Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

2016 ANTITRUST YEAR IN REVIEW

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Introduction

Wilson Sonsini Goodrich & Rosati is pleased to present its *2016 Antitrust Year in Review*. In this report, we summarize the most significant antitrust matters and developments of the past year. We begin with a look at the mergers and acquisitions arena, where we discuss trends that characterized the FTC's and DOJ's aggressive approach to U.S. antitrust enforcement in 2016. We also contrast enforcement during the final year of the Obama administration with the prospective shifts expected with the onset of the Trump administration. We then examine international mergers and discuss noteworthy shifts in the European Commission's practice.

Our report also summarizes how 2016 was an active year for agency investigations and discusses a series of cases that illustrate the expanded agency focus on marketing and bidding restrictions. We summarize significant statements on defense contracting and the sharing economy, as well as the DOJ's appeal of an order striking its interpretation of consent decrees. In the intellectual property area, we address U.S. agency interest in patent assertion entities and proposed updates to antitrust guidelines for IP licensing. In addition, we look beyond the U.S., primarily to Europe, where we saw the EC's pursuit of abuse of dominance cases and its prosecution of allegedly anticompetitive behavior in the pharmaceuticals and television licensing sectors. Further, we examine notable recent activities of antitrust authorities in other key jurisdictions, including China, Hong Kong, Korea, and Brazil.

In the last two sections of our report, we cover criminal and civil litigation matters that resulted in developments affecting both U.S. and global entities. The criminal section looks closely at trends in the DOJ's criminal enforcement program in 2016, significant prosecutions during the year, the DOJ's continued focus on compliance, DOJ-driven policy initiatives and priorities, and key cartel enforcement matters outside of the U.S. Finally, in the civil antitrust section of our report, we note the majority of actions in which private plaintiffs sought damages based on wrongdoing previously alleged in separate government investigations. As we explain, the increased costs of pursuing litigation and the related discovery processes have spawned "me-too" actions in which parties hope to leverage investigatory work already done by government agencies. We examine the high-profile class action cases that made headlines throughout the year, as well as analyze the types of cases that were focal points in different court jurisdictions, including the Second Circuit's landmark ruling that clarified jurisprudence regarding the territorial scope of the Sherman Act.

In each section, we also preview important pending outcomes and expectations for 2017.

We hope you find our *2016 Antitrust Year in Review* to be a useful resource for insightful perspectives on the most meaningful developments from the past year. As always, should you have any questions or comments on any of the matters, trends, or controversies discussed in the report, please contact your regular WSGR attorney or a member of the firm's antitrust practice.

Mergers

U.S. Trends

In 2016, the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) (the "agencies") continued to take an aggressive approach to U.S. antitrust enforcement. This is reflected in four notable trends: (1) prosecution against companies for failure to notify the agencies of reportable transactions and the investigation of non-reportable transactions; (2) continued willingness to go to court to block transactions; (3) intense scrutiny of parties' efficiency claims and proposed remedy packages; and (4) focus on vertical transactions that historically have been viewed as procompetitive. It is unclear whether these trends will continue under the Trump administration.

Hart-Scott-Rodino (HSR) Act Compliance

The HSR Act mandates that transactions that meet specific thresholds be notified to the antitrust agencies for review. If after a 30-day waiting period the pertinent agency still has doubts about the antitrust impact of the transaction, the agency will issue a "Second Request," opening an in-depth review. In August 2016, the FTC and the DOJ released the fiscal year 2015 HSR Report (covering October 1, 2014, through September 30, 2015). In fiscal year 2015, 1,801 transactions were reported under the HSR Act, representing an 8.3 percent increase from the 1,663 transactions reported in fiscal year 2014.[1] Second Requests were issued in 47 of these transactions.[2] Fiscal year 2016 filing volumes, which are approaching pre-2008 financial crisis levels, are expected to show further increase. The number of HSR filings is a guide to measuring overall merger and acquisition activity. However, total HSR filings may not represent the agencies' workload or enforcement trends, because the proportion of Second Requests that result from the total number of HSRs filed is typically only around 5 percent of the total.

Continued Enforcement for Failure to Report

The DOJ and the FTC continued to bring enforcement actions for failure to file HSR notifications in reportable transactions. In particular, enforcement focused on improper reliance on the "investment-only" exemption, which exempts from HSR notification requirements transactions in which: (1) the acquirer holds less than 10 percent of the voting securities of a corporation; (2) that acquisition is made "solely for the purpose of investment";[3] and (3) the investor has "no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer."[4]

In April 2016, the DOJ filed a complaint against ValueAct Capital, arising out of the acquisition of shares of both Baker Hughes and Haliburton in late 2014 and early 2015.[5] ValueAct, which describes itself as an "activist" investment firm, purchased shares in both Baker Hughes and Haliburton at the time the two companies were planning to merge in a $35 million transaction (which was later abandoned after challenge by the DOJ). ValueAct's acquisitions met HSR thresholds, but ValueAct relied on the "investment-only" exemption to avoid HSR filings for the share acquisitions. The DOJ filed a complaint in April 2016 alleging that ValueAct did not qualify for the investment-only exemption because it: (1) gained access to senior executives of both companies; (2) sought information regarding the Baker Hughes-Haliburton merger; (3) influenced decisions about the transaction; and (4) positioned itself to assist in potential restructuring in order to gain regulatory approval. Documents created by ValueAct also allegedly evidenced an intent to play an active role in merger integration and in the combined post-merger entity. In July 2016, ValueAct agreed to an $11 million settlement—the highest fine paid for an HSR violation to date.[6]

Also in 2016, the FTC reached a settlement of $720,000 with investor Fayez Sarofim for failure to notify certain acquisitions of voting securities.[7] This appears to be the first fine ever imposed on an investor for an inadvertent violation of the HSR Act where the investor has self-reported the violation and has committed no prior violation of the act. It also appears to be a deviation from the agencies' longstanding "one strike" policy, under which investors who self-report are not typically fined for their first HSR violation.

Continued Investigation of Non-Reportable Transactions

While the HSR Act forms the "backbone of the government's merger review process,"[8] the agencies continue to challenge non-reportable transactions. Transactions that do not meet the thresholds for HSR notification can still be challenged under the antitrust laws. For example, in 2016, the FTC challenged Valeant Pharmaceuticals International Inc.'s 2015 non-reportable acquisition of Paragon Holdings I, Inc.[9] The FTC alleged that the acquisition would harm competition in the production of gas-permeable "buttons" used to make contact lenses. Pursuant to a settlement, Valeant will divest Paragon as a standalone entity, and Paragon will acquire the assets of Pelican Products LLC—a contact lens packaging company that Valeant acquired after its purchase of Paragon, the sole producer of FDA-approved vials used for shipping certain gas-permeable lenses.[10] The agency's challenge of Valeant's acquisition serves as an important reminder of antitrust risks regardless of whether a transaction is HSR-reportable.

Lessons from the Merger Year in Review

The final year of the Obama administration was arguably among the most aggressive to date—in keeping with the general trend towards more litigation and skepticism that otherwise problematic mergers could be resolved through remedies.

Litigation Remains a Focus

In 2016, the antitrust agencies successfully challenged 32 mergers. Of those, 21 were settled prior to litigation, four were abandoned prior to or during litigation, and seven were fully litigated in court (in each, the agency won or the deals were later abandoned).

In spite of the proportionally greater number of settlements, the agencies continued to assert that they are prepared to go court rather than agree to ineffective remedies. As the head of the DOJ's Antitrust Division, Renata Hesse, stated earlier this year: "Antitrust enforcers at the Antitrust Division and the FTC have become justifiably more skeptical about the promise of procompetitive benefits of mergers and of the likelihood that remedies solve the competitive concerns. As a result, we are more and more litigating to challenge mergers we see as fundamentally problematic and difficult, if not impossible, to fix."[11]

Defenses Unlikely to Save Problematic Deals

Two defense arguments that parties often make in response to agency concerns about a deal are: (1) the efficiencies generated by the merger will offset any competitive harms; and (2) any competitive harm resulting from the deal will be short lived because competition from new firms entering the market and expansion from existing firms will replace any lost competition. In 2016, parties to problematic deals found little success in making either of these arguments.

The agencies' skepticism towards claimed efficiencies arguments took center stage in their litigation challenge to *Staples/Office Depot.* Office supplies retailer Staples agreed to buy competitor Office Depot for $6.3 billion in February 2015. The FTC challenged the transaction in court, claiming a reduction of competition in the market for "consumable" office supplies sold to large business customers. At trial, the FTC stated, "No court has ever relied on efficiencies to rescue an otherwise unlawful transaction."[12] In defending their transaction, Staples and Office Depot claimed that the merger would generate $1 billion in annual synergies from reductions in expenses and optimization of retail stores.[13] The FTC dismissed these arguments, noting that: (1) many of the cost savings could be achieved without the merger; (2) the projected efficiencies were based on speculation and business judgment, not rigorous data analysis; and (3) the projected efficiencies were unlikely to be passed on to consumers.[14]

Parties have historically had greater success with entry and expansion arguments than with efficiencies arguments, but the antitrust agencies in recent years have tended to discount these arguments as well. For example, in late 2015, the DOJ successfully sued to block AB Electrolux's bid to acquire General Electric's appliance business after rejecting the parties' arguments that expansion from non-U.S. firms (e.g., Samsung, LG) was likely to address the competitive concerns related to the deal.[15] In contrast, the DOJ under the Bush administration unconditionally cleared the acquisition of Maytag by Whirlpool in 2006 based, at least in part, on similar entry/expansion arguments.[16] *Staples/Office Depot* also highlighted a failed entry/expansion argument. Despite the fact that the FTC had recently acknowledged the increasingly competitive landscape for the sale of *retail* office supplies,[17] the FTC rejected the parties' arguments that online providers such as Amazon Business and regional providers such as W.B Mason could replace any lost competition resulting from the merger for the sale of office supplies for business-to-business accounts.

Agencies Require Clean and Effective Remedies

In 2016, the FTC and the DOJ also continued to closely scrutinize the effectiveness of proposed remedy packages. For example, Halliburton abandoned its bid to acquire rival oilfield services provider Baker Hughes after the DOJ sued to block the deal. Halliburton and Baker Hughes offered to divest assets across different business lines, including assets from Halliburton's drilling and drill bits businesses and assets from Baker Hughes' fluids, completions, and cementing businesses. But the proposal did not allay the DOJ's concerns and the DOJ criticized that even with the proposed remedy: (1) the company would retain the most valuable assets; (2) many of the divested assets would require a buyer to reach support agreements with Halliburton to successfully operate them, leaving the buyer dependent on its rival; (3) the company's offer of non-exclusive licenses for certain intellectual property and numerous contractual restrictions would interfere with effective transfer or assignment of divestiture technology licenses or customer contracts; and (4) the DOJ would need to remain deeply involved for years to come, monitoring and enforcing one of "the most complex and riskiest remedies ever contemplated in an antitrust case"[18] Similarly, in *Staples/ Office Depot*, the FTC rejected the parties' proposed divestiture of $1.25 billion in corporate contracts and technology assets to wholesaler Essendant for $22.5 million.[19] The FTC successfully argued that the remedy was inadequate because: (1) the contracts at issue were short-term (i.e., customers could return to Staples-Office Depot in a short time frame); (2) Essendant did not serve the business-to-business market (i.e., Essendant was not an ideally positioned purchaser of the assets); (3) Essendant would be unable to effectively compete with the combined Staples-Office Depot "on day one"; and (4) Essendant would continue to rely on Staples-Office Depot for customer transition services post-divestiture.[20]

In years past, merging parties often successfully avoided litigation by agreeing to remedy competitive concerns through divestitures and/or conduct remedies (e.g., agreements to license IP or content on competitive terms). However, recent high-profile failed remedy packages[21] have caused the agencies to take a much more cautious approach to granting conditional approval for problematic deals. The agencies are scrutinizing any potential remedies to ensure that divestitures are "limited, discrete, and clean"[22] and that divestiture buyers are not dependent on the merged company in any relevant way.[23] The agencies want to ensure that any divestiture buyer will function as a *bona fide* competitor of the merging parties, and will "step into the shoes" of the eliminated competitor.[24] Behavioral remedies, such as company commitments to act or refrain from acting in some fashion, must be easy to monitor and enforce.[25]

Identifying acceptable remedies may be particularly challenging for companies in consolidating industries where the number of buyers for divestiture assets may be limited or in transactions that do not allow for straightforward divestitures. The agencies' scrutiny of remedies means that companies need to consider early on not only whether remedies may be necessary, but also whether the possible remedies will be deemed sufficient by the agencies.

Vertical Deals Remained a Priority

Vertical mergers (i.e., mergers between companies operating at different levels of the supply chain) remained a focus in 2016. Vertical mergers generally receive less attention from the antitrust agencies because: (1) they typically involve companies that are not direct competitors;[26] and (2) vertical theories of harm require evidence that the merger will give the combined firm the ability and incentive to foreclose competition (e.g., an input foreclosure theory where a manufacturer buys a key supplier and withholds supply from rival manufacturers). Although the vast majority of vertical mergers do not present serious competitive issues, in recent years the antitrust agencies have shown that they remain committed to investigating and challenging problematic vertical deals. As Deputy Assistant Attorney General Jon Sallet recently noted, there is a misperception that "the division does not devote many resources to the review of vertical transactions, [but] this conclusion is belied by the recent work of the division."[27]

The DOJ's investigations into several high-profile media and communications deals highlight the agencies' commitment in recent years to heavily scrutinizing vertical mergers, albeit allowing them to proceed subject to conditions. For example, the DOJ cleared Comcast's acquisition of NBCUniversal, subject to conditions, but blocked Comcast's proposed acquisition of Time Warner Cable, where the DOJ alleged the merger would affect distribution of content.[28] In 2016, the DOJ approved Charter Communications' acquisitions of Time Warner Cable and Bright House Networks, subject to remedies to address vertical concerns.[29]

Merger Enforcement Under the Trump Administration

Merger enforcement has been a priority throughout the Obama presidency, but we do not expect that trend will continue under a Trump administration. While the agencies will likely continue to conduct thorough investigations into mergers, we do not anticipate that there will be as much of an appetite for merger challenges. As Acting Assistant Attorney General Renata Hesse noted in a recent speech, during the Obama administration, "a total of 40 mergers have been blocked by court order or wholly abandoned by the merging companies in the face of [a DOJ] investigation, a stark increase from 16 in the [Bush] administration."[30] If there is a decline in merger enforcement under the Trump administration, many in the business community may wonder how it will affect their business. Below are some tips for companies thinking about doing strategic deals during a Trump presidency.

