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2021 ANTITRUST YEAR IN REVIEW

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Introduction

Wilson Sonsini Goodrich & Rosati is pleased to present its 2021 Antitrust Year in Review.

This report summarizes the most significant antitrust matters and developments of the past year. We examine policies and enforcement activity by U.S. and global antitrust agencies and enforcers across a range of merger review, civil conduct, and criminal enforcement matters as well as antitrust litigation filed by private plaintiffs. In the United States, the first year of antitrust enforcement under the Biden Administration has seen an even greater focus on major technology companies and online platforms coupled with a more aggressive enforcement posture across the board. Enforcement elsewhere around the world followed a similar trend, with global agencies taking on increasingly active roles and showing greater willingness to assert jurisdiction in merger, civil, and criminal/cartel matters.

This report is organized into five chapters. First, we highlight a handful of significant policy and legislative developments that have ramifications across antitrust matters of all types. Second, the Merger Enforcement chapter sets out major policy developments in merger review and discusses significant enforcement decisions from the past year. Third, the Agency Investigations chapter summarizes the activity of U.S. and global enforcers concerning non-merger conduct, including related litigation. Fourth, the Criminal and Cartel Investigations chapter describes the U.S. Department of Justice's criminal enforcement activity, cartel enforcement developments in the EU, and a selection of cartel matters from other global enforcers. And fifth, the Civil Litigation chapter provides an update on private antitrust litigation and related class certification issues in the United States and the United Kingdom.

We hope you find our 2021 Antitrust Year in Review to be a useful resource. 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 Wilson Sonsini attorney or any member of the firm's antitrust practice.

A Global Spotlight on Antitrust

Antitrust has continued to capture political and popular attention, both in the United States and abroad, over the past year. In the United States, a change in presidential administration provided an opportunity for leadership shake-ups at the antitrust agencies, which have already led to sweeping policy changes and considerable party-line tension at the Federal Trade Commission (FTC). In the EU, calls for legislative action to address antitrust enforcement in technology industries took a major step forward this year as the Digital Markets Act finally cleared a plenary vote in Parliament in mid-December. This section describes some of these broader policy and legislative developments that will affect antitrust enforcement and litigation across all the areas covered by this report.

Noted Progressive Tech Critics Picked to Head Antitrust Agencies

President Joe Biden acted quickly to facilitate major changes at the FTC after inauguration. On March 22, 2021, President Biden nominated Lina Khan to be a commissioner, and she was confirmed on June 15, 2021. Shortly afterward, Biden designated Khan as the FTC chair, replacing Commissioner Slaughter who had been acting as chair since President Biden took office. Khan came to the FTC from Columbia Law School, where she was an antitrust scholar known for her progressive vision of antitrust enforcement and critique of conduct by large tech companies.[1]

On September 13, 2021, President Biden nominated Alvaro Bedoya to replace Commissioner Chopra, who had been selected to head the Consumer Financial Protection Bureau. Bedoya is a law professor at Georgetown University Law School, where his research has focused on algorithmic discrimination and the intersection of privacy and technology. The Senate held a confirmation hearing for Bedoya on November 17, 2021. The Commerce Committee deadlocked on the vote to advance his nomination on December 1, and President Biden resubmitted his nomination. Christine Wilson and Noah Phillips continue to serve as Republican commissioners.

Makan Delrahim departed as head of the U.S. Department of Justice's (DOJ's) Antitrust Section on January 19, 2021, and Richard Powers was designated the acting assistant attorney general for the Section. Powers had previously served as deputy assistant attorney general for criminal antitrust enforcement. On July 22, 2021, President Biden nominated Jonathan Kanter to permanently replace Delrahim.[2] The Senate confirmed Kanter on November 16, 2021 in a bipartisan vote. Like Chair Khan, Kanter has been a proponent of reining in what is seen as monopoly power in Big Tech and has prominently argued that regulators have failed to adequately enforce antitrust laws against the technology sector, harming small businesses and consumers. Kanter's DOJ will likely make the activity of large technology companies a major part of its enforcement agenda in the years to come.

Partisan Tension at the FTC

Chair Khan's FTC has not been shy to court controversy by using the 3-2 Democratic majority among Commissioners to enact major policy reforms. The Commissioners have voted along party lines, with Republicans issuing strong dissents, for many recent agency actions under Chair Khan, including:

- The Commission's rescission of its 2020 Vertical Merger Guidelines;[3]
- The Commission's rescission of its 1995 Prior Approval Policy Statement;[4]
- The Commission's rescission of its 2015 Section 5 Policy Statement;[5]
- The Commission's changes to its administrative rulemaking process under FTC Act Section 18;[6]
- The Commission's expansion of compulsory process for 15 priority targets;[7]

In a September interview, Commissioner Wilson offered sharp criticism of the Commission's lack of bipartisan spirit: "What we've seen is three commissioners of one political party abandon, with little or no deliberation or discussion or solicitation of input, many good-government policies and practices that were founded upon deep practical experience and supported by a broad bipartisan consensus in cases from Carter to Trump."[8]

Divisions among the Commissioners also appeared evident in more routine procedural matters. One of Chair Khan's first acts was the announcement of public Commission meetings, the first taking place on July 1.[9] For the first time in decades, these meetings allow public viewing of Commission votes regarding significant actions such as agency policy statements and procedural changes. Chair Khan has led each meeting by briefly describing the proposals being voted on, then each Commissioner has an opportunity to make statements before votes are tallied. Members of the public are invited to sign up in

advance to make 60-second statements at the end of each meeting. Republican Commissioner Wilson criticized the format, noting that it omitted knowledgeable staff and precluded discussions among Commissioners.[10] She contrasted the "chaos" of the open meeting with the "bipartisan and collaborative" approach that had characterized the agency prior to Chair Khan's tenure.

In September, Commissioner Wilson complained on Twitter that she was unable to obtain copies of Second Requests directly from the Commission and had to request copies directly from the parties.[11] Commissioner Phillips commented there was "absolutely no justification for denying a sitting Commissioner access to document requests."[12] The Commission responded that, due to the need to protect confidentiality, "second requests were generally not accessible to other Commissioners and were provided only at the Chair's discretion and direction."[13] The Commission noted, however, that the policy would be changed so that the full Commission would have access to Second Requests and voluntary access letters via a secure system.[14]

Pressure for Greater Enforcement in the United States

Congress and the White House have been active in proposing changes to antitrust law and policy. President Biden signed an Executive Order titled, "Promoting Competition in the American Economy," in July.[15] The order gave instructions to many federal department and agencies across the government to increase competition in the industries they oversee, including in technology, pharmaceuticals, aviation, and alcohol. The order also established a White House Competition Council, directed the FTC and the DOJ to assess policies including the Horizontal and Vertical Merger Guidelines, encouraged the FTC to consider rulemaking, and directed the Secretary of Health and Human Services to promote generic and biosimilar competition.

Momentum for antitrust legislation swelled in 2021. Although no bills were passed, members of both the House and Senate on both sides of the aisle made numerous proposals that would, if enacted, lead to major changes in enforcement standards and subject large technology companies to extensive regulation. For instance, both the House and Senate have advanced versions of a bill from committee that would make unlawful a broad range of practices for "dominant platforms," including favoring their own products or restricting business users from interoperating with the platform.[16] Another bill sponsored by Senator Amy Klobuchar would create a rebuttal presumption of illegality for some large transactions, add a new section in the Clayton Act for exclusionary conduct, and make a number of other changes aimed at both merger and conduct enforcement reform.[17] We expect that pressure for new antitrust legislation will continue in 2022 and that either new or existing proposals may reach floor consideration later this year.

Antitrust Legislation: The Digital Markets Act

In December 2020, the European Commission (EC) unveiled a set of proposals for regulation for large digital tech companies intended to become law at some point in 2022.[18] One of these proposals, the Digital Markets Act (DMA), is an antitrust measure intended to address a perceived lack of contestability in the digital sector. It seeks to do so by targeting a catalogue of practices such as leveraging data collected from competitors across markets, self-preferencing, and erecting switching-barriers.[19] The EU Council approved a position on the DMA in November, and the EU Parliament approved a version of the law via a plenary vote in December.[20]

Under the DMA, the EC will be solely responsible for ensuring that "gatekeeper" platforms do not harm competition, with national authorities playing an advisory role. The DMA is not designed to apply across the entire digital space, but rather focuses on certain "core platform services," such as online intermediation (e.g., marketplaces, app stores), online search, social networking, video sharing, electronic communication, operating systems, cloud services, and online advertising.[21] To provide clarity as to who qualifies as a "gatekeeper," the DMA sets out quantitative and qualitative criteria taking into account services' impact on the internal market (spelling out certain turnover thresholds, which were increased by an amendment added in the Parliament vote), the strength of services' intermediary positions (looking, e.g., at monthly active users, and the existence of an entrenched and durable position in the market.[22]

The DMA imposes a number of obligations and restrictions on the activity of gatekeepers. For instance, gatekeepers are prohibited from treating their own services more favorably on platforms they operate. Gatekeepers are also required to allow users to access services purchased outside of the platform and to allow platform

participants to promote such off-platform services. On the merger side, the DMA requires gatekeepers to notify the EC of every acquisition involving a target in the digital sector, regardless of whether EU thresholds are met. The law contemplates restrictions on killer acquisitions and allows the EC to set broad restrictions on the ability of gatekeepers to make acquisitions in areas relevant to the DMA.

The DMA is not intended to displace existing competition tools or national regimes. Germany got a jump on the DMA and introduced a national-level ex-ante regulatory tool in January 2021.[23] The German Federal Cartel Office (FCO) immediately acted upon its "first-mover advantage" by opening investigations against all four GAFA-companies. After initiating investigations against Facebook,[24] Amazon,[25] Google,[26] and Apple[27] throughout the first half of 2021, the FCO launched a broad market investigation, addressing questionnaires to hundreds of third parties in the second half of the year. If the FCO finds evidence that the investigated companies are "undertakings with paramount significance across markets," it will be able to draw upon a catalog of detailed prohibitions and new enforcement powers. A law with a similar mechanism is moving toward final adoption in Italy. In the UK, discussions to develop a national ex-ante regime are still in an early stage but are expected to intensify and potentially lead to new rules in 2022.

Merger Enforcement

2021 was a very eventful year for merger enforcement. Enforcers in the United States, Europe, and the UK each staked out more aggressive enforcement positions. In the United States, the FTC's Democratic majority under Chair Khan rescinded support for a number of policy statements, and both agencies have tightened merger control processes. Perhaps as a result, abandoned deals appeared to increase this year, though the agencies' actual success in litigation was mixed. In Europe, the EC courted controversy by implementing and exercising a new referral process allowing review of deals that do not meet ordinary notification thresholds, and the UK Competition and Markets Authority (CMA) released guidelines that outline a more dynamic approach to merger enforcement.

Upheaval in U.S. Merger Enforcement Policy and Practice

In the second half of this year, the antitrust agencies—particularly the FTC once Khan was confirmed as Chair—enacted a wave of policy and practice changes following signals from the Biden Administration in favor of more aggressive enforcement. President Biden's Executive Order titled, "Promoting Competition in the American Economy," declared his Administration's policy to "enforce the antitrust laws to combat excessive concentration in the industry."[28] The order instructed federal agencies to cooperate more to promote competition and to revise guidelines and adopt regulations to avoid further consolidation.[29] Notably, the order expressly asked the DOJ and the FTC to consider revising their horizontal and vertical merger guidelines and reaffirmed the FTC and DOJ's authority to challenge consummated transactions.[30]

The FTC Breaks Sharply from Prior Merger Enforcement Policy

In September, the FTC voted 3-2 along party lines to rescind its support for the Vertical Merger Guidelines jointly issued by the DOJ and the FTC in 2020. At the time of their adoption, the agencies stated that the 2020 Guidelines would encourage competition by increasing clarity and predictability in the merger review process.[31] The FTC's vote to change course so soon is noteworthy, particularly given the fact that the DOJ did not also rescind its own support. Chair Khan released a joint statement with Commissioners Chopra and Slaughter explaining the decision, arguing that the Guidelines contravened statutory text, ignored empirical evidence by giving too much credit to elimination-of-double-marginalization (EDM) efficiencies, and created difficulties for courts attempting to evaluate the procompetitive efficiencies of vertical mergers.[32] The majority Commissioners said that new, yet-to-be-developed guidelines will consider market structure presumptions and additional mechanisms of harm, but the FTC has not yet set a timeline for issuing these new guidelines.[33]

Commissioners Wilson and Phillips objected to the decision, arguing that the FTC failed to seek public input and had sown confusion by rescinding the 2020 Guidelines without issuing new ones.[34] The dissenters argued that the Guidelines are indeed grounded in empirical evidence and reflect the reality that vertical mergers are less likely to harm consumers than horizontal mergers.[35] The dissenters also pointed out that the DOJ did not also rescind the Guidelines, meaning that the two agencies are currently applying different standards to vertical mergers.

