust rules applicable to the automobile sector. The final promulgation of these guidelines is expected in 2018. Among them, the guidelines related to IPR are the most controversial and are expected to have a major impact on multi-national 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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