Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION



2017 ANTITRUST YEAR IN REVIEW

Table of Contents

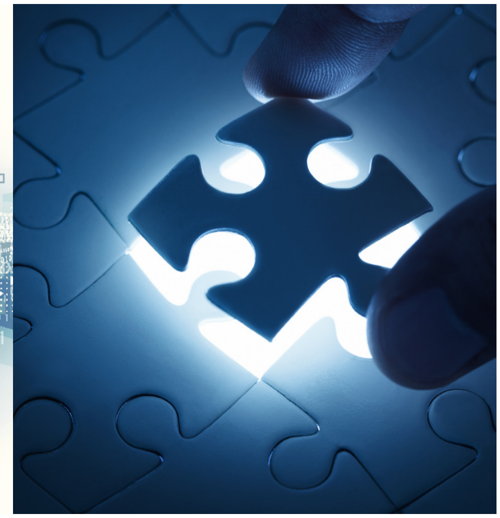
Introduction 1
Mergers 2
U.S. Merger Trends 2
HSR Act Enforcement: Exercising Beneficial Ownership, Failure to File, and Post-HSR Clearance Merger Challenges 2
Shifting Approach to Vertical Mergers 3
Civil Litigation Wins Shine Spotlight on Difficulty of Merger Defenses 4
DOJ Approach to Enforcement of Merger Settlements 5
International Insights 5
Europe 5
China 7
Civil Agency Investigations 8
U.S. Case Developments 8
FTC Complaint Against Qualcomm Extends Global Dispute over Licensing Practices 8
DOJ Anti-Steering Cases Move Toward Resolution 9
United States v. American Express 9
Carolinas HealthCare 9
FTC and DOJ Continue to Pursue Restraints on Trade in Healthcare and Health Products
1-800 Contacts 9
OFTACOOP 10
Pay for Delay/Sham Petitions 10
Continued DOJ/FTC Focus on Information-Sharing Agreements 10
Guidelines for HR Professionals: Information-Sharing in Labor Markets 10
DIRECTV 11
American Guild of Organists 11
Louisiana Real Estate Appraisers Board 11
National Association of Animal Breeders 11
Europe 12
Google Shopping and AdSense 12
Intel – Decision of the ECJ 12
Excessive Pricing 13
EU Aspen Pharma Investigation 13
UK Pharmaceutical Cases 13
"Distribution" Cases 13

Table of Contents (cont.)

Amazon e-Books – MFN Clauses 13
Coty – Selective Distribution 13
Luxury Brand Watch Makers 14
Lithuanian Railway Operator Case 14
EU Double Jeopardy 14
Criminal 15
Notable Developments in the DOJ's Criminal Antitrust Enforcement Program 15
Notable Prosecutions in 2017: Corporations and Individuals 16
DOJ Policy Initiatives 19
Revised Leniency Program: Frequently Asked Questions 19
Antitrust Guidelines for International Enforcement and Cooperation 20
Advocacy for Per Se Standard 21
Antitrust Guidance on Disaster Relief Efforts 21
Guidelines for HR Professionals: Criminal Enforcement for Collusion in Labor Markets 21
Enforcement Against Collusive Conduct Outside the U.S. 21
Civil Litigation 24
This Year in Sherman Act Section 1 and 2 Litigation 24
Price-Fixing Litigation 24
Monopolization and Single-Firm Conduct Litigation 26
Immunity from Antitrust Liability 27
Trends in Pharmaceutical Litigation 28
Pay-for-Delay 28
Other Generic Entry Issues 29
Product-Hopping 29
Risk Evaluation and Mitigation Strategy (REMS) 30
Citizen Petitions 30
Sovereign Immunity 30
Class Certification 31
Class Certification in Pay-for-Delay Cases 31
Indirect Plaintiffs' Failure to Survive Class Certification 31
Different Standards for Ascertainability Requirement 31
Conclusion: Outlook for 2018 32
About WSGR's Antitrust Practice 33

Introduction





Wilson Sonsini Goodrich & Rosati (WSGR) is pleased to present its *2017 Antitrust Year in Review.* In this report, we summarize the most significant antitrust matters and developments of the past year. We begin with a look at mergers and acquisitions, and we discuss the shifts we have observed as U.S. agencies transitioned with the Trump administration, including a high-profile vertical merger challenge by the U.S. Department of Justice (DOJ) and a 1-1 split between commissioners at the Federal Trade Commission (FTC) that resulted in the closing of an investigation. We then examine international mergers and discuss noteworthy shifts in the European Commission's practice. As 2017 was an active year for U.S. and European agency investigations, our report discusses the expanded focus on companies that have significant intellectual property portfolios and other factors enforcers view as an indicator of dominance in markets.

In the last two sections of our report, we focus on criminal cartel and civil litigation matters that impacted both U.S. and global entities. The criminal section provides an overview of trends in the DOJ's criminal enforcement program, including clarifications to leniency program policies, and a lower level of overall corporate fines than in prior years as the agency concludes many large multi-year investigations and begins several new domestic and global investigations. We also highlight cartel investigations in active jurisdictions outside of the U.S., including in Canada, the EU, Japan, Korea, and China. Finally, in the civil litigation section of our report, we discuss key cases that followed on the heels of government investigations, as well as unilateral conduct cases brought by competitors and other private parties. We devote specific attention in this litigation section to developments in the pharmaceuticals and life sciences sectors, which we see as a continuing front for complex and high-stakes disputes.

We hope you find our *2017 Antitrust Year in Review* to be a useful resource on the most meaningful developments from the past year. As always, should you have any questions or comments on any of the matters, trends, or controversies discussed in the report, please contact your regular WSGR attorney or any member of the firm's antitrust practice.

Mergers

U.S. Merger Trends

Antitrust enforcement generally is bipartisan, without dramatic swings in either political direction. Enforcement decisions are based on facts, economics, and the law—and ultimately, when litigated, determined by the courts. Still, with increased public attention focused on antitrust enforcement, this has been an area to watch as the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ) (collectively, the agencies) transitioned under a new Republican administration.

In 2017, President Trump announced his nominees to lead the Antitrust Division of the DOJ and the FTC. The Senate confirmed President Trump's pick, Makan Delrahim, as the Assistant Attorney General (AAG) for the Antitrust Division on September 27, 2017.[1] Delrahim was a DOJ official in the Bush Administration and served in the Trump White House until his confirmation as AAG. The new DOJ leadership has already made its mark, challenging AT&T's acquisition of Time Warner. The trial is scheduled for March 2018. The lawsuit came on the heels of the DOJ's announcement that the agency generally is no longer amenable to merger settlements unless those resolutions involve selling off a line of business that is the source of the competition concerns.

At the FTC—a bipartisan, five-person commission[2]—President Trump has nominated Joseph Simons (a Republican) as FTC Chairman,[3] as well as Noah Phillips (a Republican) and Rohit Chopra (a Democrat) as FTC Commissioners.[4] Until these nominees are confirmed by the U.S. Senate sometime in 2018, the FTC will continue to be led by two commissioners—Acting Chairman Maureen Ohlhausen (a Republican) and Commissioner Terrell McSweeny (a Democrat), both of whom need to vote in favor of an enforcement action in order to sue to block a transaction.

The FTC's 1-1 split is unprecedented, and the FTC's review of Walgreens Boots Alliance's (Walgreens) acquisition of Rite Aid stores shows how this unusual scenario can play out. On October 27, 2015, Walgreens announced its intention to acquire competing retail pharmacy Rite Aid.[5] In early 2017, after an in-depth investigation by the FTC, Walgreens offered to sell 865 drugstores to Fred's Inc. in order to resolve the FTC's antitrust concerns.[6] The parties could not obtain the required unanimous vote to approve the settlement, and, at the end of June, the companies abandoned the initial transaction.[7] Walgreens then proposed a new transaction through which it would acquire only 2,186 (or fewer than half of) Rite Aid's stores, which was also rejected. Walgreens ultimately satisfied Acting Chairman Ohlhausen's concerns by purchasing only 1,932 stores.[8] This revised transaction was cleared without further investigation. Commissioner McSweeny issued a statement expressing her disappointment about the result, saying that at a minimum, the FTC should have fully examined the revised deal.[9] Acting Chairman Ohlhausen issued her own statement, stating that those concerns were unfounded.[10] Because Acting Chairman Ohlhausen has the sole authority to determine whether to conduct an investigation, when she declined to launch such an investigation, the deal closed.

In spite of this split, the FTC maintains that it is business as usual during the transition period.[11] Both commissioners voted together in favor of challenging two other proposed transactions.[12] Nevertheless, until there is a full complement of FTC commissioners in 2018, a single commissioner's vote can, as it did in the *Walgreens/Rite Aid* case, result in no action.

HSR Act Enforcement: Exercising Beneficial Ownership, Failure to File, and Post-HSR Clearance Merger Challenges

The Hart-Scott-Rodino Improvements Act of 1976 (HSR Act) mandates that transactions that meet specific thresholds be notified to the antitrust agencies for review. If, after a 30-day waiting period, the relevant agency still has doubts about the competitive effects of the notified transaction, the agency will issue a Request for Additional Information and Documentary Materials (known as a Second Request), opening an in-depth review into the transaction. The FTC and DOJ's recently released FY 2016 Annual HSR Report[13] showed that both filings and Second Requests increased over FY 2015.[14]

The determination of whether a transaction requires a filing under the HSR Act—and the restrictions that apply to companies during the HSR waiting period—is important. The agencies will bring enforcement actions against companies and individuals for HSR Act violations, and 2017 was no different in that respect.

In January 2017, the DOJ announced an enforcement action against Duke Energy Corporation (Duke) for "gun-jumping" in connection with its acquisition of Osprey Energy Center (Osprey).[15] Under the HSR Act, acquirers may not obtain beneficial ownership of the acquired company's assets or voting securities during the HSR waiting period. A party may be viewed as prematurely obtaining beneficial ownership of a business (or engage in gun-jumping) by assuming the risk or potential benefit of changes in the value of the business or exercising control over day-to-day business decisions. In this case, the DOJ alleged that Duke entered into a tolling agreement that immediately gave Duke control over Osprey's output as well as the right to receive day-to-day profits and losses from Osprey's business, thereby removing Osprey as an independent competitor, before expiration of the HSR waiting period.[16] Duke agreed to pay $600,000 to resolve the DOJ's complaint.[17]

The agencies also pursued two failure-to-file cases in 2017. In April 2017, entrepreneur Mitchell P. Rales agreed to pay $720,000 to resolve charges that he violated the HSR Act[18] by failing to report his purchases of shares in amounts above the applicable filing thresholds when he and his wife purchased shares in Colfax Corporation and Danaher Corporation in 2008 and 2011.[19] Rales contended that the violations were inadvertent, but the FTC, in seeking penalties, noted that Rales had paid civil penalties to settle an HSR enforcement action in 1991.[20] Also in April, hedge fund founder Ahmet H. Okumus agreed to pay $180,000[21] to resolve charges that he violated the HSR Act by failing to report his purchases of voting securities in Web.com Group Inc., an internet services company.[22] Purchasers should be mindful of the HSR rules that require a filing for transactions resulting in the value of the purchaser's voting securities exceeding annually adjusted value thresholds. It is important to seek counsel to determine whether an HSR filing is required.

As a general matter, once parties clear the HSR waiting period, they can close their transaction without expecting the agencies will challenge their transaction—but not always. On September 26, 2017, the DOJ filed suit against industrial equipment manufacturer Parker-Hannifin, looking to partially unwind its consummated $4.3 billion acquisition of rival CLARCOR.[23] The parties announced their transaction on December 1, 2016, and Parker's public filings indicate that the HSR waiting period expired on January 17, 2017, without a Second Request for information.[24] The DOJ then received a complaint about the transaction and opened an investigation, ultimately suing to block the deal.[25] In a press release regarding its complaint, the DOJ stated that "Parker-Hannifin failed to provide significant document or data productions in response to the department's requests" and did not enter into a "satisfactory agreement to hold separate the fuel filtration businesses at issue and to maintain their independent viability pending the outcome of the investigation."[26] Parker-Hannifin later agreed with the DOJ, in settling the case, to divest the aviation fuel filtration business to resolve the agencies' concerns, an insignificant part of the $4.3 billion deal.[27] While the DOJ always has made clear that it can and will challenge mergers that do not require an HSR filing, it is more unusual for it to challenge a transaction that had already cleared agency review. This case may ultimately prove to be an outlier; however, it is a reminder that both agencies have broad powers to challenge any transaction.

