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Global Competition Law Developments To Watch In 2017

By **Melissa Lipman**

Law360, New York (January 9, 2017, 5:36 PM EST) -- How the new U.S. administration will handle enforcement may be the latest hot topic in the antitrust bar, but with more than 120 agencies now policing competition worldwide some of the most interesting issues in 2017 will be nowhere near American shores.

From a Europe grappling with how the U.K.'s vote to leave the bloc will affect competition enforcement to new intellectual-property-focused guidelines due from watchdogs in Asia, attorneys will have plenty of regulatory developments to look for in the year ahead.

Here are a few key changes to watch:

European Union

Though the EU is a well-developed competition jurisdiction, it has a host of changes large and small that attorneys should be watching for in the year ahead.

The European Commission is in the final week of a public consultation looking at fine-tuning its merger review process. One key issue it is considering is whether to draft new thresholds to capture deals where major technology companies buy startups that may not have enough turnover to trigger EU notification, even if the transactions are high-profile.

This is essentially the problem of Facebook's acquisition of WhatsApp, which the commission **ultimately examined** on Facebook's request even though the \$19 billion deal didn't automatically mandate EU-wide review.

The fix the commission **is eyeing** would also create a notification threshold based on the value of the deal, something that already exists in the U.S. but that is more complicated in Europe, where the regime is designed to capture deals that have an effect across national boundaries.

"This is a difficult topic to address in Europe, but the commission is basically concerned with potential competition issues in fast-moving industries, innovative industries like pharma or internet-based industries in situations where large companies acquire startups," said Linklaters LLP global competition group head Jonas Koponen. "There is a debate on this. Where it will land, it's not clear but the commission certainly seems interested in pursuing it."

One of the biggest pieces of competition legislation the EU has passed in recent years is also set to kick in across the bloc in 2017: the private damages directive. The measure laid out a baseline of rules each member state must meet in order to make it easier for those who overpaid for price-fixed products to recover damages.

So far, litigation has centered mainly in the U.K., the Netherlands and Germany, where there has long been more case law and more developed court systems to support complex cartel damages suits and the like. The question for 2017 and beyond is whether some suits following on the heels of commission actions will start to spread into the other national courts and whether more national follow-on cases will flourish.

"Immediately we will continue to see a lot of litigation activity centered on the jurisdictions where there is experience, is my expectation," Koponen said. "For the big commission pan-European cases, in the near term we will be likely to see continued litigation in Germany, the Netherlands and the U.K., but in other member states ... this creates new opportunities."

And of course, 2017 may begin to provide some insight into what kind of relationship the U.K. will have with the EU once it eventually leaves the bloc, and that includes the interaction between the competition regimes in the two countries. Likewise, whether the British courts **will continue to be** such a prime destination for damages litigation after Brexit remains an open question.

"Will companies still choose it as a forum to litigate in?" said Rachel Brandenburger, senior adviser to Hogan Lovells. "Over time that will partly depend on whether U.K. competition law is still pretty much the same as or diverges from European law."

China

China's younger antitrust regime is poised to move forward with a number of key developments in 2017, including final guidelines on the intersection between antitrust and intellectual property from the country's State Council.

The country divides competition duties among three agencies — the Ministry of Commerce, the National Development and Reform Commission, and the State Administration for Industry and Commerce — and all three have worked on draft guidelines in the past. The SAIC put out its own rules in 2014, but all three have now submitted competing draft guidance to the State Council, which will have to reconcile the three.

"The three agencies are always vying for power, so if they adopt NDRC's version over SAIC's or MOFCOM's, that could signal something about the power struggle," said Koren Wong-Ervin, the director of the Global Antitrust Institute.

The substance of the rules will also be key, as in the past attorneys have had to divine the agencies' approaches to IP-antitrust issues like the limitations on what companies can do with their standard essential patents from negotiated settlements with Qualcomm and InterDigital, among others.

"This is the first time we'll get a clear picture of what China's policy is," Wong-Ervin said. "Especially in a country that has had issues with due process and transparency and is a new agency so doesn't have the experience of really telling people, 'Here's our theories of harm,' it's extra guessing."

Likewise, the country is also considering revisions to its Anti-Unfair Competition Law, which is enforced by SAIC. The agency was trying to expand its authority by pushing for an expansion of the law, most notably by making having a superior bargaining position a violation, according to Wong-Ervin.

"The U.S. doesn't punish it because it's not an antitrust issue, it's much more like contract issue, but the latest reports are it was taken out," Wong-Ervin said.

The latest phase of the Chinese government's economic development plan also calls for introducing competition compliance for government initiatives across the country. The NDRC rolled out the review process in July.

"It's basically ... to try to determine that initiatives by state and provincial agencies are helping to bring competition to the marketplace and the agencies' instruments, all directives and rules and regulations and so on need to be reviewed against these initiatives," Brandenburger said. "There have been a lot of statements about this from the highest levels within China, and we are seeing now investigations being launched ... into sectors that are explicitly to try to turn these more into market economy sectors."

That includes looking at everything from pharmaceuticals to spare car parts, with a focus in

particular on industries that directly affect consumers.

Japan

Both China and Japan are also in the process of revising their guidelines for how penalties are calculated for antitrust violations, having wrapped up consultations in late 2016.

The Japan Fair Trade Commission is weighing changing its system for calculating administrative penalties, saying that in some cases its long-standing methods make it difficult to deal with increasingly global and complex corporate structures.

Among other things, the JFTC wants to be able to set fines based in part on how much companies cooperate with investigations.

The Chinese guidelines, meanwhile, look to set up a situation under which agencies will calculate fines based on a percentage of affected sales and allow them to seize illegal gains.

In both cases, Wong-Ervin warned, the penalties wouldn't be tied to theories of optimal deterrence, particularly when it comes to dealing with unilateral conduct that is not subject to the same kind of secrecy as cartels.

"They're looking for some kind of certainty [but] it's just not grounded in economics," Wong-Ervin said. "Making penalties so high for conduct that is 100 percent detected could over-deter some pro-competitive conduct."

South Korea

The Korea Fair Trade Commission is considering new revisions to its IP-antitrust guidelines alongside new guidance on extra-territoriality and extra-jurisdictional remedies, according to Wong-Ervin, whose institute has had deputy directors as international fellows to study IP issues.

The move to revise the guidance yet again would be significant in the wake of the KFTC's **recent decision to fine** Qualcomm Inc. \$854 million for forcing mobile phone makers to pay royalties on broad patents covering modem chipsets and for tying licensing agreements to chip supply numbers. The decision focused on sales in Korea or companies based there, but would affect foreign patents, according to Wong-Ervin.

Likewise, the previous version of the IP guidelines includes a section on patent assertion entities, but agency officials have said the KFTC's concern is about about the so-called patent trolls suing Korean companies in the U.S. rather than about a domestic issue with patent enforcers.

"They got a lot of pressure about what's the tie to Korea then, so it will be interesting to see how broad of a reach they think they have," Wong-Ervin said.

--Editing by Rebecca Flanagan and Catherine Sum.