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Competition Law Enforcement Trends and Developments in the U.S., Europe and China: Looking Ahead to 2019

U.S.

A Whole New Federal Trade Commission (FTC)

For the first time since its formation, the FTC was completely reconstituted due to five new commissioners being seated in 2018. The new slate, comprising three Republican commissioners (Chairman Joseph Simons, Commissioner Noah Phillips and Commissioner Christine Wilson) and two Democratic commissioners (Commissioner Rohit Chopra and Commissioner Rebecca Slaughter) laid out an ambitious agenda of public hearings on a wide range of competition and consumer protection topics, including big data, algorithms, AI, privacy, labor markets, nascent competition, remedies, and intellectual property. It is not yet clear how these hearings will influence the FTC, although statements by Chairman Simons and a majority of the commissioners suggest that it is unlikely that the FTC will radically depart from its current enforcement practice.

Some areas of FTC enforcement emphasis have emerged, including a focus on innovation and quality effects in merger review, an interest in monopsony issues (especially in labor markets), and the potential for retrospective review of past merger decisions. Democratic Commissioner Rohit Chopra has called for the FTC to use its rulemaking authority under Section 5 of the FTC Act to write rules governing unfair competition and for scrutiny into the effect on competition of increased ownership by private equity funds, although neither of these ideas has gained traction with a majority of commissioners. The new FTC has continued to be fairly bipartisan and consensus-oriented in its antitrust decision-making, with the recent exceptions of the FTC's remedy in the Staples-Essendant merger (discussed below) and its decision not to challenge vertical aspects of the Fresnius-NxStage merger.

Merger Enforcement

Behavioral Merger Remedies

Two 2018 FTC decisions show daylight between the Commission and the Department of Justice Antitrust Division (DOJ) on behavioral remedies in mergers. Early in his tenure, DOJ Assistant Attorney General Makan Delrahim withdrew the Antitrust Division's existing guidance on merger remedies issued during the prior Administration and announced the Division's strong preference for structural relief over behavioral remedies, even with respect to vertical mergers. DOJ then put that policy into play in its ultimately unsuccessful challenge to AT&T's acquisition of Time Warner and by negotiating a $9 billion structural divestiture in the Bayer-Monsanto merger while rejecting compulsory licensing. While the FTC continues to express a preference for structural remedies, it has been more willing to entertain behavioral remedies, at least for vertical mergers. In June 2018, the FTC conditionally approved Northrop Grumman's acquisition of Orbital ATK without divestiture, and in January 2019, it allowed the merger of Staples and

Essendant, subject to conditions limiting access to some commercially sensitive information. The latter decision was divided three to two along party lines: Democratic Commissioners Rohit Chopra and Rebecca Kelly Slaughter dissented. Commissioner Slaughter also called for the FTC to adopt a general practice of planned retrospective investigations for vertical mergers where the FTC has obtained a limited consent decree. Still, it appears that for vertical mergers before the FTC there may be a path forward with behavioral remedies in some circumstances.

DOJ Merger Review Process Modernization

In September 2018, AAG Delrahim announced a number of procedural reforms aimed at reducing the length and burden of merger investigations. Most significantly, he announced that DOJ will try to resolve most merger investigations within six months of a HSR filing - subject to the caveat that "parties expeditiously cooperate and comply throughout the entire process." Delrahim offered the following:

- The opportunity for an introductory meeting with the Front Office to talk about deal rationale and facts the parties believe are important.
- A model voluntary request letter, published in November, for use in the initial 30-day waiting period.
- Tracking and accountability for "pull-and-refile" of HSR filings, to ensure the DOJ is effectively using the additional time.
- A model timing agreement, published in November, including new limits on the number of custodians and depositions.
- Greater enforcement of CIDs to ensure third party compliance.
- Help coordinating, when possible, parallel investigations outside the United States.
- The withdrawal of its 2011 Policy Guide to Merger Remedies, substituting the 2004 Guide until the release of an updated guide.
- The release of merger review statistics to increase transparency.

These changes only apply to the DOJ.