<u>Do Not Assume a Free Pass</u>: While the odds of securing clearance for your deal may increase, do not expect a rubber stamp from antitrust enforcers. First, investigations are largely driven by staff

attorneys and economists, and therefore, Second Requests will remain the norm for problematic deals. Second, though the FTC and the DOJ may be less likely to bring cases under a Trump administration, we do not expect litigation to grind to a halt. The Bush administration challenged a number of mergers that were not obviously anticompetitive, including *Oracle/PeopleSoft* (the DOJ lost at trial), *Whole Foods/Wild Oats* (the FTC lost at trial and won on appeal), and *CCC/Mitchell* (the FTC won at trial on a coordinated effects theory, but the court was skeptical of the FTC's unilateral effects theory).

<u>Think About Remedies First for Problematic Deals</u>: We expect that the agencies will be more open to remedies to solve for competitive problems. Thus, giving early thought to potential divestiture packages for deals that raise obvious horizontal issues could mean the difference between clearance and litigation. Additionally, remedy packages that may have been viewed as insufficient under the Obama administration could be viewed differently under a Trump administration. Even a relatively weak remedy package can enable the agencies to claim victory (and avoid appearing too soft on merger enforcement) without departing significantly from free-market principles

International Insights

European Union (EU)

The year 2016 saw three noteworthy shifts in the European Commission's (EC's) practice: a stronger stance on mergers in the telecoms sector; the continued use of complex and extensive remedy packages (such as in *Teva/Allergan Generics*); and increasing attention being given to dynamic competition and to the incentives of market participants to innovate post-merger. It also saw strong enforcement at a national level, with the French competition agency imposing the highest fine to date worldwide for the implementation of a deal before clearance ("gun-jumping"). In addition, a number of legislative reforms are being examined at both European and national (Germany) levels that would plug a possible "enforcement gap" by introducing new jurisdictional thresholds to capture transactions where an undertaking may not have significant turnover but controls a key technology or is particularly innovative (such as the *Facebook/WhatsApp* deal). This has been thrust to the forefront of policymakers' agendas by growing concerns over so-called "big data."

Telecoms Under Scrutiny

The EC's strict stance on mobile telecoms deals subject to its review was clear when on May 11, 2016—in a rare move—it blocked the proposed £10.5 billion acquisition of Telefonica UK by Hutchison.[31] The proposed transaction would have combined Three UK's (Hutchison) and O2 UK's (Telefonica) mobile businesses in the UK, creating a new market leader with over 40 percent of the national mobile market, and leaving only two other mobile network operators (MNOs)—EE and Vodafone. The EC cited "strong concerns" that the deal would have reduced competition in the mobile market, as the combined company would have had less incentive to compete with Vodafone and EE. It is the first time that the EC has prohibited a telecoms merger in a major European market. Under the previous EU Commissioner for Competition, the EC cleared three comparable deals, but in September 2015, negative EC comments resulted in the abandoning of a proposed telecoms joint venture in Denmark. In order to address the EC´s competition concerns in the UK case, Hutchison offered a number of commitments, which were deemed insufficient. Hutchison has filed an appeal against the EC's prohibition decision.

Earlier in 2016, the EC thoroughly reviewed another telecoms deal and cleared it subject to comprehensive remedies. The EC approved Liberty Global's acquisition of BASE in February 2016.[32] The merger combined one of the three MNOs in Belgium (BASE) with the country's largest mobile virtual network operator (MVNO) and largest cable company (Telenet, owned by John C. Malone's Liberty Global). The EC was concerned that the transaction would have reduced competition in the mobile telecommunications market. The $1.4 billion acquisition was ultimately cleared with a "fix-it-first" remedy (i.e., that required a binding sale agreement prior to the clearance decision). As part of the remedy, Liberty Global committed to the divestiture of an existing virtual operator and customers to a new entrant, on top of a network access agreement. This novelty in the EC's telecoms merger practice makes it clear that network access commitments alone may now often be insufficient.

Negotiation of Complex Remedy Packages

The EC's ability to extract complex and comprehensive remedies to enable a deal to be cleared was also evidenced in its reviews of *Ball/Rexam* and *Teva/Allergan Generics*. The EC cleared the proposed acquisition of Rexam by Ball (valued at over $60 billion) in January 2016,[33] subject to conditions. Rexam and Ball were the two main global market players (first and second in the European Economic Area (EEA), respectively) in the manufacturing of beverage cans. Following an in-depth investigation, the EC had concerns that the deal, as notified, would have left only two other competitors in Europe (Can-Pack and Crown) in an already concentrated market. The EC's approval of the deal was subject to a significant remedy package, entailing the divestiture by Ball of 12 of its plants in the EEA (almost the whole overlap in Europe). The parties were not permitted to close the deal until the EC approved the buyer of the assets ("up-front buyer" remedy). The review was conducted in close cooperation with both the U.S. and Brazilian competition authorities, in particular for the scope of the remedy package.

The EC required another comprehensive remedies package in *Teva/Allergan Generics*, which was cleared subject to conditions in March 2016.[34] The sheer scale of Teva's $40.5 billion acquisition of the generic pharmaceutical business of Allergan—resulting in the world's leading maker of generic medicines—posed a number of interesting challenges. The EC assessed competitive dynamics beyond product-by-product overlaps at an EU member state level, and for the first time in a generics merger, deemed certain vertical aspects problematic. Teva offered remedies to address the EC's concerns, committing to divest a number of assets, including the majority of Allergan Generics' business in the UK and Ireland, Teva's generic business in Iceland, and certain overlapping molecules in 24 European countries (including pipeline products). The remedy highlighted the EC's current focus on innovation, and is a prime example of the EC's ability to clear even complex deals at an early review stage (Phase One) if they are properly thought through by the parties. Implementation of the remedy will require significant monitoring due to the scale of the remedy package and the complex regulatory framework of the markets. Approval in the U.S. was also subject to conditions, with the FTC requiring the divestiture of 79 generic drugs to rival firms (the largest FTC drug divestiture order).

While there has been an increase in upfront buyer and fix-it-first commitments, the EC has stressed that these remain the exception in remedy cases. For companies contemplating a complex deal or the acquisition of a competitor with a particularly strong R&D pipeline, however, these recent cases illustrate the need to factor in potential remedy demands across jurisdictions when devising their transaction timelines, and the importance of engaging in early negotiations with authorities to address any concerns effectively.

The EC's Flexibility in Merger Reviews

The EC's determination to take a more holistic approach in its deal reviews is apparent in its treatment of the ongoing consolidation in the agrichemical sector. The $60 billion proposed "merger of equals" between *Dow/DuPont*[35] was notified to the EC in June 2016, and is the first of a trio of mega-deals in the agrichemicals industry that falls within the jurisdiction of the EC. *ChemChina/Syngenta* is also currently the subject of an in-depth investigation by the EC,[36] and *Bayer/Monsanto* is expected to be notified to the EC in early 2017. It is common practice for the EC to review transactions on a case-by-case basis and in the order in which they have been officially notified (the "priority rule"). In 2011, WSGR represented Seagate in its acquisition of Samsung's hard-drive business. By completing its notification before the parties to a previously announced transaction (Western Digital buying Hitachi's hard-drive business) completed their notification, the EC reviewed Seagate's deal as though the other deal was not pending (resulting in divestitures for the other deal, but not for Seagate/Samsung). In this case, however, there have been suggestions that the EC may not adhere to the priority rule. The EU Commissioner for Competition has warned that the deals could leave the sector "quite concentrated."

In its *Dow/DuPont* review, the EC has raised concerns that the combination may reduce competition for crop protection, seeds, and some petrochemicals. Similar to the EC's focus on innovation in its review of *Teva/Allergan Generics*, the EC has focused on concerns that the merger would reduce the parties' incentive to compete through innovation. The parties submitted commitments to alleviate the EC's concerns in July 2016, but these were deemed insufficient, and the EC opened an in-depth investigation into the deal in August. The EC has already extended its in-depth investigation, and suspended the review twice to request more information from the companies. The parties received a "Statement of Objections" from the EC in December 2016 that detailed the competition concerns to be addressed. A decision is unlikely to be adopted before the end of March 2017.

The third of the deals in the agrichemical sector, Bayer's proposed $66 billion acquisition of Monsanto, has yet to be notified to the EC, but the parties have opened pre-notification talks with the EC.[37]

Strict Application of National Gun-Jumping Rules

On November 8, 2016, the Altice Group and its telecommunications subsidiary, SFR, were fined €80 million ($88 million) by the French competition authority (FCA) for gun-jumping.[38] Altice's acquisition of SFR—France's second MNO—had been cleared by the FCA in October 2014, and Altice's acquisition of Virgin Mobile—one of France's MVNOs—was cleared by the FCA in November 2014. Following clearance, and acting on tips from the companies' competitors, the FCA conducted several dawn raids on the companies' premises. The FCA found that prior to its clearance decision in *Altice/SFR*, Altice had interfered in SFR's management and commercial policy, and the companies had exchanged strategic and sensitive information. In addition, the FCA found that Altice and SFR had coordinated their behavior in the purchase of Virgin Mobile and engaged in implementation prior to clearance in this separate transaction. More specifically, Virgin Mobile's CEO had participated in the SFR group's decision-making, and had engaged in monthly reporting to Altice of Virgin Mobile's commercial performance. Among other factors, the FCA took into account the size of the transactions in determining the fine and the deliberate nature of the gun-jumping, having occurred in two separate transactions.

To date, the fine is the highest imposed by any competition agency worldwide for gun-jumping and comes in the context of the increasing global trend for competition agencies to impose sanctions for the early implementation of deals. While transitional and implementation planning is key to a successful merger, the French case highlights the need for companies to balance such strategies for a proposed merger against any antitrust limitations, particularly in the context of deals that trigger antitrust filings in multiple jurisdictions and could thus be subject to parallel enforcement actions.

China

China's Ministry of Commerce (MOFCOM) continues to strive to improve the efficiency of its merger notification and review process. Since introducing in 2014 a simplified notification and review procedure that draws on the EU model, MOFCOM has observed that "simple" cases account for roughly 75 percent of all reviewed deals, and the majority of simple cases are closed at the initial review stage. The new director general of MOFCOM's Antimonopoly Bureau recently indicated that MOFCOM would outsource the economic analysis of complex and significant cases to third-party consulting firms, illustrating that Chinese antitrust authorities' current ability to review "non-simple" mergers is not yet fully fledged and likely to have limitations.[39]

During the first three quarters of 2016, MOFCOM received approximately 286 merger notifications and cleared almost 260 of them during the same time period—about a 20 percent increase in comparison to the same period in 2015. MOFCOM closed 210 deals at the initial stage without entering the in-depth stage (Phase Two) of the review process.[40]

As of the beginning of the fourth quarter of 2016, Anheuser-Busch InBev NV's $108 billion acquisition of SABMiller PLC was the only merger on which MOFCOM imposed conditions for clearance. In a July 2016 decision, MOFCOM required SABMiller to divest its 49 percent interest in China Resources Snow Breweries to the other owner, China Resources Beer.[41]

Since 2012, MOFCOM has seen at least nine merger deals refiled for review. Of these nine, two were unconditionally cleared, five were conditionally approved, and two lapsed. The two mergers that were unconditionally cleared after refiling were both approved in 2016. In the first deal, MOFCOM approved computer manufacturer Dell's acquisition of data storage provider EMC Corporation, shortly after the two companies refiled in August 2016. In the second deal, Beijing Zhong Ke San Huan High-Tech and Hitachi Metals had originally filed their joint venture agreement in August 2015 under MOFCOM's simplified review procedures. After third parties raised objections during a 10-day-long public comment period, MOFCOM asked the companies to refile through the normal review procedure. The deal was ultimately cleared in May 2016.[42]

Agency Investigations

2016 was a highly active year in agency investigations in both the United States and abroad. In the U.S., the FTC and the DOJ demonstrated a new willingness to pursue companies for allegedly collusive non-price agreements, especially agreements not to advertise. The agencies also issued significant new statements on defense contracting and the sharing economy, and the DOJ completed its long-anticipated review of the consent decrees governing music licensing.

In intellectual property, the ongoing trend of U.S. agency interest in so-called patent assertion entities (PAEs) continued, with the agencies seeking to continually clarify the line between permissible and anticompetitive conduct. The agencies also considered substantive proposed updates to their jointly issued Antitrust Guidelines for the Licensing of Intellectual Property.

In Europe, the European Commission pursued several closely followed abuse of dominance cases, including against Morningstar, Austrian firm ARA, and Google. The commission also prosecuted allegedly anticompetitive behavior in the pharmaceuticals (*Lundbeck*) and television licensing (*Paramount*) sectors, and received a substantial setback in its ongoing rebate litigation against Intel.

Outside of the U.S. and Europe, 2016 was marked by increased sophistication among antitrust authorities in key jurisdictions, with China and Hong Kong both issuing significant new antitrust guidelines. Korean and Brazilian authorities also demonstrated their growing confidence in pursuing aggressive investigations against leading multinational firms, including Apple, Google, and Volkswagen.

Agency Litigation and Investigations

The U.S. agencies were busy in 2016 with both investigations and policy matters. In investigations, the agencies focused on some new areas, particularly marketing restrictions. In policy, the DOJ completed its multi-year review of the *ASCAP/BMI* consent decrees, and issued new joint statements with the FTC on the defense industry and the sharing economy.

Expanded Agency Focus on Marketing and Bidding Restrictions

In the U.S., the past year has been notable for the increased willingness of the FTC and the DOJ to pursue investigations against new types of non-price collusion—marketing restrictions in particular. While some of the industries targeted—contact lenses, hospitals, and television broadcasting—have seen significant action in the mergers and price-fixing contexts of late, the DOJ's and the FTC's expansion into non-price advertising restrictions indicates an increased appetite for pushing traditional enforcement boundaries in defense of consumers. Three recent matters exemplify this trend: the 1-800 Contacts investigation; the investigation into information sharing by DirecTV regarding Los Angeles Dodgers broadcast rights; and a pair of DOJ enforcement actions against hospital advertising restrictions.

1-800 Contacts

Perhaps the most surprising and potentially significant non-price investigation of the year came in August 2016, when the FTC filed suit against 1-800 Contacts, alleging that the company had acted as a ringleader in a series of agreements by contact lens vendors not to advertise on each other's search keywords.[43] While agreements not to advertise have long been targeted by FTC and DOJ investigations, the case is one of the first to touch specifically on search advertising (e.g., on Google, Bing, and other sites) as a venue for anticompetitive collusion.