Earlier in the year, the Commission also voted to rescind its 1995 Policy Statement on Prior Approval and Prior Notice Provisions, again 3-2 along party lines.[36] Before 1995, the FTC regularly required all companies that had been found to have violated the law in a previous acquisition to obtain prior approval from the FTC for any future transaction in the same product and geographic market. The FTC decided to eliminate this requirement in 1995, concluding that HSR filings would suffice, and that prior approval and prior notice provisions were required only when there was a "credible risk" of an unlawful merger.[37]

In October, the FTC officially announced a return to the pre-1995 policy, whereby it will "routinely requir[e] merging parties subject to a Commission order to obtain prior approval from the FTC before closing any future transaction affecting each relevant market for which a violation was alleged" for a "minimum of ten years."[38] In a highly contentious joint dissent, Commissioners Wilson and Phillips harshly criticized the decision as "daft," "perverse," and "bonkers crazy."[39] The two Republicans contended that the majority's purported goals were not served by the shift in policy and claimed the majority's true intentions were to weigh down all merger activity, regardless of whether a deal was lawful or not.[40] The minority Commissioners also criticized the decision on procedural ground, arguing that Commissioner Chopra issued a "zombie vote" that was cast weeks before the announcement and prior to his departure from the FTC.[41]

The Agencies Tighten Merger Process

In prior years, parties could request and receive permission to close a transaction prior to the end of the applicable waiting period under the HSR Act (usually 30 days). In February, the FTC and the DOJ suspended the early termination practice for HSR filings, claiming the agencies were overwhelmed by a high number of deals.[42] Although the agencies stated that the suspension was temporary, they have not indicated whether or when they will reinstate the early termination practice.

1. **Issuing "At Your Own Risk" (AYOR) Warnings.** In August, the FTC began sending warning letters to companies saying that they may close at their own risk even after the expiration of the HSR waiting period.[43] While this reflects current law, which permits the FTC to challenge an illegal merger even after the expiration of the HSR waiting period, it has been rare for the FTC to challenge consummated mergers. The industry has interpreted the FTC's AYOR warnings as demonstrating increased willingness to challenge mergers post-closing, and increased uncertainty for deals.

2. **Making the Second Request Process "More Rigorous."** In September, the FTC announced changes to its Second Request process in an effort to make the process "more streamlined and more rigorous."[44] According to the announcement, the FTC plans to make Second Requests even more demanding by broadening the scope of investigations to "factor in additional facets of market competition" in its review, such as a deal's effect on labor markets or how the involvement of investment firms may affect competition.[45] The FTC also announced it was changing certain practices to more closely align with the DOJ (such as requiring upfront information about e-discovery methods, and no longer allowing parties to submit partial privilege logs).[46]

Increased Scrutiny of "Big Tech" Deals

In 2021 the agencies continued their increased scrutiny of acquisitions by large technology companies and closely investigated transactions which did not present any obvious competition problems. Amazon's acquisition of legacy film production studio Metro-Goldwyn-Mayer (MGM) is a notable example.[47] Despite MGM's legacy, it is no longer a major production company and has struggled financially for decades, including a bankruptcy in 2010.[48] Amazon is a large technology company but is small compared to Netflix, and both services are steadily losing share to Disney+.[49] The transaction would seem to present no competitive concerns, but the FTC has reportedly issued a second request, signaling a protracted, in-depth review.[50] This is likely because the FTC is worried about Amazon's overall size rather than because it anticipates negative effects in the market for content production or distribution.[51]

Agency focus on technology deals is likely to be bolstered by the conclusion of the FTC's Rule 6(b) study of acquisitions by Alphabet, Amazon, Apple, Facebook, and Microsoft between 2010 and 2019 that fell below the HSR reporting thresholds.[52] At the FTC's September open meeting, Chair Khan claimed that the study illustrated the systemic nature of large digital platforms buying, instead of competing with, small rivals.[53] She argued that the

study supports closely examining and possibly reforming HSR's reporting requirements.[54] Commissioner Chopra suggested amending the HSR rules to require the largest firms to report all mergers and acquisitions, even those that fall below the reporting thresholds.[55]

Wins, Losses, and Settlements in the Healthcare Sector

As in previous years, healthcare merger enforcement continued to be a major priority for the agencies. Given the increased focus on healthcare access caused by the pandemic, both the FTC and the DOJ vigorously pursued challenges within the healthcare space, to varying degrees of success.

Jefferson Health/Albert Einstein Healthcare Network. In March, the FTC lost its challenge of the proposed merger of Jefferson Health and Albert Einstein Healthcare Network, two leading providers of inpatient general acute care hospital services and inpatient acute rehabilitation services in Pennsylvania—the agency's first loss in a hospital merger case in 20 years.[56] The FTC moved to block the proposed merger last year and filed for a preliminary injunction alongside the Pennsylvania Attorney General to halt the transaction.[57] The FTC argued that the transaction would substantially lessen competition in the market for "inpatient acute rehabilitation services in the Philadelphia Area," alleging a post-transaction market share of at least 70 percent.[58] In denying the parties' preliminary injunction, Judge Pappert of the Eastern District of Pennsylvania found that the FTC's alleged markets should have focused more on the insurers, who would feel the immediate impacts of any price increases, rather than the patients.[59] The Commission voted 4-0 to voluntarily dismiss the case after the opinion was released.[60]

Hackensack Meridian/Englewood Healthcare. The FTC moved unanimously to block Hackensack Meridian Health, Inc.'s proposed acquisition of Englewood Healthcare Foundation in December 2020.[61] The FTC alleged that the merged healthcare system would control three of the six inpatient general acute care hospitals in Bergen County, New Jersey, and that the proposed deal would eliminate competition in New Jersey's most populous county.[62] The FTC alleged that this would ultimately allow Hackensack Meridian Health to demand higher rates from payers.[63] The U.S. District Court for the District of New Jersey granted the FTC's preliminary injunction in August 2021 halting the transaction.[64] The merging parties appealed the order to the Third Circuit and oral arguments concluded December 7, 2021.[65] The FTC administrative trial is currently paused while respondents appeal the preliminary injunction.

Geisinger Health/Evangelical Community Hospital. In March 2021, the DOJ reached a settlement concerning Geisinger Health's partial acquisition of Evangelical Community Hospital.[66] Geisinger originally sought to obtain a 30 percent stake in Evangelical Community Hospital, but under the deal may obtain no more than a 7.5 percent passive interest.[67] In its complaint, the DOJ alleged the parties together had approximately 71 percent of the market for "inpatient general acute-care services" within a six-county region in central Pennsylvania.[68] The DOJ argued that a partial acquisition would have created "entanglements" between the two parties.[69] For example, the DOJ was concerned with Geisinger receiving rights of first offer and first refusal for any joint venture.[70] Such an agreement would have likely increased coordination and reduced competition between the two entities.[71] According to the DOJ, the settlement allowed for the procompetitive aspects of this transaction, such as record sharing and technology support, to proceed. The DOJ emphasized that the 7.5 percent passive interest was not a safe harbor and reflected a particularized assessment of this case.[72]

Abandoned Deals Increase as Agency Scrutiny Intensifies

Merging parties appeared more likely to abandon deals in 2021 in the face of a more aggressive enforcement posture from U.S. agencies around both novel and conventional theories of harm. Two noteworthy deals potentially susceptible to "nascent competition" challenges were abandoned in January 2021. Proctor & Gamble, the leading brick-and-mortar supplier of wet shave razors, abandoned its planned acquisition of Billie, which had begun to carve out a niche with younger women and e-commerce distribution, after opposition from the FTC.[73] Visa abandoned its acquisition of Plaid, which operates a leading financial data aggregation platform, after the DOJ sued on the theory that the deal would have eliminated a threat to Visa's online debit monopoly.[74]

Other abandoned deals presented more conventional theories of harm. The DOJ sued to block the merger of Aon and Willis Towers Watson, two of the three largest insurance brokers in the world, arguing that the deal would increase industry concentration and lead to higher prices for lower quality insurance services.[75] Despite receiving approval with divestitures at the EC,

the parties abandoned the deal in July 2021.[76] Similarly, the FTC moved to block Lehigh Cement Company's acquisition of Keystone Cement Company, arguing that Keystone had been an aggressive price cutter that often won business from Lehigh.[77] An administrative trial was scheduled to begin in November 2021, but the parties abandoned the transaction in June 2021.[78]

Unusual Merger Enforcement Actions

The FTC Conducts Two Administrative Trials

To challenge a merger, the FTC must file an administrative complaint internally. Usually, it will simultaneously seek a preliminary injunction in federal court, leading to a *de facto* trial on the merits of the case before a federal judge. The FTC and parties almost always end their dispute after the federal court rules on the preliminary injunction rather than proceeding to an administrative trial. For this reason, administrative trials in merger cases have been extremely rare.[79] It is therefore unusual that the FTC held not one but two administrative merger trials this year.

The first trial was held in June 2021 regarding Altria Group's already-closed investment in JUUL Labs, Inc.[80] At trial the Commission sought to prove that Altria, one of the largest tobacco companies, unlawfully agreed to discontinue its line of e-cigarettes in return for a substantial ownership interest in JUUL (a leading e-cigarette maker).[81] The parties disputed that the investment was conditioned on Altria exiting the e-cigarette market and argued that Altria stopped producing its line of e-cigarettes because it had failed to gain traction with consumers despite intense promotional efforts.[82] An initial decision is expected in early 2022.

In the second trial, the Commission asked the administrative law judge to unwind Illumina Inc.'s $7 billion acquisition of Grail Inc. Grail is the only company that has so far launched a "multi-cancer early detection" (MCED) test, which can screen for many types of cancer in asymptomatic patients at very early stages by performing DNA sequencing on a blood sample.[83] Illumina is the only provider of DNA sequencing suitable for MCED tests in the United States,[84] and the Commission argues that after the merger Illumina will therefore have the ability and incentive to raise the prices for DNA sequencing for rivals developing MCED tests.[85]

The Illumina trial is the result of some unusual maneuvering by the parties. The FTC filed its administrative complaint in March 2021, before the transaction closed,[86] and as is typical, filed a complaint in federal court seeking a preliminary injunction to prevent the parties from closing during the administrative proceedings.[87] The FTC withdrew its federal suit in June 2021, believing the European Commission's decision to review the deal would delay closing.[88] However, the parties closed the transaction despite the EC's investigation,[89] and so the FTC litigated the merits of the case at an administrative trial, rather than in federal court. The trial ended in September and the outcome is pending.

The FTC Brings Another Vertical Challenge

The FTC capped off the year with a challenge to NVIDIA's acquisition of ARM.[90] The challenge is notable because the agency had not challenged a vertical deal in decades and has now challenged two this year—the first being Illumina/Grail. ARM is a leading open-licensing chip design provider.[91] The FTC alleges the acquisition will give "NVIDIA control over critical ARM technologies"[92] and that NVIDIA will have the ability and incentive to foreclose its competitors' access to those technologies.[93] A trial date is not yet available.

Democratic FTC Commissioners Publicly Call Staff-Negotiated Settlement into Question

In August 2020, 7-Eleven entered into an agreement to acquire approximately 3,900 Speedway stores for $21 billion.[94] Following a protracted Second Request process, 7-Eleven negotiated a settlement agreement with FTC staff to divest 293 fuel outlets to resolve the Commission's concerns.[95] In May 2021, just days before the transaction was scheduled to close, Democratic Commissioners Slaughter and Chopra asked the parties for additional time to review the settlement.[96] The parties declined and closed the transaction on May 14, citing their reliance on their negotiated agreement with FTC staff.[97]

In response, the Democratic Commissioners publicly reprimanded 7-Eleven's decision to close the transaction, warning that the parties had closed at their own risk and advising that the Commission would continue to work with State Attorneys General to determine "an appropriate path forward."[98] The Republican Commissioners responded with a statement criticizing the Democratic Commissioners for failing to reach a resolution with the parties despite having "plenty of time" to review and work towards an agreement that protected consumers.[99] In June, the Commission finally signed off on the

already-consummated transaction, approving a deal virtually identical to the one negotiated by the parties and agency staff.[100]

The DOJ's Monopsony Case

In November, the DOJ filed a lawsuit to block Penguin Random House's proposed acquisition of Simon & Schuster alleging that the acquisition will harm the authors of top-selling books.[101] The DOJ's complaint focuses on the loss of head-to-head competition between Penguin Random House and Simon & Schuster for the rights to well-known authors' books with minimal assertions that the transaction would result in consumer harm.[102] Until recently, monopsony cases were unusual, but in July President Biden announced his administration's antitrust policy will include a focus on monopsony, stating, ". . . it is the policy of my Administration to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony."[103] Trial is scheduled for August 2022.