Focus on Tech

The perceived power of technology firms in the digital economy remains an area of intense political interest and debate. Comments from both DOJ and FTC leadership do not indicate major changes in approach with respect to their investigation of the data collection and data protection practices of technology firms. For example, leadership at both agencies have remained skeptical of the use of competition laws to address issues more appropriately regulated through privacy law. However, technology firms are likely to remain under somewhat greater scrutiny in the Trump administration. At his confirmation hearing, Attorney General nominee William Barr expressed his intention to review how the Antitrust Division is handling tech issues and "how such huge behemoths that now exist in Silicon Valley have taken shape under the nose of the antitrust enforcers." He also suggested that the DOJ may get more involved in questions of privacy, technology and antitrust.

On February 26, 2019, the FTC announced the formation of a Technology Task Force "dedicated to monitoring of competition in technology markets, investigating any potential anticompetitive conduct in those markets, and taking enforcement actions when warranted." The Task Force comprised 17 lawyers and economists and a Technology Fellow to provide

technology expertise. Bruce Hoffman, Director of the Bureau of Competition to which the Task Force would report, has said that it would also look at consummated mergers.

At the state level, attorneys general have adopted a somewhat more aggressive approach, including opening investigations and jointly submitting comments to the FTC discussing potential areas of scrutiny at the intersection of privacy, data, and competition.

FTC-DOJ Divergence on Intellectual Property Issues

The FTC and DOJ have adopted increasingly divergent positions on antitrust issues associated with standard essential patents (SEPs) subject to commitments to license at fair, reasonable and non-discriminatory (FRAND) rates. In December, AAG Delrahim withdrew the DOJ's joint policy statement with the U.S. Patent and Trademark Office (PTO) that cautioned against injunctions blocking the use or importation of technology containing SEPs. The withdrawal of this statement is consistent with Delrahim's view that a patent holder's unilateral decision not to license a patent - even if that patent is part of a standard - is not anticompetitive conduct. Delrahim has repeatedly emphasized that the DOJ's focus should be on "hold out" issues - collective conduct by licensees that refuse to buy licenses - rather than on "hold up" issues involving single licensors. His view differs from the position the FTC took in its challenge to Qualcomm's practices relating to licensing of SEPs. The trial in that case concluded on January 29, 2019 and is awaiting a verdict.

Cartel Enforcement

Although there were not a large number of fines imposed in 2018, investigations continue in many different sectors. Moving into 2019, a few important trends have emerged.

- *Increased use of parallel criminal and civil enforcement.* In November 2018, the DOJ reached a global settlement with three South Korean companies related to bid-rigging allegations for fuel supply contracts to U.S. military bases in South Korea. In addition to a criminal fine of $82 million, the companies paid an additional $154 million to resolve civil claims under the False Claims Act and Section 4A of the Clayton Act. Section 4A allows the government to recover treble damages for antitrust violations when the government itself is the injured party. AAG Delrahim, in remarks at the ABA Fall Forum, touted this as the first significant settlement under Section 4A in many years, and pledged to use it more in the future.
- *A new approach to leniency*. Deputy Attorney General Rod Rosenstein announced in November 2018 a revision to the DOJ's policy on cooperation credit. Under the previous policy, as laid out by former DAG Sally Yates, the DOJ used an "all or nothing" approach, allowing corporate defendants to get cooperation credit only if they identified all employees who were involved in criminal conduct. The revised policy allows companies to receive credit so long as they identify every individual who was substantially involved in or responsible for criminal conduct. This change is a recognition that the previous standard was not practical in a world of limited investigative resources. Companies should continue to work in good faith to identify individuals who were substantially involved in or responsible for wrongdoing.
- *Continued focus on no-poach agreements*. The DOJ continues to pursue action related to its October 2016 guidance on the illegality of agreements between companies not to "poach" each other's employees. In April, the DOJ brought civil enforcement actions against multiple companies in the rail industry, and has indicated that it is actively investigating potential criminal cases. This is also an area of interest for various state attorneys general. Washington, for example, has targeted no-poach clauses in franchise

agreements, convincing dozens of franchisors to drop restraints on employee recruitment and bringing suit against a national fast food chain in October 2018.