According to the FTC's administrative complaint,[44] 1-800 Contacts entered into bidding agreements with at least 14 competing online contact lens retailers to eliminate competition in auctions to place advertisements on online search engines such as Google and Bing. The complaint alleges that 1-800 Contacts threatened competitors with litigation unless they entered into agreements not to bid on each other's keywords, and that these bidding agreements unreasonably restrained price competition in Internet search auctions and restricted truthful and non-misleading advertising to consumers, in violation of federal law. 1-800 Contacts has argued that its behavior is justified to protect its trademarks, which would risk being diluted if rival firms were able to use them to target ads to 1-800 Contacts customers.[45] The case, which is scheduled to go before an FTC Administrative Law Judge in early 2017, continues a trend of FTC and congressional attention to anticompetitive behavior in the contact lens industry.

DirecTV

In November 2016, the DOJ sued DirecTV (and its corporate successor, AT&T) for illegally sharing information with competitors during negotiations to carry Dodgers baseball games in the Los Angeles area. The complaint alleges that DirecTV colluded with competitors Cox Communications and Charter Communications to avoid competing for access to Dodgers broadcast rights, for which rightsholder Time Warner initially demanded an extra $4.90 per subscriber per month.[46] In particular, DirecTV is alleged to have kept its competitors updated on the status of negotiations with Time Warner, and to have made assurances to them that it was not planning to bid on the rights at the price that Time Warner was demanding.[47]

Ultimately, DirecTV and its alleged co-conspirators declined to obtain rights to the Dodgers games, which had been previously purchased by Time Warner Cable in a 25-year, $8.35 billion deal. As a result, live Dodgers games in the Los Angeles area were made available only to Time Warner subscribers, locking other consumers out.[48] The DOJ's statement on the suit emphasized the particular importance of aggressive enforcement in markets like cable television broadcast rights, where customers may only have "a handful of choices in the marketplace."[49] However, some commentators have noted the dearth of similar antitrust complaints focusing solely on information sharing, and have questioned whether the DOJ will be able to demonstrate consumer harm, given the absence of direct economic damage to subscribers.[50] The case will also test whether information sharing can support antitrust liability when the core piece of shared information—in this case, that DIRECTV did not intend to bid on the Dodgers games—was also shared publicly.

Hospital Advertising Collusion

In the final marketing-related challenge of 2016, in April, the DOJ entered into a consent decree with two West Virginia hospitals that prohibits the hospitals from entering into any agreement to limit their marketing or to divide marketing territories, either between themselves or with any other healthcare provider. The DOJ's complaint alleged that the hospitals, Charleston Area Medical Center and St. Mary's, had entered into a "gentleman's agreement" not to advertise in each other's geographic territories, in violation of Section 1 of the Sherman Act. [51] The case follows close on the heels of a similar 2015 DOJ challenge to an alleged territorial marketing agreement among four hospitals in Michigan.[52] In both cases, the defendants allegedly engaged in "soft" market allocation via territorial agreements not to advertise. Three of the Michigan defendants settled with the DOJ in late 2015; the fourth, Allegiance Health, continues to litigate.[53]

While the hospital sector has been the subject of significant DOJ and FTC antitrust litigation in recent years, the willingness of the DOJ to bring these two cases on non-price collusion alone reaffirms that, as Deputy Attorney General Baer noted, the DOJ views marketing as "an important tool that hospitals use to compete for patients" and a key benefit for consumers seeking to make an informed healthcare choice.[54]

ASCAP/BMI Consent Decree Review

In August 2016, the DOJ concluded its two-year review of the ASCAP and BMI consent decrees with a decision not to accept the decree modifications and interpretations proposed by ASCAP and BMI, the two largest U.S. performance rights organizations (PROs) administering the licensing of performance rights in musical compositions.[55] The consent decrees, which have been in place for decades, provide a framework (a compulsory license with rate-court oversight of pricing) for music users, such as digital streaming services, broadcasters, and venue owners, to obtain "blanket licenses" to perform compositions written by songwriters who are members of ASCAP or BMI.[56] The review began in 2014 after songwriters and publishers who are members of the PROs argued that the decrees' licensing scheme had become obsolete, particularly in light of the rapid rise of Internet music streaming.[57]

ASCAP and BMI had asked the DOJ to allow their members (which include music publishers and songwriters) to withdraw selectively from the two PROs with respect to some music users—namely, digital streaming services like Pandora. If this change—termed "partial withdrawal"—had been accepted, digital streaming services would have had to obtain licenses directly from the music publishers that would have opted for partial withdrawal, almost certainly at higher prices that would not have been subject to rate court oversight.

In addition, ASCAP and BMI asked the DOJ to construe the decrees to permit "fractional" licensing of multi-authored compositions. In many cases, co-authors of compositions are affiliated with different publishers and PROs. Under fractional licensing, co-authors agree that each author would license only their fractional share of a co-authored song, meaning that a licensee would have to obtain separate licenses from each and every co-author (or each publisher or PRO representing each co-author's interest) before the licensee could perform the song. Fractional licensing is a deviation from the general rule that a license from any one co-author would give the licensee the right to perform the work without the need to obtain separate licenses from the other co-authors.While fractional licensing has been used in other licensing contexts, it was not clear that fractional licensing had been the norm (or would be permitted by the consent decrees) in the case of the collective licensing of the right to perform songs under the blanket license that the Supreme Court approved of in the famous *BMI v. CBS* case.[58]

In its closing statement, the DOJ—supported by comments from broadcasters, digital music services, and other licensees—stated its view that the consent decrees require ASCAP and BMI to offer a 100 percent or "full work" license for each work in their repertories, regardless of whether all co-authors of a work are members of the licensing PRO.[59] In addition, the DOJ declined to accept the PROs' partial withdrawal modification proposal, leaving open the possibility that it may agree to the modification at a later date.

After the DOJ announced its conclusion regarding fractional licensing, BMI sought a declaratory judgment from the court overseeing the BMI decree that the decree does not prohibit fractional licensing. In a short opinion, the court concluded that "the Consent Decree neither bars fractional licensing nor requires full-work licensing."[60] The DOJ has appealed the decision to the Second Circuit.[61]

AmEx

In September 2016, the Second Circuit overturned a major DOJ litigation victory, ruling that the DOJ could not prove that the anti-steering provisions of American Express's (Amex's) card-acceptance agreements with merchants violated the antitrust laws.[62] The DOJ alleged that Amex had restrained competition by preventing merchants from encouraging customers to use alternative forms of payment that carried lower transaction fees, for example, by indicating a preference for other forms of payment, unevenly imposing restrictions on the use of Amex cards, or criticizing Amex's services or programs.[63] After a bench trial, the district court concluded that these practices violated Section 1 of the Sherman Act.[64] The Second Circuit reversed.

The Second Circuit's reversal underscores the need for careful consideration of interaction between the various participants in a multisided platform.[65] The district court focused on a relevant market limited to Amex's provision of network services to merchants.[66] The Second Circuit faulted the district court for failing to account for "feedback effects" requiring consideration of the platform as a whole, such as reduced cardholder demand caused by merchants refusing to accept a given payment card or increased cardholder demand resulting from increased benefits funded by higher merchant fees.[67] The Second Circuit found that the district court's narrow focus also critically undermined its analysis of market power. For instance, the district court viewed evidence of a large segment of cardholders who "insist" on using Amex cards as buttressing Amex's market power over merchants.[68] Focusing on the platform as a whole, the Second Circuit found that this evidence instead showed that benefits funded by higher merchant fees effectively made the card less costly for consumers.[69] Ultimately, the government failed to meet its burden because it did not adduce reliable evidence that *both* merchants and cardholders were harmed by these practices.[70]

Statement on Competition in the Defense Industry

In April 2016, the FTC and the DOJ issued a statement on competition in the defense industry[71] in an apparent response to the U.S. Department of Defense's (DOD's) call for legislation that would have allowed it to approve or disapprove of mergers on national security grounds. The DOD's push for independent review authority is generally believed to have been spurred by the DOJ's decision not to seek additional information on the *Lockheed Martin/Sikorsky Aircraft* merger last year.[72] In October 2015 remarks, a DOD official acknowledged that the deal did not raise traditional antitrust concerns or run afoul of the DOD's 2011 statement discouraging mergers among prime contractors, but argued that the prospect of larger and fewer prime defense contractors could have perverse effects on innovation and increase costs to the American taxpayer.[73]

The FTC and DOJ statement did not explicitly address the DOD's proposal, but affirmed that the agencies already afford substantial weight to the views of the DOD as a significant purchaser—and in many cases the sole purchaser—of defense contracting services. The agencies account for the kinds of industry-specific concerns raised by the DOD, such as "high barriers to entry, the importance of investment in research and development (R&D), and the need for surge capacity, a skilled workforce, and robust subcontractor base." The statement concluded that the existing antitrust review system already ensures that mergers "will not adversely affect short- and long-term innovation crucial to our national security and that a sufficient number of competitors, including both prime and subcontractors, remain to ensure that current, planned, and future procurement competition is robust." Following the agencies' statement, the DOD withdrew its legislative proposal, averting a potential interagency dispute.[74]

Statement on the Sharing Economy

In November 2016, the FTC released a staff report summarizing a June 2015 public workshop and public comments solicited by the FTC to explore the potential benefits and challenges posed by "sharing economy" platforms such as Uber or Airbnb.[75] Although largely focused on consumer protection concerns, the report also considers issues arising in the sharing economy that may inform analysis under the competition laws. The report makes clear that the new business model poses complex and challenging public policy questions, but does not make specific findings or proposals. Instead, the report echoes FTC Chairwoman Edith Ramirez's more general remarks that regulation must be appropriately targeted to strike a balance between allowing competition and innovation to flourish while protecting consumers.[76]

The report observed that "traditional" suppliers may come to supplant individual suppliers in sharing economy platforms. For instance, small businesses are increasingly crowding out individual sellers on eBay.[77] In addition, the report noted that network effects might lead established platforms to achieve a dominant position, though this risk may be tempered by market forces such as supplier and consumer multi-homing or by beneficial network externalities. For instance, drivers in a ride-sharing platform may benefit from switching to a less crowded platform with fewer suppliers.[78] Finally, the report observed that platform providers could foreclose competition from suppliers by vertically integrating, but noted that integration could also help manage negative externalities. For instance, a vertically integrated Uber might be better able to manage congestion.[79]

Intellectual Property

Both agencies and courts have continued to struggle with the antitrust treatment of intellectual property over the past year. This section discusses two key pieces of agency guidance released in 2016: an FTC study on the activities of patent assertion entities and a proposed update to the Antitrust Guidelines for the Licensing of Intellectual Property jointly issued by the FTC and the DOJ. Both are helpful additions to the growing body of guidance and experience on this topic, but leave some key issues unresolved.

FTC Study on Patent Assertion Entities

In October 2016, the FTC released a long-awaited study on patent assertion entities (PAEs) intended to improve the quality of policy dialogue by complementing public data with confidential business information obtained under Section 6(b) of the FTC Act.[80] The study differentiates the behavior of "Litigation PAEs" that rely on suing potential licensees as a business model.[81] The study found that Litigation PAEs accounted for 96 percent of patent infringement lawsuits (but just 20 percent of license revenue)[82] and that 93 percent of Litigation PAE licenses were preceded by litigation.[83] In addition, Litigation PAEs are also more likely to assert claims against downstream resellers or users of allegedly patented technologies.[84] Finally, the licenses ultimately obtained by Litigation PAEs are typically simple, narrow, and provide royalties below the lower bound of early-stage litigation costs, consistent with nuisance litigation intended to force settlements based on the cost of litigation rather than the merits.[85]

The study includes several recommendations described by FTC Chairwoman Edith Ramirez as "designed to balance the needs of patent holders with the goal of reducing nuisance litigation."[86] Specifically, the FTC recommended:[87]

- developing discovery rules and case management practices to reduce the cost and burden asymmetries that PAEs enjoy because they do not themselves develop patented technologies or develop products that incorporate them;
- amending the *Federal Rules of Civil Procedure* to expand the range of reportable entities that may have a financial interest in PAE litigation;
- creating procedures to encourage courts to stay litigation against customers or end-users where a PAE has also sued a manufacturer on the same theory of infringement; and
- continuing to develop plausibility pleading standards in patent litigation that provide defendants with adequate notice of the nature and scope of the alleged infringement.

The FTC's PAE study is a valuable addition to the discussion surrounding PAE licensing and litigation behavior and patent litigation reform, but many open questions remain. As the study itself acknowledges, legal developments that occurred during the study period may affect the patent litigation landscape,[88] potentially limiting the need for the kinds of reforms proposed by the FTC.

Proposed Update to the Joint Guidelines for the Licensing of Intellectual Property

In August 2016, the FTC and the DOJ jointly issued proposed updates to the 1995 Antitrust Guidelines for the Licensing of Intellectual Property[89] to reflect changes in the agencies' approaches to antitrust enforcement of IP-related issues. To that end, the update incorporates case law developments from the past two decades, including the U.S. Supreme Court's holding that resale price maintenance is no longer a per se antitrust violation,[90] and clarification that intellectual property rights do not necessarily confer market power.[91] The proposed new guidelines also incorporate statutory updates, such as changes to the length of copyright and patent terms and the Defend Trade Secrets Act of 2016.[92]

The agencies generally avoid using the guidelines to announce new principles or expand the guidelines into new areas. [93] Consistent with that practice, the proposed updates do not provide any specific guidance on licensing standards-essential patents (SEPs) or on setting fair, reasonable, and non-discriminatory (FRAND) licensing terms.[94] Although the agencies have addressed these topics several times in recent years,[95] comments on the proposed guidelines indicate that they remain hotly debated. For instance, Nokia argued that there was no need for SEP-specific guidance,[96] while a combined statement by 12 technology companies and organizations noted that the agencies had elsewhere recognized the "special circumstances attendant to SEP licensing" and the "potential 'hold up' or other abuses that can arise in connection with

SEP licensing."[97] A separate comment from The App Association contended that formal guidance was needed to address the "major threat to the competitiveness of any industry that relies on standards."[98] The guidelines' silence on these issues may indicate that the agencies believe more experience is needed before clear guidance can be developed.