The DOJ Sues to Block Co-Marketing Agreement

In September 2021, the DOJ, along with six states and the District of Columbia, took the unusual action of suing to block a co-marketing collaboration between American Airlines and JetBlue Airways.[104] The complaint suggests the collaboration, under which American and Jet Blue will sell each other's seats, market each other's flights, and share revenues on selected routes, amounted to a "de facto merger[]" and was the "modern-day version of a nineteenth-century business trust."[105] In the parties' motion to dismiss, they stressed that the "procompetitive alliance" has benefited consumers for nine months, yet the DOJ failed to allege "that the [alliance] has actually harmed competition."[106]

EU Merger Enforcement Developments

European Commission Introduces Controversial New Referral System for Non-Notifiable Deals

In March 2021, the EC published guidance on its new Article 22 referral policy.[107] Article 22 of the EUMR enables Member States to request that the EC review any merger that does not meet the EU merger thresholds, but "*affects trade between Member States*" and "*threatens to significantly affect competition*" within the territory of that Member State(s), regardless of whether it meets the thresholds in that Member State. The referral mechanism was originally introduced to give Member States which did not have national merger control regimes (the Netherlands, at the time) a legal basis to ensure potentially problematic mergers could still be reviewed.

The EC's new guidance clarifies that any transaction that does not trigger EU or national thresholds can still be referred to the EC because of its potential competitive impact.[108] According to the EC, turnover-based thresholds failed to capture acquisitions of nascent and innovative companies with little to no turnover, but which could play a significant role on the market. This clarification stretches the Article 22 mechanism significantly beyond its original purpose and encourages referrals even where a Member State does not have jurisdiction over the case.[109]

In April 2021, the EC accepted the first referral under the new mechanism: Illumina's proposed acquisition of Grail. Even though Grail had no EU turnover, the EC accepted the referral based on the cross-border impact of the deal and the fact that Grail had competitive significance beyond its immediate sales. The French Council of State rejected an application from Illumina to suspend the referral because the referral request cannot be separated from the substantive merger review and therefore can only be challenged before EU courts once the EC reaches a decision.[110] Illumina continues to contest the EC's use of Article 22 to establish jurisdiction before the EU General Court.

In August, the EC opened its second Phase II investigation based on its new Article 22 referral policy.[111] The EC is investigating whether Facebook's acquisition of customer service platform Kustomer might increase the amount of data available to Facebook for personalizing advertisements, allowing the company to further strengthen its position in the online display advertising market. The merger could also give Facebook incentives to stop providing Kustomer's competitors with access to its messaging services, which would reduce competition in the market for customer relationship management software. Controversially, the German Competition Agency refused to join the Article 22 referral request, stressing that its opinion is that a referral requires a merger to be subject to notification based on national competition law (contrary to the EC's current position).[112]

The EC Continues to Prosecute Procedural Infringements

In May, the EC fined Sigma-Aldrich €7.5 million for providing incorrect

or misleading information on three occasions[113] during the enforcer's review of its acquisition by Merck, so that the EC would not order it to divest an R&D project known as iCap.[114] It is only the third such fine, all of which have been in the last four years. While the EC has not revoked any clearance decision due to procedural infringements so far, it retains this power.

In August, Illumina completed its acquisition of Grail despite the EC's ongoing review of the deal.[115] The EC opened an investigation to determine whether this constitutes gun-jumping and adopted its first gun-jumping interim measures in October, requiring that Grail be held separate from Illumina.[116] The EC also instructed Grail to actively work on alternative options to the transaction, should the EC block it. Compliance will be monitored by a trustee approved by the EC.

In September, the EU General Court confirmed the EC's gun-jumping fine imposed on Altice for both failing to notify the deal and closing the deal before clearance in the context of its acquisitions of the assets of Portugal Telecom.[117] However, it reduced the fine from €124.5 million to €118.3 million insofar as Altice took steps to inform the agency about the deal before filing the notification. Altice has appealed before the EU's highest court.[118]

UK Merger Enforcement Developments

CMA Publishes Its Final Merger Assessment Guidelines

In March 2021, the CMA published updated Merger Assessment Guidelines. Together with its revised guidance on jurisdiction and procedure, these Guidelines aim at strengthening the CMA's merger control investigations post-Brexit. The Guidelines maintain the CMA's approach to dynamic competition, confirm the reduced prominence of market definition, and clarify its assessment of concerns regarding substantial lessening of competition.[119] Despite potential legal uncertainty, the CMA confirmed its shift to a more dynamic counterfactual assessment to address so-called "killer acquisitions." The Guidelines also include more detail on how it will consider competitive effects in mergers involving two-sided platforms, including network effects and tipping. Further, the CMA acknowledged that sustainability objectives are relevant to customer benefits and may be included in the merger assessment under specific circumstances. Finally, the CMA emphasized that market definition is primarily about identifying the most significant alternatives rather than determining quantitative thresholds.

The UK CMA continued this year to aggressively assert its jurisdiction and role in reviewing globally significant deals. In October, the CMA fined Facebook £50.5 million for breaching an IEO imposed as part of the regulator's review of the completed $400 million acquisition of the GIF database company GIPHY, Inc.[120] Facebook unsuccessfully appealed the CMA's freeze order before the Competition Appeal Tribunal (CAT)[121] and in the Court of Appeal.[122] The penalty decision marks the first time in the CMA's history that it has found that a company "consciously refused" to supply compliance information required under an IEO, despite repeated warnings and court losses.

On November 30, the CMA blocked the deal over concerns that Facebook would be able to increase its already significant market power in relation to other social media platforms by denying or limiting access to GIFs or changing the terms of access by, for example, requiring more data.[123] The CMA found that the deal had removed GIPHY as a potential challenger in the display advertising market. Facebook must now sell GIPHY to a CMA-approved buyer.

Expanded Notification Requirements

The UK's current draft proposals for an updated digital regime would require all firms determined to have a "strategic market status" by the CMA's new Digital Markets Unit to report all transactions to the CMA "within a short period after signing." Those that meet certain thresholds would be subject to mandatory notification, with a prohibition on pre-clearance completion. While retaining the existing substantive test, the CMA proposes using a "lower and more cautious standard of proof" at Phase II, meaning the CMA could intervene where there is a "realistic prospect" that a merger gives rise to a significant lessening of competition (compared to the current balance of probabilities test).[124]

In addition, the UK's National Security and Investment Act entered into force on January 4, 2022. It establishes a U.S. CFIUS-like (Committee on Foreign Investment in the United States) framework whereby acquisitions of UK entities or assets in 17 sensitive sectors are subject to mandatory notification, with a voluntary regime for others. The mandatory sectors include a heavy focus on the tech industry, with communications, data infrastructure, computing hardware, and artificial intelligence all included. The trigger events include minority investments, as well as intra-group transactions and (in the context of the voluntary regime)

acquisitions of, or transactions giving control over, assets such as land or IP.

Coupled with the existing "voluntary" merger regime (which the CMA has pushed to its jurisdictional limits), these developments mean dealmakers considering any transaction with a UK nexus—however limited—will need to be prepared to navigate an increasingly fragmented and complex regulatory environment across the UK and the EU.[125]

Agency Investigations

Antitrust investigations and enforcement in conduct matters reflected a still intensifying focus on the activity of large technology companies in 2021. Federal agencies in the United States continued to press their suits against tech giants, and the FTC sought to establish stronger enforcement powers and more aggressive policy under Chair Khan. State attorneys general were particularly active this year, filing numerous suits both in conjunction with and independently of federal agencies. European and other global enforcers also pressed forward, issuing decisions, filing objections, and launching investigations in a number of technology and platform-related matters.

The FTC

Strategic, Policy, and Rulemaking Changes Under Chair Khan

In September, Chair Khan released a memo outlining her thoughts on the Commission's strategic approach, policy priorities, and operational objectives.[126] Khan identified several key principles that she believes should guide the agency's strategic approach. Notably, Khan promised to focus the agency on next-generation technologies, innovations, and nascent industries across sectors. Operationally, Khan stated the agency would consider a wider array of antitrust harms, including harms against workers and independent businesses, and employ a wider range of analytical tools to assess business practices.

The FTC passed two packages of procedural rule changes that make it easier for the agency to issue compulsory process to companies this year. The resolutions allow a single Commissioner, instead of a majority of sitting Commissioners, to approve FTC compulsory requests such as civil investigative demands and subpoenas for information in investigations. These resolutions only apply for key "priority targets"—such as large company acquisitions, tech platforms, and monopolistic practices—and expire after 10 years.[127]

Chair Khan stated that the resolutions cut down on "red tape" bureaucracy and give FTC staff appropriate power to target unfair practices.[128] Commissioners Wilson and Phillips were opposed to both measures, arguing that they go beyond the FTC's legislative delegation of authority, and "create less accountability and more room for mistakes, overreach, cost overruns, and even politically-motivated decision making."[129]

Calls have grown for the FTC to exercise its rulemaking powers in the competition and privacy arenas, something the agency has not done for decades.[130] In July, the Commission voted 3-2 along party lines to approve changes to its rulemaking process that give more power to the Chair to initiate and push along FTC rulemaking.[131] The change gives the Chair power to appoint the Chief Presiding Officer, a role previously held by the FTC's Chief Administrative Law Judge. The new rules also remove the requirement for a staff report and allow the Commission to designate factual disputes earlier in the process. Commissioners Wilson and Phillips opposed the changes, arguing that the changes "enable the Chair to hand pick the presiding officer, opening the door for a fact-finding process gerrymandered to fit the agenda of a majority of commissioners."[132]

Supreme Court Bars the FTC from Seeking Equitable Monetary Relief in Federal Court

In April 2021, the Supreme Court unanimously held that Section 13(b) of the FTC Act does not authorize the agency to seek monetary equitable relief such as restitution or disgorgement.[133] The Court observed that Section 5 of the FTC Act authorizes the Commission to impose civil penalties through administrative proceedings and held that the authorization to seek a permanent injunction in federal court under Section 13(b) therefore did not support conferring broader authority to seek retrospective equitable relief from courts and bypass such proceedings.

New Focus on Oil and Gas Markets

In August, Chair Khan said the FTC will investigate potential unlawful conduct in the U.S. gasoline market.[134] Chair Khan promised to enhance agency efforts in three key ways: 1) by identifying additional legal theories to challenge mergers where dominant players are buying family-run businesses, 2) by deterring unlawful mergers via "prior

approval" requirements, and 3) by investigating abuses in the gas franchise market.

In a September statement, the Commission elaborated further on the latter.[135] The FTC detailed the practice of price "restoration," whereby one retail gas chain implements a significant price increase across all of its stations in a certain city or area, then monitors to see if competitors follow and raise prices. If competitors do not follow, the instigator will lower its prices and wait for another opportunity. If competitors do follow, prices for gas suffer a sustained rise across the city. According to the agency, "Staff has observed common restoration behavior among major chains, leading to a concern that consolidation may have led to a world more conducive to signaling behavior."[136]

Facebook Suit Dismissed and Re-Filed

In December 2020, the FTC and a group of 48 state and territory attorneys general filed separate but substantially identical suits against Facebook, alleging that the acquisitions of Instagram and WhatsApp suppressed prospective competition in the market for social networking and that Facebook's policy of refusing interoperation with competing apps was anticompetitive. In June, Judge James Boasberg of the D.C. District Court issued parallel rulings dismissing both suits.

The court found the FTC's allegations of market power in the market for personal social networking to be deficient, noting that the complaint gave no indication of the metrics or methods used to calculate Facebook's market share or any indication of what services or competitors the market includes. The court found that Facebook's interoperability policy could have been unlawful but that there were no allegations of any examples of revocation during the statute of limitations. The FTC was given leave to amend. The states' claims were dismissed as time-barred under the doctrine of laches with no opportunity to amend.[137]

In August, the FTC filed an amended complaint, this time providing Comscore data to support the market power allegations and alleging that Facebook continues to enforce its policies regarding interoperability.[138] The Commission vote to authorize filing the amended complaint was 3-2 along party lines. Commissioner Wilson issued a dissent, a rarity in votes to authorize a complaint so as to avoid undermining the Commission's case. Commissioner Wilson's primary concern was that the suit undermines the agency's own prior evaluations of Facebook's acquisitions of Instagram and WhatsApp and that seeking to unwind those acquisitions undermines the integrity of the premerger notification process. In January, the court denied Facebook's motion to dismiss the amended complaint, finding that the complaint was now sufficiently detailed on market definition. However, the court still narrowed the case by rejecting the FTC's claims about Facebook's interoperability policies. The court also rejected Facebook's efforts to have the case dismissed on the grounds that FTC Chair Khan had prejudged the case.

The FTC Settles Broadcom Investigation

In July, the FTC announced it has reached an agreement with Broadcom to settle charges that the company monopolized the semiconductor market for chips used in broadband modems and set-top cable boxes.[139] According to the agency's complaint, Broadcom illegally maintained its market power by entering long-term agreements with both original equipment manufacturers (OEMs) and service providers that prevented these customers from purchasing chips from Broadcom's competitors, leading them to purchase Broadcom's chips on an exclusive or near-exclusive basis. The settlement prohibits Broadcom from using certain types of exclusivity or loyalty agreements for core chips, such as conditioning discounts on a customer buying more than 50 percent of their requirements from Broadcom, and from retaliating against customers that deal with competitors.