Important Litigation

Impact of Amex Decision

The impact of the Supreme Court's 5-4 decision in *Ohio v. American Express Co.,* 138 S.Ct. 274 (2018) is still unclear, but the effects could be wide-reaching. The case, involving a challenge by the DOJ and several states to credit card company rules prohibiting merchants from attempting to "steer" consumers to cash or other cards less expensive to the merchant, focused on whether courts should consider the net effect of the anti-steering rules on both sides of a two-sided market (in this case consumer and merchant).

The Court held that due to "commercial realities," analyzing the merchant side of the market alone does not provide a reliable indication of either market power or competitive harm. Justice Thomas, for the majority, wrote that price increases on one side of the platform "do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services." Both sides of the platform, then, must be considered when defining the relevant market. However, two-sided platforms do not always require such analysis. Rather, "[a] market should be treated as one sided when the impacts of indirect network effects and relative pricing in that market are minor." Finally, the Court held in a footnote that, because vertical restraints "often pose no risk to competition unless the entity imposing them has market power," market definition is required even when plaintiffs assert evidence of actual competitive harm. It is unclear whether the Court's holding will be limited to platforms that share characteristics with credit cards, like simultaneity, or whether it will extend to other two-sided industries like healthcare, software, e-commerce, and digital services.

Other Significant Litigation

- *Apple v. Pepper*. In September 2013, a set of private plaintiffs brought suit against Apple for alleged monopolization and attempted monopolization in operating the App Store, through which third-party apps are distributed to customers, with a 30% commission paid to Apple. Plaintiffs are a group of consumers who purchased these third-party apps through the App Store. The district court dismissed the case for lack of standing under *Illinois Brick*'s holding that "only the overcharged direct purchaser, and not others in the chain of manufacture or distribution" can bring an antitrust lawsuit. The Ninth Circuit reversed, finding standing, and the Supreme Court granted *certiorari*. The case was argued November 26, 2018.

  Apple argues that it is running a two-sided marketplace, selling distribution services to developers. The iPhone users buy apps from developers, and Apple collects the purchase price and forwards it to the developers. Under this view, the developers are the direct purchasers, and they are merely passing on any overcharge to the iPhone users. Plaintiffs, on the other hand, argue that they buy apps directly from Apple through the App Store. The ruling could have important consequences for a variety of other companies running similar marketplaces.

- *NCAA Grant-in-Aid Cap Litigation*. In 2014, plaintiff classes representing college athletes brought suit against the NCAA, alleging that rules that prohibit college athletes from being paid in any form beyond tuition and other college costs are unlawful restraints on trade. The NCAA has argued that these restrictions are justified by pro-competitive purposes upheld by the Ninth Circuit in *O'Bannon v. NCAA*. The case culminated in a September 2018 bench trial, although any decision is likely to be appealed to the Ninth Circuit.

- *Korean Ramen Noodles Litigation*. In December 2018, a rare antitrust jury trial resulted in a verdict for the defendants, bringing an end to litigation that began in 2013. Plaintiffs alleged that Korean ramen companies had engaged in a price-fixing conspiracy, resulting in inflated prices for noodles in the United States. Korean trade authorities had fined a number of companies 136 billion won ($125 million) in 2012 for the alleged collusion. After only three hours of deliberation, the jury found that no conspiracy existed.

Europe

In 2018, the European Commission (Commission) continued to actively enforce EU competition law in all areas. The abuse of dominance decision in the *Google Android* case (imposing a €4.34 billion fine) was one of the key developments . The Commission closed a number of high-profile cartel cases and opened an in-depth cartel investigation into its *Car emission* probe*.* The College of Commissioners will be renewed in 2019, which will likely bring an end of Commissioner Vestager's term as Competition Commissioner.