EU

In 2016, the European Commission (EC) saw several important developments in its enforcement proceedings. The agency showed its ability to successfully enforce in diverse industries, and signaled its determination to tackle abuses of a dominant position. In this context, it will be interesting to see how the Court of Justice of the European Union (CJEU) will rule on the pending appeal of the EC's decision imposing a record fine on Intel for its (allegedly) abusive rebate practice. In procedural terms, the European courts once again confirmed the EC's broad margin of discretion when it comes to accepting commitments offered by companies to end investigations. At the same time, the EC demonstrated its general willingness to be flexible in the use of its remedy and fines tool box, for example, by granting a fine reduction outside of a cartel proceeding for the first time in over a decade.

General Court in *Lundbeck*

On September 8, 2016, the General Court of the European Union (General Court) dismissed appeals brought by Lundbeck and several generics companies[99] against a decision of the EC[100] in relation to patent settlement agreements. The General Court upheld the EC's view that the companies had entered into patent settlements to prevent competition by delaying market entry by generics in return for payments. Lundbeck, a pharmaceutical originator, and generics producers had entered into agreements to settle patent disputes relating to Lundbeck's basic patent for citalopram, which had expired. At the time of the settlement, Lundbeck still held a number of process patents. In the settlement agreements, the generic companies committed not to market generic citalopram for the duration of the agreement in return for financial compensation. The EC concluded that this behavior amounted to a restriction of competition by object (where no analysis of the actual effects on competition is required) and imposed a fine of €93.8 million on Lundbeck and fines totaling €52.2 million on the generic companies. The General Court upheld the EC's decision in its entirety. It is the first time an EU court has ruled on the compatibility of patent settlement agreements with EU antitrust rules. All parties involved have appealed the General Court judgments to the CJEU.

Cross-Border Access to Pay-TV (Paramount Commitments)

In January 2014, the EC opened antitrust proceedings into licensing agreements between several U.S. film studios (including Warner Bros, Sony Pictures, Twentieth Century Fox, and Paramount) and certain European pay-TV broadcasters.[101] Licensing agreements are typically concluded by the studios on a bilateral basis with a single pay-TV broadcaster per EU country or linguistic region. The EC is investigating whether these agreements grant "absolute territorial protection" by preventing broadcasters from providing their services across borders, thereby creating barriers to cross-border provision of pay-TV services within the EU and eliminating competition between broadcasters. The licensing agreements entail "geo-blocking" clauses that, inter alia, require each pay-TV broadcaster to block or limit access to the studios' content to consumers outside of its licensed territory. In July 2015, the EC sent a Statement of Objections to Sky UK and six U.S. film studios outlining its concerns. In July 2016, following commitments offered by Paramount to no longer include such contractual obligations in its licensing terms with broadcasters, the agency closed its investigation against the studio.[102] The commitments have a duration of five years. Regarding the other studios and broadcasters, the investigation continues. This case reflects the tough stand the EC has recently adopted on commercial practices that may hinder cross-border trade between EU member states.

Google Investigations

Search

In November 2010, the EC opened a formal investigation into allegations that Google had abused its dominant position in online search.[103] Subsequently, Google and the EC engaged in commitment discussions. Having rejected several commitment proposals submitted by Google, in April 2015, the EC sent a Statement of Objections to Google.[104] The EC took the preliminary view that Google abused its dominant position in the markets for general Internet search services by allegedly "favoring" its own comparison shopping service on its general search results pages. As a result, according to the EC, Google's comparison shopping service has grown, to the detriment of rival comparison shopping services. In August 2015, Google submitted its reply. The EC continued its investigation and, on July 14, 2016, issued a supplementary Statement of Objections further elaborating on its allegations.[105] In November 2016, Google filed its reply contending that its improvements to its search results benefit users and have not harmed competition, as evidenced by the growth of sites such as Amazon. Google's response is now being assessed by the EC.

AdSense

In July 2016, the EC initiated proceedings to investigate agreements between Google and partners of its online search advertising intermediation program AdSense.[106] The EC sent a Statement of Objections to Google alleging that the company artificially restricts third-party websites from displaying search advertisements from Google´s competitors. According to the EC, Google protects its dominant position in online search advertising by requiring these third parties: (1) not to source search ads from Google´s competitors; (2) to take a minimum number of search ads from Google and reserve the most prominent space on their search results pages for Google search ads; and (3) to obtain Google's approval before making any change to the display of competing search ads. In November 2016, Google filed its reply emphasizing that the EC failed to consider different types of advertising that compete with AdSense and the lack of evidence of competitive harm. The EC is now assessing Google's response.

Android

In April 2015, the EC initiated formal antitrust proceedings against Google with regard to several business practices related to Android.[107] On April 20, 2016, the EC sent a Statement of Objections to Google.[108] The EC considered that Google is dominant in the markets for general Internet search services, licensable smart mobile operating systems, and app stores for the Android mobile operating system. The EC further took the preliminary view that Google abused its dominant position by: (1) requiring manufacturers wishing to pre-install Google's app store for Android (Google Play Store) to also install Google Search and set it as the default search engine, and to install Google's Chrome Browser (the "tying claims"); (2) requiring manufacturers wishing to pre-install Google's proprietary apps to enter into an anti-fragmentation agreement (i.e., refrain from selling devices running on incompatible versions of Android developed using the open-source Antroid code); and (3) giving financial incentives to manufacturers and mobile network operators conditional upon them exclusively pre-installing Google search on their devices.

According to the EC, Google's practices may strengthen the company's market position in Internet search, restrict competition for mobile browsers, and hinder the development of operating systems based on the Android open-source code. In November 2016, Google submitted its reply to the EC emphasizing that it disputes the EC's allegation that Apple does not compete in the relevant market and that its agreements promote the manufacture of compatible devices and promote user choice. Google's response is now being assessed by the EC.

Advocate General Wahl in Intel

Intel appealed a judgment of the General Court[109] upholding a €1 billion fine imposed on Intel for abusing its dominant position by virtue of operating exclusivity rebate practices to the CJEU.[110] The fine was the highest single penalty imposed on an undertaking for breaching EU competition law, and came after a decade-long investigation. The General Court declared that exclusivity rebates (unlike other types of rebate schemes) granted by a dominant undertaking are by their very nature capable of restricting competition, and thus an analysis of the actual anticompetitive effects of Intel's conduct was not required. As part of the process before the CJEU, the Advocate General issues a non-binding opinion that is often embraced by the court in its judgment. According to Advocate General Wahl, the General Court was wrong in its analysis because all rebate schemes (including the exclusive rebates at issue) must be evaluated on their facts for anti-competitive effects. Therefore, Advocate General Wahl proposes that the CJEU set aside the judgment and refer the case back to the General Court to carry out a full assessment of the actual or potential effect on competition of Intel's conduct. That would mean that the fine of €1 billion imposed by the EC,[111] and then confirmed by the General Court, also needs to be re-considered. The CJEU's judgment is expected in 2017.

Morningstar

In September 2016, the General Court[112] ruled for the first time on third-party allegations against a commitment decision. Emphasizing the limited review the court is willing to exercise in this area, the judgment upheld the EC's 2012 commitment decision with Thomson Reuters.[113] The EC had conducted an investigation into the potential abuse of Reuters' dominant position in the market for the provision of real-time data feeds through the imposition of restrictions on licenses regarding the use of Reuters Instrument Codes (RICs), thereby foreclosing other providers of data-feed services.[114] The investigation was closed after Thomson Reuters had offered commitments. Morningstar, a competitor, had argued before the General Court that the commitments were not sufficient to address the EC's concerns, as competing providers remained unable to offer a service comparable to Reuters' service. In its judgment, the General Court upheld the decision by confirming that Reuters' commitments were sufficient to address the concerns raised by the EC and emphasizing the EC's broad margin of discretion in commitment decisions. The judgment thus raises the bar for unsatisfied third parties to successfully bring a challenge against a commitment decision and makes it clear that such challenges have a very limited chance of success.

Essential Facilities and Remedies

In September 2016, the EC fined Altstoff Recycling Austria (ARA) €6 million for abusing its dominant position on the Austrian market for management of household packaging waste.[115] ARA had developed a nationwide collection infrastructure, the use of which was indispensable for market entry and denied potential competitors access to this infrastructure, thereby foreclosing the market for waste management. The EC's decision entails several procedural novelties. First, the EC accepted ARA's offer to divest the part of the household collection infrastructure that it owned in order to open up the Austrian waste infrastructure to competitors. This is interesting, as the EC considers that (voluntary) commitments are generally only appropriate in the context of decisions where no fine is issued. Second, ARA's fine was reduced by 30 percent due to its close cooperation, marking the first time in over a decade that a reduction for cooperation has been granted outside of cartel proceedings. It will be interesting for companies to see whether this more flexible approach to remedies and fines that rewards the cooperation of companies under investigation will become a regular pattern in the EC's antitrust practice

International

China

2016 has been an active year for Chinese antitrust authorities' efforts to reform antitrust legislation. China's National Development and Reform Commission (NDRC) took the lead on drafting six antitrust guidelines under the instruction of the Anti-Monopoly Committee (AMC). Specifically, the six draft guidelines relate to intellectual property, the auto industry, leniency, commitment and exemptions, and illegal gains and fine calculation.[116] All six draft guidelines have been released for public consultation. The NDRC is expected to submit, around the end of 2016, all six sets of draft antitrust guidelines to the Antimonopoly Commission of the State Council for final review.

Chinese authorities have continued to closely scrutinize the health care and pharmaceutical sectors following drug-price reforms in 2015 that removed maximum retail prices and allowed most drug prices to be determined by the market instead. In February 2016, for example, the NDRC fined five Chinese companies for price-fixing and market sharing of allopurinol.[117] In July 2016, eight Chinese government ministries—including the NDRC and the State Administration for Industry and Commerce (SAIC)—announced a joint inspection campaign into the health care sector, focusing on conduct by government agencies that led to excessive drug pricing.[118] Finally, in December 2016, the NDRC imposed fines totaling approximately $17.2 million against Medtronic, a multinational medical device company, for engaging in resale price maintenance in the sale of medical devices.[119]

In the unilateral conduct arena, SAIC ended its four-year investigation of Swedish packaging company Tetra Pak, imposing a $97 million fine on the basis that Tetra Pak had abused its market dominance by bundling, tying sales, and providing loyalty discounts.[120] The decision clarifies SAIC's approach to bundling and loyalty discounts. SAIC found, for example, that: (1) Tetra Pak's bundling of packaging materials as part of providing packaging-equipment and technology services had no justifiable reasons and damaged competition in the packaging-materials market; and (2) loyalty rebates offered by Tetra Pak were anticompetitive because they caused customers to become dependent on Tetra Pak's products.[121]

Hong Kong

Hong Kong's Competition Ordinance, Hong Kong's first general and cross-sector competition law, went into effect on December 14, 2015.[122] The Competition Ordinance is closely modeled on Article 101 and Article 102 of the Treaty on the Functioning of the European Union (TFEU),[123] which also served as the model for the competition laws of other jurisdictions like the United Kingdom and Singapore.

As of June 2016, the Hong Kong Competition Commission (HKCC) has received 1,250 enforcement contacts, of which 272 related to alleged cartels, 238 related to alleged resale price maintenance, 267 related to alleged abusive conduct, and 224 related to the general state of competition. Out of the 1,250 enforcement contacts, the HKCC has moved 111 cases to the initial assessment phase. Approximately 10 of these cases are currently under in-depth investigation.[124]

Korea

Over the past year, the Korea Fair Trade Commission (KFTC) has initiated new investigations of international companies such as Apple and Google for allegedly anticompetitive conduct. The KFTC's investigation of Apple's Korean branch was triggered after receiving complaints that Apple was forcing unfair terms in its contracts with Korean telecom companies, such as asking the telecom companies to cover part of the advertising costs for new iPhones and imposing warranty expenses. The KFTC conducted several dawn raids of Apple's Korean premises in mid-2016.[125]

In July 2016, the KFTC launched an investigation into Google on suspicions that Google forced Android smartphone makers to pre-load Google's search engine onto their devices. At least one source from the Korean press has observed that, unlike the European Commission's recent investigation of Google, the Korean market had not been affected by Google's alleged conduct because Korean customers prefer local search engines like Naver and Daum instead of Google.[126] The KFTC had previously investigated Google from 2011 to 2013 following similar allegations by Naver and Daum, but the KFTC ultimately cleared Google of any anticompetitive wrongdoing.[127]

Brazil

The Administrative Council for Economic Defense (CADE), Brazil's antitrust enforcement agency, released an Official Recommendation asking for investigations to begin on automakers Volkswagen, Fiat, and Ford for refusing to license intellectual property rights to independent manufacturers to enable them to compete in the replacement auto parts market.[128] The case is currently pending before the CADE's Administrative Tribunal, which will issue a final opinion on the matter.

Conclusion

Agencies worldwide continued to break new ground in 2016 on both the scope and the intensity of their investigations, moving both into new areas of conduct (advertising) and engaging in extended inquiries into the behavior of some of the world's largest companies. While the degree of emphasis on these enforcement areas going forward will depend on national-level political developments, counsel should be on notice that both longstanding competition agencies and their newer peers are looking for opportunities to break new ground in defense of local consumers.

Criminal

The DOJ's criminal antitrust enforcement program remained very active in 2016. The DOJ's final statistics for the year were not published as of the date of this writing; however, we estimate that the DOJ's criminal program netted significant sanctions again during the government fiscal year 2016. Perhaps most notable is the DOJ's emphasis on prosecuting individuals—the agency charged or received sentences against well over 50 individuals during 2016. And in the past five years, the DOJ has prosecuted almost three times as many individuals as corporations for antitrust crimes, has been seeking longer jail sentences, and has not hesitated to pursue extradition of foreign nationals.

The DOJ's continued vigor in criminal antitrust enforcement reinforces the importance of monitoring operations proactively and ensuring that employees have not crossed a line—or even appeared to do so. This is particularly important given that early detection can mean the difference between complete immunity from prosecution under the DOJ's leniency program and hefty criminal sanctions (jail and fines) if prosecuted. This need is not limited to the U.S., as several foreign competition agencies aggressively prosecute collusive conduct and also offer immunity to the first to report.

This section: (1) identifies a few notable trends in the DOJ's criminal enforcement program in 2016; (2) summarizes the DOJ's more significant criminal prosecutions in the last year; (3) offers insight into the DOJ's continued focus on compliance; (4) describes recent policy initiatives and priorities in the DOJ's criminal enforcement program; and (5) highlights some significant developments in cartel enforcement outside the U.S.