Shifting Approach to Vertical Mergers

Transactions involving businesses operating at different levels of a supply chain (vertical transactions) are an area to watch, with the *AT&T/Time Warner* trial in the spotlight in 2018. Vertical mergers do not eliminate head-to-head rivalry between existing firms, but often help firms align incentives and reduce costs—and have generally been viewed as offering at least some efficiencies that benefit companies and importantly, consumers. Antitrust agencies have, generally, resolved competitive concerns in vertical mergers, through behavioral decrees that enable the transaction to proceed while targeting specific conduct that is the source of potential competitive harm. The DOJ's Remedy Guide issued in 2010 states that behavioral remedies may be a valuable tool in alleviating competitive harm that may result from a merger while preserving its potential efficiencies.[28] For example, where the agencies have a concern about the merged entity withholding acquired assets from rivals, transacting parties may be required to continue to license or sell their products to third parties. The merged company may also be required to establish firewalls that prevent the sharing and misuse of information newly accessible as a result of the transaction.

In a notable departure, in one of his first speeches as AAG, Makan Delrahim expressed his significant skepticism about behavioral remedies, describing them as "overly intrusive and unduly burdensome for both businesses and government."[29] He noted that the DOJ will "return to the preferred focus on structural relief to remedy mergers that violate the law and harm the American consumer."[30]

Four days later, on November 20, 2017, the DOJ filed a complaint challenging AT&T's proposed acquisition of Time Warner—a vertical merger combining AT&T's video distribution business with Time Warner's content business.[31] The DOJ's complaint alleges that AT&T, a distributor of content, will have the incentive to withhold Time Warner's content from its video distribution competitors.[32] The answer filed by AT&T and Time Warner notes that Time Warner "formally and irrevocably" offered third-party distributors licensing terms similar to those accepted by the DOJ in 2010 when it considered a similar vertical transaction that combined Comcast and NBCUniversal.[33] The case remains ongoing, and, in the near term, there is likely little room for the parties to propose conduct-focused settlements to the DOJ.

It is unclear whether the FTC will take a similar approach. In July, the FTC accepted a behavioral decree to remedy concerns that Broadcom's acquisition of Brocade Communications Systems was anticompetitive.[34] Pursuant to the decree, Broadcom agreed to set up a firewall to prevent the exchange of Cisco Systems' confidential business information to Brocade.[35] If the FTC continues to be amenable to behavioral remedies in 2018, the fate of potentially problematic vertical mergers may hinge, in part, on whether the FTC or the DOJ reviews the deal.

Behavioral remedies also have attracted attention more broadly. In December 2017, U.S. Senator Elizabeth Warren delivered a speech at the Open Markets Institute calling for more aggressive antitrust enforcement and commending the DOJ's suit against AT&T and Time Warner.[36] Senator Warren noted specifically that in order "to revive competition in our economy, vertical mergers, particularly mergers in already concentrated industries, should be viewed with the same critical eye that's needed for mergers between direct competitors."[37] Senator Warren's remarks also called out tech companies specifically, warning that there is "no exception in antitrust laws for big tech."[38]

Civil Litigation Wins Shine Spotlight on Difficulty of Merger Defenses

This year, the agencies added to their merger litigation records, including the DOJ's successful litigation of three major mergers in 2017—two mergers in the health insurance industry and EnergySolutions' acquisition of Waste Control Specialists.

In late 2016, the DOJ, 11 states, and the District of Columbia sued in federal district court to block the $54 billion dollar combination of health insurers Anthem and Cigna.[39] The court enjoined this merger in February 2017, finding harm in two of the alleged five markets where the government alleged harm, including in the sale of health insurance and the purchase of healthcare services by commercial health insurers.[40] A divided panel of the U.S. Court of Appeals for the D.C. Circuit affirmed this decision in April, finding that competitive harm for the same of health insurance to national accounts sufficed to enjoin the merger and that the companies efficiencies claims failed to offset the likely harm from the merger.[41] On May 12, 2017, Anthem announced that it would no longer seek to acquire Cigna.[42]

In another case filed the same day as the *Anthem/Cigna* challenge, the DOJ, eight states, and the District of Columbia challenged the $37 billion merger of Aetna and Humana, alleging the elimination of competition in both the sale of health insurance and the purchase of healthcare services.[43] The DOJ's complaint alleged that the two mergers "would reshape the industry, eliminating two innovative competitors . . . at a time when the industry is experimenting with new ways to lower healthcare costs."[44] In January 2017, the U.S. District Court for the District of Columbia sided with the DOJ.[45] In February, Aetna abandoned the transaction and paid Humana $1 billion in break-up fees.[46]

Anthem/Cigna may be the more instructive case because it serves to remind parties that it is difficult to prove in litigation that anticompetitive effects may be overcome by efficiencies. Agencies generally recognize that even mergers of head-to-head competitors can lead to efficiencies that result in lower prices, quality improvements, and innovation. Indeed, transactions are often cleared on the basis of such efficiencies. However, in litigation, parties are much less successful in persuading courts of these efficiencies. In *Anthem*, the parties argued that the combination would generate $2.4 billion in merger-specific efficiencies on an annual basis and that the merger would result in reduced provider costs that would make healthcare more affordable for customers.[47] The district court disagreed, declining to credit the claimed efficiencies, and Anthem appealed this issue to the D.C. Circuit.[48] The majority opinion of the three-judge panel sided with the DOJ and the states, questioning (but not resolving) the availability of an efficiencies defense in the context of an illegal merger,[49] and holding that even with such a defense, Anthem failed to rebut the government's case.[50] The appellate court agreed with the lower court's holding that, among other things, the efficiencies were not merger-specific, were vague and not verifiable, and would not be passed through to consumers at the rate claimed by the parties.[51]

Another 2017 DOJ litigation win reveals another difficult merger defense—the failing firm defense. In June 2017, the District of Delaware ruled in favor of the DOJ in the agency's challenge to an acquisition by EnergySolutions of Waste Control Specialists (WCS), both of which provide radioactive waste disposal to commercial customers.[52] The DOJ alleged that the transaction would be a merger to monopoly in one market. The defendants asserted a failing firm defense, which is permitted when "the possible threat to competition resulting from an acquisition is deemed preferable to the adverse impact on competition and other losses if the company goes out of business."[53] However, the court in the case explained that defendants must show: "(1) that the resources of [WCS] were "so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure," and (2) that there was no other prospective purchaser for it."[54]

The court ultimately rejected failing firm defense because the defendants failed to demonstrate that EnergySolutions was the "only available purchaser" of WCS.[55] In this case, the court found there was no good faith effort to find other reasonable offers. Instead, the parent company "essentially engaged in a single bidder process" and then relied on deal protection devices that made it impossible to entertain other offers.[56] The court ruled in favor of the government and enjoined the $367 million merger.[57] *EnergySolutions/WCS* shows not only the high burden to establish that the acquired company is in grave probability a "business failure," but also the need to carefully evaluate the approach to selling assets if a failing firm defense will be advanced.

DOJ Approach to Enforcement of Merger Settlements

The DOJ's merger settlements also offer guideposts for parties analyzing antitrust risk. In June 2017, General Electric (GE) reached a settlement with the DOJ, agreeing to divest its Water and Process Technologies (GE Water) to SUEZ S.A. by the end of September 2017, as a condition to acquiring Baker Hughes.[58] Although GE divested assets accounting for 90 percent of GE Water's revenues, as of October 2017, it had not yet transferred legal title of certain GE Water assets in certain international jurisdictions, and informed the DOJ that administrative hurdles would likely delay completion of the divestment into 2018.[59] In response, the DOJ and GE entered a modified final judgment whereby GE agreed: (1) to make daily "incentive payments" to the DOJ for each day in 2018 that the divestiture is not fully completed; and (2) to reimburse the U.S. for attorney's fees and costs incurred in addressing delays and enforcing the original consent decree[60]—features that, according to the DOJ, would become more regular components of consent decrees moving forward.[61]

In another case, the DOJ's consent decree relaxed the standard for any subsequent contempt action for failure to comply with settlement terms. In *CBS/Entercom*, the DOJ required Entercom to divest 13 radio stations in three cities to protect competition for local businesses that sought to advertise on radio stations in those particular markets.[62] Typically, a civil contempt action must be proven by a clear and convincing evidence standard,[63] but under the terms of the *CBS/Entercom* decree, any alleged violation by the parties will be evaluated under a "preponderance of the evidence" standard.[64]

In light of the GE and Entercom settlements, parties should think carefully about all terms in a DOJ merger settlement and identify any areas in advance where compliance may be difficult. The DOJ may not be flexible in amending or extending such terms once a settlement has been reached.

International Insights

Europe

Focus on Innovation in Merger Reviews

The merger between E. I. du Pont de Nemours and Company (DuPont) and the Dow Chemical Company was conditionally approved by the European Commission (EC) on March 27, 2017.[65] It was the first of a trio of megadeals in the agrichemicals industry to obtain clearance in Europe this year. The EC analyzed whether the combination might reduce competition with respect to crop protection (pesticides) and some petrochemicals, focusing on concerns that the merger would reduce the parties' incentive to compete through innovation. The merger was ultimately approved after the parties submitted commitments to divest a significant part of DuPont's existing pesticide business including its R&D branch. The second merger in the trio, *ChemChina/Syngenta*, was conditionally approved by the EC on April 5, 2017, based on a series of divestitures offered by ChemChina in their Adama and Syngenta products within the pesticide and plant growth markets.[66] In this case, the EC considered, but ultimately dismissed, the concern that competition for innovation would be impacted.[67]

The third agrichemical deal is still pending. After rejecting Phase I commitments submitted by the parties, the EC announced in August 2017 that it was opening an in-depth investigation into the proposed acquisition of Monsanto by Bayer, a diversified German pharmaceuticals, consumer health, agriculture, and animal health company.[68] If approved, the transaction will lead to the creation of the largest integrated company in the industry, with the largest portfolio of pesticide products and a powerful global market position in the markets for seeds and traits (plant characteristics such as height, herbicide tolerance, and insect resistance, which can be developed in laboratories and introduced into certain plant varieties). The EC's preliminary concerns are that there could be a reduction of competition in the markets for pesticides, seeds and traits, leading to higher prices, lower quality, less choice, and less innovation. Critically, however, the EC is also investigating whether competitors' access to distributors and farmers could become more difficult if Bayer and Monsanto were to bundle or tie their sales of pesticide products and seeds, notable with the advent of digital agriculture, with significant investment by Bayer and Monsanto. Digital agriculture involves the collection of data and information about farms to provide farmers with tailored advice or aggregated data. The EC has until March 5, 2018, to make a decision.[69]

While the EC has looked at the relationship between pipeline products and products on the market in a number of pharmaceutical mergers, the emphasis on innovation in an industry, rather than in a specific antitrust market, is new and controversial. Commissioner for Competition Margrethe Vestager seems determined to explore this area. She has made several high-profile speeches this year focusing on the importance of innovation for the competitive process, and case teams are now systematically testing the incentives to innovate in merger investigations.[70]

Penalties Imposed for Procedural Violations

Gun-Jumping

This year, the EC sent separate Statements of Objections to two companies, telecommunications company Altice and imaging equipment manufacturer Canon, for alleged gun-jumping. These actions were in line with a general trend of increased enforcement in this area across the globe.