Pharmaceutical Companies Still Under the FTC's Microscope

The FTC continued its enforcement focus on pharmaceutical companies in 2021. This year saw two significant decisions in the various litigations related to oxymorphone ER (sold under the brand Opana ER). The FTC originally filed a suit in 2017, alleging that Endo Pharmaceuticals and Impax Laboratories entered into an unlawful agreement in 2010 that prevented Endo from entering with a generic version of its Opana ER product until 2013 in exchange for a $112 million payment.[140] Endo settled, and Impax proceeded to an administrative trial where the Commission found the agreement to be an illegal reverse payment.[141] During that litigation, Endo and Impax entered a second, similar agreement following the FDA's request that Endo voluntarily withdraw a reformulated Opana ER from the market. The FTC sued Endo and Impax over this second agreement in January 2021.[142]

In April 2021, the Fifth Circuit ruled on Impax's appeal in the first action and upheld the FTC's decision.[143] Notably, this was the first FTC pay-for-delay case to be fully litigated following the Supreme Court's landmark 2013 decision in *FTC v. Actavis*. The case will provide the FTC appellate backing for its decisions to ban similar reverse-payment deals. In June, Endo Pharmaceuticals lost its motion to dismiss the FTC's new action.[144]

In a separate matter concerning the AndroGel testosterone drug, the FTC in July withdrew its remaining claims against AbbVie.[145] In 2014, the FTC charged AbbVie and Besins Healthcare for illegally blocking patients' access to lower-cost alternatives to AndroGel through a reverse-payment agreement and by filing baseless patent infringement lawsuits against potential generic competitors. The trial court dismissed the reverse-payment claim but held Abbvie and Besins liable for filing sham litigation and awarded the FTC $493.7 million in equitable monetary relief to return to consumers. On appeal, the Third Circuit reinstated the reverse payment claim but overturned the sham litigation award on the ground that the FTC lacked the power to obtain equitable monetary relief, a ruling essentially affirmed by the *AMG Capital Management* case described above. The FTC considered that intervening market developments and settlements in other matters had essentially resolved the reverse payment claim and therefore withdrew its suit.

Second Circuit Overturns FTC Win in 1-800-Contacts Suit

In June, the Second Circuit vacated a decision by the FTC that 1-800 Contacts was unreasonably restraining truthful advertising.[146] The FTC found that from 2004 to 2013, 1-800 Contacts sent cease and desist orders to various competing contact sellers, alleging that those competing sellers were infringing on 1-800 Contacts' trademarks by using search advertising keywords relating to those trademarks. 1-800 Contacts entered 13 settlement agreements restraining both 1-800 Contacts and their competitors from using each other's trademarks, URL, or variations of those things as search advertising keywords.

The Second Circuit rejected 1-800 Contacts' argument that trademark agreements were "generally immune from antitrust scrutiny." But the court also found that it did not have enough experience with this type of conduct to employ an abbreviated "quick look" analysis as the FTC did. The Second Circuit therefore applied the rule of reason and found that 1-800 Contacts' interest in reducing litigation costs and protecting its trademarks was a procompetitive end that justified the trademark agreements. The court also found the FTC's proposed less restrictive means to be overbroad and practically difficult to enforce. The court therefore remanded the case to the FTC with instructions to dismiss.

The U.S. DOJ

Search Monopolization Litigation Against Google Moves Forward

The DOJ and 11 state attorneys general sued Google in October 2020, alleging unlawful maintenance of monopolies in search and advertising markets through agreements related to the placement of Google Search on mobile phones and in web browsers.[147] The DOJ alleges that these agreements precluded other general search engines from important distribution opportunities and denied them the user and query data needed to effectively compete. The case was consolidated for discovery and pretrial purposes with a suit filed by a separate group of state attorneys general that incorporates the DOJ complaint and adds additional allegations (described below).[148] Discovery in the matter is ongoing, and trial is scheduled for September 2023.[149]

The DOJ Withdraws Settlement with National Association of Realtors

In July 2021, the DOJ announced its withdrawal from its November 2020 settlement agreement with the National Association of Realtors (NAR) after it determined the agreement would not adequately protect the department's rights to investigate other NAR conduct that might impact competition in the real estate market.[150] The November 2020 agreement settled charges that NAR had established and enforced certain rules and policies that illegally restrained competition in residential real estate services, including prohibiting the disclosure of broker commissions and limiting access to the lockboxes that provide licensed brokers with access to homes for sale to certain brokers.[151] Private litigation regarding NAR rules has been active in 2021, and some notable decisions are discussed below in the Civil Litigation chapter.

DOJ Restores Its 2015 Business Review Letter to IEEE on SEP Licensing

In April 2021, the Antitrust Division reclassified its 2020 Supplement to a 2015 Business Review Letter as "Advocacy" rather than Formal Guidance. The 2020 Supplement, issued by the previous administration, had limited the effect of the 2015 BRL, which approved a standard-setting policy that made it difficult for Standard Essential Patent (SEP) holders to seek injunctions

and limited SEP holders' flexibility in royalty negotiations with licensees. The 2020 Supplement stated that the Antitrust Division did not support limiting the rights of SEP holders to seek injunctive relief or negotiate reasonable royalty rates.[152]

Coordination with Other Federal Agencies

The DOJ issued a statement in June supporting three proposed rules from the U.S. Department of Agriculture (USDA) relating to enforcement of the Packers and Stockyards Act. The rules were designed to 1) provide clarity and strengthen enforcement of unfair and deceptive practices, undue preferences, and unjust prejudices; 2) propose a new poultry grower tournament rule; and 3) clarify a rule that parties do not need to demonstrate competitive harm in order to bring an action under sections 202(a) and 202(b) of the Act.[153] In July, the DOJ issued a statement in support of the USDA's $500 million pledge to expand meat and poultry processing capacity to increase competition and level the playing field for family farmers and ranchers.[154]

Also in July, the DOJ and the Federal Maritime Commission (FMC) signed an interagency Memorandum of Understanding (MOU) to foster cooperation and communication between the agencies to enhance competition in the maritime industry.[155] The MOU establishes a framework for the Antitrust Division and the FMC to regularly discuss and review law enforcement and regulatory matters affecting competition in the maritime industry and to exchange relevant information and expertise.

The DOJ submitted a comment in August in support of the Federal Reserve's proposal to clarify that rules ensuring that merchants processing transactions can pick at least two different debit card networks to "card-not-present" transactions, such as online purchases through virtual wallets.[156] The DOJ argued that the rule was a chance to foster competition by lowering a barrier to both entry and expansion for new and small debit card networks.

State Enforcement

D.C. Attorney General Sues Amazon over MFN Provisions

In May, the Attorney General of the District of Columbia sued Amazon in the D.C. Superior Court alleging that it fixed online retail prices and stifled competition through contract provisions and policies that prohibited third-party sellers from offering their products at lower prices or better terms on any other online platform.[157] In September, the AG amended the complaint to add allegations that Amazon's agreements with the suppliers of products it sells directly are anticompetitive.[158] Amazon has moved to dismiss, arguing that its various agreements ensure low prices for consumers and that its policies that limit third-party seller's prices on other websites are in place to prevent price-gouging.[159]

Utah Leads Suit over Google Play Store

In July 2021, the Utah Attorney General and a group of 36 other attorneys general filed suit in the Northern District of California alleging that Google effectively compels Android users and application developers to use its Google Play Store while collecting supracompetitive commissions on app purchases.[160] The complaint alleges that Google has established and maintained a monopoly in the market for Android app distribution through its control over the Android operating system as well as through agreements that require installation and prominent placement of Google services and discourage the creation and distribution of rival app distribution channels. In addition, Google allegedly forces developers to use Google's in-app billing system, which requires them to pay excessive commissions to Google on sales of in-app digital content. The litigation is ongoing.

State AG Google Search Monopolization Suit Consolidated with DOJ Action

In December 2020, a group of 38 state and territory attorneys general brought a suit against Google alleging monopoly maintenance in search and search advertising markets that overlaps substantially with the DOJ suit described above.[161] The complaint fully incorporates DOJ complaint but adds two new allegations. First, the states claim that Google further enhanced its monopoly position by failing to implement features for rivals in its Search Ads 360 search engine marketing tool. Second, the Colorado complaint alleges that Google designed its search results in a way that reduced traffic to "specialized" search providers, alleged not to compete with Google, and thereby raised barriers to entry and expansion in a "general" search market. As noted above, the case was consolidated with the DOJ action for pretrial purposes and discovery in both cases is ongoing.[162]

Texas Suit Against Google Consolidated into MDL over AG Objections

In December 2020, 10 state Attorneys General, led by Texas AG Ken Paxton, filed a complaint in the Eastern District of Texas accusing Google of monopolizing the market for advertising displayed on third-party websites.[163] In January, Google filed a motion to transfer to the Northern District of California, where private class-action suits also alleging monopolization of the display advertising markets were pending. The court denied the transfer in May, finding that Texas was no less convenient and that the private suits involved different claims, parties, defenses, and damages.[164] In August, however, the case was consolidated by the Judicial Panel on Multidistrict Litigation into a multidistrict litigation (MDL) with 19 other lawsuits accusing Google of monopolizing the display advertising market for pretrial proceedings. The consolidated cases were assigned to U.S. District Judge P. Kevin Castel of the Southern District of New York.[165] This decision has attracted attention from Congress, and bills to exempt state attorneys general from the MDL statute have been proposed.[166]

Civil Antitrust Enforcement Outside the United States

Draft Vertical Rules for 2022 Introduced in EU and UK

In July 2021, the EC published first drafts of its revised Vertical Block Exemption Regulation (VBER) and Vertical Guidelines due to enter into force in June of next year.[167] The updated rules contain sweeping changes for online platforms and to dual distribution rules. For instance, the draft VBER clarifies the scope of the dual distribution privilege (exempting dual distributors from the stricter set of horizontal rules), but at the same time newly introduced market share thresholds will make it more complex for many companies to assess whether they qualify for the exception. The update also liberalizes the EU's previously tight rules on online sales restrictions, allowing, for example, marketplace bans and online/offline dual pricing. In parallel, the UK CMA published a proposal to replace the substantive rules of the VBER, de facto still applied after Brexit, with a distinct UK Vertical Agreements Block Exemption Order (VABEO).[168] It is expected that this will end the synchronization between vertical rules in the EU and the UK, with the CMA specifically taking a divergent approach on dual distribution.[169]

Ongoing Scrutiny of Google, Apple, Facebook, and Amazon

The EU General Court largely dismissed Google's appeal of the $2.72 billion fine the company received in 2017 arising from the way it presented search and ads results for product offers.[170] The EU's first instance court affirmed the EC's novel approach of fining an undertaking for "self-preferencing" proprietary services on its own platform compared to competitors' services. The judges' embrace of this theory of harm will likely have a significant impact on pending investigations against other digital platforms, such as the App Store investigations against Apple (see below), in which downstream competitors have raised similar allegations of their offers being demoted by the platform. Google has not yet lodged a further appeal with the EU Court of Justice.

Apple's App Store rules came under fire around the world in 2021. The EC filed formal charges against Apple,[171] taking the preliminary view that requirements to use Apple's in-app purchase mechanism in the iOS App Store distorted competition.[172] The UK CMA launched investigations into Apple's terms and conditions for developers following complaints from the market.[173] The Russian FAS issued a warning letter to Apple, requiring it to eliminate its prohibitions to inform users about alternative payment methods.[174] Apple reached a settlement with the Japanese FTC, based on a non-public remedy that seems to allow including some type of in-app registration link in iOS apps.[175] And, finally, South Korea announced a new law prohibiting obligations by app stores to only allow payments for and in apps by proprietary in-app purchasing methods.[176]

The EC and the CMA launched parallel investigations into Facebook's use of data and the Facebook Marketplace in June.[177] The two agencies are investigating separately whether Facebook is misusing data obtained from competitors through its single sign-on option to favor its own adjacent services. The EC is also investigating potential tying practices between Facebook's Marketplace and social network. The CMA's investigation further concerns Facebook Dating.

In early December, Amazon received a $1.28 billion fine in Italy for anticompetitively leveraging its Fulfillment by Amazon (FBA) logistics service.[178] The authority found that Amazon tied sellers' use of FBA to certain privileges, specifically the use of the Amazon Prime label and participation in special promoted events (Prime Day, Black Friday, Cyber Monday), to the detriment of the logistics services offered by competing operators. EC proceedings against Amazon's Marketplace and Buy Box remain ongoing.[179]

Criminal/Cartel Investigations

Criminal and cartel enforcement remained active around the world in 2021. Although the DOJ recorded relatively low fines in 2021, it secured a number of indictments, including the first in a no-poach case. In Europe, the EC returned to pre-COVID levels of monetary penalties, consistent with an increasing pace of raids and more aggressive rhetoric on the scope of conduct it would enforce. Other global enforcers took significant enforcement actions this year as well, showing a greater emphasis on cartel enforcement around the world.