Notable Trends in the DOJ's Criminal Antitrust Enforcement Program

The DOJ's definition of "criminal" antitrust conduct continues to expand. While the Sherman Act—the core antitrust statute in the U.S.—allows for criminal prosecution of an antitrust violation, the DOJ has traditionally reserved criminal prosecution for "hard-core" violations, such as "naked" price-fixing, bid-rigging, and market-allocation conspiracies among competitors. The DOJ traditionally has sought only civil penalties for anticompetitive conduct falling outside of these categories. But in recent years, the DOJ's definition of "hard-core" conduct (or the antitrust "conspiracy") has expanded and become somewhat blurred; this trend was particularly apparent in 2016. As a result, it is often difficult for companies and individuals involved in competitor collaborations to know exactly when conduct might cross the line and trigger criminal prosecution.

In the recent past, some have criticized the DOJ for focusing on prosecuting only conspiracies involving large, multinational companies supplying commodity components (primarily from Asia). In 2016, however, the DOJ continued its trend of prosecuting conduct in a broad array of industries, including technology, auto parts, transportation, financial services, pharmaceuticals, and online retail, to name a few. The DOJ also has not shown any reluctance to pursue smaller enterprises in smaller markets, such as technology start-ups. For example, the DOJ recently investigated sellers in the online wall décor market after discovering that sellers of prints and posters used a sophisticated pricing algorithm to coordinate prices on e-commerce sites. Additionally, 2016 showed the DOJ's continued pursuit of conduct in various geographies (domestic and worldwide), so long as there is an effect in the U.S.

Finally, the DOJ continues to push new initiatives and policies in its criminal enforcement program, despite an already aggressive track record of enforcement. For example, the DOJ announced in 2016 that going forward it will prosecute criminally certain "wage-fixing" and "no poaching" agreements that traditionally had been pursued civilly. As another example, the DOJ announced that it will issue revised guidelines for prosecuting conduct outside the United States. As described below, the DOJ takes an aggressive position on how broad it will interpret the extra-territorial reach of the Sherman Act in order to prosecute conduct criminally.

Notable Cases in DOJ Criminal Antitrust Enforcement

Corporate Prosecutions

As previously noted, the DOJ has not hesitated to prosecute corporations of all sizes and in all industries in 2016. The DOJ has also continued to look beyond the stereotypical smoke-filled hotel room to detect antitrust "cartels." Many of the DOJ's corporate prosecutions in the last year appear to stem from competitor collaborations that might have at one point served a legitimate purpose (e.g., a joint venture), but ultimately became a vehicle for anticompetitive conduct. Some of the more significant prosecutions in 2016 are noted below.

Automotive Parts. The DOJ's pursuit of antitrust violations in the automotive parts industry is international in scope and covers a broad swath of components used in the manufacture of automobiles. Since first bringing charges in this industry in 2011, the DOJ has secured more than $2.9 billion in criminal fines from 47 different companies (and 65 executives). Over the past year, the DOJ's long-running investigation into various segments of the automotive parts industry continued unabated. In total, the DOJ netted over $270 million in corporate fines from auto parts manufacturers in 2016. For example:

- In March 2016, Omron Automotive Electronics Co., Ltd. agreed to pay $4.55 million for rigging bids for power window switches that were used in Hondas sold to U.S. buyers.
- In May 2016, Corning International Kabushiki Kaisha pled guilty to fixing prices, rigging bids, and allocating the market for the sale of ceramic substrates that are used in automobile catalytic converters.
- In June 2016, two Japanese companies, Tokai Kogyo Co., Ltd. and Maruyasu Industries Co. Ltd., as well was their respective U.S. subsidiaries, were indicted by a federal grand jury in the U.S. District Court for the Southern District of Ohio for fixing prices on automotive body sealing products and rigging bids on automotive steel tubes.
- In July 2016, Nishikawa Rubber Co. Ltd. pled guilty to fixing prices and rigging bids for automotive body sealing products.
- In August 2016, Hitachi Automotive Systems pled guilty to allocating markets, fixing prices, and rigging bids for shock absorbers used in automobiles that were sold in the United States, agreeing to pay a $55.48 million criminal fine. That plea followed on the heels of a 2013 plea where Hitachi Automotive pled

guilty to fixing the price of starters, alternators, and other electrical parts used in automotive applications.

- Also in 2016, Alpha Corporation pled guilty to price-fixing and bid-rigging in the market for automobile access mechanisms and Usui Kokusai Sangyo Kaisha Ltd. pled guilty to fixing prices, allocating customers, and rigging bids for automotive steel tubes.

Electrolytic Capacitors. In 2016, the DOJ made significant progress in an investigation involving electrolytic capacitors, which are electronic components found in a substantial number of consumer and industrial products, including mobile devices, computers, and household appliances. The DOJ's first successful prosecution in this investigation was of NEC Tokin Corporation in 2015; NEC pleaded guilty and agreed to pay a fine of $13.8 million. In 2016, the DOJ secured pleas from four other companies: Rubycon Corporation, Elna Co. Ltd., Hitachi Chemical Co., Ltd., and Holy Stone Holdings Co., Ltd.

Ocean Shipping, Chemicals, Pharmaceuticals, and Financial Services. In 2016, the DOJ has been busy in a variety of industries beyond auto parts and electronic components. For example:

- In ocean shipping, the DOJ reached a plea deal with Wallenius Wilhelmsen Logistics AS, a Norwegian company, for conspiring to fix cargo prices in international ocean shipping services; that company agreed to pay a fine of $98.9 million.

- In chemicals, the DOJ secured a $5 million fine and guilty plea from GEO Specialty Chemicals Inc. for conspiring to fix prices for liquid aluminum sulfate, a chemical used in water treatment processes by both municipalities and private industry.

- In pharmaceuticals, the DOJ has been investigating potential collusion among generic drug manufacturers. As discussed below, the DOJ has begun bringing individual indictments, but no charges have yet been filed against any generics manufacturers.

- In financial services, the DOJ continues its investigations into collusion over LIBOR rates and in the foreign exchange market, which yielded billions of dollars in criminal fines in 2015. In 2016, it appears the focus has been on prosecuting individuals.

"Smaller" Innovative Markets. The DOJ has not shied away from prosecuting conduct in smaller, innovative markets. For example, the DOJ continued to pursue anticompetitive conduct in the "online wall décor" industry, charging Trod Ltd., an e-commerce merchant, for conspiring with competitors to adopt sophisticated pricing algorithms to coordinate or stabilize prices of posters sold through web retailers. Trod agreed to plead guilty after being indicted in 2015 by a federal grand jury in San Francisco. As another example, the DOJ advanced its investigation into the "heir location services" industry in 2016, charging Kemp & Associates, Inc. with conspiring to allocate customers. The DOJ had previously brought charges against Brandenburger & Davis in the same industry, and that company agreed to pay a criminal fine of $890,000.

Individual Prosecutions

This last year was particularly notable for the DOJ's prosecution of individuals. Indeed, the DOJ brought charges against a significant number of individuals (at least over 50) in 2016 and sought increased sentences in many instances. This trend is consistent with the instruction issued by U.S. Deputy Attorney General Sally Yates in September 2015 in the policy paper entitled "Individual Accountability for Corporate Wrongdoing" (often referred to as the "Yates Memo"). The DOJ management has embraced the Yates Memo, encouraging DOJ staff to remain aggressive in prosecuting individuals.

In early 2016, the DOJ's Deputy Assistant Attorney General in charge of the criminal enforcement program, Brent Snyder, stated that the DOJ would "do even better" to identify potentially culpable individuals early in the investigation to minimize the risk of prosecutions against individuals being time-barred. Snyder further noted that the DOJ would focus on identifying "*all* senior executives who potentially condoned, directed, or participated in the criminal conduct." Testifying before the Senate Judiciary Committee, Deputy Attorney General for Antitrust William Baer echoed this message, stressing that the DOJ will hold "senior executives accountable for criminal antitrust misconduct" and will seek jail sentences.

The numbers bear out these statements on the DOJ's increased focus on individual prosecutions. Indeed, the charges that the DOJ has announced against individuals in 2016 compared to 2015 indicate that the DOJ remains determined to hold individuals accountable. In the past year, we have also observed the DOJ targeting more individuals "tangentially involved" in the conduct when compared to prior years; we have also observed the DOJ pursuing potential charges against individuals with less evidence than in prior years. It is still a bit early to tell whether this uptick in enforcement against individuals is a new norm, but we expect that it will become one if the DOJ succeeds in prosecuting many of these individuals.

Below are some examples of the DOJ's enforcement efforts against individuals in the past year:

Financial Services. The DOJ's ongoing investigations into financial benchmarks resulted in several significant individual prosecutions this year. In March 2016, a New York federal district court sentenced three former Rabobank derivatives traders to prison for their roles in a scheme to manipulate Japanese Yen and U.S. Dollar LIBOR benchmark interest rates. The sentences ranged from three to twenty-four months. Additionally, two former Deutsche Bank employees were indicted as part of the DOJ's ongoing LIBOR investigation this year.

Automotive Parts. The DOJ has brought 65 charges against individuals in the course of its auto parts investigation. At least eight of these occurred in the 2016 calendar year, including the following:

- A former president of an automotive body sealing products supplier pled guilty and received an 18-month sentence in a U.S. prison for his participation in a price-fixing conspiracy.
- Five executives were charged with conspiring to fix prices for automotive steel tubes.
- A former executive was also charged for his alleged participation in a conspiracy to fix prices, rig bids, and allocate the market for ceramic substrates.

Electrolytic Capacitors. Most recently, the DOJ announced a grand jury indictment against eight executives, mainly foreign nationals, in connection with an alleged price-fixing conspiracy of capacitors. Nine individuals have been indicted in this investigation, and none have entered into plea agreements or been sentenced thus far.

Real Estate. In addition to corporate officers and executives, the DOJ has indicted a large number of individual real estate agents for potential antitrust violations this year. The DOJ announced indictments of more than 20 individuals as a result of its ongoing investigation into bid-rigging and fraud at public foreclosure auctions throughout Alabama, California, and Georgia. Among those indicted, 10 real estate agents received prison sentences of up to seven months and were ordered to pay up to $1 million in criminal fines.

Pharmaceuticals. The DOJ brought the first charges stemming from its ongoing cartel investigation into the generic pharmaceutical industry against two executives for conspiring to fix prices, rig bids, and allocate customers of certain generic drugs.

Non-Antitrust Charges. One of the risks of an investigation is that the DOJ might find other misconduct apart from an antitrust violation. DOJ attorneys have become very well equipped to spot other potential violations and either refer them to the appropriate enforcement agency or prosecute the conduct themselves. For example, in the last year:

- The owner of a New Jersey-based industrial pipe supplier was sentenced to 32 months in prison for conspiring to commit fraud and pay bribes to a purchasing manager at Consolidated Edison of New York. These charges arose from the DOJ's ongoing bid-rigging and price-fixing investigation into the power generation industry.
- A former senior investigator for the New York Power Authority (NYPA) was prosecuted for conspiring to defraud the NYPA through a scheme that skimmed government funds from multimillion-dollar landscaping and maintenance contracts. This was the result of a joint investigation with the New York State Inspector General and the DOJ involving bid-rigging, fraud, and tax-related offenses.
- Four executives were charged with obstruction of justice in separate antitrust investigations. In June 2016, a former officer of the MCC construction company was charged in connection with attempts to circumvent federal contracting rules to divert contracts to his business by concealing information from a regulatory agency. A former executive at Coach USA Inc. was charged in October 2016 for concealing and attempting to destroy documents relevant to a civil antitrust investigation related to the joint venture formation in the New York City hop-on, hop-off tour bus market. In September 2016, two executives were charged in connection with the auto parts investigation for allegedly conspiring to delete and destroy documents referring to communications with their competitors.

"No Jail" Sentences. It has been the DOJ's longstanding policy to pursue jail sentences when prosecuting an individual for an antitrust violation. In December 2016, it appears the DOJ might have departed from this policy when it entered into a plea with an individual from Bumble Bee for his involvement in collusion

around the supply of canned tuna fish and other pre-packaged seafood. Based on the DOJ's announcement and the DOJ's information, it appears that this Bumble Bee executive will need to pay an undisclosed fine and cooperate with the investigation, but will not face any jail time. The DOJ has not yet filed a sentencing recommendation and a court will still need to enter a sentence, but if the DOJ indeed does not pursue jail time, it could mark a significant departure from past practice.

The DOJ's Focus on Compliance

As is true with most criminal programs, the DOJ's aggressive approach to criminal enforcement is largely to deter collusive conduct from occurring in the future. Thus, the DOJ expends significant effort to encourage companies to implement antitrust compliance programs designed to prevent ill-advised conduct from occurring in the first instance. Over the past few years, the DOJ has made compliance one of its top priorities, and 2016 was no different. In fact, in a speech in November 2016, Acting Assistant Attorney General Renata Hesse described how "[c]ompliance and remediation have become *central* to [the Antitrust Division's] corporate resolutions and sentencings."

The DOJ has pushed compliance in a number of ways. First, the DOJ continues to encourage companies to implement and improve compliance programs via speeches and statements. In the last few years, the DOJ made a number of speeches that not only promoted compliance, but also advised on what a "successful" compliance program might include. While the DOJ has not provided an enumerated list of compliance program features, it has made clear that the linchpin of a successful corporate compliance program is corporate culture. The DOJ has stressed that a company must make compliance a priority at the uppermost levels of management and set the proper tone from the top. The DOJ has also encouraged: (1) routine training, particularly for salespeople or others in higher-risk positions; (2) reporting initiatives, including avenues for concerned employees to report potential violations that insulate them from retaliation; and (3) discipline for those found to violate company compliance policies.

Second, in an effort to deter repeat conduct, the DOJ has recently started to reward companies that improve their compliance programs by reducing their fines when charged. For example, the DOJ announced in 2015 that it would offer a compliance credit to Barclays PLC for steps taken by that company to improve its internal compliance program—the first-ever such credit. Later that year, the DOJ's plea agreement with Kayaba Industry Co. Ltd. offered a compliance credit on the basis of the "substantial improvements" to its internal compliance program "to prevent recurrence of the charged offense." By offering these two compliance credits, the DOJ has provided the "carrot" necessary for organizations to take steps to improve their compliance programs even if an infraction occurred previously.