In February 2015, Altice notified the EC of its intention to acquire control of Portugal's legacy telecoms operator, PT Portugal. In a Statements of Objections issued to the company in May 2017, the EC takes the preliminary view that through a series of actions, Altice implemented the acquisition prior to the adoption of the EC's clearance decision, and in some instances, prior to its notification.[71] In particular, the EC alleges that the purchase agreement between the two companies put Altice in a position to exercise decisive influence over PT Portugal before notification of the transaction, and that in certain instances Altice actually exercised decisive influence over PT Portugal.[72] This is not the first time Altice has been involved in a gun-jumping investigation. In November 2016, Altice was fined a record-breaking €80 million ($88 million) for gun-jumping by the French national competition authority.[73] An EC official said at a conference in October 2017 that the EC is analyzing carefully the covenants in the share purchase agreement, and the type of rights that were granted to the purchaser between signing and closing.[74]

In the other gun-jumping investigation, the EC is looking into Canon's acquisition of Toshiba Medical Systems Corporation (TMS). The EC's preliminary conclusion is that Canon acquired TMS by way of a two-step transaction structure involving an interim buyer, which essentially allowed it to acquire control of TMS prior to obtaining merger approval.[75] In *Canon/TMS*, as a first step, the interim buyer acquired 95 percent of the share capital of TMS for €800 (approximately $940), whereas Canon paid €5.28 billion (approximately $6.2 billion) for both the remaining 5 percent and share options over the interim buyer's stake. This first step was carried out prior to notification to the EC. As a second step, following approval of the merger by the EC, the share options were exercised by Canon, giving it control over 100 percent of the shares of TMS.[76]

As merger procedures in many major transactions become longer, merging parties are constantly exploring the boundaries within which they are permitted to work together prior to closing. The Altice case may ultimately provide clarity on what pre-closing covenants the EC considers unacceptable, while the Canon case may provide important guidance on how the EC views transactions structured in stages. However, if merging parties were hoping for guidance from the General Court (GC) in *Marine Harvest/Morpol*, this has not been particularly favorable. In October 2017, the GC dismissed the appeal filed by a Norwegian seafood company, Marine Harvest, against a €20 million (approximately $25.3 million) gun-jumping fine in 2014—the first of its kind imposed by the EC.[77] While the GC acknowledged that the complete takeover of Morpol, a Norwegian salmon producer, occurred in three stages involving various sellers, it agreed with the EC that Marine Harvest had acquired de facto sole control over Morpol during the first step of the transaction, and that the notification obligation was triggered at that stage.[78]

Providing Misleading Information

Focusing on other procedural breaches, in May 2017, the EC fined Facebook €110 million (approximately $122 million) for providing misleading information during its 2014 review of Facebook's takeover of WhatsApp, an unprecedented fine for such infringements.[79] During the EC's review, Facebook had explained that the automated matching between the two companies' user accounts was not yet reliable and was in fact impracticable.[80] Two years later, Facebook's terms of service and privacy policy evidenced that the automated matching between the separate accounts had in fact been achieved. The EC reacted by sending Facebook a Statement of Objections alleging that, contrary to Facebook's submissions during the merger notification process, automated matching was *already* a reality at that time and Facebook's experts were aware of it. The EC fined Facebook less than the maximum fine of 1 percent of its aggregate turnover, but the fine could have been higher had Facebook not cooperated fully with the EC's investigation.[81] Announcing the fine in a press release, Commissioner Vestager reiterated her view that even breaches of the merger control procedural rules will not be tolerated: "Today's decision sends a clear signal to companies that they must comply with all aspects of EU merger rules, including the obligation to provide correct information."[82]

The EC also sent a Statement of Objections to Merck this year, for allegedly (intentionally or negligently) supplying incorrect or misleading information. In June 2015, the EC cleared the *Merck/Sigma-Aldrich* merger, provided the merging parties divested certain Sigma-Aldrich assets.[83] Merck had not disclosed the existence of an important innovation project concerning certain laboratory chemicals, which would have been relevant to the EC's assessment. Subsequently, the EC was made aware of this by a third party. Had the R&D project been disclosed to the EC, the remedy package would, it is alleged, have included it. The relevant innovation was closely linked to the divested business and had the potential to substantially increase its sales. By not including it, the viability and competitiveness of the divested business was impaired. Although Merck has since agreed to license the relevant technology to Honeywell—the buyer of the divested business—this happened almost one year after the divestment.[84]

Similarly, this year the EC opened an investigation regarding allegations that GE provided misleading information. According to the EC's allegations, when the agency first reviewed GE's acquisition of LM Wind, GE had failed to disclose information to the EC concerning its R&D activities and the development of a specific product, which were important to the EC's assessment of GE's position on the onshore and offshore wind turbine markets. The EC viewed this omission as critical not only to this transaction, but also to the EC's assessment of Siemens' acquisition of Gamesa, a separate transaction in the wind turbine market, being reviewed at the same time. The EC has stated that the information was necessary to properly assess, in both cases, the future position of GE and the competitive landscape on the markets for wind turbines. GE withdrew its notification and re-filed, including the relevant information in the second filing, and issued a public statement that it had no intent to mislead the EC. Notwithstanding both mergers *(GE/LM Wind* and *Siemens/Gamesa*) being cleared unconditionally in March 2017, GE is now facing the prospect of a procedural fine.[85]

The EC's recent push on procedural breach investigations has not had an impact on the EC's decisions approving those particular mergers, which remain effective. The fact that the EC is using its resources to pursue companies where those investigations do not have an impact on the outcome of the merger approvals highlights the EC's tough stance on procedural breaches and serves as a reminder to businesses that the EC can revoke a clearance decision if it is based on incorrect information for which one of the merging firms is responsible.

EC's Ongoing Consultation on Merger Control Thresholds

In 2017, the EC consulted on plans to modify the rules that trigger a mandatory filing with the EC to catch transactions, which are likely to have an impact in the European market, but do not trigger the current turnover-based thresholds. Any change is likely to be particularly significant for the digital and pharmaceutical industries, where the target company may have modest sales in Europe, but hold commercially valuable data, or have considerable market potential for other reasons.[86] For example, in digital markets, many companies' business model involves the ownership and curation of data and user relationships, which will only be monetized subsequently. Since many such businesses do not necessarily generate significant turnover in their first few years, their sales may fall below the current merger control regime thresholds. Given the EC's focus on preventing mergers that might harm innovation in the future, a change in the jurisdictional thresholds would provide the EC with an additional tool to review mergers that are not caught under the current rules, but which the EC considers may have an impact on competition. The EC published a summary of the replies to its consultation in July 2017,[87] but as of the date of this publication, no evaluation has yet been made public.

China

In 2017, China's Ministry of Commerce (MOFCOM) issued a number of conditional approval decisions for large international mergers requiring their clearance, both structural and behavioral. For example, in August 2017, Broadcom's takeover of Brocade Communications Systems received approval from MOFCOM on the condition that Broadcom maintain the interoperability between its own switches and third party host bus adapters (HBAs), and never discriminate against third-party HBAs.[88] The company was also required to install firewalls akin to those required by the U.S. and European agencies, and to refrain from engaging in any tie-in sale or bundling in any form.[89] Likewise, in May 2017, MOFCOM granted regulatory approval of DuPont and the Dow Chemical Company's proposed merger, conditioned on DuPont and Dow divesting certain parts of DuPont's crop protection portfolio, its R&D pipeline and organization, and Dow's global ethylene acrylic acid copolymers and ionomers businesses.[90]

The Chinese authorities also issued a number of procedural fines this year for companies' failures to notify transactions.[91] One important departure for the Chinese authorities came on January 4, 2017, when MOFCOM published its decision to fine Japanese firm Canon Inc. for failure to notify, under China's Anti-Monopoly Law (AML), its acquisition of Toshiba Medical Systems Corporation, a Japanese medical equipment company, from Toshiba Corporation in a two-step merger.[92] MOFCOM—like the EC—essentially regarded both steps of the transaction as part of the same transaction and concluded that Canon should have notified the transaction before completion of the first step of the merger. Failure to do so, according to MOFCOM, meant that Canon had jumped the gun in implementing at least parts of the transaction before obtaining MOFCOM clearance. MOFCOM fined Canon RMB 300,000 (approximately $43,000) for its failure to notify, despite the fact that the transaction raised no substantive competition concerns.[93]

On September 8, 2017, MOFCOM published revised draft merger review measures, which will amend China's AML, for public comment.[94] It is expected that some amendments will be made in order to supplement and clarify the current law, for example, clarifying the rules' concept of "control."[95] In addition, the draft measures clarify the law's treatment of inter-dependent transactions; make some changes regarding the calculation of turnover in the case of a thresholds analysis; and set out a new procedure for MOFCOM to investigate non-reportable transactions that do not meet the statutory thresholds.[96] Notably, it has also been proposed that the statutory penalty for failure to notify a notifiable concentration, currently capped at RMB500,000 (approximately $76,000) would be increased.[97]

Civil Agency Investigations

Antitrust agencies worldwide launched investigations into new areas of allegedly anticompetitive behavior in 2017, while continuing to focus on priorities set in previous years. In the U.S., the Federal Trade Commission (FTC) joined other jurisdictions in launching a suit against Qualcomm over its smartphone IP licensing practices, while the U.S. Department of Justice (DOJ) continued to pursue its landmark credit card anti-steering case despite a setback at the Circuit Court level. The U.S. agencies also drilled deeper into information-sharing and other allegedly collusive practices, particularly in key industries—like healthcare—that are the subject of heightened concerns over consumer welfare.

In Europe, commission enforcers saw a major setback with the European Court of Justice's (ECJ's) reversal of the European Commission's (EC's) previous decision against Intel. Google was also in the spotlight, with the EC issuing a historic €2.42 billion (approximately $2.91 billion) fine in the long-running Shopping case while continuing simultaneous investigations into Google's AdSense and Android practices. Beyond the tech sector, the EC also continued to break new ground through investigations into a variety of allegedly harmful unilateral practices, including excessive pricing, MFN distribution, and unilateral refusals to deal.

U.S. Case Developments

FTC Complaint Against Qualcomm Extends Global Dispute over Licensing Practices

On January 17, 2017, the FTC voted 2-1 to file a complaint against Qualcomm.[98] The FTC's complaint joins pending or concluded investigations in several jurisdictions around the world—including China,[99] South Korea,[100] Taiwan,[101] Japan,[102] and the European Union (EU)[103]—that have challenged a range of Qualcomm business practices. The FTC's complaint alleges that Qualcomm has market power in the worldwide markets for CDMA and premium LTE chipsets for mobile baseband communications.[104] According to the FTC, Qualcomm allegedly leveraged this market power to support a "no license, no chips" policy whereby device OEMs are required to license Qualcomm's standard-essential patents at royalty rates and license terms they would not otherwise accept before they are allowed to purchase chips.[105] The FTC further alleged that Qualcomm refused to license its standard-essential patents to competing chipset manufacturers. According to the FTC's complaint, these policies allowed Qualcomm to impose an anticompetitive "tax" that made rivals' chipsets relatively more expensive for OEMs.[106] Finally, the FTC contends that Qualcomm coerced Apple into entering an exclusive agreement for mobile broadband chipsets by offering partial relief from the royalties that Qualcomm charged to Apple's contract manufacturers (and were subsequently passed through to Apple).[107] The FTC alleged that foreclosing sales to Apple, a prominent and high-volume purchaser, had a particularly significant impact on the market by denying opportunities for rivals to achieve efficient scale and the experience and reputation necessary to make further sales.[108]

The FTC Commissioners split 2-1 in voting to issue the complaint. In a rare move, dissenting Commissioner Maureen Ohlhausen issued a statement expressly criticizing the theory of the FTC's complaint.[109] Commissioner Ohlhausen stated that she felt compelled to write because of the extraordinary potential for the complaint to undermine U.S. intellectual property rights abroad, as well as because of its unusual timing—filed three days before the end of the Obama Administration.[110] Commissioner Ohlhausen took issue with the fact that the FTC's complaint failed to allege that Qualcomm charged supra-competitive, rather than merely fair, reasonable, and non-discriminatory (FRAND) royalties.[111] She observed that there was no robust economic evidence of exclusion and anticompetitive effects, either as to the complaint's "taxation" theory or its allegations of exclusive dealing, but instead the complaint was based on what amounted to "simply a possibility theorem." Finally, Commissioner Ohlhausen noted that the FTC's complaint notably included a standalone claim under Section 5 of the FTC Act.[112] Under the FTC's 2015 Guidance on the enforcement of Section 5, such claims would ordinarily be evaluated using the framework of the Sherman Act, making the standalone Section 5 claims surprising.[113]

Qualcomm moved to dismiss the FTC's complaint, which the court denied in June 2017.[114]

DOJ Anti-Steering Cases Move Toward Resolution

Two DOJ civil actions focused on the unilateral imposition of anti-steering rules moved closer to final resolution in 2017.

United States v. American Express

In September 2016, the Second Circuit overturned the U.S. District Court for the Eastern District of New York's finding that American Express (Amex) had violated the Sherman Act by prohibiting merchants that accepted Amex cards from encouraging consumers to use other payment cards, which often had lower merchant fees.[115] The district court had agreed with the allegations of the DOJ and several states that the nondiscriminatory provisions Amex entered into with retailers restrained competition by preventing merchants from encouraging customers to use alternative forms of payment (for example, by offering discounts to customers using other cards or cash), imposing non-uniform restrictions on the use of Amex cards, or otherwise criticizing Amex's services.[116]

The Second Circuit held that the district court had applied an incorrect market definition which failed to consider the feedback effects in a multisided platform, and erroneously found Amex to have market power by failing to account for the relationship between cardholder demand for services and merchant attrition. By failing to account for the potentially beneficial effect that the Amex merchant restrictions created for Amex cardholders and focusing solely on the merchant side of the platform, the Second Circuit found that the district court had incorrectly determined that Amex's nondiscriminatory provisions adversely affected competition.[117]

Eleven states appealed the Second Circuit's decision, even though the DOJ declined to seek certiorari with the co-plaintiff states. In October 2017, the U.S. Supreme Court granted certiorari and argument will be heard in 2018.