Merger Control

- Substance. In *Bayer/Monsanto*, the Commission applied a similar framework to the assessment of innovation as it did in *Dow/DuPont*. We expect that the Commission will continue to refine its approach to the assessment of the dynamic effects on innovation in merger reviews. Similarly, the role of data in terms of competition will remain an important topic in 2019. In addition, we expect that the issue of common ownership will continue to be a topic for discussion. The Commission has prohibited the proposed acquisition of Alstom by Siemens, finding that this transaction may reduce competition in several markets. The transaction has triggered a broader discussion on the potential need to build European champions that proponents of such an approach contend will, in the future, be able to compete with Chinese (state-founded) players.
- Procedure. In 2018, the Commission fined Altice for early implementation of its acquisition of PT Portugal (so-called "gun jumping"). On the same topic, the EU Court of Justice issued its first judgment providing guidance on the scope of gun jumping in *Ernst & Young P/S v Konkurrencerådeet*. We can expect a sustained focus on procedural aspects of merger reviews in 2019. The Commission is currently investigating *Canon* for gun jumping. The Commission is also focusing on the role of third parties, by investigating *Merck/Sigma-Aldrich* and *GE/LM Wind Power* for alleged failure to provide complete and accurate information during merger control proceedings. We expect the Commission to remain vigilant in this respect in 2019. Finally, the EU Court of Justice confirmed that by not providing the final version of an econometric study to the parties, the Commission infringed UPS's rights of defense during the review of the proposed acquisition of TNT Express by UPS.
- Jurisdictional thresholds. The Commission continues to evaluate modifying procedural and jurisdictional aspects of EU merger control regime, in particular by introducing non-turnover-based notification thresholds. However, it is unlikely that any legislative amendment to the EU merger control regime will occur in 2019.

Abuse of Dominance

In 2019, Google will continue to be at the top of the Commission's enforcement agenda, with the on-going *AdSense* and *Local Search Business* investigations, and a continuing debate over the efficacy of the remedies being implemented in the *Comparison Shopping* and *Android* cases.

Another growing concern for the Commission relates to pricing behaviors. In 2018, the Commission sent a Supplementary Statement of Objections to Qualcomm for alleged sales below cost and started investigating Broadcom's rebate policy, both in relation to the chip sector. Most of the debate focuses however on excessive pricing cases in the pharmaceutical sector. The national competition authorities (NCAs) have been very active in this area and, following the Italian competition authority's fining decision, the Commission is investigating *Aspen* for unfair and excessive prices for certain drugs in the EU. Finally, following its paper published in November 2018, we expect the Commission to continue assessing the potential effects of personalized pricing, where companies use data to determine the maximum prices they can charge individual (groups of) consumers.

Cartel Enforcement

In September 2018, the Commission opened an in-depth investigation to assess if the main German car manufacturers colluded to avoid competition on the development and roll-out of technology to reduce harmful emissions from petrol and diesel passenger cars. This investigation confirms the Commission's focus on companies' behavior, even at the R&D stage. We expect that the Commission's tough approach to fines will remain unchanged in 2019. The Commission will also continue its in-depth investigation in the *US Dollar supersovereign, sovereign and agency bond trading* cartel, started in December 2018. The EU Courts continue to closely scrutinize the Commission's decisions. *Servier* is the second General Court judgment to date on reverse payment patent settlements, confirming that such agreements may constitute a restriction of competition by object for which it is not necessary to analyze the effects. The Commission is due to reach a final decision in its investigation in another reverse payment patent settlement case concerning Teva and Cephalon.

The settlement procedure continues to be a successful tool for the Commission, covering more than half of the cases such as the *Car Part*s settlement decisions in the *Occupant Safety Systems* and *Braking Systems* cases. As a result, investigations have continued to move more quickly. However, while all cartel cases in 2018 were based on immunity applications, the question of how the Commission will respond to the drying up of the immunity pipeline will remain in 2019.