Third, the DOJ is also increasingly using compliance as a stick in 2016, looking for ways to fold compliance requirements into plea deals and sentences with defendants. While the DOJ has indicated that the imposition of a compliance monitor is reserved for extraordinary cases, it has taken other steps to ensure that corporate defendants prioritize compliance. In 2016, in connection with the DOJ's plea deal with Hitachi Chemical Co., Ltd., a maker of electrolytic capacitors, the DOJ requested three years of probation, in part so it could follow that company's efforts to shore up its compliance program as required under its plea agreement (the judge later increased that term to five years). Similarly, this year the DOJ requested five years of probation and annual reporting on compliance efforts as part of a plea deal with Rubycon Corporation, another maker of capacitors, though the court has yet to sentence that defendant. The growing inclusion of compliance program implementation requirements in plea agreements across industries, whether alone or paired with terms of probation at sentencing, reflects the DOJ's commitment to fostering compliance. We expect this emphasis on compliance to continue in the year ahead.

Other divisions of the DOJ have apparently taken notice of the overall success of the Antitrust Division's leniency program at facilitating detection and enforcement of past violations. In April 2016, the Criminal Division's Fraud Section launched a one-year pilot leniency program with respect to enforcement of the Foreign Corrupt Practices Act (FCPA). Though in its infancy, that pilot program, like the Antitrust Division's longstanding leniency program, seeks to motivate companies to self-report violations of the FCPA in return for non-prosecution or a substantial reduction in criminal fines. The program includes a provision that specifically takes into account an organization's compliance or remediation efforts in determining whether a company qualifies for credit for voluntarily disclosing the FCPA violation. It remains to be seen how successful the FCPA pilot program will be and whether the Criminal Division will extend the program following the initial one-year term. That decision will likely fall to the incoming administration.

DOJ Policy Initiatives in 2016

Guidance for HR Professionals: Criminal Enforcement in Labor Markets

In October 2016, the DOJ and the FTC jointly published a paper titled "Antitrust Guidance for Human Resources Professionals" ("HR Guidance"). This HR Guidance highlighted that certain forms of horizontal collusion and information exchanges within the labor and employment context could violate the antitrust laws. In particular, the HR Guidance put companies and individuals on notice that certain collusion—namely "naked" wage-fixing and "no poaching" agreements—can subject them to *criminal* prosecution. The DOJ and the FTC have taken enforcement actions in the past for conduct that has restrained competition in labor markets, but all of those actions were brought civilly (typically resulting in agreements to stop the conduct). The HR Guidance changes the stakes significantly and indicates that the DOJ (and the FTC) will be looking closely at employment practices to identify collusive conduct.

Horizontal Collusion in Labor Markets. The HR Guidance highlighted that both wage-fixing and "no poaching" agreements among competitors violate the antitrust laws. The guidance stressed that if such agreements are not related to a pro-competitive purpose or necessary for promoting such a purpose, then the conduct would be categorized as a "naked" restraint subject to criminal prosecution. Importantly, the DOJ and the FTC clarified that companies can "compete" for employees even if the companies do not compete in the services or products that they supply. This increases the risk of entering into agreements with other companies around hiring and salary/wage decisions. To illustrate this, the HR Guidelines cite a case brought against eBay and Intuit for agreeing not to solicit each other's employees (among other things). While eBay and Intuit do not compete in the same markets, the DOJ considered them "competitors" for "specialized computer engineers and scientists," allowing the DOJ to categorize the no-solicitation agreement as "horizontal collusion." The HR Guidance warns that such agreements could result in criminal prosecution in the future.

Information Exchanges. The HR Guidance also emphasized the potential illegality of sharing competitively sensitive employment information, such as salaries or wages, with competitors. Unlike "no poaching" and wage-fixing agreements, the DOJ does not prosecute unlawful information exchanges criminally. However, such conduct may still be subject to civil liability if found to have an anticompetitive effect. The HR Guidance again serves to put companies and executives on notice that the DOJ and the FTC will be looking for instances of misconduct in this area.

International Criminal Enforcement Efforts

In 2016, the DOJ continued to deepen cooperation efforts with foreign antitrust agencies, as it recognizes that cooperation between agencies has been a key tool in prosecuting collusive conduct. The DOJ has made particularly clear that prosecuting international cartels through joint investigations with its foreign counterparts is and will continue to be a high priority. DOJ Acting Assistant Attorney General Renata Hesse this year stated in two separate speeches a need for increased international cooperation. In June 2016, Hesse stated that cartel enforcement was the "most conspicuous area of convergence" in international competition policy. Despite differences in other areas of competition law, Hesse noted that competition authorities unanimously recognize that price-fixing, bid-rigging, and market allocation are high enforcement priorities. In September 2016, Hesse addressed new initiatives aimed at achieving greater international cooperation—including an international staff exchange program between the U.S. and the EC, Japan, and the UK in order to learn firsthand international investigations and strategies.

Notwithstanding the apparent progress toward a common view on collusion, the treatment of individuals for collusive conduct remains an area of pronounced difference among competition agencies. Hesse has vowed that the DOJ will continue to encourage and promote individual accountability—whether for foreign nationals or U.S. citizens—despite some jurisdictions not allowing for individual sanctions. In 2016, the DOJ continued to show its commitment to holding foreign nationals accountable by pursuing extradition and harsh sentences against those individuals. For example, a Canadian national, John Bennett, who was extradited two years ago, was sentenced this year to serve 63 months in prison and ordered to pay $3.8 million in restitution. Bennett, the former CEO of a hazardous waste treatment company, was found to have conspired to pay kickbacks and committed fraud against the U.S., thwarting the government's competitive contracting practices. Moreover, the DOJ extradited an Israeli national, Yuval Marshak, from Bulgaria to the U.S. for fraud charges arising from a joint investigation with the Antitrust Division, U.S. Attorney's Office, and Israel's Ministry of Defense. Marshak's extradition shows another step forward in the DOJ's efforts to coordinate investigations with foreign authorities and is further evidence that the Antitrust Division will continue to vigorously pursue individuals regardless of where they reside.

Further, in November 2016, the DOJ and the FTC published proposed updates to the Antitrust Guidelines for International Enforcement and Cooperation ("International Guidelines"). These International Guidelines describe how the DOJ and the FTC will approach investigations and prosecutions for conduct occurring outside the U.S. In particular, the proposed revisions to the International Guidelines provide an additional chapter on international cooperation, addressing the agencies' investigative tools used with other enforcement agencies to detect and prosecute collusive conduct.

In addition, the International Guidelines state the DOJ's policy on the interpretation of the Foreign Trade Antitrust Improvements Act (FTAIA), which is the statutory framework that outlines the extraterritorial reach of U.S. antitrust laws. For conduct not involving imports, the FTAIA limits the reach of the U.S. antitrust laws to conduct that has a "direct, substantial, and reasonably foreseeable" effect on U.S. commerce. The DOJ has actively advocated that the term "direct" under the FTAIA should be read as requiring only a "reasonably proximate" (rather than a "direct" or "immediate") nexus between the collusive conduct at issue (e.g., price-fixing) and the effect on U.S. commerce (e.g., increased prices). This reading of the "direct" requirement allows the DOJ to establish more easily that collusion outside the U.S. had the requisite effect in the U.S., allowing the DOJ to prosecute the conduct criminally. The DOJ provides two important examples in the International Guidelines to illustrate its interpretation.

- The first example involves companies outside the U.S. that agree to fix prices (or otherwise improperly collude) on component parts supplied outside the U.S. The DOJ observes that these companies can be prosecuted under U.S. antitrust laws if those component parts indirectly enter the U.S.—i.e., the components are sold outside the U.S. and are then integrated (by other companies) into finished products sold into the U.S. The DOJ observes that the component suppliers need not actually know that the finished products are sold in the U.S. to be subject to prosecution.

- The second example involves companies outside the U.S. that agree to fix prices (or otherwise improperly collude) on products that never make their way into the U.S. The DOJ observes that these companies can be prosecuted so long as the anticompetitive conduct influences the "worldwide" price of a certain product sold (by other companies) in the U.S.—e.g., the fixed price outside the U.S. serves as a "benchmark" for the price of the product in the United States (again supplied by another company not part of the collusion).

As of this writing, the proposed guidelines have yet to be adopted. However the fact that the DOJ proposed incorporating its position on the FTAIA's "direct" requirement into the International Guidelines suggests that the DOJ is committed to its interpretation of the FTAIA and to aggressively pursuing conduct outside the United States.

Cartel Enforcement by Competition Agencies Outside the U.S.

Competition agencies outside the U.S. have also remained active against collusive conduct and cartels in 2016. While some of these agencies do not pursue such conduct criminally, they generally view the conduct similarly to the DOJ and impose harsh sanctions. Below are some of the more notable enforcement actions taken by certain agencies against collusive conduct in 2016.

Australia. This year marked the first criminal charge against a corporation under the criminal cartel provisions of the Competition and Consumer Act enacted in 2000. The Australian Competition and Consumer Commission (ACCC) brought charges against Nippon Yusen Kabushiki Kaisha (NYK) for alleged price-fixing in the transportation of vehicles to Australia, with NYK ultimately pleading guilty. The ACCC brought a second criminal charge a few months later against Kawasaki Kisen Kaisha, Ltd. related to the same shipping cartel conduct.

Brazil. In May 2016, the Brazilian Administrative Counsel for Economic Defense (CADE) published Leniency Guidelines and amended certain rules for companies seeking leniency for reporting collusion. The Leniency Guidelines provides clarity on how CADE enforces the leniency program, emphasizing increased safeguards for ensuring confidentiality. The amendments to the leniency rules: (1) clarify certain proceedings conducted before CADE; (2) modify the "marker system" by allowing applicants to request CADE to certify in writing the date and time to appear before the agency to protect the line order of leniency; and (3) revise the calculation of discounts by offering full administrative and criminal immunity for the second cartel offense under the Leniency Plus program and a one-third reduction in fine to the first cartel offense.

China. In 2016, the National Development and Reform Commission of the People's Republic of China (NDRC) drafted six antitrust guidelines under the authority granted by the Anti-Monopoly Committee (AMC). Two draft guidelines, not yet adopted, are particularly relevant to cartel enforcement efforts. The first is the draft Guidelines for Applying Leniency Program to Horizontal Monopoly Agreements, which provide further guidance for applying for leniency. The draft guidelines: (1) set forth that leniency is no longer applicable to vertical restraints; (2) note that a preliminary report with only limited information as "evidence" is acceptable for leniency; and (3) offer protection to information offered in the administrative proceedings. The second is the draft Guidelines on the Determination of Illegal Gains and Fines in Relation to Business Operators' Monopolistic Conduct, which set transparent approaches in determining penalties in antitrust cases for illegal gains and fines. The current penalty calculation provides Chinese antitrust regulators with broad discretion in assessing the fines, while the draft proposes a consistent and transparent approach to antitrust fine calculations.

European Union. The European Commission (EC) is always active in its enforcement against cartel conduct. A few developments from 2016 include the following:

- The EC this year imposed a €2.93 billion fine on the main European truck manufacturers for their participation in cartel—the highest such fine it has ever levied.
- In January 2016, the Court of Justice of the European Union (CJEU) issued a preliminary ruling with respect to the relationship between EU and EU member state leniency programs. The CJEU held that a leniency applicant cannot rely on its single application to the EC to receive leniency in every member state. Instead, a leniency applicant must ensure that precise information covering the scope of conduct and relevant jurisdictions is submitted to all competent authorities.
- In July 2016, the CJEU came down with a decision that could affect how companies interact with independent service providers. The CJEU held that a company can be liable for collusive conduct of an independent service provider if: (1) the service provider is in fact acting under the direction or control of the company; (2) the company is aware of the anticompetitive objectives pursued by its competitors and the service provider, and intends to contribute to them by its own conduct; or (3) the company could reasonably have foreseen the anticompetitive acts of its competitors and the service provider, and was prepared to accept the risk that entailed.
- In December 2016, the EC imposed a combined €166 million fine on Sony, Panasonic, and Sanyo for their involvement in fixing the prices of batteries used in laptops and mobile devices.

Japan. In February 2016, the Japan Fair Trade Commission (JFTC) filed criminal accusations with the Public Prosecutor General against 10 companies and 11 individuals who were found to have been in violation of the Antimonopoly Act for bid-rigging. The parties involved were engaged in rigging contract bids for disaster-restoration paving work after the Great East Japan Earthquake. In addition to filing criminal charges, the JFTC issued a cease-and-desist order and a surcharge-payment order.

South Korea. The Korea Fair Trade Commission (KFTC) made efforts to improve the leniency application procedures by amending its Public Notification on Implementation of Leniency Program, effective September 30, 2016. The amendment declares that submissions of the leniency application via email, fax, or visiting the Cartel Policy Division are acceptable formats, providing clarity in determining who is in line for leniency. Further, the amendments clarify the reduction in penalty for amnesty-plus applicants. The KFTC implemented stricter conditions for order of rank succession by imposing on lower-ranked successors to contribute to the investigation if the preceding ranked leniency applicant is removed in consideration for reduction in fines. Last, the amendment stipulates the removal of leniency benefits for those who have repeatedly engaged in cartel activities.

United Kingdom. The UK Competition and Market Authority (CMA) has been quite active. For the first time, the CMA opened an investigation into whether the UK modelling agencies and their trade association colluded to coordinate prices in 2016. Furthermore, the CMA is pursuing a criminal prosecution against directors for their participation in a cartel in the steel tanks industry. One director pled guilty and was handed a six-month suspended prison sentence, while the two remaining directors were acquitted. Under the Company Directors Disqualification Act, the CMA has the right to apply to the court for an order to disqualify the directors of the company that had breached competition law. The CMA secured its very first such disqualification, preventing an individual from acting as a director to any UK company for five years for breach of competition law. This disqualification follows the CMA's investigation into Trod Ltd.'s anticompetitive conduct in e-commerce.

Outlook for 2017

In 2016, the DOJ secured significant fines against companies and sentences against individuals as part of its criminal enforcement program. Notably, while five years have passed since the DOJ first brought charges in the automotive parts industry, the DOJ remained active in pursuing prosecutions in this investigation in 2016 and we anticipate this will continue into 2017. The DOJ also has continued its push into new industries, including ones operating online and with sophisticated technology. At the same time, the DOJ has remained active and vigilant in traditional areas of enforcement, such as the electronic components industry. If 2016 is any indicator, the DOJ will continue to be aggressive and innovative in its pursuit of corporate wrongdoing in the year ahead. We can also expect in 2017 that the DOJ will continue its efforts toward holding individuals accountable for corporate misconduct. Corporations involved in criminal antitrust investigations can expect their most senior-level executives and former employees to be subject to criminal exposure if they condoned, directed, or were otherwise involved in the conduct at issue.