Notable Developments in the DOJ's Criminal Antitrust Enforcement Program

Enforcement Priorities and Initiatives

Labor markets have been an important recent focus of DOJ enforcement. In February, the DOJ's then-acting Assistant Attorney General for the Antitrust Division Richard Powers warned that prosecuting no-poach and wage-fixing agreements is a top priority.[180] The White House called on the antitrust agencies to step up enforcement efforts in labor markets in July through President Biden's Executive Order on Promoting Competition in the American Economy.[181] Finally, at a September antitrust conference, Associate Attorney General Vanita Gupta emphasized that the DOJ is committed to investigating and prosecuting agreements that deprive workers of a chance to bargain for better wages and working conditions.[182]

The DOJ also announced in June that it is cracking down on collusion through encrypted virtual chatrooms.[183] Then-acting Assistant Attorney General (AAG) Powers stated that chatrooms are a frequent medium for unguarded, conspiratorial exchanges and warned that institutions should ensure that their corporate controls can keep up with changing technology to prevent any untracked potential violations.

Leniency Program Updates

In February, the DOJ emphasized that those hoping to receive immunity under its leniency program must provide full and complete cooperation.[184] The DOJ's former Director of Criminal Litigation, Andre Geverola, noted that this may include proactive investigative techniques, such as consensually monitored communication. In addition, then-acting AAG Powers stated that leniency is still a better deal for companies and individuals than deferred prosecution agreements (DPAs), reflecting agency concern that wider use of DPAs could undermine the leniency program.[185]

Interagency Cooperation

This year, the FTC expanded its criminal referral program, through which the agency may formally refer a matter to criminal law enforcement agencies and offer investigative support.[186] The FTC also aids criminal enforcement by providing law enforcement agencies with access to the Consumer Sentinel database, the FTC's repository of consumer complaints of potential violations of law. FTC Chair Khan stated that the program's expansion is designed to further disincentivize antitrust violations, as civil fines are not always a sufficient deterrent and are instead treated "as a cost of doing business."[187]

The Procurement Collusion Strike Force (PCSF), launched in 2019, is a partnership between the DOJ and other federal law enforcement agencies formed to combat bid-rigging for government contracts. Since its inception, the PCSF has trained over 17,000 special agents, attorneys, investigators, analysts, and procurement officials and launched a Data Analytics Project to collect and analyze bid data.[188] In 2021, the PCSF obtained guilty pleas from companies involved in defrauding the North Carolina Department of Transportation, rigging bids for public concrete repair contracts, and providing security services to the U.S. Department of Defense.[189] Moving forward, the PCSF's priorities will include set-aside contracts and infrastructure.[190]

Significant DOJ Investigations and Prosecutions

In 2021, the DOJ has continued to prosecute criminal antitrust violations across a variety of industries, including pursuing long-awaited prosecutions for "no poach" agreements and collusion surrounding recruiting and hiring practices. Nevertheless, the DOJ secured just $151 million in criminal fines and penalties, which is less than in recent years.[191] This section summarizes significant DOJ cartel enforcement activity in the past year.

Labor Markets

This year, the DOJ brought several long-anticipated criminal indictments for "no poach" agreements and other collusive employment practices. In January, the DOJ filed an indictment against healthcare company Surgical Care Affiliates LLC (SCA), alleging that SCA agreed with two other companies not to solicit each other's senior-level employees.[192] In March, SCA filed a motion to dismiss the indictment,

arguing that a non-solicitation agreement is not a *per se* violation of the Sherman Act.[193] The motion to dismiss is currently pending. Trial is set for May 9, 2022.

In March, the DOJ indicted a healthcare staffing company, VDA (formerly Advantage On Call), and a former manager, Ryan Hee, with participating in a conspiracy to allocate employee nurses and to fix the wages of those nurses from October 2016 until July 2017.[194] VDA and Hee moved to dismiss the indictment on the basis that "no poach" agreements are not a *per se* violation of the Sherman Act.[195] Hee argued in the alternative that the statements he made to an FBI agent should be suppressed because the DOJ surreptitiously tape recorded the FBI interview without his knowledge or consent.[196] A hearing on the motions to dismiss was held in November. The district court judge took VDA's motion to dismiss under submission and asked the parties to set a date for an evidentiary hearing regarding the circumstances surrounding Hee's FBI interview.[197] Trial is currently set for July 11, 2022.

In April, the DOJ filed a superseding indictment charging Neeraj Jindal, the former owner of a physical therapist staffing company, and John Rodgers, a former clinical director of Jindal's company, with conspiring to fix the wages of physical therapists and physical therapist assistants in the North Texas area from March to August 2017.[198] Jindal and Rodgers were also charged with conspiring to obstruct and making false statements in the FTC's related investigation. Notably, Rodgers moved to dismiss the indictment, arguing that the DOJ induced him into cooperating with its investigation with the promise of non-prosecution.[199] The DOJ responded that the Antitrust Division had not entered into non-prosecution agreements, but rather "unambiguous" no-direct-use agreements.[200] In November, the district court denied Jindal and Rodgers' motions to dismiss, ruling for the first time that wage-fixing is a form of price fixing and is thus a *per se* violation of the Sherman Act.[201] The judge also decided that Rodgers had failed to prove that he had a final non-prosecution agreement with the DOJ.[202] Rodgers has asked the court to reconsider its decision. Trial is scheduled for April 4, 2022.

In July, the DOJ brought charges against another healthcare company, DaVita Inc., and its former CEO, Kent Thiry, alleging that they conspired with two other companies to suppress competition for the services of senior-level employees.[203] In November, the DOJ charged DaVita and Thiry with conspiring with a third company.[204] The defendants moved to dismiss the indictment, arguing that a non-solicitation agreement is not a *per se* violation of the Sherman Act. A hearing on the motion to dismiss was held in November and a decision is pending.[205] Trial is currently scheduled for March 28, 2022.

Most recently, in December the DOJ filed an indictment against a former manager of a major aerospace engineering company and five executives of outsource engineering suppliers for participating in a conspiracy not to hire or solicit employees from each other's companies.[206] The alleged leader of the conspiracy, Mahesh Patel, was previously charged by complaint.[207]

Government Contracts

The DOJ secured guilty pleas and other criminal resolutions related to a number of government contract conspiracies. For instance, in January, the DOJ announced charges against Berlitz Language Inc. and Comprehensive Language Center Inc. for conspiring to rig bids for contracts with the National Security Agency (NSA) from March 2017 through December 2017.[208] The DOJ signed deferred prosecution agreements (DPAs) with both companies, which require the companies to pay penalties and create compliance programs to prevent further bid-rigging.[209]

In June, the DOJ obtained its first international resolution through operation of the PCSF.[210] Belgium-based G4S Secure Solutions NV (G4S) pleaded guilty to a criminal antitrust conspiracy involving bid rigging, customer allocation, and price fixing in the Department of Defense (DOD) procurement process. The alleged conspiracy ran from spring 2019 to summer 2020 and affected a multimillion-dollar contract issued in 2020 to provide security services to the DOD in Belgium. As part of the guilty plea, G4S agreed to a $15 million criminal fine and to cooperate in the ongoing investigation. The DOJ also secured guilty pleas from two company executives based in Belgium.[211] Two former employees of G4S also pleaded guilty in connection with that investigation.[212] Also in June, the DOJ indicted another Belgian security services company and three individuals, all of whom were charged with participating in the conspiracy.[213]

A PCSF investigation also led to a guilty plea from Contech Engineered Solutions LLC for rigging bids and defrauding the North Carolina Department of Transportation (NCDOT).[214] Contech admitted to conspiring to fraudulently obtain contracts for critical infrastructure projects, including water

drainage systems, beginning as early as 2009 and continuing until March 2018. Contech agreed to pay $7 million in criminal fines and $1.5 million in restitution to the NCDOT. Former Contech executive, Brent Brewbaker, has been charged as a co-defendant.[215]

In September, another PCSF investigation resulted in a guilty plea from a Minnesota concrete contractor, Clarence Olson.[216] Olson was charged with conspiring to rig bids on concrete repair and construction contracts submitted to at least four municipalities in Minnesota, including local governments and school districts in the Minneapolis-St. Paul area, from September 2012 through July 2017.

Food and Consumables

This year, the DOJ secured sentences for multiple executives who played key roles in a canned seafood price-fixing conspiracy. The former CEO of Bumble Bee, Christopher Lischewski, was sentenced to 40 months in prison and a $100,000 fine. The Ninth Circuit affirmed the sentence in July.[217] In April, two former Bumble Bee executives, Walter Scott Cameron and Kenneth Worsham, were each sentenced to three years of probation and $25,000 fines.[218]

In February, the DOJ secured a $107 million criminal fine against Pilgrim's Pride for conspiring to fix the price of broiler chickens since 2012, one of the largest fines in recent history for a Sherman Act Section 1 price-fixing violation.[219] In May, another broiler chicken producer, Norman W. Fries Inc. (dba Claxton Poultry Farms), was charged with participating in a nationwide conspiracy to fix prices and rig bids for broiler chicken products from 2012 to 2019.[220] Another company, Koch Foods, was indicted in July.[221] The DOJ has also prosecuted individuals in the case, including executives from Claxton Poultry Farms, Pilgrim's Pride, Tyson Foods, Koch Foods, and George's.[222] In July 2021, the individuals from Claxton Poultry Farms unsuccessfully moved to dismiss the indictments.

In October, 10 individuals who were indicted went to trial after their motions to dismiss the indictment were denied. After a seven-week trial, the case ended in a mistrial with a hung jury.[223] The jury was unable to agree on a verdict as to any of the 10 defendants despite being instructed by the judge to resume deliberations. The DOJ plans to retry the case and trial is set to begin on February 22, 2022.

Generic Pharmaceuticals

In 2020, the DOJ brought charges against Glenmark related to three conspiracies involving price-fixing of at least 10 medications.[224] In July 2021, Glenmark accused the DOJ of prosecutorial abuse, arguing that the DOJ's communications compelling interviews with executives who did not have their own counsel violated rules of professional conduct. The court granted Glenmark an emergency relief motion and ordered the DOJ to halt all non-attorney contact and to cease and desist from conducting such interviews.[225] The DOJ filed a motion for extension of time to respond to this emergency motion for the chance to clear any accusations that it was forcing involuntary interviews.[226] The DOJ wanted to "reengage" and reopen discussions to pursue voluntary interviews with executives.[227]

The court subsequently denied Glenmark's request to stop the DOJ from interviewing Glenmark's India executives.[228] The district court judge ruled that because the requested interviews were necessary, and because the DOJ agreed going forward to only contact Glenmark India through counsel once it was notified that the business was represented, the DOJ did not violate any rules of professional conduct.[229] The judge said that if the DOJ seeks a compulsory, rather than voluntary, interview from Glenmark India executives, Glenmark may refile its motion for relief.[230]

Cartel Enforcement in the EU

The EC and European courts were very active in cartel enforcement in 2021, exceeding pre-COVID levels. CMA, however, did not adopt any significant cartel decision in 2021, which is not surprising given that the EC retains jurisdiction over investigations opened before January 1, 2021. In the coming year, the CMA may well replicate the interventionist approach it has adopted in merger enforcement in the cartel space as well.

EC Stakes Out a broader and More Aggressive Cartel Enforcement Position

In an October 22 speech titled, "A New Era of Cartel Enforcement," EU Commissioner for competition Margrethe Vestager spoke to the enforcer's recent raids and broader focus on potentially collusive activity. The EC had 10 days before announced that it carried out surprise inspections of companies active in the wood pulp sector. Commissioner Vestager characterized the raid as "just the start of a series of raids that we're planning for the months to come."[231] The EC followed up days later with the dawn raid of animal health company Zoetis

in Belgium over abuse of dominance charges on October 25, 2021.[232] Commissioner Vestager stressed that the investigations would not just focus on traditional "hardcore" cartel behaviors (e.g., price-fixing or market sharing), but also on more complex cartel infringements, such as agreements on technical development, buyer cartels, and no-poach agreements, the latter of which have received considerable attention from enforcers all around the world in the past year.[233] The EC finished the year by dawn raiding a defense company in November 2021.[234]

Cartel Enforcement

The EC issued six cartel decisions in 2021, totaling €1.7 billion in fines. This brings cartel enforcement back to pre-COVID levels (€345 million in 2020 and €1.4 billion in 2019). Out of the six cartel decisions issued by the EC in 2021, five concerned exchanges of commercially sensitive information. One of these was the EC's first decision regarding the exchange of information and agreements on restrictions of technical development.