Carolinas HealthCare

A few months before the Second Circuit issued its decision in *American Express*, the DOJ and the North Carolina attorney general filed suit against Carolinas HealthCare System (CHS), alleging that it leveraged its market power to require every major insurer to agree not to introduce plans that encouraged patients to use lower-cost hospitals.[118] According to the complaint, CHS, which controls roughly 50 percent of the relevant market, exerted this market power by threatening to cut off their contracts with insurers that steer patients to lower-cost providers.[119]

On March 30, 2017, the court denied CHS's request for judgment on the pleadings, preserving the government's lawsuit on the grounds that the DOJ had plausibly alleged that steering restrictions drive up insurance prices and reduce patients' options for care.[120] The case remains pending in the Western District of North Carolina.

FTC and DOJ Continue to Pursue Restraints on Trade in Healthcare and Health Products

In 2017, the U.S. antitrust agencies continued to focus particular attention on anticompetitive agreements in healthcare and health products:

1-800 Contacts

On October 30, 2017, an administrative law judge (ALJ) upheld the FTC's complaint alleging that 1-800 Contacts entered into a series of anticompetitive horizontal agreements, which the FTC alleged prohibited competitors from presenting paid advertisements on search engine results that were responsive to searches for its own trademark brands.[121]

The FTC had initially filed suit against 1-800 Contacts in August 2016, claiming that the online contact lens manufacturer unlawfully orchestrated a network of anticompetitive agreements with at least 14 competing online contact lens retailers to eliminate competition in auctions to place advertisements on online search engines like Google and Bing. According to the complaint, 1-800 Contacts coerced competitors to enter into agreements not to bid on each other's brand name keywords through threats of litigation.[122] *1-800 Contacts* continues the FTC's and the DOJ's longstanding practice of targeting agreements not to advertise, but introduces a new competitive context – search engine advertising.[123]

1-800 Contacts argued, unsuccessfully, that the challenged agreements were reasonable efforts to protect its intellectual property.[124] The ALJ disagreed and issued an order barring 1-800 Contacts from entering into bidding agreements that restrict competition in online search engine auctions by prohibiting rivals from paying to appear when a user searches for "1-800 Contacts" or other closely related terms.[125] Moreover, the ALJ's order forbids 1-800 Contacts from entering into an agreement with another contact lens seller to restrict, prohibit, regulate, or otherwise limit that seller's use of "truthful, non-deceptive, and non-trademark-infringing advertising or promotion."[126]

In November 2017, the FTC granted a joint motion to extend the deadlines for filing appeals, answers and replies related to the matter.[127]

OFTACOOP

On January 19, 2017, the FTC issued a final order and entered into a consent agreement sanctioning the Cooperativa de Médicos Oftalmólogos de Puerto Rico (OFTACOOP), a Puerto Rican ophthalmologist cooperative of roughly 100 members, for organizing an exclusionary group boycott against health plan, MCS Advantage (MCS) and network administrator, Eye Management of Puerto Rico (Eye Management).[128]

According to the FTC's complaint, MCS approached Eye Management to establish a new reduced-cost network of individual ophthalmologists. Upon learning of MCS's and Eye Management's efforts, OFTACOOP coordinated a plan among its members to boycott the new network. The boycott ultimately forced MCS and Eye Management to abandon their plans for a reduced cost network.[129]

The final consent decree bars OFTACOOP from entering into or facilitating agreements between or among ophthalmologists to refuse to deal with any payor regarding price or any other term. The decree also bars OFTACOOP from facilitating information exchange, which might assist a boycott, or suggesting, advising, pressuring, inducing, or trying to induce anyone to engage in any similar conduct.[130]

Pay for Delay/Sham Petitions

The FTC continued to prioritize illegal pay-for-delay pharmaceutical settlements in 2017, extending a pattern that has lasted since the FTC's landmark *Actavis* victory in 2013. On January 23, 2017, the FTC issued two separate complaints against Endo and Impax alleging that Endo entered into pay for delay settlements with Impax and other conspirators to prevent entry of generic versions of Lidoderm and Opana ER with Impax.[131] On February 7, 2017, the FTC filed a complaint in federal district court alleging that Shire engaged in sham petitioning of the FDA as a way to obstruct generic entry.[132]

The FTC has stated that pay-for-delay results in $3.5 billion in higher drug costs every year. The FTC also supports legislation to end such pay-for-delay settlements.[133]

Continued DOJ/FTC Focus on Information-Sharing Agreements

The focus on anticompetitive collusion by the DOJ and the FTC has not been restricted to the drug and medical device context. The agencies also focused on information-sharing agreements, which the agencies view as having a strong likelihood of restricting competition and enabling anticompetitive behavior.

Guidelines for HR Professionals: Information-Sharing in Labor Markets

In late 2016, the DOJ and the FTC jointly published a paper titled "Antitrust Guidance for Human Resources Professionals" (HR Guidance).[134] As we describe in further detail in the Criminal Enforcement section of this report, the HR Guidance highlighted that certain forms of horizontal collusion and information exchanges within the labor and employment context could violate the antitrust laws. Information about wages, employee salary, or other terms of compensation, either at a specific level or within a range is of particular concern by the agencies. Two Deputy Assistant Attorneys Generals (Andrew Finch and Barry Nigro) have commented publicly that the DOJ is readying cases against such agreements. Companies that have engaged in benchmarking studies and analysis or have trade association participation on human resources issues will want to pay close attention to the

DOJ's pursuit in this space, particularly given the broad implications for hiring and the setting of wages and compensation in various contexts.

DIRECTV

In March 2017, the DOJ settled its ongoing case against DIRECTV and AT&T. The DOJ had originally sued DIRECTV (and its corporate successor, AT&T) in November 2016, for alleged collusion and unlawful information-sharing with competitors during negotiations to carry Dodgers baseball games in the Los Angeles area. The complaint alleged that DIRECTV colluded with competitors Cox Communications and Charter Communications to avoid competing for access to Dodgers broadcast rights.[135] DIRECTV allegedly kept its competitors updated on the status of negotiations, and made assurances that it was not planning to bid on the rights at the price that Time Warner was demanding.[136]

According to the DOJ, the settlement "will obtain all of the relief sought by the department in its lawsuit," including requiring the companies to monitor certain communications their programming executives have with their rivals, and to implement antitrust training and compliance programs.[137]

The DOJ emphasized the particular importance of aggressive enforcement in markets like cable television broadcast rights, where customers may only have "a handful of choices in the marketplace."[138]

American Guild of Organists

In May 2017, the FTC issued a final order and entered into a consent agreement with the American Guild of Organists (AGO), a national trade association for organists and choral conductors.[139] Under the consent agreement, AGO agreed to eliminate rules that the FTC found to restrict its members from competing for opportunities to perform in violation of Section 5 of the FTC Act.[140]

Specifically, the FTC alleged that AGO restrained trade by promulgating a Code of Ethics and model contracts that limited the freedom of organists and choral directors to seek or accept engagements. Members were required to seek the consent of an incumbent musician at a venue before accepting the engagement, forcing consumers to pay for both the chosen musician and the incumbent musician (even though only the chosen musician performs at the event).[141] In addition, AGO allegedly developed and enforced a schedule to be used by AGO chapters to set regionally applicable compensation schedules, based on which AGO members set their fees.[142]

The final consent agreement required AGO to stop restraining its members from soliciting work or issuing compensation schedules, guidance, or model contracts based on which members determine their fees.[143] In addition, AGO is also required to implement an antitrust compliance program and to stop recognizing chapters that fail to certify compliance with the order's provisions.

Louisiana Real Estate Appraisers Board

In May 2017, the FTC filed an administrative complaint charging the Louisiana Real Estate Appraisers Board (LREAB) with restraining price competition among appraisal management companies beyond the dictates of the Dodd-Frank Act, which requires appraisers to charge "customary and reasonable rates."[144] Then-Acting Director of the Bureau of Competition Tad Lipsky noted the significance of this complaint as the first FTC complaint against a state board since the U.S. Supreme Court's decision in the *North Carolina State Board of Dental Examiners* case.[145]

The challenged conduct was the board's policy that appraisers set their fees exclusively based on the methods prescribed by the board.[146] Further, the board allegedly commissioned annual reports of the median fees charged in different regions in Louisiana, posted the reports on its website, and required appraisers to charge fees that are equal to or exceed such median fees.[147] The board allegedly took enforcement actions against the appraisers charging fees below the published median fees, resulting in agreements by these appraisers to raise the fees so that they equal or exceed the median fees, as well as wide press coverage of the board enforcement actions and their outcomes.[148]

The FTC alleged that the board's conduct constituted concerted action that unreasonably restrains trade under Section 5 of the FTC Act.[149] With respect to the state action doctrine, the FTC argued that neither the Dodd-Frank Act nor the state law implementing it required the board to set customary and reasonable fees at any particular level.[150] Further, the FTC argued that state law did not clearly articulate an intention to displace competition in the setting of appraisal fees, and that states may comply with Dodd-Frank requirements without violating the antitrust laws.[151] A motion to dismiss is now pending before the administrative law judge.[152]

National Association of Animal Breeders

In September 2017, the FTC issued a final order and entered into a consent agreement with the National Association of Animal Breeders (NAAB) whereby NAAB agreed to refrain from adopting rules that stifle competition amongst its members in the buying or selling of dairy bulls or bull semen for artificial insemination.[153]

The NAAB, in cooperation with the U.S. Department of Agriculture, developed a genomic testing technology that better predicts the ability of the bull to transmit commercially important traits, which is superior to the traditional method for predicting such ability.[154] The FTC's complaint challenged a NAAB rule requiring members to already have a financial interest in a bull in order to use the technology on the bull. The FTC alleged that this resolution prohibited members from selling the technology to non-members for the non-members' bulls without having an interest in the non-members' bulls, and therefore "impeded the development" of this market.[155] The FTC alleged that access to the technology would "tend to drive the price of the bull toward its true value," so the resolution injured non-members by restraining competition among NAAB's members.[156]

Europe

Google Shopping and AdSense

On June 27, 2017, the EC announced the conclusion of its seven-year investigation into Google's search service, finding that Google had leveraged a dominant market position in general search to advantage its own comparison shopping service (CSS) in violation of Article 102 TFEU.[157] The EC's objections centered on the position and display of product search results and advertisements on Google's search results page. The EC found that Google gave prominent placement to the Product Universal and Google Shopping Ads on its search results pages. The EC also found that Google applied different ranking and display algorithms to the Product Universal and Shopping Ads than to CSS sites appearing in Google's organic search results, which the EC found were systematically demoted based on factors inherent to Google's organic web search algorithms.[158]

The EC found that Google has been dominant since 2008 in "general internet search" throughout the EEA and that Google search results are an important source of traffic for rival CSS. According to the EC, Google's conduct caused traffic from Google search results pages to rival CSS to decline, impairing their ability to compete against Google's own CSS. The EC fined Google €2.42 billion (approximately $3.24 billion)—the largest penalty ever imposed by the EC—and required Google to modify its search engine so as to "apply the same processes and methods to position and display rival comparison shopping services in Google's search results pages as it gives to its own comparison shopping service."[159]

In a blog post following the decision, Google argued that the EC undervalued user preference for a direct link to a merchant site, like that provided by its Shopping Ads, as compared to a CSS where the user must repeat their search.[160] Google also highlighted intense competition from global e-commerce giants, such as Amazon and eBay, as an alternative explanation for some CSS' decline in popularity.[161] In late August 2017, Google submitted a remedy proposal whereby each slot in the Commercial Unit would be filled through a single auction that ranked product offers from Google Shopping and rival CSS using the same criteria.[162] Google filed an appeal of the EC's decision with the EU General Court the following month.[163]

Intel – Decision of the ECJ

In a much-anticipated judgment delivered on September 6, 2017, the EU's highest court, the ECJ, set aside a General Court (GC) ruling that upheld an EC decision imposing fines of €1.06 billion (approximately $1.3 billion) on Intel.[164]

In 2009, the European regulator found that Intel had abused its dominant position by granting loyalty rebates to PC manufacturers conditional upon their sourcing all, or almost all, of their x86 CPUs from Intel and thus foreclosing a competitor, AMD, from the market.[165] The GC, upholding the decision on appeal by Intel, had declared that loyalty-inducing exclusivity rebates granted by a dominant undertaking are per se illegal.[166]

In overturning the lower court's ruling, the ECJ embraced a rule of reason and held that it is not necessarily illegal for a dominant company to grant rebates conditional on exclusivity. A dominant company may submit evidence to rebut a presumption of abuse and show that its conduct is not restrictive of competition. Where it does so, the EC is required to assess the company's capacity to foreclose competitors that are at least as efficient as the dominant firm. The EC must also assess whether any foreclosure effect is capable of objective justification and may be outweighed by efficiencies that benefit consumers.