Civil Litigation

Civil antitrust litigation activity continued at the same level as recent years in 2016, with the majority of actions seeking damages for private plaintiffs for wrongdoing previously alleged in separate government investigations. As the average cost of litigation and discovery steadily increases (especially in the U.S.), plaintiffs see great benefits to filing "me-too" actions, hoping to capitalize on investigatory work already done by government agencies. A number of class action cases dominated the headlines this year following government price-fixing investigations of the LIBOR interest rate and the pharmaceutical industry.

Circuit and district courts wrestled with important issues in both the unilateral and joint conduct arenas. In particular, exclusive dealing claims were the subject of multiple decisions by courts in the Third Circuit, the Fourth Circuit weighed in on tying, and the Second Circuit clarified jurisprudence regarding the territorial scope of the Sherman Act in a landmark ruling successfully advocated by WSGR.

Internationally, private enforcement under antitrust laws is relatively new compared to its long history in the U.S. and is still only permitted in a small—but growing—number of countries and regions of the world. Despite the nascent stage of its development, international civil litigation resulted in a number of significant rulings in 2016. Google successfully fended off challenges in the U.K., Germany, and France to its allegedly discriminatory practices, while MasterCard and Visa have not been as fortunate in ongoing litigation in the UK concerning certain interchange fees. It is expected that 2017 will continue to see more private enforcement in markets where it has not traditionally played a significant role, including in China.

Antitrust Law Background

Antitrust law—both in the U.S. and internationally—generally recognizes two types of illegal conduct: coordinated and unilateral. Coordinated conduct typically involves an illegal agreement (explicit or tacit) between a plurality of market participants that ultimately aims to restrict competition between the players, with a view to fixing prices or restricting output. A textbook example of coordinated conduct is a price-fixing cartel.

In contrast, unilateral conduct needs not involve multiple players. Generally, a firm engages in unlawful unilateral conduct when two conditions are met: first, the firm has market power (the ability to raise prices above those that would be charged in a competitive market) and, second, the firm willfully acquires or maintains that power through certain unlawful means. Unlawful unilateral conduct can take multiple forms, but the ultimate goal of a violator is to exclude competitors from a market. For example, firms that have substantial market shares (or are dominant participants in a market) may be held liable for certain business practices, including the use of exclusive deals with customers or tying the purchase of one product to another. Exploiting market power by charging excessive prices to customers may also be actionable in certain non-U.S. jurisdictions.

Unilateral Conduct

Defendants prevailed in a number of significant unilateral conduct cases in 2016. Notably, multiple district and appellate courts dismissed actions brought by competitors alleging that another company somehow delayed, foreclosed, or otherwise prevented full competition in the market. Ultimately, companies considering bringing plaintiff-side actions must be cognizant of the limits of antitrust law; courts have shown a demonstrable hesitance to extend the boundaries of liability, especially where doing so may in fact chill legitimate competition. The following cases provide examples of courts acknowledging that certain conduct (exclusive dealing, tying, patent infringement, product hopping, and discriminatory practices disadvantaging competitors) may in fact serve as a basis for an antitrust complaint, but proving liability requires stronger evidence than the plaintiffs set forth in these instances.

U.S.

Exclusive Dealing: Eisai v. Sanofi. Economic analysis has shown that exclusive agreements and loyalty rebates may have positive or negative effects on competition depending on the particular facts. Consequently, courts assess these agreements on a case-by-case basis under the "rule of reason" test. Further, courts generally have applied two types of "rule of reason" tests to loyalty discounts and related exclusive practices: a "price-cost" test, or a more comprehensive "substantial foreclosure" test. The price-cost test looks at whether the defendant's prices exceed its production costs, and the substantial foreclosure test considers several factors to determine the percentage of competitors that were foreclosed. The price-cost test is generally more favorable to defendants, who only need to show that their prices are not below costs to overcome allegations of wrongdoing. Its application is generally limited to loyalty discounts.

In *Eisai* v. *Sanofi*,[129] the Third Circuit provided further guidance on how to evaluate these types of arrangements. Eisai attacked two of Sanofi's marketing policies for its anticoagulant drug Lovenox: volume discounts and prohibiting hospitals from favoring other drugs over Lovenox in their formularies (lists of medications approved for use in the hospital).

The district court had dismissed Eisai's claims under the price-cost test, finding that Sanofi never priced below costs. The district court had also found the claim to be without merit even if applying the substantial foreclosure analysis. The district court found that Eisai was not excluded because it could have met or beaten the discounts profitably. The Third Circuit affirmed, resting its decision on an application of the more probing substantial foreclosure test. The court distinguished its previous decisions in *LePage*, *Dentsply*, and *ZF Meritor*,[130] which all applied a substantial foreclosure test but ultimately found in favor of the plaintiffs.

Two key takeaways can be understood from the Third Circuit's decision. First, exclusive or quasi-exclusive arrangements are unlawful under the substantial foreclosure test only if they would exclude a hypothetical rival as efficient as the defendant. Second, the practice of offering such loyalty discounts may not be evaluated under the price-cost test because "the price-cost test may be utilized . . . only when 'price is the clearly predominant mechanism of exclusion.'"[131]

This case advances the jurisprudence on exclusive practices, but its ultimate impact is unclear. In particular, the Third Circuit has confirmed that defendants could, in theory, be found liable even if their discount programs are kept above costs—although that is unlikely under the equally efficient rival test the court adopted. *Eisai* also confirms that, to avoid liability safely, it's important that the defendant's customers be left with the option to opt in or out of the discount program on relatively short notice without fear of any retaliatory actions (beyond loss of the benefits under the agreement) by the defendant.

Tying: Live Nation. The Fourth Circuit addressed another area of unilateral conduct analysis—tying—in *It's My Party, Inc.* v. *Live Nation, Inc.*[132] WSGR successfully represented Live Nation in this action.

The plaintiff was a concert promoter that operated an outdoor amphitheater near Baltimore, Maryland, and accused Live Nation (LN) of using its alleged market power in concert promotion and amphitheaters to steer artists from the plaintiff's venue to LN's amphitheater in the same region. LN was accused of forcing artists that hired LN to promote national tours to perform at LN's amphitheater (promotion-to-venue tying). LN also allegedly told artists that if they wanted to perform at LN amphitheaters across the country, the artist had to perform at LN's local amphitheater and not at the plaintiff's venue (venue-to-venue tying).

The court granted summary judgment for LN because there was no evidence that LN coerced artists to perform at its venue. The court found that LN's success was due to good-faith competition and negotiation. The court also stressed that in the absence of coercion, LN customers benefitted from LN's economies of scale and scope that allowed LN to offer advantageous products to its customers.

As in the *Eisai* case, the Fourth Circuit sided with the defendant, finding that legitimate competitive tactics such as those undertaken by LN could not serve as the basis for antitrust liability. The antitrust laws are focused on harm to competition in the marketplace, not necessarily losses by a single market participant, and failing to show such general market-wide harm is fatal to a claim.

Patent Infringement: Retractable Techs. In a recent decision, the Fifth Circuit took the opportunity to restate that the infringement of a competitor's patent cannot be the basis for antitrust liability.

In 2008, Retractable Technologies (RT) sued its competitor Becton Dickinson (BD) for allegedly foreclosing competition in the specialized market for retractable syringes. The broad allegations covered exclusive contracts, loyalty discounts, false advertisement, patent infringement, and unfair competition. In particular, RT alleged three unlawful acts to support its antitrust claims: first, BD's infringement of RT's patent; second, BD's false advertising; and third, BD's alleged attempt to "taint" the market for retractable syringes. The district court denied BD's motion for judgment as a matter of law, and entered a jury's verdict for RT for more than $300 million in treble damages.

The court of appeals reversed the determination of the district court, while affirming or remanding other aspects of the case.[133] First, the panel held that, consistent with its case law, "patent infringement cannot serve as a basis to impose antitrust liability." In fact, patent laws and antitrust laws serve conflicting goals, as the infringement of a patent increases competition by causing competing products to enter the market. Second, the court stated that "false advertisement, without more, can[not] support an antitrust claim," and that the best antidote to false or misleading speech is not antitrust litigation, but "more speech --- the marketplace of ideas." Finally, the court dismissed the last of RT's claims, whereby BD would allegedly market flawed retractable needles with the aim of discrediting RT's products. The court rejected this argument as having "no direct evidentiary basis," and as being "illogical" and "incoherent."

As with the courts in *Eisai* and *Live Nation*, the Fifth Circuit reminded companies that the antitrust laws were created with the goal to protect "competition, not competitors."

Product-Hopping: Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd. Co. In *Mylan Pharms. Inc.* v. *Warner Chilcott Pub. Ltd. Co.*, the Third Circuit contributed to the ongoing debate about whether allegations of "product-hopping" can constitute a violation of the antitrust laws.[134]

As background, "product-hopping" in the pharmaceutical industry refers to the strategy of a brand-name drug manufacturer to introduce formulation changes, modification of dosage, or other alterations in order to avoid competition from typically lower-priced generic drugs. Because generic manufacturers must show that their version of the drug and the currently marketed brand-name drug are bioequivalent (i.e., have a similar formulation and effect), a brand manufacturer's alterations to a drug can force generics to incur costly delays in development and approval (especially when done just prior to generic entry). Typically, generics are automatically substituted for the more expensive brand version by pharmacists, so brands are incentivized to delay competition for as long as possible.

In this case, Mylan Pharmaceuticals claimed that Warner Chilcott introduced a number of changes to the formulation and strength of its brand-name Doryx drug in order to prevent or delay competition of Mylan's generic version of Doryx. Most significantly, Warner Chilcott switched Doryx from a capsule to a tablet, forcing Mylan to scrap its development of a generic capsule and shift to developing a generic tablet. Mylan alleged that the purpose of the switch was primarily to delay competition and that the change offered no legitimate benefits to consumers.

Despite an amicus curiae brief from the FTC supporting Mylan's position, the Third Circuit sided with the defendant, and affirmed the lower court's decision to grant Warner Chilcott summary judgment. First, the district court concluded (and the Third Circuit agreed) that Doryx, an antibiotic indicated to treat moderate-to-severe acne, faced sufficient competition from other acne medications such that even if the product-hopping did foreclose Mylan, the conduct was unlikely to have harmed the broader marketplace for acne drugs. This is a significant ruling because it runs counter to the FTC's position in many of its cases in the pharmaceutical arena that a single product (and its generic equivalents) can constitute a relevant antitrust market, especially where, as here, the defendants' actions made no economic sense absent market power (a point the court did not address).

Second, the court found that Mylan failed to prove anticompetitive conduct. Although the Second Circuit had held in a 2015 case (*Namenda*) that a similar product switch was illegal, the Third Circuit attempted to distinguish that case from Mylan's.[135] The Third Circuit explained that *Namenda* concerned a different procedural posture—the plaintiff was seeking an injunction to prevent a forthcoming switch—and involved an attempt by the defendant to fend off generic competition by pushing back the expiration of its patent exclusivity period. In the Mylan action, Warner Chilcott's patent had expired long before the switch, leading the court to conclude that Mylan could have entered with a generic capsule at any time between the expiration and the switch to a tablet had Mylan chosen to market the product (incurring costs that generics generally avoid).

International

Much of the private litigation in Europe revolved around the antitrust implications for the introduction of new technologies. In particular, several players criticized Google's business practices in the Internet search market. These actions developed in parallel to an ongoing investigation by antitrust agencies into Google's promotion of its own shopping and mobile operating system over competing solutions (please refer to the Agency Investigations section of this publication).

Abuse of Dominance: Germany and the UK. Google was the object of several litigation proceedings in Germany and the UK. In Germany, the Berlin regional court dismissed 41 complaints of abuse of dominance against Google.[136] Following a 2013 law allowing publishers to oppose the reproduction by search engines of their works without payment, Google asked publishers to choose between showing snippets of their content for free and displaying only a link to their works. The court held that such "ultimatum" was legal, because—despite Google's alleged dominant position—the search engine did not discriminate against the publishers. The court further emphasized that Google's model creates a "win-win" situation, where each of the publishers, customers, and Google benefit from the system.

In the UK, Streetmap.eu, a provider of web mapping services, filed a claim against Google with the Chancery Division of London's High Court, alleging that Google abused its dominant position by introducing the "Maps OneBox" feature. Streetmap.eu alleged that Google abused its dominant position in Internet searches by displaying a clickable link to Google's map services on top of Google's search page, and by relegating hyperlinks to Streetmap.eu in the lower part of the page. In February, the court dismissed Streetmap.eu's claim.[137] Judge Roth found that the introduction of the OneBox likely did not affect competition, and even if it did, Google's conduct was objectively justified. The court further found that any other alternatives to the OneBox would be "disproportionate," as Google would need to implement changes in every territory where it has market power. Streetmap.eu appealed the decision, and a hearing before the Court of Appeal is scheduled for February 2017.

Unilateral Conduct, Vertical Restraints, and IP Litigation: China. Private antitrust litigation, which has only existed in China since 2008, continues to increase every year and 2016 was no exception. Whereas only fewer than a dozen private cases were brought when the Chinese Antimonopoly Law was first instituted, more than 150 were brought in 2015, and the number is expected to have risen in 2016. In particular, litigation concerning Standard Essential Patents (SEPs) attracted significant attention in 2016.

Two cases are worth highlighting. First, in June 2016, Qualcomm filed a complaint against the Chinese smartphone manufacturer Meizu in the Beijing Intellectual Property Court,[138] requesting a declaratory ruling that the terms of a patent license it offered to Meizu comply with Chinese antitrust law and with Qualcomm's fair, reasonable, and non-discriminatory licensing obligations. Since then, Qualcomm has also filed suit against Meizu in the U.S., Germany, and France, exerting significant pressure against the Chinese OEM and likely sending a signal to other Chinese manufacturers that refusing to negotiate will result in costly litigation. Whether or not Meizu continues to litigate in 2017 will set the tone for future Chinese litigants.

Around the same time that Qualcomm brought its action against Meizu, Chinese technology company Huawei filed a number of lawsuits against Samsung in Chinese courts as well as in the U.S. District Court for the Northern District of California, alleging SEP infringements related to smartphones. The outcomes of these recent lawsuits by Huawei could bring interesting developments at the intersection of antitrust and IP litigation in China; though Huawei has not raised any claims under China's anti-monopoly law in these litigations, Samsung is likely to do so in response or in counterclaims.[139]

The availability of private antitrust litigation in Chinese courts opens up new possibilities for companies around the world, especially as more and more U.S. companies seek out new business opportunities in China.