German carmakers cartel. In July 2021, the EC found following a settlement procedure that Daimler, BMW, and the Volkswagen group participated in a cartel in emission cleaning for new diesel passenger cars between 2009 and 2014. BMW and the Volkswagen group were fined €875 million, while Daimler was able to avoid a €727 million fine by successfully applying for leniency and revealing the cartel conduct to the authority.[235] The EC found a by-object restriction in the participants' agreement not to compete on offering technology to consumers that was cleaner than required by law, the first time the enforcer has based a cartel decision solely on technical development restrictions. The decision could have far-reaching consequences, for example, for companies engaging in standardization efforts or other technical cooperation. Notably, the decision deviates from the EC's previous practice in "novelty-cases" to issue symbolic fines or not to impose fines at all. Instead, the EC applied an unprecedented blanket 20 percent fine reduction based on the absence of prior decisional practice prosecuting this type of cartel behavior.

Financial sector cartels. Three of the EC's 2021 four cartel decisions concerned the financial sector and the misuse of traders' chatrooms. Some of these decisions stand out as the only cartel decisions in 2021 adopted under the normal procedure rather than following a settlement. In April, the EC fined three investments banks—Bank of America Merrill Lynch, Crédit Agricole, and Credit Suisse—€28.5 million for a five-year cartel in the trading of U.S. denominated SSA bonds on the secondary market in the entire EEA.[236] Deutsche Bank avoided a €21.5 million fine for revealing the existence of the cartel.

In May, the EC issued a decision against seven banks for cartel behavior in the European government bonds (EGB) trading market between 2007 and 2011.[237] Out of the seven cartel participants, only three were fined (UBS, Nomura, and UniCredit) for a total of €371 million. As a leniency applicant, NatWest received immunity, while Bank of America and Natixis avoided fines because the statute of limitations had expired for their participation in the infringement. Portigon (formerly known as WestLB) avoided a fine because it had a negative net turnover in the year preceding the fine. In both cases, the cartels were coordinated through the exchange of commercially sensitive information in trader chatrooms.

In December, the EC then fined UBS, Barclays, RBS, HSBC, and Credit Suisse €344 million for cartel behavior. It found that traders of the banks in charge of the Forex spot trading of G10 currencies exchanged sensitive information and trading plans and occasionally coordinated their trading strategies through an online professional chatroom called Sterling Lads. UBS avoided a €83 million fine through leniency. Barclays', RBS', and HSBC's fines were significantly reduced in exchange for their cooperation and agreement to settlements. Given that it did not cooperate under the leniency or settlement procedures, Credit Suisse benefited from no reduction under those frameworks. However, the EC granted a total reduction of four percent to reflect the fact that Credit Suisse was not liable for all aspects of the case.[238]

EU rail cargo cartel. In April 2021, following a settlement procedure, the EC fined Deutsche Bahn, the second-largest transport company in the world, and the Belgian train operator SNCB €48 million for allocating customers between December 2008 and April 2014 in the cross-border rail cargo transport services market.[239] Austrian operator ÖBB escaped a fine of €37 million under the EU's leniency program. The EC found that the three companies allocated customers by coordinating their respective offers to customers and providing each other with cover quotes.

Court Activity

The General Court and the European Court of Justice (ECJ) provided practical guidance on cartel enforcement in

2021. In a set of September decisions related to the Japanese capacitors cartel, the General Court offered important clarifications on the EC's territorial jurisdiction and the requirements for finding single and continuous infringements.[240] In an earlier decision in June, the ECJ explained how evidence offered in leniency should be evaluated to determine fine reductions.

Territorial jurisdiction. In the appeals of the *Capacitors* cartel decisions, the General Court found that the EC did indeed have jurisdiction to investigate the cartel even though discussions were held in Japan and did not concern the EEA specifically. The fact that the discussions had a global reach—thus also including the EEA—and that the products were sold in the EEA was sufficient to establish jurisdiction.[241] The General Court rejected the argument that the EC was not allowed to punish the behavior because cartel participants had already been fined in non-EEA countries for the same global conduct. Under the principle *ne bis in idem*, the same conduct cannot be sanctioned twice where there is identity of the facts, unity of offender, and unity of the legal interest protected. In this case, because the conduct had been prosecuted by non-EEA competition authorities, the prior prosecution did not protect the same legal interests.[242]

Concept of single and continuous infringement. Also in the *Capacitors* case, the General Court provided two important clarifications on how to establish a single, continuous infringement. First, the court confirmed that the EC may attribute to a cartel participant liability for conduct planned or put into effect by the other participants, in pursuit of the same cartel objectives, if it was aware of the conduct or was reasonably able to foresee it.[243] Second, the General Court provided further guidance on what may constitute an interruption of the cartel participation, finding that two 10-month delay periods were not enough to interrupt a 12-year period of participation including more than 21 multilateral meetings.[244]

Leniency reductions. On June 3, 2021, the ECJ rejected Recylex's appeal against the €26.7 million fine imposed by the EC for its participation in a scrap car batteries buyer cartel in 2017.[245] Recylex argued that it should receive a larger fine reduction than its order in leniency applications allowed because of the evidentiary value of information it provided. Recyclex's appeal was rejected by the General Court in 2019, and the ECJ rejected it again this year.[246] The ECJ confirmed that the test to receive a fine reduction is whether the evidence brought forward provides new facts which increase the gravity or the duration of the infringement, not its evidential value.[247]

Other Enforcers

Cartel enforcement has remained a major priority for antitrust agencies and authorities worldwide. Below we discuss a sample of cartel enforcement activity outside of the United States and Europe in 2021.

South Korea

The Korea Fair Trade Commission (KFTC) is an active cartel enforcer. In 2021, revisions to both the underlying law supplying the KFTC's enforcement powers and to the KFTC's leniency program came into effect. Under the amendments to the Monopoly Regulation and Fair Trade Act, which came into effect in December, the KFTC will continue to have the exclusive right to make a criminal referral in hardcore cartel cases, but i) the administrative fine cap in cartel cases will be increased from 10 percent to 20 percent of the relevant sales revenue, and ii) certain acts of exchanging information will be added to the types of collusion allowing a presumption of cartel agreement. The revisions to the leniency program, which came into effect in June, clarify reporting timing and ensure applicants receive a penalty reduction in proportion to their contribution.[248] For instance, second-in-line applicants can choose to remain in the position and receive a partial penalty exemption if first-in-line applicants become disqualified, rather than advancing to the first position and taking on more stringent cooperation requirements.

This year saw several notable referrals for criminal prosecution in Korea. In February, the KFTC for the first time made a criminal referral based on obstruction, referring SeAH Besteel and three of its employees to the country's criminal prosecutor for impeding a price-fixing investigation by shredding documents and hiding data. The case resulted in approximately USD $234.5 million in fines.[249] In November, the Korea Ministry of Small and Medium Enterprises (KMSME) for the first time requested the KFTC to submit a criminal referral for the abuse of dominance and technology misappropriation.[250] The KMSME alleged that the Naver and Korea Shipbuilding & Offshore Engineering (parent of Hyundai Heavy Industries) imposed exclusive-dealing arrangements to block small and mid-sized real-estate information services from dealing with rival internet company Kakao to source real-estate information. The companies had already been fined one billion won and 246 million won, respectively, for conduct related to unfair trade practices concerning real estate and subcontracting.

Japan

In April, the Japan Fair Trade Commission (JFTC) raided Japan's top utility companies, Kansai Electric Power, Chubu Electric Power, and Chugoku Electric Power, to investigate cartel conduct affecting general consumers.[251] In October, the agency conducted a second raid, expanding the investigation to include collusion affecting business users. The probe marks the first time that the JFTC has been able to avail itself of new leniency tools, which may prompt the affected companies to approach the regulator in the hope of reduced penalties. This investigation is also the JFTC's first into Japan's utility market since it was liberalized after decades of regional monopolies by 10 power companies.

In November, the JFTC imposed fines of 1.4 billion yen (approximately $12.3 million) on 20 Japanese printing companies including Toppan Forms and Kyodo Printing, for allegedly engaging in bid rigging for the Japanese Pension Service's tenders for mail notices sent out to tens of millions of citizens.[252] It has been two years since the JFTC had first launched a dawn raid against these printing companies. The companies will have a hearing before the JFTC finalizes the corrective orders and fines.

China

In July, 33 Chinese tech companies including Huawei, Tencent, Alibaba, and TikTok's parent company ByteDance signed an antitrust "self-discipline" convention, prohibiting online platform operators from using technical means and platform rules to fix prices, divide sales territories, or engage in group boycotts.[253] This pledge comes in response to a heavy emphasis from China's State Administration for Market Regulation (SAMR) against e-commerce giants this year, including publication of the State Council Anti-Monopoly Commission Anti-Monopoly Guidelines on Platform Economy Sectors in February[254] and imposition of fines reaching up to $2.8 billion on Alibaba and Tencent.[255]

Hong Kong

In February, Hong Kong Competition Commission (HKCC) issued infringement notices to six hotel groups and a tour operator after they admitted facilitating a conspiracy to fix prices for tickets to tourist attractions.[256] Gray Line and Tink Labs agreed to fix and control the prices of tickets for tourist attractions and transportation between March 2016 and May 2017. According to the HKCC's announcement, the hotels knew about the conspiracy and "actively contributed" to its implementation by passing on pricing information between both companies. The case marks the first time the HKCC has pursued facilitators of cartel conduct.

In November, the HKCC announced a new policy that it is unlikely to accept commitments as a way of settlement to end investigations or lawsuits in cartel cases, or when the case is in a very advanced stage.[257] Commitments to change behavior, set up a compliance program and/or admit violation in Hong Kong, may allow companies to settle the agency's investigation before the HKCC files an enforcement lawsuit to seek penalties, but cartel participants under the new policy would find it more difficult to escape a suit this way. Also in November, the HKCC agreed to enter into cooperation agreements with inserter machine companies engaged in the cartel conduct, resulting in the submission of joint applications to the Competition Tribunal seeking orders to allow the proceedings to be disposed of by consent. This is the first case to be fully resolved under the Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct by the HKCC.[258]

India

In September, the Competition Commission of India (CCI) announced that the manufacturers of Heineken, Carlsberg, and Budweiser beer fixed prices over 11 years.[259] The CCI imposed penalties totaling approximately USD $117.5 million against United Breweries, Carlsberg, the All India Brewers Association, and 11 individuals involved in the sale and supply cartel. The leniency applicant, Belgium's Anheuser Busch InBev, avoided any penalty. United Breweries and Carlsberg received discounts of 40 percent and 20 percent, respectively, for their cooperation in the cartel investigation.

Australia

In February, the head of the Australia Competition and Consumer Commission (ACCC) announced that cartel prosecution would be a top priority in 2021.[260] In the same month, Australian prosecutors issued formal criminal charges against ANZ, Citigroup, Deutsche Bank, and several of their employees related to collusion to distribute A$789 million worth of ANZ shares to bank executives.[261] The case is still pending in court as the jury trial has been pushed to June 2022.[262] An acquittal in another case this year shows the difficulty of successfully bringing factually and legally complex cartel charges. In June, the jury sitting at the Federal Court of Australia found the disability-aid retailer County Care and two men associated with the company, not guilty of any cartel and bid-rigging

charges because the conduct was covered under joint-venture exemptions in Australian competition law.[263] In October, an individual plead guilty to criminal cartel charges, the first ever under Australia's 2009 criminal cartel law. The individual plead guilty to price fixing, bid rigging, and market allocation cartel agreements with scopolamine-N-butylbromide (SNBB) suppliers, an active ingredient in anti-spasmodic medication.[264]

Labor Market Investigations Proliferate in Brazil and Mexico

In March, Brazil's Administrative Council for Economic Defence (CADE) for the first time opened an administrative proceeding to investigate anticompetitive conduct in a labor market. Three dozen companies including Brazilian subsidiaries of Abbott, Acelity LP, Baxter, Bayer, and Siemens Healthcare—as well as 108 individuals linked to them—have been targeted by CADE's investigation into alleged wage-fixing labor agreements related to the healthcare equipment and products industries.[265] In May, the Mexican Federal Economic Competition Commission (COFECE) issued statements of objections as part of its first investigation into anticompetitive hiring and wage-setting practices.[266] COFECE pointed to similar investigations by other enforcers and stated that it was sending a clear signal that it will investigate any collusion in the labor market that affects or prevents the mobility of workers or prevents workers from negotiating wages.

Civil Litigation

The following chapter highlights a sample of noteworthy developments in antitrust litigation in 2021. This year saw a decision in the closely watched case between Epic Games and Apple over in-app payments for the popular Fortnite video game, a major Supreme Court decision regarding the NCAA's amateur athleticism rules, and the first class certifications in the United Kingdom. This chapter provides an overview of these cases as well as other noteworthy Section 1 and Section 2 antitrust litigation developments in the United States and the United Kingdom. In addition, we provide a summary of decisions related to class certification, which is often a major hurdle for a successful antitrust plaintiff.