The ECJ observed that the "as efficient competitor" (AEC) test had played an important role in the EC's assessment of Intel's ability to foreclose. The lower court was thus required to consider all of Intel's arguments rebutting the EC's conclusions on the test, but had failed to do so. In light of this failure, the ECJ held that the judgment should be set aside and the case remanded back to the lower court for rehearing on this point.

It could be several years before a final decision is reached in the already 18-year old saga, especially if either Intel or the EC appeal a future GC judgment. However, the case indicates that the EC will need to carefully consider economic context in future abuse of dominance investigations.

Excessive Pricing

EU Aspen Pharma Investigation

The EC has traditionally been reluctant to launch excessive pricing cases, in part due to the difficulties involved in pointing to what is a genuinely excessive price. However, on May 15, 2017, the EC opened an investigation into Aspen Pharmacare's pricing of five cancer drugs in the first EC competition investigation into excessive pricing practices in the pharmaceutical sector. The EC has concerns that Aspen may have abused its dominant position by imposing significant price increases of up to several hundred percent (so-called "price-gouging") in breach of Article 102 TFEU. The EC will also investigate allegations that Aspen, in order to impose the price increases, threatened to (or did) withdraw the drugs in some EU member states.[167]

The EC's investigation covers all of the EEA except Italy, where Aspen's conduct has already been the subject of a fine. If the EC finds that Aspen has imposed excessive prices, it could face a fine of up to 10 percent of its global turnover. Aspen could also be subject to private damages actions before national courts.

While competition authorities generally do not wish to be seen as price regulators, the EC's investigation, and the national cases below, make clear that where a pharmaceutical company is suspected of exploiting the non-branded status of a drug (meaning it is no longer subject to price regulation) in order to increase prices, this could constitute a violation of EU law. Pharmaceutical companies should therefore be extremely vigilant with regard to their pricing schemes in the EU, particularly where off-patent drugs are involved.

UK Pharmaceutical Cases

In October 2017, the UK's Competition and Markets Authority (CMA) confirmed that it was investigating Aspen Pharmacare over alleged anticompetitive conduct in the supply of blood pressure and arthritis drugs.[168] The CMA is also investigating Actavis UK and Concordia. Actavis is under CMA scrutiny for allegedly charged excessive prices for hydrocortisone tablets—imposing an increase of over 12,000 percent compared to the previous branded version sold by another company.[169] Concordia, which focuses on off-patent drugs, is under investigation for alleged excessive pricing in the supply of drugs for hypothyroidism, including to the UK's national health service (NHS).[170]

These cases build on the record fines imposed by the CMA on Pfizer and Flynn Pharma in December 2016. Pfizer had sold the rights to distribute the drug to Flynn, which subsequently made the drug an unbranded generic, meaning that it was no longer subject to price controls. The companies were fined almost £90 million (approximately $120.5 million) for charging excessive and unfair prices to the NHS for an epilepsy treatment drug, implementing increases of up to 2,600 percent.[171]

"Distribution" Cases

Amazon e-Books – MFN Clauses

In May 2017, the EC adopted a decision formally accepting commitments offered by Amazon in relation to the regulator's e-books investigation.[172] The EC's investigation was launched in June 2015 and focused on so-called most-favored-nation (MFN) clauses in Amazon's distribution agreements with e-book publishers in Europe. The EC was concerned that Amazon was using its dominant position in the markets for the retail distribution of English and German language e-books to make it more difficult for other e-book platforms to innovate and compete effectively with Amazon.

These MFN clauses required publishers to offer similar (or better) terms to Amazon compared to its rivals and to inform Amazon about more favorable or alternative terms given to Amazon's competitors. The clauses covered not only price but many aspects that a competitor might use to differentiate itself from Amazon, such as different distribution methods or release dates, features of e-books, or a promotion.

In response to the EC's concerns, Amazon offered to remove the offending clauses from its contracts and refraining from using such clauses for a period of five years with regard to any e-book in any language distributed by Amazon in the EEA.

Coty – Selective Distribution

On December 6, 2017, the ECJ ruled that a supplier of luxury goods can prohibit its authorized distributors from selling online via third-party platforms.[173] The case concerns a dispute between U.S.-based perfume and cosmetics supplier, Coty Inc., and one of its German distributors, Parfümerie Akzente (PA), which refused to comply with a clause in Coty's contracts preventing its retailers from supplying Coty products via online third-party platforms, such as Amazon and eBay. A German court sought guidance from the ECJ as to whether the clause was legal and enforceable under EU competition law.

The EU's highest court ruled that a selective distribution network, designed primarily to preserve the luxury image of certain goods, can be valid provided two conditions are met: (1) the resellers are selected on the basis of non-discriminatory and objective qualitative criteria; and (2) the criteria used are proportionate. As for restrictions on online sales via third-party platforms, the ECJ found that these will not be deemed anticompetitive where the restriction is proportionate and designed to preserve the goods' luxury image, and it is applied in a non-discriminatory manner.

The court's ruling appears limited to prestige products which carry an aura of luxury. Companies with over 30 percent market share—i.e., those that are ineligible for safe harbor protection—will need to consider whether their products merit similar protection as prestige goods. Otherwise their selective distribution networks and restrictive clauses risk being struck down.

Luxury Brand Watch Makers

On October 23, 2017, the GC affirmed the EC's decision to close an investigation into certain luxury brand watchmakers (including LVMH Moët Hennessy-Louis Vuitton, Rolex, and the Swatch Group).[174] The appellant, CEAHR, alleged that the luxury brand watchmakers had abused their dominant positions by implementing selective distribution systems for repair services and refusing to supply spare parts to watch repairers that were not part of their authorized repair and maintenance network. The GC noted that for a refusal to supply to constitute an abuse, it must: (1) not be objectively justified; (2) be related to goods and services that are indispensable for the requesting person's activity; and (3) be likely to eliminate all competition. The GC upheld the EC's finding that there was a low probability of all effective competition being eliminated.

While the GC did not go as far as the ECJ would in Coty in stating that the preservation of a luxury brand image alone could be a justification for a restriction of competition, it did hold that the objectives of preserving the quality of products, ensuring their proper use, and preventing counterfeiting may justify such a restriction. For companies wishing to supply spare parts for luxury goods solely to authorized partners, this judgment provides a clear framework within which to implement a permitted selective distribution network.

Lithuanian Railway Operator Case

On October 2, 2017, the EC fined Lithuanian Railways almost €28 million (approximately $37.5 million) for abusing its dominant position on the rail freight market by removing public rail infrastructure connecting Lithuania and Latvia.[175] Complainant AB Orlen Lietuva (Orlen) used Lithuanian Railway's rail freight services to transport refined crude oil products from its refinery in Lithuania to ports in Latvia. After Orlen considered contracting with a different rail operator in 2008, Lithuanian Railways used its control over the national rail infrastructure to dismantle a 19km long section of rail track connecting Lithuania and Latvia, close to Orlen's refinery. This effectively prevented Orlen from using an alternative freight supplier, as it would need to take a much longer route to reach Latvia.

Following a complaint by Orlen, the EC opened formal antitrust proceedings against Lithuanian Railways in March 2013. The EC found that Lithuanian Railways failed to evidence any objective justification for the removal of the track, suggesting that the dismantling of 19 kilometers of railway was solely to prevent a major commercial customer from using the services of a competitor.

EU Double Jeopardy

In a judgment issued on November 23, 2017, the ECJ ruled that conduct that has led to the EC accepting commitments can still give rise to parallel national proceedings.[176]

In 2006, the EC accepted commitments from Repsol, an oil and gas company, in lieu of a formal finding of infringement, bringing its investigation into long-term exclusive supply agreements to a close. In subsequent national proceedings in Spain, Gasorba, one of Repsol's service station tenants, challenged its supply agreement with Repsol, claiming that it infringed Article 101 TFEU, which prohibits anticompetitive agreements. The Spanish Supreme Court referred the issue to the EU's highest court, requesting guidance on whether a national court is precluded from finding an agreement infringes Article 101 TFEU where the EC has already accepted binding commitments covering that same agreement.

The ECJ ruled that an EC commitment decision does not affect the power of national courts to apply EU competition law to conduct that the EC has already investigated. While national courts are obliged not to take decisions that are contrary to those adopted by the EC, the nature of commitment decisions is such that they do not establish whether there has been an antitrust violation. However, the judgment clarified that national courts are expected to treat commitment decisions as an "indication," if not prima facie evidence, of the anticompetitive nature of an agreement.

Companies should be mindful that choosing to negotiate commitments with the EC so as to avoid a potential fining decision does not mean the chapter is necessarily closed on their EU liability, and they are still open to private enforcement and damages claims before national courts. These two factors highlight the need for a more nuanced internal strategizing in the future for companies accused of anticompetitive conduct as to whether to negotiate commitments with the EC or challenge the allegations.

Criminal Cartel Investigations

Criminal antitrust enforcement remained a core focus of the U.S. Department of Justice (DOJ) in 2017. While criminal antitrust fines for corporations were significantly lower this past year, the DOJ's commitment to vigorous criminal antitrust enforcement has historically remained unchanged in both Republican and Democratic administrations. The DOJ demonstrated this by initiating several significant investigations, prosecuting a number of domestic and international cartel matters, holding more individuals accountable, and advancing certain policy initiatives. This section of our Antitrust Year in Review: (i) identifies a few notable developments in the DOJ's criminal enforcement program in 2017; (ii) summarizes the DOJ's significant criminal prosecutions of corporations and individuals in the last year; (iii) describes recent policy initiatives and priorities in the DOJ's criminal enforcement program; and (iv) highlights some significant developments in cartel enforcement outside the U.S.

Notable Developments in the DOJ's Criminal Antitrust Enforcement Program

First, as with other areas of antitrust enforcement, 2017 was a year of transition for the DOJ's criminal enforcement program and leadership. Upon the departure of the prior Acting Assistant Attorney General Renata Hesse, head of Criminal Enforcement Brent Snyder served as Acting Assistant Attorney General. Upon his recent departure, Marvin Price, who previously served as the Director of Criminal Enforcement, took over as the head of the criminal enforcement program. Michelle Rindone, a former Assistant Chief in the New York office, is serving as Acting Director. The DOJ is currently searching to appoint a permanent Deputy Assistant Attorney General for Criminal Enforcement, and we expect this search will conclude in the near future, so more changes are soon to come.

Second, this year will end with lower overall corporate fines for criminal antitrust violations as compared with prior years. In FY 2017, the DOJ netted $107.8 million in corporate criminal fines. This marked a significant decrease compared to previous years; indeed, it is a 73 percent decrease compared to FY 2016, a 97 percent decrease compared to FY 2015, and a 91 percent decrease compared to FY 2014. There could be a number of reasons for this drop, including that in the immediate prior years, the DOJ concluded some significant prosecutions, while the next wave of investigations commenced in 2017, and will take some time for the DOJ to see the results of those investigations. Indeed, in FY 2016, the DOJ initiated 23 criminal grand jury investigations—the highest number since FY 2009. A number of these new DOJ probes and grand jury investigations were reported in the press in 2017, including investigations into advertising, Chinese air cargo services, and metal paints and coatings. These are new investigations to watch in 2018.

Third, in setbacks for the DOJ, two corporate defendants were acquitted of criminal charges after trials in 2017. Both corporate cases involved defense arguments regarding "rule of reason"-type evidence that is not typically admissible in a criminal case alleging a per se violation. Although there are case-specific reasons for these acquittals, an overall point is that business rationales that are not often credited by the DOJ in the course of plea negotiations may resonate with U.S. judges and juries. The first case was *United States v. Kemp & Associates*, involving the supply of heir-location services. In that case, the DOJ alleged that the defendants conspired with one another to allocate heirs entitled to an inheritance from a relative that died intestate. The DOJ further alleged that the defendants would split the higher fees they were able to charge by avoiding directly competing. The defendants filed a motion to dismiss, arguing that the case should not be subject to the per se standard (and thus not prosecuted as a criminal case), but instead analyzed under the rule of reason standard (and thus prosecuted, if at all, as a civil case). The court agreed with the defendants, observing that the arrangement was sufficiently "unusual" and may have created the potential for increased efficiency in estate administration, so the per se rule might not be appropriate. The court held that in any event, the action was time-barred under the statute of limitations and should be dismissed. The DOJ has appealed that ruling to the Tenth Circuit.

