

Antitrust Enforcement Trends in the U.S., Europe and China: Looking Back at 2015 and Ahead to 2016

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Antitrust/Competition

Antitrust in 2015 was characterized by aggressive and often internationally-coordinated enforcement. The authorities in the U.S. continued to demonstrate a willingness to take parties to court, where they have sought increasingly significant remedies. In Europe, Commissioner Vestager established herself as the new head of the Competition Directorate, with a focus on the high-tech and Internet sectors. Authorities in China solidified their position as key enforcers with respect to mergers and intellectual property licensing. Clients should anticipate these trends to continue into 2016, as we explain further in this alert.

U.S.

- **Litigated merger challenges.** 2015 was a year of litigated merger challenges. Most typically, DOJ and FTC challenges are settled concurrently with the filing of a complaint by the parties' agreement to divest overlapping assets or businesses. In 2015, however, parties to several mergers put the government's case to the test. The FTC litigated two preliminary injunction cases to decision,¹ winning one and losing the other. It also sued to enjoin Staples' acquisition of Home Depot (litigation pending) and filed administrative cases against three hospital mergers. DOJ sued to block two deals that the parties abandoned prior to decision.² Three additional deals were abandoned in response to DOJ's threat to sue.³ In several of these matters, the parties had offered divestitures that the government deemed insufficient to fully address its competitive concerns. The government's demonstrated willingness to litigate will likely impact regulatory risk assessment and strategy going forward in a year that promises additional consolidation and mega-mergers in key industries, such as health insurance and chemicals.
- **FTC enforcement agenda.** The FTC continued to pursue an agenda of supporting generic drug competition during 2015, pursuing claims alleging unlawful "reverse payment" agreements and filing an amicus brief explaining its view that "product hopping" can be illegal. In addition, in August, the FTC began an effort to "update and expand on" its merger remedies study issued in 1999 and issued a one page-statement of enforcement principles regarding stand-alone claims of "unfair methods of competition" under Section 5 of the FTC Act, confirming the agency's commitment to using the FTC Act to challenge anticompetitive conduct that is not unlawful under the Sherman Act or Clayton Act. We expect the pharmaceutical and healthcare industries to

¹ *Sysco Corp./US Foods* (FTC win) and *Steris Corp./Synergy Health plc* (FTC loss).

² *Electrolux AB/General Electric* and *National CineMedia Inc./Screenvision*.

³ *Comcast/Time Warner Cable* (which was also subject to FCC approval), *Bumble Bee/Chicken of the Sea* and *Applied Materials/Tokyo Electron*.

be a continued focus of the FTC's energies and are looking for a merger remedies update before the end of the year.

- **DOJ enforcement agenda.** DOJ can be expected to continue to prosecute alleged financial manipulation and cartel activity relating to automobile parts, ocean shipping, capacitors and diodes, municipal bonds, tax liens, and real estate, among other industries. It will also likely continue to pursue aggressive remedies in both criminal and civil cases, including the appointment of independent antitrust monitors and requirements to disgorge alleged ill-gotten gains in civil matters.
- **Guidance from the courts?** 2016 could produce significant appellate decisions in the areas of reverse payment settlements (answering questions left open in the Supreme Court's *Actavis* decision), pharmaceutical "product hopping" and financial benchmark manipulation (*In re LIBOR-Based Financial Instruments Antitrust Litigation*), and regarding the question of how much market power is required to support a monopolization claim (*US v. American Express Co., et al.*).
- **Upcoming presidential election.** Changes in administration typically mean only marginal differences in enforcement, and antitrust is rarely a significant issue in Presidential campaigns. Nevertheless, Democratic front-runner Hillary Clinton has promised to be even more aggressive than the Obama Administration. Ms. Clinton has vowed to "take on the fight" against industry consolidation by hiring "aggressive regulators who will conduct in-depth industry research to better understand the link between market consolidation and stagnating incomes" and requiring merging companies to commit to passing on savings and efficiencies to consumers." Republican candidates have not yet addressed antitrust enforcement, but two front-runners have specific antitrust-related experience. Sen. Cruz served as Director of the FTC's Office of Policy Planning July 2001 to January 2003, heading the agency's competition advocacy efforts aimed at eliminating federal, state and local governmental impediments to competition in industries from wine to cable television and caskets. Mr. Trump was architect of the USFL's (ultimately unsuccessful) suit against the NFL and the subject of a DOJ merger investigation when he merged casinos in Atlantic City.