Epic v. Apple: Trial Decision in a Platform Case

Epic v. Apple.[267] In August 2020, game developer and publisher Epic Games updated its Fortnite iOS app to give users the option of paying for in-app purchases through Epic's own processing system. The same day, Apple removed the Fortnite app from the iOS App Store. Later in the year, Epic also made clear to Google that it would no longer adhere to Google's payment processing restrictions, and Google removed Fortnite from the Google Play Store. Epic sued both Apple and Google, and the Apple suit came to trial and a decision in 2021. Judge Yvonne Gonzalez Rogers of the Northern District of California concluded that Apple's conduct did not violate the Sherman Act but that certain aspects did violate California's Unfair Competition Law (UCL).

Epic challenged provisions of Apple's Developer Product Licensing Agreement (DPLA) requiring developers to distribute through the iOS App Store and to use Apple's In-App Purchase functionality under Section 1 of the Sherman Act. The court found that the DPLA did not constitute an agreement for antitrust purposes because the relevant terms were unilaterally imposed by Apple. Nonetheless, the court conducted a rule of reason analysis because these terms could potentially conflict with the goals of antitrust law. The court concluded that Epic had shown some anticompetitive effects arising from the agreement but that Apple had shown that user security and IP protection were a sufficient countervailing justification that could not be met by less restrictive alternatives.

Epic also challenged a provision of the DPLA preventing game developers from steering users to other channels to pay for purchases that can be used in game under Section 2 of the Sherman Act and California's UCL. Judge Gonzalez Rogers concluded that Apple had not monopolized any relevant market—though she did find that Apple had a 55 percent share of in the digital mobile gaming transactions market and enjoyed very high profit margins. Accordingly, she held that Apple had not violated Section 2. However, she did find that the same conduct constituted unfair conduct under California's UCL and issued a nationwide injunction eliminating the provision.[268]

Prior to trial in August 2021, Apple reached a $100 million settlement in developer class actions related to the DPLA. Per the settlement, Apple cannot block app developers' efforts to steer users to third-party payment platforms where Apple does not receive commissions on sales.[269]

Section 1: Concerted Action

Section 1 of the Sherman Act prohibits agreements among two or more parties that unreasonably restrain trade. Private litigation concerning concerted action

has remained active, both for original cases and as follow-ons to criminal or civil enforcement from government agencies. This section surveys a selection of significant Section 1 cases from 2021.

Section 1 at the Supreme Court

NCAA v. Alston.[270] In a June opinion authored by Justice Neil Gorsuch, the U.S. Supreme Court affirmed the high-profile injunction prohibiting the National Collegiate Athletic Association from limiting the education-related benefits college sports programs were permitted to provide student athletes as a violation of Section 1 of the Sherman Act. The NCAA argued that its status as a joint venture and its member schools' status as non-profits should entitle its conduct to a "quick look" analysis like that applied in NCAA v. Board of Regents of Univ. of Oklahoma. The Court distinguished that case as not involving payments to student athletes and held that, because the NCAA has monopoly power in a relevant market (regardless of whether it is a joint venture), it should be subject to the standard rule of reason analysis. The Court further rejected a challenge to the terms of the injunction, finding that it did not amount to judicial micromanagement but rather was limited and grounded in antitrust principles.

Animal Science Prods. v. Hebei Welcome Pharma. Co. Ltd.[271] In 2018, the Supreme Court overturned a Second Circuit decision in favor of Chinese vitamin C producers on international comity grounds, finding that the appeals court was too deferential to submissions of China's Ministry of Commerce regarding regulations on the Chinese vitamin C industry.[272] The Supreme Court instructed the Second Circuit to "carefully consider" the Ministry's submissions, weighing several factors without conclusively deferring to the Ministry. On reconsideration, the Second Circuit concluded again that Chinese export controls required the vitamin C manufacturers to coordinate and set prices, making it impossible for manufacturers to comply with both Chinese law and United States law.

Mixed Results for National Association of Realtors in Listing Rules Cases

REX, Inc. v. Zillow, Inc.[273] In September, Judge Zilly of the Western District of Washington denied a motion to dismiss filed by defendants Zillow and the National Association of Realtors (NAR) in a suit concerning NAR's Buyer Agent Commission Rule and Segregation Rule. The Buyer Agent Commission Rule requires a seller's agent to include an offer of a commission to a buyer's agent in any listing on NAR's multiple listing services (MLS). The Segregation Rule requires separating MLS listings from listings from other sources. The court upheld allegations that these rules made it harder for listings from sources besides MLSs to reach consumers. The court further found that Zillow's decision to redesign its website to enforce those rules plausibly suggested an anticompetitive agreement, rejecting Zillow's argument that it was merely a "data aggregator" and not acting as a real estate broker.

In response to REX's amended complaint, NAR argued that it did not cause REX's injuries because some, but not all, NAR-affiliated MLSs did not require Zillow to change its websites. In a December order, the court rejected this argument, concluding that REX's amended complaint plausibly alleges that Zillow changed its websites because of NAR's rules.

Top Agent Network, Inc. v. Nat'l Ass'n of Realtors.[274] In August, Judge Chhabria of the Northern District of California dismissed a complaint from Top Agency Network alleging that the NAR's Clear Cooperation Policy constitutes an anticompetitive group boycott. The Clear Cooperation Policy prohibits MLS subscribers from marketing listings unless those listings are posted on an MLS. The court found that TAN had not alleged antitrust injury because its service cut off listings from realtors unable to subscribe to TAN's network. The Clear Cooperation Policy therefore actually remedied anticompetitive aspects of TAN's service by increasing the number of realtors who could compete for business related to a listing.

PLS.com, LLC v. Nat'l Ass'n of Realtors.[275] In February, Judge Holcomb of the Central District of California dismissed a complaint from PLS.com related to NAR's Clear Cooperation Policy. Again, the court found that allegations of antitrust injury were insufficient, in this case because PLS.com had failed to allege facts showing reduction in output or injury to home buyers rather than mere injury to PLS.com itself.

Benchmark Manipulation Claims Against Financial Institutions Face Headwinds

Alaska Dep't of Revenue v. Manku.[276] In July, the Second Circuit affirmed by summary order the dismissal of a claim by a large group of pension funds that several banks and multiple individual traders collaborated to decrease bids and increase asks for supranational, sovereign, and agency bonds in the secondary market. The court held that the plaintiffs did not allege enough

facts to support an allegation that the defendants controlled the secondary bond market to the point that it affected all of the plaintiffs' trades in that market over a period of seven years. Further, the court found that the plaintiffs failed to allege that each defendant acted anticompetitively in furtherance of the conspiracy, making a market-wide conspiracy implausible.

Fund Liquidation Holdings, LLC v. Bank of Am. Corp.[277] In March, the Second Circuit vacated a decision by the Southern District of New York that had dismissed a class action complaint alleging that several banks had conspired to manipulate SIBOR and SOR, two Singapore-based benchmark interest rates. The district court held that the plaintiffs named in the original complaint did not exist as legal entities at the time of filing and therefore lacked standing under the "nullity doctrine." The Second Circuit reversed, stating that the successor legal entity (not named at the inception of the lawsuit but later added as a party) had standing as the real party in interest. Because the successor was in existence when the action was initiated and was willing to join the suit, it had standing to bring its claims regardless of whether the other, now-dissolved named plaintiffs existed when the action was initiated. The Second Circuit was clear that, in choosing not to follow the "nullity doctrine," it was adopting a minority rule.

Aluminum Warehousing.[278] In February, Judge Engelmayer of the Southern District of New York granted summary judgment against claims that several large financial institutions conspired to raise the Midwest Premium benchmark price of aluminum. The court held that the plaintiffs, who purchased aluminum settled off the Midwest Premium, lacked antitrust standing because they were not efficient enforcers of the antitrust laws. The court found that the link between the financial institutions' alleged misconduct (conspiring to increase the amount of time aluminum would be stored in warehouses) and the increased prices paid by the aluminum buyers was too attenuated to support standing. Further, the court noted that almost all of the plaintiffs' transactions were with parties other than the defendant banks, and that "[a]llowing plaintiffs to pursue defendants with whom they did not do business would also create the risk of disproportionate liability."

Healthcare Providers Find Success Against Section 1 Claims

Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.[279] In August, the Ninth Circuit affirmed the district court's grant of summary judgment to defendants AMN Healthcare in a suit over non-solicit agreements in AMN Healthcare's contracts with spillover vendors. The Ninth Circuit noted that, ordinarily, non-solicit agreements with horizontal competitors would be *per se* anticompetitive, but in this case the restraint should be analyzed under the rule of reason because it was ancillary to the spillover provider contract. The court was persuaded that the non-solicitation agreement was necessary to prevent AMN from losing its personnel when collaborating with Aya and that the plaintiffs had failed to proffer any evidence of anticompetitive effects.

Benitez v. Charlotte-Mecklenburg Hospital Authority.[280] In March, the Fourth Circuit affirmed the holding of the district court that the Charlotte-Mecklenburg Hospital Authority was a local government entity and therefore immune to suits for damages under the Local Government Antitrust Act of 1984. The court rejected arguments that the Hospital Authority did not have typical powers of local government, such as taxing power, and considered it to be a "special function governmental unit" created by North Carolina law. The court also rejected an argument that the Hospital Authority's multistate reach prevented it from conceivably being a local government entity. While the court found this argument intuitively appealing, the court ultimately rejected this argument as having no basis in the statutory text.

Other Section 1 Litigation

Intel Corp. v. Fortress Investment Group.[281] In January, Judge Chen of the Northern District of California granted a motion by Fortress Investment Group to dismiss a suit by Intel and Apple claiming that Fortress had gained the ability to charge above-market patent licensing rates by aggregating patents in 13 separate markets.[282] The court dismissed the claims based on a mix of standing defects, overbroad market definitions, and insufficient allegations related to anticompetitive conduct, but granted leave to amend. Notably, the court also dismissed a related claim by Apple that patent assertion entities such as Uniloc, who were not members of the relevant standard-setting organization, were anticompetitively acquiring patents that SSO members were required to disclose. The court cited the Ninth Circuit's ruling in *FTC v. Qualcomm*,[283] which held that "breach of a[] [standard setting organization] commitment does not rise to the level of an antitrust violation."

Judge Chen dismissed an amended complaint from Intel in October. The court held that the alleged relevant

markets for certain patents were implausible because they contained economic complements as well as substitutes. The court did not reject outright Intel's theory that patent assertion entities collecting enough patents to effectively control a field could be anticompetitive, but found that Intel had not plausibly alleged such conduct in this case. In particular, the court held that Intel did not adequately explain why the defendants' patents were so crucial to the field or why the patents were enough to establish a dominant position.

In re American Express Anti-Steering Rules Antitrust Litigation.[284] In November, the Second Circuit affirmed the district court's dismissal of claims by merchants who claimed that American Express's payment "anti-steering" rules caused merchant fees to rise across the market. The plaintiffs did not accept Amex, so proceeded under an "umbrella" theory of liability. The Second Circuit upheld the District Court's conclusion that the plaintiffs lacked antitrust standing to pursue their claims because they were not "efficient enforcers" of the antitrust laws. The plaintiffs' claims violated the "first step" rule, which limits liability to parties injured at the first step of the causal chain of the defendants' actions. Amex allegedly raised its fees at the "first step" through its Anti-Steering Rules, which apply to Amex-accepting merchants, not plaintiffs.

In re Broiler Chicken Antitrust Litigation.[285] In June, Judge Durkin of the Northern District of Illinois granted a motion to dismiss claims brought by poultry buyers alleging that defendant Rabobank facilitated a conspiracy to fix chicken prices by helping chicken producers share information with each other. The court contrasted the conduct of Agri Stats, an industry analyst that had been a "conduit of information" among chicken producers for purposes of the conspiracy. The plaintiffs alleged that particular Agri Stats reports were so detailed that the information in the reports was no longer anonymous, and the court found it plausible that Agri Stats knew the reports were being used to facilitate the conspiracy. The court found that there was no similar basis for inferring that Rabobank was involved.

Section 2: Monopolization

Section 2 of the Sherman Act prohibits monopolization through exclusionary conduct and attempts to monopolize. Suits challenging a firm's unilateral conduct are often factually complex, and therefore private litigation is relatively less common than for Section 1 claims. The following paragraphs describe a number of significant Section 2 actions from the past year, organized by the primary type of exclusionary conduct alleged.

Exclusive Dealing

Health First. In August, Florida patients survived a motion to dismiss their putative class-action suit against integrated health system Health First Inc. The plaintiffs alleged that Health First built and maintained a monopoly over the Central Florida acute care market by boycotting competing hospitals, offering financially inducing referrals, and engaging in exclusive dealing arrangements with referring physicians. This conduct allegedly suppressed competition from rival acute care hospitals in Brevard County and potential market entrants. The U.S. District Court for the Middle District of Florida denied Health First's motion to dismiss, rejecting the defendant's argument that the claim was a "shotgun" pleading based exclusively on conclusory or immaterial allegations.[286]

Align. In April, a class of dentists and orthodontists survived a motion to dismiss claims that Align Technology, maker of Invisalign, carried out a nationwide scheme to monopolize the market for clear aligners and the mouth scanners used to make them through exclusive dealing and bundling. The dental practitioners claimed that Align made exclusive deals with dental service organizations and bundled their scanners with aligners in a way that penalized dental practices that used competing products. The Northern District of California ruled against Align's motion to dismiss, reasoning that the totality of the alleged conduct gave rise to a Section 2 monopolization claim.[287] Align is also facing similar claims brought in the District of Delaware by its competitor, 3Shape.