The second case, *United States v. Tokai Kogyo Co. Ltd., et al.*, involved the supply of automotive body sealing parts (i.e., weatherproofing) to certain automobile OEMs. The DOJ alleged that Tokai conspired with other suppliers to fix prices and rig bids on those products. In that case, the DOJ charges survived a motion to dismiss, and the case was tried by a jury. Among the defense arguments was that Honda, the customer to whom auto parts were sold, had a procurement process that itself allocated sales and facilitated the alleged collusion. Following a 13-day trial, however, the jury acquitted the defendants after less than four hours of deliberation.

Fourth, it has become apparent that the DOJ has been proactively looking to identify collusive conduct (and initiate criminal investigations) through sources and means outside of its Leniency Program. Although the DOJ historically has stated that it obtains leads from other sources (e.g., investigating agents and complaining parties), many of the largest criminal investigations have begun with a corporate leniency applicant. More recently, however, one of the investigatory sources has been its civil enforcement program. For example, the DOJ prosecuted three executives and one corporate defendant in 2017 for alleged collusion in the supply of packaged seafood. This investigation started when the DOJ uncovered evidence of potentially collusive conduct while reviewing a proposed merger of two packaged seafood companies. As another example, in March 2017, the DOJ secured a 15-month prison sentence for an executive charged with concealing information, destroying documents (and directing subordinates to also do so), and making false and misleading statements during a DOJ civil investigation of a joint venture between two New York tour bus companies. In the past, the DOJ has been criticized for relying too heavily on its Leniency Program to detect criminal conduct, and whether the criticism is warranted or not, it does appear that the DOJ is now looking beyond it for evidence of cartel conduct. The DOJ attorneys are well attuned to antitrust violations of all types, and when evidence is uncovered even in civil contexts, the DOJ has not hesitated to pursue such conduct criminally.

Notable Prosecutions in 2017: Corporations and Individuals

In 2017, the DOJ continued investigating and prosecuting collusive conduct across various industries. As noted, the DOJ netted approximately $107.8 million in corporate fines in FY 2017,[177] which represents a significant decrease from previous years. The DOJ, however, charged more than 20 individuals during the past twelve months and continued to seek significant sentences against individuals. Many of the individuals sentenced in 2017 received jail terms of between 14 and 24 months and were ordered to pay substantial fines. The DOJ's aggressive approach against individuals should not come as a surprise. The DOJ has issued multiple policy directives over the last three years detailing its intent to increase enforcement against individuals involved in criminal antitrust conduct.[178] Some of the more significant DOJ prosecutions from this year are discussed below.

- *Automotive Parts.* The DOJ's pursuit of antitrust violations in the automotive parts industry is international in scope and has covered dozens of components used to manufacture automobiles. Though the investigations continued in 2017, as compared with previous years, the investigations seem to be winding down. This year, the DOJ yielded $61.58 million in corporate fines from auto parts manufacturers, down from $270 million the year before. Most recently, and as noted above, in November 2017, a federal jury in Ohio acquitted Tokai Kogyo and its subsidiary, Green Tokai, on charges of fixing prices on automotive body sealing products and rigging bids on automotive steel tubes. Although the trial lasted 13 days, the jury took only four hours to deliberate and return its verdict. The DOJ also continued to charge individuals. In February 2017, the president of a U.S. joint venture of an automotive body sealing products supplier pleaded guilty and agreed to serve 14 months in prison, in addition to paying a $7,500 criminal fine.

- *Electrolytic Capacitors.* Since the outset of the investigation in the capacitors industry in 2014, eight companies and ten individuals have been charged with participating in an alleged conspiracy. In 2017, the DOJ continued to extract guilty pleas from manufacturers, including Matsuo Electric and Nichicon Corporation. Total fines imposed for 2017 exceeded $62 million,[179] with Nichicon Corporation's $42 million fine making up the bulk of this number. In October, the DOJ secured its first indictment of a company in the investigation, when a grand jury indicted Nippon Chemi-Con Corporation (NCC). The DOJ is expected to go to trial against NCC in October 2018. Notably, Judge James Donato of the U.S. District Court for the Northern District of California has been carefully securitizing and increasingly criticizing the plea agreements in this case. In the past year, Judge Donato rejected three capacitor companies' plea deals, including Matsuo Electric's, finding that the criminal fines were too low and did not serve the best interest of justice. Further, Judge Donato has voiced his reservations about Type C plea agreements because they take away a court's discretion in sentencing.

This has caused two companies to enter into Type B plea agreements with the DOJ. A Type B plea gives the court significantly more discretion in the sentence that can be imposed. In 2017, the DOJ also turned its attention to individuals, and in February 2017, a Matsuo executive became the first to plead guilty in the capacitor investigation, agreeing to serve a one year and one day prison sentence. Nine other executives were previously indicted in 2016 and 2015 in connection with the investigation.

- *Ocean Shipping – Roll-On, Roll-Off*. The DOJ has initiated several investigations into the ocean shipping industry. The DOJ's "roll-on, roll-off" cargo investigation continued to pick up steam over the last year, with Höegh Autoliners pleading guilty in September 2017 and agreeing to pay a $21 million fine for allocating customers, rigging bids, and fixing prices for the sale of roll-on, roll-off cargo shipments. Höegh Autoliners' plea agreement brings the total criminal fines imposed to over $255 million. Additionally, the DOJ announced the indictment of three Wallenius Wilhemsen Logistics executives in June 2017; notably, this investigation has already resulted in lengthy prison terms for four executives, while an additional seven executives have been indicted but remain fugitives.

- *Ocean Shipping – Containers*. Also in ocean shipping, in March 2017, the DOJ conducted a search at a biannual meeting of the International Council of Containership Operators—known as the "Box Club"—and served grand jury subpoenas on several container ship operators, including Moller-Maersk, Evergreen, the Orient Overseas Container Line, and Hapag Lloyd, as well as many executives. Since many of the subpoena recipients are based overseas, the DOJ used the Box Club meeting in San Francisco as an opportunity to serve the subpoenas on foreign entities that might otherwise be more challenging to reach. To date, there have not been any charges filed in the investigation.

- *Packaged Seafood.* In its investigation into suppliers of packaged seafood, the DOJ obtained a guilty plea from Bumble Bee Foods, which agreed to a $25 million fine for its role in a conspiracy to fix the prices of shelf-stable tuna fish. Bumble Bee's fine represented a reduction from the initial fine of over $136 million, because of concerns about the company's ability to pay and remain a viable competitor. Bumble Bee was the first corporate defendant to plead guilty in the investigation, which had already seen several guilty pleas from executives. A former Starkist sales executive is awaiting sentencing after pleading guilty in June 2017 to fixing the prices of packaged seafood. To date, three individuals have pleaded guilty to their role in the alleged conspiracy. In September 2017, Tri-Union Seafoods, the U.S. subsidiary of Thai Union Group, disclosed that it was the whistleblower and had agreed to cooperate with the DOJ in exchange for conditional leniency.

- *E-Commerce: Promotional Products*. In August 2017, the DOJ secured guilty pleas from both Custom Wristbands and Zaappaaz for their roles in an alleged conspiracy to fix prices for promotional products, including customized wristbands sold online to U.S. customers. The companies agreed to pay fines of $409,342 and $1.9 million, respectively. The DOJ also reportedly is investigating an Ohio-based promotional company, Totally-Promotional. Interestingly, the DOJ alleged that the companies primarily carried out the conspiracy via social media and messaging applications, including Facebook, WhatsApp, and Skype. In its press release announcing Zaappaaz's guilty plea, the DOJ emphasized that "criminals cannot evade detection by conspiring online and using encrypted messaging." As for individuals, in 2017 the DOJ's investigation netted two guilty pleas from high-level executives.

- *Generic Pharmaceuticals.* In 2017, the DOJ continued its long-running investigation into collusion among generic drug manufacturers, but to date, there has been no corporate charge or guilty plea. As part of this investigation, the DOJ reportedly conducted a dawn raid of generic pharmaceutical maker Perrigo Co.'s corporate offices in May 2017. Two former executives have entered guilty pleas in the case for fixing prices, rigging bids, and allocating customers for two generic drugs. A parallel civil lawsuit concerning those two drugs was also brought by attorneys general from 45 states and the District of Columbia. In October 2017, the attorneys general filed a motion for leave to amend the complaint to include an additional 12 companies and 13 new drugs. Defendants opposed the motion in part, and a decision is expected in early 2018.

- *Real Estate Foreclosure Auctions.* The DOJ continued aggressively to pursue enforcement in the area of real estate foreclosure auction services in 2017, in an investigation that has resulted in a significant number of charges against individuals. In 2017, nine individuals in California, Florida, Georgia, and Alabama were charged or sentenced, three of whom received prison terms ranging from 14 to 21 months. The investigation has already resulted in over 100 guilty pleas and convictions in those states. Notably, Judge Hamilton of the U.S. District Court for the Northern District of California has taken a narrow approach to calculating the volume of commerce for individual sentences, finding it should be calculated to include only the bids an agent personally bid on and won.

- *Financial Services.* Following record-breaking criminal fines from banks in connection with DOJ's London Interbank Offered Rate (LIBOR) and foreign exchange spot market (FOREX) investigations in previous years, the DOJ shifted its focus to other banks and individuals in 2017. In LIBOR, two Société Générale bank managers were indicted for their role in the conspiracy to fraudulently manipulate the LIBOR for the U.S. dollar and several other currencies. Additionally, DB Group Services, a wholly owned subsidiary of Deutsche Bank AG, was sentenced in March 2017 and ordered to pay a $150 million fine. In FOREX, two traders pleaded guilty for their role in an alleged conspiracy, and a federal grand jury returned an indictment against three other traders. The DOJ is set to go to trial against these three indicted individuals in June 2018.

  The LIBOR investigation has involved both antitrust and fraud charges, as well as parallel proceedings by European authorities. Following convictions of several individuals on LIBOR-related fraud charges, the U.S. Court of Appeals for the Second Circuit recently overturned the jury verdicts on the grounds that a witness at trial had previously read testimony compelled from the defendants in UK proceedings, in violation of the defendants' Fifth Amendment rights.[180]

- *Heir Locators.* As discussed previously, the DOJ sought to prosecute Kemp & Associates for collusion in supply of heir locator services, but a federal court dismissed the indictment. The court focused on whether the agreement the DOJ alleged should be analyzed as per se unlawful under the Sherman Act. Characterizing the alleged conspirators' agreement as "unique and unusual,"[181] the court determined that it should not be viewed as per se unlawful but rather analyzed under the Rule of Reason. Ultimately, however, the court found that the case was barred by the statute of limitations; the DOJ filed a notice of appeal with the U.S. Court of Appeals for the Tenth Circuit.

- *Public School Buses.* In a smaller-scale regional case, following a week-long trial in January 2017, a jury in Puerto Rico convicted four school bus company owners of participating in bid rigging and fraud conspiracies at an auction for public school bus transportation services in Puerto Rico's Caguas municipality. This decision followed a criminal indictment filed in May 2015 against five individuals. The fifth defendant pled guilty to the charges before going to trial. No other charges have been disclosed since that time.

- *Obstruction of Justice.* The DOJ has continued to vigorously prosecute individuals who obstruct justice during antitrust investigations. Notably, these individuals often receive prison terms much longer than the prison terms imposed for anticompetitive conduct itself. For example:

  - In February 2017, an executive of an automotive parts company pleaded guilty for his role in a conspiracy to obstruct justice during the course of the DOJ's automotive parts investigation. The executive received a 14-month prison sentence.

  - In March 2017, a former Coach USA executive was sentenced to 15 months in prison for attempting to conceal and destroy documents during the course of civil litigation related to the New York City hop-on, hop-off tour bus market.

- *Diversion of Federal Funds.* The DOJ has been active in prosecuting individuals accused of misusing federal funds as well. Assistant Attorney General Makan Delrahim noted about one of these prosecutions that it "demonstrate[d] the Antitrust Division's commitment to pursuing individuals who seek to enrich themselves by misusing federal programs at the expense of taxpayers."[182] For example:

  - In April 2017, an officer of multiple construction companies was sentenced to six months in prison and 24 months of supervised release for defrauding a disadvantaged persons' business assistance program of tens of millions of dollars.

- In June 2017, a former executive of an Israel-based defense contractor was sentenced to 30 months in prison for his role in multiple schemes to defraud a multi-billion dollar United States foreign aid program.

- In October 2017, the DOJ indicted a roofing company owner and a former facilities manager at Sierra Army Depot for their roles in a conspiracy to divert government funds intended to rebuild and repair the Army facility to themselves and their companies.

DOJ Policy Initiatives

Revised Leniency Program "Frequently Asked Questions"

On January 26, 2017, the DOJ updated a policy statement to its Leniency Program. The policy statement is published as "Frequently Asked Questions" (FAQs) to the Leniency Program, and this marks the DOJ's first revision to the FAQs since they were originally published in 2008. In issuing the revisions, the DOJ observed that many of the responses to the FAQs remain unchanged, and those that changed should be viewed as "clarifications" to the Leniency Program in light of the DOJ's experience over the last ten years. The new FAQs, however, contain a number of significant updates.