Private Damages Actions

All EU Member States have now implemented the EU Damages Directive. We can expect a continuing increase in the number of private follow-on damages claims, particularly arising from the recent *Trucks* cartel decision. The UK has for a long time been the plaintiffs' preferred jurisdictions. In 2018, the High Court of England and Wales handed down its first reasoned damages award in a follow-on antitrust damages claim (*Britned v ABB*). However, the UK Government made it clear that in case of a "no-deal" Brexit scenario, competition damages claimants will no longer be able to rely on infringement decisions adopted by the European Commission post-Brexit as a 'binding' finding of infringement in the UK Courts (even regarding infringing conduct that took place prior to Brexit). Germany and the Netherlands have also been a popular forum for competition litigation and is expected to remain so in 2019.

E-Commerce and Digital Economy

Following the E-Commerce Sector Inquiry, the Commission launched a number of investigations into e-commerce markets over the past two years. In 2018, the Commission fined consumer electronics companies for restricting the ability of online retailers to set retail prices for their products (resale price maintenance), and Guess for restricting retailers from online advertising and selling cross-border to consumers in other Member States (geo-blocking). We expect

further developments in this area with a number of on-going investigations relating to video games, licensors of merchandising products rights, and holiday accommodation. More broadly, recent statements from EU officials suggest that the Commission is assessing whether EU competition rules need to be adjusted to "*capture changing realities and new phenomena*" resulting from the digital economy. Such issues will likely arise in the context of the review of the EU Vertical Block Exemption Regulation, which expires in 2022.

State Aid

We expect that the Commission will continue to heavily scrutinize tax rulings as well as national tax schemes across the EU. While the Commission found that the tax rulings issued by Luxembourg to *McDonald's* did not constitute aid, there are still three on-going investigations into tax rulings. Two of them concern possible State aids granted by the Netherlands to *Ikea* and *Nike*. The third one concerns a UK national tax scheme for multinationals (Controlled Foreign Company Rules), but it remains uncertain whether the Commission will be able to finalize its investigation before the UK leaves the EU. In addition, the Commission will continue its investigation into Italy's bridge loan of €900 million to Alitalia, notified as a rescue aid in January 2018. Finally, in the context of its review of the current guidelines set to expire at the end of 2020, the Commission recently extended seven sets of guidelines as well as the General Block Exemption Regulation for a further period of two years and launched an evaluation of State aid rules to determine whether to further extend or update them.

National Competition Authorities ("NCAs")

In December 2018, the EU Institutions adopted the so-called "ECN+ Directive", which aims to ensure that NCAs, acting independently, are better placed to enforce EU competition rules more effectively, with adequate resources and powers to investigate and to impose dissuasive sanctions. Other key elements include the harmonization of the leniency programs and measures to support mutual assistance among NCAs. The Member States have until 4 February 2021 to implement this Directive into national laws.

Brexit

The exact nature of Brexit's impact on enforcement in the UK remains uncertain at this time. If the UK were to leave the EU without a deal, the CMA would face a large number of new cases as of March 2019. In particular, the CMA would have jurisdiction over transactions that were previously reviewed solely by the European Commission and would become the only independent national state aid regulator. The CMA's Annual Plan Consultation 2019/20 makes it clear that the CMA will prioritize the areas where they have a statutory duty to investigate, *i.e.*, merger control and State aid cases. The CMA acknowledges that this prioritization may lead to a decrease in the its effective enforcement of other antitrust rules, including cartels and market studies. The CMA is set to publish a summary of the responses to this consultation and a final version of its Annual Plan in March 2019. Finally, in light of its new role, we expect the CMA to strengthen its international profile and increase global cooperation.

China

Consolidation of Antitrust Agencies

In March 2018, China announced that, as part of a broader government reorganization, the antitrust portfolio of three agencies - the Ministry of Commerce (MOFCOM), the State Administration for Industry and Commerce (SAIC), and the National Development and Reform

Commission (NDRC) - was to be consolidated into a newly created agency: the State Administration for Market Regulation (SAMR). SAMR became fully operational in May 2018.

Following the integration at the central level, SAMR's local counterparts (AMRs) at the provincial level began to consolidate enforcement resources at the local level. For antitrust enforcement activities, SAMR authorized provincial AMRs to run enforcement cases within their regions from December 2018. However, SAMR retains the right to handle high profile investigations that involve multiple provinces, that are complicated or, that involve a provincial government's abuse of administrative power or with major impact on national economy.