Refusals to Deal

Advent Software. In April, the U.S. District Court for the Southern District of New York concluded that hedge fund management technology firm Advent Software's cancelation of a software reseller agreement with Arcesium LLC did not amount to an anticompetitive refusal to deal. Arcesium accused Advent of illegally monopolizing the market for portfolio accounting software and post-trade solutions. However, the court found that Arcesium did not adequately allege facts establishing how Advent's actions precluded it from the market.[288]

Tying

BASF/Ingevity. In September, German chemical company BASF was awarded nearly $85 million in a jury trial over

long-term exclusive supply agreements for Ingevity's fuel vapor canister honeycombs that tied the products to licenses for one of Ingevity's patents. The jury found that these agreements served to protect Ingevity's dominance in markets for vehicle fuel vapor capture components in violation of Sections 1 and 2 of the Sherman Act as well as Section 3 of the Clayton Act.

Spotlight on Pharmaceutical Litigation

Pharmaceutical antitrust cases in 2021 focused on so-called "pay-for-delay" or "reverse payment" patent litigation settlements. Plaintiffs continue to challenge settlement agreements between brand and generic pharmaceutical companies, alleging that terms of the deals stifle competition from lower-cost generic medicines.

In re Namenda.[289] In June, a district court ruled that Allergan subsidiary Forest Laboratories LLC must face a jury over alleged pay-for-delay deals that kept generic versions of Alzheimer's drug Namenda off the market. A court in the Southern District of New York denied in full summary judgment on the antitrust claims, finding there were too many factual disputes about whether the defendants violated antitrust laws by making reverse payments to generic manufacturers to resolve patent infringement claims triggered by the generic manufacturers' attempts to produce their own versions of Namenda. For example, the parties dispute whether the reverse-payment settlements were anticompetitive and whether they caused a delay in generic competition.

Fresenius Kabi USA, LLC v. Par Sterile Prods., LLC.[290] The Third Circuit revived Fresenius' antitrust claims against Par Pharmaceuticals in a non-precedential opinion. Fresenius claimed that Par delayed generic versions of the blood pressure drug Vasopressin through exclusive supply arrangements, but the district court dismissed the suit on the ground that Par's patents barred the claims because they would have prevented Fresenius from bringing a generic medication to the market. The Third Circuit reasoned that the district court had failed to analyze Fresenius' allegations that the patents would not have stopped its conduct because they were invalid.

In re Xyrem (Sodium Oxybate) Antitrust Litigation.[291] A California federal judge largely upheld claims that Jazz Pharmaceuticals prevented generic competition for its narcolepsy drug Xyrem through anticompetitive reverse payments to several generic drugmakers, including Hikma, Amneal, Par, and Lupin. The court rejected assertions that the plaintiffs needed to show how the generic drugmakers could have prevailed in patent litigation with Jazz over their generic drug applications. Instead, the court relied on Supreme Court precedent that a brand making a large and unexplained payment to a generic rival is sufficient and suggests major doubts about the survivability of the underlying patent in litigation.

In re EpiPen. The antitrust actions related to Mylan's emergency allergy treatment EpiPen continued this year. In In re*: EpiPen Marketing, Sales Practices and Antitrust Litigation*,[292] the District Court of Kansas denied a motion for summary judgment regarding whether a pair of settlements ending patent litigation constituted an illegal reverse payment in violation of state antitrust laws. In *In re: EpiPen Direct Purchaser Litigation*,[293] the District Court of Minnesota refused to dismiss a proposed class action that alleges Mylan paid bribes and kickbacks to a series of PBMs and conspired to engage in anticompetitive practices to inflate the price of EpiPen.

Class Certification

Class certification is a complex and often outcome determinative feature of antitrust cases. Over the last several years, the law of class certification has developed significantly, and decisions in 2021 have continued to push this area forward.

Class Certifications Continue to Hinge on Predominance

Stromberg v. Qualcomm. In September 2021, the Ninth Circuit vacated the Northern District of California order certifying a nationwide indirect purchaser class seeking injunctive and monetary relief under Sections 1 and 2 of the Sherman Act and California law against Qualcomm, and remanded for reconsideration of the plaintiffs' claims given the Ninth Circuit's decision in the FTC suit against the company.[294] Judge Koh had previously certified a damages class and an injunctive relief class, and Qualcomm sought an interlocutory appeal.[295] The Ninth Circuit held that the class was erroneously certified under a faulty choice of law analysis because differences in relevant state laws affecting the different plaintiffs overrode predominance.[296]

Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC ("Packaged Seafood"). In April 2021, the Ninth Circuit decertified three classes of canned tuna purchasers.[297] While the Ninth Circuit approved the use of statistical analysis that relies on averaging, it reversed the class certification decision because the

district court failed to resolve a dispute as to whether the plaintiff's data showed no antitrust impact for 28 percent of the proposed class or just 5.5 percent.[298] The Ninth Circuit noted that predominance would be defeated if "more than one-fourth" of the class were uninjured.[299]

In re Lamictal Direct Purchaser Antitrust Litigation. Last year, the Third Circuit issued a significant decision vacating class certification, finding that the district court abused its discretion by assuming, without rigorous analysis, that average price increases were sufficient to show that the plaintiffs could establish antitrust injury by common proof at trial.[300] In April 2021, the District of New Jersey on remand declined to certify a class of generic direct purchasers.[301] Specifically, Judge Vazquez found that the plaintiffs had failed to demonstrate that all direct purchasers would have received a price discount had GSK launched an authorized generic—a "crucial issue" in light of the reliance on averages to establish classwide injury.[302]

Numerosity Can't Be Taken for Granted

In re Zetia (Ezetimibe) Antitrust Litigation. In August 2021, the Fourth Circuit decertified a class of 35 direct purchasers of Merck's cholesterol drug Zetia.[303] The Fourth Circuit held that district court's numerosity analysis "fell short in several respects," including a "faulty" analysis of the judicial economy factor and an "improper[] look[] to the impracticability of individual suits rather than joinder."[304] The court emphasized that the proper numerosity inquiry is not with reference to individual suits, but rather whether it is practicable to join class members into a single action, and that under Rule 23(a)(1) plaintiffs must produce evidence that, absent certification of a class, the putative class members would not join the suit.[305]

Success for Ranbaxy *Direct Purchasers and End Payors*

In re Ranbaxy Generic Drug Application Antitrust Litigation. In May 2021, the District of Massachusetts certified classes for direct purchasers and end payors accusing Ranbaxy of delaying generic versions of three different drugs by manipulating the regulatory approval system and wrongly obtaining exclusivity periods.[306] Although Ranbaxy had argued that the plaintiffs' use of averaging masked differences in the class and the presence of uninjured class members, Judge Gorton found that the inclusion of a *de minimis* number of uninjured class members—which was only in the "single digits"—was not fatal to class certification.[307]

UK Civil Litigation

First Class Actions in the UK Certified

Merricks v Mastercard.[308] The collective proceedings brought by solicitor Walter Merricks against Mastercard, which concern the decision that the default level set by the corporation for its Intra-EEA multilateral interchange fee from May 1992-2007 was in breach of Art. 101 TFEU, reached a significant stage this year. Following referral from the UK Supreme Court in December 2020 for a new assessment of whether the claim should be certified as suitable for trial, the CAT certified the class action claim in August 2021.

Notably, despite clarification from the Supreme Court that the certification process should only contain a limited examination of the merits of a case, the CAT decision did entail a certain degree of scrutiny. In particular, the CAT found that "no credible or plausible method" had been put forward to arrive at any estimate of the extent of the overcharge "that would have been saved or used to reduce borrowings rather than spent," which was the "essential basis" for the claim for loss by way of compound interest, and they held that that claim could not be fairly resolved in the collective proceedings, and accordingly had to be excluded. Nevertheless, this decision is an important step for collective redress procedures in the UK and is likely to be relied upon in future cases where individual actions are impracticable.

Justin Le Patourel v BT.[309] One month after *Merricks*, the CAT certified another claim, in the case of *Justin le Patourel v BT.* This case is the first stand-alone claim to be certified for collective proceedings. Mr. Le Patourel intends to bring proceedings seeking £469 million on behalf of two million BT customers who purchased landline telephone services, alleging that BT abused a dominant position on the market by imposing excessive pricing. BT applied for strike-out/summary judgment and opposed certification on an opt-out basis. Dismissing that application, the CAT held that there was a real prospect of success for the claim and that an opt-out basis was "clearly more appropriate" than an opt-in basis. The CAT's decision is noteworthy in two respects. First, the CAT will consider the merits at the certification stage to exercise its power to give strike-out or summary judgment. The CAT was critical of BT's choice to not file evidence of its own for some of its key objections, suggesting that respondents will need to consider

whether they ought to file responsive evidence at this stage in future cases. Second, this case shows that opt-out certification may be appropriate outside of follow-on claims.

Service out of Jurisdiction

As noted at the outset of this chapter, Epic has challenged conduct by both Google and Apple related to app distribution and in-app payments in the United States. Epic also filed actions concerning this conduct in the UK CAT against various Apple and Google subsidiaries in England, Ireland, and the United States.[310] Epic had no difficulties in serving on the Apple and Google subsidiaries in England, nor those in Ireland (thanks to the Brussels Regulation (recast) applying as the actions were commenced before the end of the EU Withdrawal Agreement's "implementation period"). Service on the U.S. companies, however, required the permission of the CAT.

In February 2021, applying the English law rules on service out of jurisdiction on a defendant not domiciled in an EU Member State, the CAT concluded that for the Apple action, the United States was an appropriate forum for the dispute. For the Google action, on the other hand, England would be the appropriate forum for trial, because in that case Epic had a serious issue to be tried for some claims against at least the Irish anchor defendants, and the U.S. entities were proper parties to those claims. It is significant that the judge held that the claimants could rely on the "tort gateway" for serving out even though no damages were being claimed (Epic was seeking injunctive relief to restrain alleged tortious conduct), as Epic's claim was that damage had been inflicted on the reputation and goodwill of Epic in the UK. Clearly, "damage" caused by anti-competitive behavior is not to be construed narrowly.

Conclusion

Antitrust remained in the spotlight in 2021. Enforcers, private plaintiffs, and legislators all around the world continued to apply pressure to technology giants and online platforms. Some of these cases have already come to decision and more will do so in the years ahead. The disposition of these cases will have major repercussions not just for the defendants, but for technology industries as a whole and for national and global economies as well. Amid the focus on big tech, it is important not to lose sight of more traditional targets for antitrust scrutiny. Both federal and state enforcers in the United States are taking stronger stances across the board, and global authorities continue to strengthen their merger, conduct, and cartel capabilities. We expect these trends to continue and gain momentum in 2022.

Wilson Sonsini will continue to keep the firm's clients and colleagues updated on the latest developments, particularly as we expect our antitrust attorneys to continue to play a significant role in matters of importance throughout the year. We invite you to contact your regular Wilson Sonsini attorney or any member of the firm's antitrust practice.

Finally, we would like to acknowledge and thank the attorneys and staff of Wilson Sonsini's antitrust practice and marketing department for their contributions to this report.

Endnotes

To view the complete listing of endnotes for this report, please visit
https://www.wsgr.com/email/Antitrust-Report/2021/Antitrust-Report-2021-Endnotes.pdf.

Wilson Sonsini Launches Videos on Antitrust Topics of Interest

Wilson Sonsini introduces our "Antitrust Conversations" resource! In this video series, attorneys in the Wilson Sonsini antitrust practice discuss topics of interest to our clients, including preparing for litigation and the complexities of antitrust class actions, avoiding criminal violations, and fundamentals of antitrust. The videos feature one-on-one discussions, Q&A with the members of our practice, and more.

Jon Jacobson and Mikaela Evans-Aziz

Fundamentals of Antitrust Law

Karen Sharp and Brent Snyder

Criminal Antitrust Investigations

Ken O'Rourke and Allison Smith

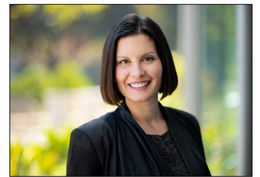
Antitrust Litigation

Tina Sessions

Five Questions for an Antitrust Litigator

Tina Sessions

What Can a Company Do to Position Itself Well for Antitrust Litigation?



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Wilson Sonsini'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 is consistently recognized among the leading antitrust practices worldwide by such sources as *Global Competition Review*, *Chambers*, and *Law360*. In 2020, *Global Competition Review* ranked Wilson Sonsini No. 13 on its "Global Elite" list, which consists of the top 25 firms practicing competition law internationally. GCR has also 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.

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