First, the DOJ's revised FAQs state that under a certain type of leniency application (referred to as Type B leniency), officers, directors, and employees must separately earn immunity, *i.e.,* stressing that immunity is not automatic for employees in Type B leniency applications.[183] Instead, employees of the Type B corporate leniency applicant will be treated "as if they approached the DOJ individually" with the agency specifically reserving the right to "exercise discretion to exclude" them from leniency protection.[184] Many practitioners argued that this is a significant shift in the DOJ's practice.[185] In past practice, the DOJ tended to grant immunity to employees of a Type B leniency applicant unless the employee was uncooperative in the investigation. In the updated FAQs, the DOJ stresses that because Type B leniency is discretionary, it will consider an individual's level of cooperation and culpability before granting immunity to the individual employee, and "highly culpable" employees may be excluded altogether. Practitioners observed that the updated FAQs thus left open the possibility that individuals working for the leniency applicant may admit wrongdoing and fully cooperate with the investigation, but face criminal prosecution nevertheless.[186]

Second, and relatedly, the updated FAQs provide further guidance on the protection of a corporate leniency applicant's former employees. Previously, the FAQs noted that it was "advisable" for the corporation to seek protection for former officers, directors, or employees, and indicated that the DOJ would consider a number of factors, including "most importantly" the former employees' cooperation.[187] The updated FAQs now clarify that all former employees are "presumptively excluded from any grant of corporate leniency" but in two scenarios they can be offered protection: 1) where they provide "substantial, noncumulative" cooperation against other potential targets; and 2) where their cooperation is necessary for the company to admit its criminal violation, an enumerated requirement under the Leniency Program. By outlining these two specific scenarios, this new guidance signals a stricter approach by the DOJ as to the eligibility of an applicant's former employees for leniency protection.

Third, the updated FAQs make clear that the Antitrust Division's Leniency Program offers coverage only for antitrust crimes and not to other potential criminal conduct. The previous FAQs were more generous, offering potential protection for criminal offenses committed "in connection with" the reported antitrust offense. The new FAQs omit this language and instead note that leniency protection will not extend to non-antitrust criminal conduct unless such conduct was "integral" to the antitrust crime itself. By way of example, the DOJ notes in the new FAQs that "emailing conspiratorially set bids" might separately also be mail or wire fraud, but the applicant will not be prosecuted for such an offense committed "in furtherance of" the antitrust violation. This example stands in contrast to the example in the previous FAQs of a company bribing a foreign public official, in violation of the Foreign Corrupt Practices Act (FCPA), to steer contracts as part of a bid-rigging conspiracy. The previous FAQs noted that if those bribes were "in connection with" the bid rigging, then the leniency applicant could be covered for that conduct as well. Indeed, the updated FAQs specifically disavow this scenario, noting that bribes paid in violation of the FCPA would not be covered even if they were done "in furtherance of" the antitrust crime. In this way, the DOJ sought to emphasize that the Leniency Program is designed to offer leniency to antitrust offenses only and to clarify that the DOJ does not expect it to be a vehicle by which applicants can seek immunity for other criminal offenses.

Fourth, the updated FAQs add a new discussion of the DOJ's Penalty Plus policy, which provides that if a corporation pleads guilty to an antitrust crime and then

DOJ later independently learns that the corporation failed to report its involvement in a separate antitrust criminal offense, the DOJ will seek a harsher penalty with respect to that newly discovered offense. The severity of that penalty will depend on the facts of the case, including why the corporation failed to report the separate offense, but the FAQs do note that in "egregious" cases, the DOJ would recommend fines at the top or even beyond the applicable statutory range and imposition of an external compliance monitor at the company.

Fifth, the updated FAQs clarified that the Deputy Assistant Attorney General or the Director of Criminal Enforcement must approve the issuance of leniency "markers," which hold potential leniency applicants' places in line for immunity. This makes clear that the DOJ's staff attorneys or section management cannot finally approve a "marker" decision.

In addition to the above, the updated FAQs provide a wealth of information to corporations and individuals about the Leniency Program, and companies and counsel should review these FAQs in detail whenever considering applying for leniency with the DOJ. Whether the update marks a significant shift in certain practices or simply a clarification of existing DOJ practice remains to be seen in the years ahead.

Antitrust Guidelines for International Enforcement and Cooperation

In early 2017, the DOJ and the Federal Trade Commission (FTC) jointly released updated Antitrust Guidelines for International Enforcement and Cooperation, which show the continued priority of international criminal cartel enforcement. Building on the previous guidelines from 1995, the new guidelines discuss the DOJ's efforts to coordinate with foreign authorities in criminal cartel investigations. Consistent with past years of enforcement, the guidelines note that where foreign companies and individuals are involved in conduct affecting markets in the U.S., the DOJ will not hesitate to rely on a number of different tools to identify and prosecute the conduct. The guidelines point to the numerous Mutual Legal Assistance Treaties that obligate foreign authorities to assist the DOJ in gathering evidence and serving subpoenas in foreign signatory jurisdictions.

The new international guidelines also highlight how the DOJ works with foreign competition authorities, sharing information and at times conducting joint operations, such as onsite inspections, dawn raids, or searches to gather evidence and avoid document destruction. The guidelines make clear that the DOJ expects cooperating witnesses and participants in the Leniency Program to provide documentary evidence in their possession, custody, or control, even when such evidence may be located abroad and outside the DOJ's ordinary jurisdictional reach. The DOJ, in turn, seeks to coordinate with foreign authorities to avoid overlapping or inconsistent requests and decrease the burden placed on such cooperators wherever possible, per the guidelines.

The updated international guidelines make clear that the DOJ will use all available tools, including issuing INTERPOL Red Notices, to detain fugitives who have been indicted in criminal antitrust investigations but who have not appeared in the U.S. to face charges. Those notices may prompt a foreign jurisdiction to arrest the fugitive should he or she enter its territory, such as at an airport. Moreover, building on the DOJ's extradition successes in the past decade, the guidelines make clear that the DOJ will seek extradition of fugitive defendants from foreign jurisdictions to the U.S., if necessary.

Last, the updated guidelines highlight the expansive approach the agencies take to commerce outside of the U.S. and the reach of U.S. antitrust laws. The DOJ considers not only import commerce affected by antitrust conduct, but also the effect of foreign commerce including sales occurring wholly abroad. Under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) if those foreign sales have a "direct, substantial, and reasonably foreseeable" effect on U.S. commerce, they fall within the reach of the U.S. antitrust laws. As a result, and the guidelines make clear, even non-import commerce or U.S. export commerce impacted by a price fixing or other anticompetitive agreement abroad can fall within the reach of U.S. antitrust enforcers. Emphasizing that the analysis is highly factual, the guidelines give the example that sales of price-fixed components abroad that are subsequently integrated into finished products imported into the U.S. could very well have the direct, substantial, and reasonably foreseeable effect on U.S. commerce to be actionable under the antitrust laws. Another example notes that even products affected by anticompetitive agreements sold exclusively abroad and never imported into the U.S. can be subject to U.S. antitrust law if the fixed price affects the worldwide or benchmark price of the product and where the same product is sold in the U.S. by non-conspirators. While the analysis is very fact-specific, the guidelines indicate that wherever there is even an indirect effect of such an agreement on U.S. commerce, the agencies will not hesitate to bring an enforcement action if necessary.

Advocacy for Per Se Standard

The DOJ has recently given renewed attention to the importance of the per se legal standard in antitrust criminal enforcement.[188] On September 12, 2017, Andrew Finch, the Acting Assistant Attorney General at the time, delivered a speech discussing the importance of the per se standard in antitrust enforcement. In that speech, Finch observed that the per se standard provides much-needed clarity for businesses as well as to regulators. He further declared the DOJ's commitment to "continue to advocate for a clear per se rule" to apply to all sorts of agreements among horizontal competitors, including those in the labor market that restrict the hiring or compensation of employees.[189] Notably, this speech followed the federal district court's decision in *United States v. Kemp & Associates*. As described above, the federal court in that case questioned whether the per se rule should apply to the conduct at issue, describing the alleged agreement among the competitors as "unusual" such that it should not be subject to a per se analysis.

Antitrust Guidance on Disaster Relief Efforts

Many parts of the U.S. and its territories were devastated in 2017 by hurricanes and wildfires. On September 12, 2017, the DOJ and the FTC released a joint memorandum providing guidance on compliance with the antitrust laws in conducting disaster relief efforts. While the guidance is meant to apply generally to various conduct, it is largely focused on reminding competitors to avoid improper collusion, which can lead to criminal exposure. The DOJ has previously been active in investigating procurement fraud and bid-rigging violations on its own and in connection with multi-agency task forces. With similar focus, the DOJ and the FTC cautioned in the joint memo that businesses should avoid price fixing, bid-rigging, and market allocation agreements, and noted that the DOJ remained poised to criminally prosecute such violations. At the same time, the DOJ and the FTC recognized that the antitrust laws were "sufficiently flexible" and that competing firms may need to cooperate during the recovery efforts.[190] The agencies stated that "joint efforts of limited duration by businesses to restore [critical] services more effectively and to assist the affected communities in recovering from the devastation may be beneficial" and recognized how competitors may enter into joint ventures, joint licensing, and other contractual arrangements during the recovery process. The agencies noted how "[a]ntitrust analysis of these collaborative arrangements can—and will—take into account the changes in market conditions as a result of the hurricanes" and signaled their commitment to "reasonable and responsible" antitrust enforcement under the circumstances. The guidelines served as a reminder to companies that blatant violations of the antitrust laws would not be tolerated, but that the agencies recognized the difficulties involved in disaster relief, and the fact that competitors may need to collaborate and support each other's efforts to rebuild and restore affected areas.

Guidelines for HR Professionals: Criminal Enforcement for Collusion in Labor Markets

In late 2016, the DOJ and the FTC jointly published a paper titled "Antitrust Guidance for Human Resources Professionals" (HR Guidance).[191] This HR Guidance highlighted that certain forms of horizontal collusion and information exchanges within the labor and employment context could violate the antitrust laws. Of particular concern to the agencies are information-sharing and/or agreements regarding employee salary or other terms of compensation, either at a specific level or within a range (so-called wage-fixing agreements), or collective refusals to solicit or hire other companies' employees (so-called "no poaching" agreements). Further, the HR Guidance served to put companies and individuals on notice that DOJ might prosecute such conduct criminally. In the past, the DOJ has brought a number of civil "no poach" cases regarding alleged collusion by companies in labor markets, but not criminal charges. Although no criminal cases were filed in 2017, two Deputy Assistant Attorneys General (Andrew Finch and Barry Nigro) commented publicly that the DOJ is readying cases regarding such agreements. Companies that have engaged in benchmarking studies and analysis or have trade association participation on human resources issues will want to pay close attention to the DOJ's pursuit in this space, particularly given the broad implications for hiring and the setting of wages and compensation in various contexts.

Enforcement Against Collusive Conduct Outside the U.S.

Competition agencies outside the U.S. also continued to be active against collusive or cartel conduct in 2017. While some do not pursue such conduct criminally, they generally view the conduct similarly to the DOJ and impose harsh civil or administrative sanctions against companies engaged in such conduct. Below are some of the more notable enforcement actions and policy updates taken by certain agencies against collusive conduct in 2017.

Canada. The Canadian Competition Bureau (CCB) recently released a "Revised Immunity Program." Some of the key provisions to the program include:
(i) allowing the CCB to record oral proffers provided during an investigation;
(ii) reinforcing that individuals will not be automatically covered under corporate immunity; (iii) introducing an "Interim Grant of Immunity" stage in the leniency process that clarifies that full immunity is contingent on cooperation by the applicant; (iv) allowing for the recording of witness interviews; and (v) requiring applicants to disclose certain types of materials, including internal investigative records unless privileged. The implications for these potential modifications to the Immunity Program may complicate timing and process associated with cross-border investigations and add uncertainty to discoverable materials to civil proceedings.

China. Competition authorities in China have remained very active in the past year, bringing enforcement actions against collusive conduct in a number of industries. This is particularly notable given that China's primary competition law is relatively new compared to other countries (i.e., China's Anti-Monopoly Law is in its tenth year). China has demonstrated that it is developing a sophisticated enforcement program in a very short period of time. As an example, in 2017, one of the Chinese agencies responsible for enforcing the competition laws, the National Development and Reform Commission of the People's Republic of China (NDRC), imposed fines on a company for obstructing one of its investigations, marking the first time a company has been fined for obstruction in a competition law investigation in China. On February 13, 2017, the NDRC announced that it, along with the local branch of Shangdong Price Bureau and the Price Supervision and Anti-Monopoly Bureau, fined Weifang Longshune Pharmaceutical RMB 120,000 for obstructing justice. Allegedly, certain Weifang employees threw away USB flash drives and secretly replaced them during a dawn raid. This action reflects how China's competition agencies are employing all means necessary to ensure the integrity of their investigations.