Europe

- **Commissioner Vestager.** Her actions during her first 15 months in the job indicated that, whether you agree or disagree with the outcome, the Commissioner will display firm hand and decisive leadership, giving the staff clear signals on prioritising cases and policy issues, including key international cartels and antitrust cases such as the comparison shopping case against Google and Gazprom. High tech sectors and eCommerce will remain at the core of Commissioner Vestager's 2016 agenda.
- **Cartel enforcement.** Following the judgment of the European Courts in *Cartes Bancaires* (seemingly narrowing the interpretation of the "by object" antitrust restrictions in the EU) and the Commission's recent abandoning of the high-profile cartel investigations in CDS and Platts, the Commission can be seen as adopting a more prudent approach to the "grey areas" of cartel enforcement. 2016 will bring more clarity on this as a result of, *inter alia*, (i) the Commission's approach to other similar investigations concerning alleged price signalling (Container Shipping) or alleged benchmark distortion (FOREX), and (ii) a number of forthcoming General Court

judgments (e.g., the *Lundbeck* and *Servier* reverse patent settlements cases), which should further define the notion of “by object” antitrust restrictions.

- **Cartel fines.** Whilst 2015 has been a moderate year for the number (and level) of the Commission’s cartel fines, we anticipate for 2016 a number of significant fines in relation to a range of key on-going cartel proceedings that often involve global markets, e.g., capacitors. Settlements, which are intended to shorten the duration of investigations, will continue to play an important role, perhaps leading to another year of less than record fines.
- **Private damage actions.** The EU Damages Directive—designed to facilitate the compensation of victims of EU antitrust infringements—must be implemented in all EU Member States by the end of 2016. We anticipate a significant increase of private follow-on damages claims as a result. Mainly due to the wide disclosure rules and the possibility of having alternative sources of financing litigation, we expect the UK to be confirmed as the plaintiffs’ preferred forum, followed by Germany and the Netherlands. The transitional rules concerning the new UK opt-out class action regime (the first such regime in the EU) will likely be tested in court by plaintiffs.
- **Merger control.** The Commission will continue to focus on dynamic competition engendered by product and process innovation when assessing fast developing markets or markets characterised by significant R&D.
- **Clear focus on high tech/internet sectors.** We expect that the Commission will make its decision in the Google comparison shopping investigation and take material steps in certain aspects of its Android investigation. These cases, together with (among other things) the recent Statements of Objections against Qualcomm and e-commerce sector inquiry, suggest a continued focus on the high tech and online sectors in 2016.
- **State aid.** In line with its investigations into Apple, Amazon, McDonalds, etc., we anticipate that the Commission will continue to heavily scrutinise tax rulings applicable to individual undertakings and national tax schemes (e.g. the Belgian excess profit tax system) across the EU.
- **National Competition Authorities (“NCAs”).** The diverging approaches and outcomes in the hotel booking investigations has highlighted the risk of inconsistent outcomes within the EU. The Commission intends to address this in consultation with the NCAs and is carrying out a public consultation on whether there is a need to adjust the NCAs’ powers and “enforcement toolbox.” Concrete legislative proposals are expected by the end of 2016.

China

- **Anti-monopoly Law (“AML”) Enforcement Regarding the “Abuse” of Intellectual Property Rights (“IPRs”).** IPR-related enforcement has been a high priority for the agencies that enforce the AML and we expect this focus to continue in 2016. The agencies’ aggressive investigations, significant enforcement decisions, and ongoing project to develop and promulgate regulations regarding “abuses” of IPRs have created significant uncertainty for companies. Although the State Council is expected to issue consolidated AML/IPR Guidelines during 2016, clients that negotiate or seek to enforce licensing agreements are likely to continue to face challenges in China.

- **Merger Control.** In 2015, China's Ministry of Commerce ("MOFCOM") made significant progress in addressing concerns regarding delayed merger clearances, by streamlining aspects of its review process and continuing to focus on clearing "simple" transactions more quickly. At the same time, the agency has levied increasingly tough penalties against both foreign and domestic companies for failing to file transactions that met the AML's reporting thresholds. We expect MOFCOM to continue to work to improve its efficiency in 2016 by further revising its notification and review regulations, while also facing significant tests of that efficiency as a result of the wave of mega-mergers that were announced in 2015.

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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