Coordinated Conduct

More often than not, coordinated conduct civil litigation follows—or runs parallel to—government investigations into cartel activity. In those cases, settlement is the likely result, as both the stakes and the likelihood of liability are high (see the case below regarding "no-poaching agreements"). However, in a number of 2016 cases, including the *Actos*, *Loestrin*, and *Vitamin C* litigations described below, the defendants prevailed in coordinated conduct cases, demonstrating that plaintiffs may face an uphill battle even in these types of actions. In other coordinated conduct cases, such as *LIBOR*, the generic drug price-fixing actions, and the MasterCard matters, the plaintiffs' claims are still alive and defendants in those cases face extremely high potential damages.

U.S.

Pay-for-Delay: Actavis Decision Spurs on Private Litigation Concerning Pharmaceutical Patent Litigation Settlements. Several decisions have expanded on the implications of the 2013 U.S. Supreme Court decision concerning reverse-payment (also known as "pay-for-delay") agreements. In *FTC* v. *Actavis*,[140] the Supreme Court held that reverse-payment settlements can violate the antitrust laws. A reverse payment occurs in a patent litigation where the plaintiff manufacturer of a brand-name drug agrees to compensate one or more manufacturers of the defendant generic drugs (the alleged infringers) in exchange for a promise of a delayed entry in the market. Following the *Actavis* decision, a number of reverse-payment cases were filed, and 2016 saw a number of significant rulings in the area clarifying and interpreting the Supreme Court's decision.

First, defendants challenged the notion of what type of compensation could constitute an illegal reverse payment with varying success on motions to dismiss. In *In re Loestrin Fe Antitrust Litigation*,[141] the First Circuit held that the compensation agreed upon in the settlement agreement can encompass transfers of value not limited to cash payments (the *Actavis* settlement involved cash). In particular, a brand manufacturer's agreement not to launch its own generic upon entry by other generics was deemed to constitute a payment subject to *Actavis*.[142] On the other hand, the defendants in *In re Actos End-Payor Antitrust Litigation* successfully argued that mere agreement between a brand manufacturer and a number of generic entrants on a generic entry date cannot constitute a reverse payment delaying competition, even if a generic defendant in the underlying patent litigation may have won and entered earlier.[143]

Second, cases in the First and Third Circuits made clear that even if plaintiffs successfully defeat motions to dismiss and can show that a reverse payment violated antitrust law, victory ultimately requires satisfying traditional antitrust law and class certification standards. For example, the plaintiffs in a reverse-payment case concerning Nexium lost at trial for failure to prove antitrust injury (actual harm caused by anticompetitive conduct). Their 2016 appeal failed as well, as the First Circuit refused to revive the case on the basis that even if the reverse payment had not occurred, the generic company at issue faced other unrelated issues that would have prevented entry.[144] Thus, evidence of an illegal reverse payment is not sufficient; a plaintiff must still show causation and injury.

Similarly, private plaintiffs in a case concerning Provigil also got tripped up, despite the FTC having previously extracted $1.2 billion in a settlement with the same defendants. In the civil litigation, the private plaintiffs convinced the district court to certify a class, only to see the Third Circuit overturn the certification on the basis that the plaintiffs could not satisfy the "numerosity" requirement. There were simply too few individual plaintiffs for the court to find (as it must in order to certify a class) that joiner was impracticable. Again, although the plaintiffs may have been able to prove that a reverse payment occurred, counsel must still carefully litigate a case to ensure that all required elements can be met.[145]

The upshot is that 2017 is likely to see additional rulings in the reverse-payment arena, as courts continue to interpret *Actavis* by addressing minimum pleading standards, damage analysis and calculations, and theories of causation.

International Comity: In re Vitamin C. On September 20, 2016, the Second Circuit issued a watershed decision in a price-fixing case. The court set out the standard for assessing the liability of foreign companies under U.S. antitrust law where the companies' government compelled the unlawful conduct.

In *In re Vitamin C Antitrust Litigation*,[146] the plaintiffs—two classes of purchasers of vitamins—alleged that several Chinese vitamin manufacturers had engaged in price-fixing of vitamin C exported from China. WSGR represented two of the defendants. The defendants pleaded the antitrust defense of foreign compulsion, namely that Chinese law and regulations compelled the price-fixing conduct. The Chinese government made an unprecedented appearance in court to support the position, but the district court still entered a judgment of $150 million for the plaintiffs.

The Second Circuit reversed the lower court's decision: the panel held that a U.S. court is bound to defer to the statements of a foreign government interpreting its own law, and dismissed the case under the judicial doctrine of international comity. The court found that where there is a "true conflict" between American and foreign law—as was the case here—international comity generally requires that American courts should not exercise jurisdiction of the case, and should certainly do so where a foreign sovereign appears formally to argue the point. Otherwise, American courts may become entangled in international affairs, a role that traditionally belongs to the executive branch.

Therefore, the court remanded the case to the lower court with instructions to dismiss the plaintiffs' complaint with prejudice. The Second Circuit's decision avoids a scenario where a foreign company can face liability in U.S. courts based on conduct that is required by their own laws. The Plaintiffs may petition the Supreme Court for review in early 2017.

Antitrust Injury: LIBOR. In 2016, an antitrust lawsuit against 16 big banks was revived by the Second Circuit. In a series of lawsuits currently before the Southern District of New York, the plaintiffs alleged that 16 major banks conspired to fix the London Interbank Offered Rate (LIBOR) as early as 2007. The LIBOR is a key benchmark interest rate used to set rates for a series of financial contracts, including mortgage and credit card interest rates. The private lawsuits are follow-on actions to criminal investigations by U.S. antitrust agencies that resulted in criminal plea deals.

In March 2013, the district court dismissed the plaintiffs' case for two reasons: first, the court found that the LIBOR-setting process was cooperative, not competitive, and thus not actionable under antitrust laws; and second, the plaintiffs failed to allege sufficient antitrust injury. In *Gelboim v. Bank of Am. Corp.*,[147] the Second Circuit reversed the district court's decision, explaining that "LIBOR forms a component of the return from various LIBOR-denominated financial instruments, and the fixing of a component of price violates the antitrust laws." Moreover, the panel held that a plaintiff alleging horizontal price-fixing is not required to prove antitrust injury. On remand, the defendants further argued that the case was outside of the jurisdiction of U.S. courts, because the plaintiffs failed to show that the banks sold price-fixed products in the U.S. According to well-established case law, U.S. courts can assert jurisdiction over foreign conduct when the harmful effects are purposefully directed to the U.S. Meanwhile, several defendants entered into settlement agreements with plaintiffs. In October 2016, three of the defendants asked the Supreme Court to scrutinize the Second Circuit's decision.

Generic Drug Price-Fixing. Following news of government investigations into generic pharmaceutical pricing, several generic drug manufacturers were hit by a number of class action lawsuits alleging price-fixing of various generic drugs, including Pravastatin, Divalproex ER, Digoxin, Doxycycline, and Clobetasol.[148]

Although the allegations in each case do not identify specific pricing agreements among manufacturers, class action plaintiffs have generally claimed "[t]here can only be one explanation for such an extreme, sustained price hike in a market in which multiple manufacturers have, for so many years, competed on price." The complaints generally allege that the defendants used the Generic Pharmaceutical Association—a trade group—as a means to meet and conspire. The plaintiffs also point to the ongoing inquiries by the DOJ, the Connecticut Attorney General, and Senator Bernie Sanders and Congressman Elijah Cummings into the price hikes to support the price-fixing claims.

The cases, which are currently docketed in the Eastern District of Pennsylvania and the Southern District of New York, will see motions to dismiss filed soon, though the plaintiffs optimistically predict that this could be as far-reaching and broad as the *Auto Parts* litigation, so additional complaints may be forthcoming.[149]

No-Poaching Agreements: In re High-Tech Employee Antitrust Litigation. The U.S. District Court for the Northern District of California put an end to a longstanding dispute concerning no-poaching agreements between a number of Silicon Valley companies. On September 2, 2015, District Judge L. Koh approved a $415 million class action settlement resolving the underlying claims.[150]

In May 2011, representatives of software engineers sued Google, Apple, Intel, and Adobe, alleging a conspiracy to eliminate competition among the defendants for skilled labor. The plaintiffs contended that the defendants agreed: (1) not to "cold call" each other's employees; (2) to notify the other companies when making an offer to an employee of the other companies; or (3) not to engage in "bidding wars" for the same prospective employee. The unlawful conspiracy would have depressed the employees' compensation by 10 to 15 percent. The defendants entered into a consent decree with the DOJ in March 2011, following an investigation into similar conduct.

International

UK: MasterCard and Visa. A number of antitrust lawsuits were filed against credit card giants MasterCard and Visa in 2016.

The European Commission (EC) began investigating Visa and MasterCard in the mid-2000s over their multilateral interchange fees (MIFs). MIFs are fees charged by the card's issuing bank to a merchant's bank every time a customer completes an in-store sales transaction with a payment card. The EC found in 2007 that MasterCard infringed EU competition law by setting a minimum price for its MIFs. In doing so, MasterCard inflated the cost of card acceptance by retailers (which increased consumer prices) without any additional efficiencies or benefits. Visa had previously avoided a liability decision by offering commitments (i.e., entering into a consent decree-like agreement) that eased the EC's concerns.

Twelve British retailers—including Marks&Spencer and Tesco—filed damages claims with the UK High Court of Justice, Commercial Court against Visa in 2013.[151] They allege they overpaid on credit and debit card transactions for a period going back to 1977. The High Court struck out claims dating prior to 2007 in applying a six-year limitations statute. A few days before the trial opened with the remaining plaintiffs on November 14, 2016, Tesco reached a settlement with Visa for about £500 million ($630 million).

In September 2016, Walter Merricks, a former Chief Financial Services Ombudsman, filed a class action against MasterCard alleging the same violations as in the 2007 EC decision.[152] Merricks seeks to represent a putative class composed of 46 million UK consumers that purchased goods between 1992 and 2008 from businesses accepting MasterCard payments. The plaintiffs estimate damages as high as £14 billion ($18.7 billion). The case is the largest collective action filed under the new UK opt-out class action regime in force since October 2015, which introduced for the first time the possibility for U.S.-style class actions to be brought in the UK.

British Airways, Europcar UK, Transport for London, and Dixons Carphone have filed similar follow-on lawsuits against MasterCard, alleging overpayment of MIFs.[153]

Outlook for 2017

We expect that 2017 will likely continue the upward trend in the number of civil antitrust actions filed, especially if government agencies continue to initiate broad, industry-wide investigations as they have, for instance, in generic pharmaceuticals. However, with the regime change in the U.S., it is difficult to make sweeping assertions or predictions, as it remains to be seen what the new government's position will be with respect to antitrust. A return to conservative Republican politics may actually result in less enforcement of antitrust regulations, which would likely lead to a decrease in civil antitrust cases.

In the U.S., district and circuit courts will likely wrestle next year with the interpretation of recent Supreme Court cases defining the boundaries of class action litigation. In particular, courts will consider the issue of the use of representative samples (such as statistical averages) to establish class-wide injury,[154] as well as the sufficiency of a violation of a statutory right to satisfy the standing requirement of injury-in-fact.[155]

WSGR represented numerous clients in landmark decisions in 2016, and will assuredly be at the forefront of antitrust civil litigation during next year as well.

Conclusion

As our *Antitrust Year in Review* illustrates, 2016 proved to be a very active year for key matters, from U.S. and global mergers to domestic civil and criminal disputes and global cartel matters. To be sure, the past year presented antitrust practitioners and businesses with a broad range of national and international regulatory challenges, as well as constantly shifting policy and enforcement landscapes. Now, as of this report's issuance, we witness the close of an eventful and dynamic period as the U.S. transitions from one administration to another.

We anticipate that 2017 may be a year of new challenges and continued change, both in the U.S. and globally. We look forward to the opportunity to continue keeping our clients and colleagues updated on the latest developments in the areas covered in our report, particularly as we expect WSGR's antitrust practitioners to continue to play a significant role in matters of importance throughout the year.

Once again, should you have any questions or comments on any of the matters, trends, or controversies discussed in the report, we invite you to contact your regular WSGR attorney or a member of the firm's antitrust practice.

In closing, we would like to acknowledge and thank the members of WSGR's antitrust practice who contributed to the content of the *2016 Antitrust Year in Review*, including Franklin Rubinstein, Charles Biggio, Susan Creighton, Jamillia Ferris, Jonathan Jacobson, Paul McGeown, Chul Pak, Michael Rosenthal, Mark Rosman, Scott Sher, Seth Silber, Jeff VanHooreweghe, Stuart Chemtob, Joshua Wright, David Reichenberg, Jeffrey Bank, Deirdre Carroll, Justin Cohen, Roisin Comerford, Takeyoshi Ikeda, Yuan Ji, Ben Labow, Jack Mellyn, Gabriel Orazi, Ted Serra, Brad Tennis, Bastian Voell, and Daniel Weick.

About WSGR's Antitrust Practice

WSGR's antitrust attorneys are uniquely positioned to assist clients with a wide range of issues, from day-to-day counseling and compliance to crucial bet-the-company matters. Our accomplished team consistently is recognized among the leading antitrust practices worldwide by such sources as *Global Competition Review, Chambers Global,* and *Law360*. In fact, *Global Competition Review* hailed the group as "perhaps the best antitrust and competition practice for high-tech matters in the world," while *Chambers USA* characterized them as "a dominant firm for matters involving the hi-tech sphere, acting for many of the most prominent technology firms," with a "deep and diverse bench of outstanding practitioners."

Based in New York City, Washington, D.C., San Francisco, Silicon Valley, and Brussels, our highly regarded antitrust attorneys advise clients with respect to mergers and acquisitions, criminal and civil investigations by government agencies, antitrust litigation, and issues involving intellectual property, consumer protection, and privacy. We advise clients on a full range of issues, including pricing, distribution, vertical restrictions, standard-setting activities, joint ventures, and patent pooling. Working with Fortune 100 global enterprises as well as venture-backed start-up companies, our attorneys have expertise in virtually every significant industry sector, including technology, media, healthcare, services, transportation, and manufacturing.

To view the complete listing of endnotes for this report, please visit https://www.wsgr.com/WSGR/Display.aspx?SectionName=practice/antitrust/2016-yir.htm.

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