Merger Control

In 2018 SAMR (and its predecessor MOFCOM) conditionally approved four transactions, namely *Monsanto/Bayer, Luxottica/Essilor, Rockwell Collins/United Technologies, and Linde/ Praxair*. Behavioral remedies were imposed in *Essilor/Luxottica*, and a combination of structural and behavioral remedies were imposed in all other cases. Throughout the year, SAMR (and its predecessor MOFCOM) reviewed 441 concentrations, which represents a 36% increase from 2017. In the fourth quarter of 2018, SAMR took around 15 days on average to review a transaction that qualified under the simplified track.

In 2019, we expect SAMR to continue the recent trend toward faster and more efficient merger review. SAMR also fined parties in 15 transactions that failed to report notifiable transactions in time and this enforcement effort is likely to continue to be strengthened in 2019.

Non-merger Enforcement Actions

SAMR (and its predecessors NDRC and SAIC) investigated 32 monopoly agreements and abuse of dominance cases in 2018, mainly in the pharmaceutical, utilities and transportation sectors. Out of the 32 investigations, 15 have been closed. Other investigations are continuing into 2019, including high profile investigations against a number of memory chip makers.

Antitrust enforcement towards active pharmaceutical ingredients (APIs) producers was a high priority for SAMR (and its predecessor NDRC). In December 2018, SAMR fined three domestic pharmaceutical companies for price-fixing in the APIs market. In addition to confiscation of illegal gains, SAMR imposed a total fine of RMB 6.25 million (approximately USD 911,000) on the three companies. Later in the same month, two chlorpheniramine maleate API manufacturers were fined RMB 12.43 million (approximately USD 1.81 million) for abuse of market dominance.

The shipping sector also has been subject to strict scrutiny last year. In June 2018, SAMR fined four Shenzhen tugboat companies RMB 12.86 million (approximately USD 1.88 million) in total, - amounting to 4% of their sales in 2017 - for price-fixing. In July, two ship tallying companies were fined a total of RMB 3,163,108 (approximately USD 462,000) for market allocation and price-fixing.

At the local level, the Tianjin Municipal Development and Reform Commission (Tianjin DRC) in July imposed a fine of approximately RMB 50 million (approximately USD 7.30 million) on 23 local yard operators for entering into and implementing monopoly agreements, and in November imposed another fine of RMB 45.1 million (approximately USD 6.58 million) on 17 local container yard operators for forming and implementing price-fixing agreements.

SAMR has publicly expressed that it will focus on anti-competitive behavior in sectors including utilities, pharmaceuticals (especially API), construction, and consumer products in 2019.

Accordingly, we expect enforcement actions in these sectors will continue to rise in the coming year.

Legislative and Regulatory Developments

- Since its establishment, SAMR has been consolidating implementing regulations issued by its predecessors and accelerating its own pace of rule-making. In October 2018, it issued a new set of regulations regarding the notification and review of transactions, which replace regulations issued by MOFCOM. Several other regulations are released for public consultation and awaiting finalization.
- By the end of December 2018, the Antimonopoly Commission (AMC) of the State Council has approved four antitrust guidelines affecting the auto sector, Intellectual Property Rights (IPR), leniency applications, and exemption of monopoly agreements. These guidelines are expected to be formally promulgated in 2019, which aim to provide more guidance to companies on the application of the AML and improve transparency of antitrust enforcement in China.
- The newly established IP tribunal of the Supreme People's Court (SPC), responsible for reviewing appeals of antitrust cases handled by China's three IP courts in Beijing, Shanghai and Guangdong, also is working a second judicial interpretation of the AML, which aims to provide more substantive guidance than the previous one published in 2012.
- In 2017, China's antitrust enforcement agencies and legislators commenced their work to revise the Antimonopoly Law (AML). A draft revision of the AML was prepared in 2018, but not released for public consultation. According to the legislative agenda of China's 13th National People's Congress, the AML will be reviewed and amended on a priority basis in the coming five years.

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

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