European Union. The European Commission (EC) has long been active in its enforcement against collusive conduct. Below are a few developments from 2017:

- *Trucks*. In July 2016, the EC imposed its highest ever cartel fine, amounting to approximately \$3.2 billion, on several truck manufacturers for a long-standing cartel that affected the majority of trucks sold in the European Economic Area (EEA) between 1997 and 2011.[192] In September 2017, an additional \$1 billion was imposed on a fifth truck manufacturer, Scania, that refused to settle with the EC and contested the charges.[193] Aside from the \$4.2 billion aggregate fine, the cartelists face the prospect of significant private damages claims before national courts given the scope of the cartel. Under the EU Damages Directive, claimants can now rely on the final decision of a competition authority as prima facie evidence of an infringement, making it easier to bring follow-on damages claims and potentially making cartel conduct considerably more costly. Several class actions and individual claims are ongoing in Ireland, Germany, the Netherlands, and the UK.

- *Automotive Industry.* There have been wide-ranging automotive parts cartel investigations by the EC in recent years, and the EC issued four infringement decisions in 2017:

  - In February 2017, a \$75 million fine was imposed for anticompetitive practices conducted by a so-called "buyer's cartel." Unlike most cartel participants who collude to increase their sale prices, in this case four recycling companies colluded to reduce the purchase price paid to scrap dealers for recycled car batteries.[194]

  - In March 2017, six car air conditioning and engine cooling suppliers were fined a total of \$163 million for their participation in four different cartels focused on the coordination of prices and markets as well as the exchange of competitively sensitive information.[195]

  - In June 2017, the EC imposed a \$30 million fine on two companies, Hella and Automotive Lighting, for coordinating their pricing strategies for the sale of vehicle lighting systems to car manufacturers. A third company, Valeo, received immunity for disclosing the cartel to the EC.[196]

  - In November 2017, the EC fined five car safety equipment manufacturers \$40 million for their participation in four different cartels. The cartel affected sales of seatbelts, airbags and steering wheels to Japanese car manufacturers Toyota, Suzuki, and Honda.[197]

- *Airfreight*. In November 2017, the European Court of Justice (ECJ), the EU's highest court, confirmed a fine imposed on British Airways for participating in a price fixing cartel for fuel and security surcharges.[198] Back in November 2010, the EC fined 11 airlines $1.1 billion for such conduct, however the General Court (GC) overturned the fine in 2015 on procedural grounds.[199] Unlike the other airlines involved in the appeals, BA had sought only a partial annulment of the decision. As the 2015 reversal did not touch upon the substantive issues of the case, the EC did not appeal and instead adopted a new corrected decision in March 2017 that re-established fines of approximately $829 million.[200] The matter is not over; several appeals against the second EC decision are now pending before the GC.[201]

- *Cathode Ray Tubes*. On September 14, 2017, the ECJ rejected appeals brought by LG and Philips against the GC's 2015 judgments, which had confirmed the EC's 2012 infringement decision in the cathode ray tube cartels.[202] The two cartels consisted of price fixing, allocation of markets, customers and sales volumes and improper exchanges of information. In dismissing the appeal, the ECJ provided useful guidance on two issues: (1) "value of sales" includes sales of finished products incorporating the cartelized products in the EEA, even when the product was sold first to entities outside the EEA via intragroup sales; and (2) sales of cartelized products between a joint venture and its parents will be considered as "intragroup sales" which can be taken into account by the EC for the calculation of fines for the entire group.

- *New EC Whistleblowing Tool*. Until now, most cartels in the EEA were detected through the EC's leniency program, which allowed companies to divulge the existence of a cartel and admit their participation therein in exchange for immunity or a reduction in fines. In March 2017, the EC introduced a new whistleblowing tool that enables individuals who might have information regarding the existence of a secret cartel (or other types of antitrust violations) to anonymously inform the EC.[203] This new tool underlines the need for companies to have their own internal compliance reporting tools so that employees can raise potential antitrust violations internally instead of escalating the matter through the EC's whistleblowing tool.

Japan. The Japan Fair Trade Commission (JFTC) continued its aggressive enforcement regarding collusion in 2017 as well. In the last year, there have been a couple of notable developments that could significantly affect how companies approach investigations of potential collusion.

- First, on April 25, 2017, the JFTC published a report focusing on the current surcharge system of imposing fines under the Antimonopoly Act, and proposing certain revisions to the system. The current system provides leniency applicants automatic discounts once the initial eligibility criteria by the applicant are satisfied. The JFTC is not afforded the discretion to adjust the surcharge or leniency benefits accordingly, which it is reported may not provide an incentive for applicants to continue cooperation in the investigation. The proposed revisions to the surcharge system will provide the JFTC with more flexibility and discretion to impose surcharge payments to motivate an applicant to cooperate throughout the investigation.

- Second, in the same report, the Study Group on the Antimonopoly Act further discussed whether to recognize certain legal privileges in JFTC investigations. In Japan, the attorney-client and attorney work product privileges are not recognized as broadly as in other jurisdictions. There has been an ongoing discussion since 2014 of introducing legal privileges in the JFTC investigations, and in 2017 the Study Group reexamined the issue. The Study Group observed that under the proposed revised leniency system, consultation with attorneys would become indispensable for leniency applicants if continuous cooperation is incentivized. Without the privilege protection, leniency applicants might deter consultation with attorneys and restrain the fact-finding efforts during the investigation. The Study Group concluded that it is a noteworthy concern, and will take the issue into future consideration.

South Korea. The Korean Fair Trade Commission (KFTC) strengthened its enforcement program by introducing an amendment to its competition laws that would increase the financial penalties for long-term or repeat violations. Specifically, the amendment to the Monopoly Regulation and Fair Trade Act and Notification on Imposition of Penalty Surcharge would allow the KFTC to increase the administrative fines for illegal anticompetitive conduct with an additional multiplier of up to

80 percent for either long-term or repeat violations. If both conditions of violations have occurred, then the increase can be up to 100 percent increase of the base fine calculation. Previously, the increase to the base fine for long term or repeat violators was only by a factor of 50 percent. The enacted amendment now allows the KFTC to impose a higher increase to the fine in an effort to deter recidivism.

United Kingdom. At the end of 2016, the UK's Competition and Markets Authority (CMA) disqualified the managing director of Trod Limited, an online poster supplier, for five years in connection with the prosecution of an online posters cartel, which serves as a reminder that some jurisdictions do more than seek fines and jail sentences.[204] In 2017, the CMA also published a warning letter to companies in the "creative industries" reminding them that, in the UK, the mere sharing of sensitive information between competitors can violate the competition laws. The CMA issued this letter because it perceived that knowledge of competition law in that sector was especially poor.[205] The CMA letter followed the CMA's investigation into a cartel involving five model agencies, in which the CMA imposed fines totaling approximately £1.5 million (approximately $ million) between April 2013 and March 2015.[206] In addition to cautioning against price fixing, the CMA's letter reminded businesses that the CMA will not tolerate even the sharing of sensitive information.

Civil Litigation

This Year in Sherman Act Section 1 and 2 Litigation

This year, large-scale civil antitrust litigation continued to be extremely active, with developments in both Section 1 and Section 2 cases. Cases involving allegations of competitor agreements and/or other collusion have been brought against companies in technology, chemicals, electronics, and pharmaceutical sectors. These cases are typically brought on behalf of purchasers in federal class actions, as well as by competitors or other entities in non-class cases. Many of the most significant cases are "follow on" civil damage class actions, i.e., are cases seeking monetary damages that follow government antitrust enforcement actions or investigations by the U.S. Department of Justice (DOJ) or the Federal Trade Commission (FTC).

Price-Fixing Litigation

U.S. Supreme Court Petition. In 2017, the U.S. Supreme Court solicited views on whether it should hear argument in the long-running Vitamin C case, in which Section 1 claims were brought against two Chinese manufacturers for an alleged conspiracy to fix the prices and output of Vitamin C.[207] Last September, in an important decision regarding comity between U.S. and foreign laws, the U.S. Court of Appeals for the Second Circuit vacated a $150 million jury verdict against the two Chinese manufacturers.[208] The panel recognized the Chinese government's official statement that Chinese law compelled the conduct at issue. Finding a "true conflict" between American and foreign law, the court dismissed the case under the doctrine of internal comity and recognized that this dispute would better be resolved by the executive branch. Direct purchaser plaintiffs petitioned the Supreme Court to hear the case arguing that the Second Circuit's complete deference to the Chinese government's interpretation of its laws creates a circuit split with the Fifth, Sixth, Seventh, Eleventh, and D.C. Circuits, where courts may exercise independent review of a foreign government's interpretation of its laws.

At the end of the 2016 term, the Supreme Court called for the views of the Solicitor General, who agreed that the Court should grant certiorari to review whether the Second Circuit gave the correct deference to the Chinese government's official statement. The Court should decide in early 2018 whether to take the case. Should the Court grant certiorari, WSGR partner Jonathan Jacobson will be arguing the case on behalf of the Chinese Vitamin C manufacturers.

Oligopoly Markets. Among the more significant antitrust decisions of the year was the U.S. Court of the Appeals for the Third Circuit's affirmation of summary judgment in favor of defendants in *Valspar Corp. v. E. I. Du Pont De Nemours & Co.*[209] This case focused on an oligopolistic market, i.e., one in which a small number of firms dominate the market. The Third Circuit held that, in an oligopolistic market (in this case, titanium dioxide), proof of parallel price increases and limited circumstantial evidence was not sufficient evidence to establish Section 1 price-fixing allegations. In granting summary judgment, the court explained that the demonstrated parallel price increases were an example of "conscious parallelism," a theory that parties in an oligopolistic market will raise prices in response to rival price increases, if it is believed that doing so will maximize industry profits. Such "parallelism," however, can involve unilateral decision and may not indicate any actual coordination or agreement to increase prices among competitors. The court therefore found that the plaintiffs failed to show evidence of an agreement to raise prices amounting to a conspiracy. Especially in the Third Circuit, which has been an active venue for antitrust litigation, the *Valspar* decision is noteworthy because it raises the bar for a plaintiff to establish an antitrust price-fixing claim in an oligopolistic market, absent direct evidence of an unlawful agreement.

Antitrust and Arbitration Clauses. In a price-fixing case initially brought against Uber's then founder, Travis Kalanick, and Uber drivers, the U.S. Court of Appeals for the Second Circuit reversed the lower court's decision and held that Uber's terms of service require consumers to arbitrate all disputes before proceeding with a court action.[210] The panel was convinced that consumers were sufficiently on notice of Uber's terms of service, which included an arbitration provision, based on the warning text used on the registration screen. This case follows after a long history of litigation reflecting a tension between upholding contractual arbitration clauses and the ability parties to seek damages via civil class actions, including *In American Express Co. v. Italian Colors Restaurant*,[211] in which the U.S Supreme Court held that an arbitration provision could not be overturned even if an arbitration would cost potential plaintiffs more than they could recover in damages. Many of WSGR's technology and other clients often are called to defend their terms of service in court, and thus, the Second Circuit's decision here may be favorable precedent in future disputes.

Pharmaceutical "Follow-On" Litigation. Since the beginning of the year, the already expansive litigation against generic drug manufacturers, *In re Generic Pharmaceuticals Pricing Antitrust Litigation*, has grown even further. These large-scale class action cases were first filed by private plaintiff purchasers in parallel with ongoing investigations by the Department of Justice and the State Attorney General for Connecticut. In April 2017, the Judicial Panel on Multidistrict Litigation (JPML) consolidated approximately 70 cases against the drug manufacturers and transferred all actions to Judge Cynthia Rufe in the U.S. District Court for the Eastern District of Pennsylvania.[212] After consolidation, the private plaintiffs in the multi-district litigation (MDL) filed amended complaints in August 2017 alleging product-specific conspiracies concerning 18 drugs: albuterol, amitriptyline, baclofen, benazepril HCTZ, clobetasol, clomipramine, desonide, digoxin, divalproex ER, doxycycline, econazole, fluocinonide, glyburide, levothyroxine, lidocaine/prilocaine, pravastatin, propranolol, and ursodiol. For purposes of motion to dismiss briefing, the court divided the 18 drugs into three groups of six drugs. Motions to dismiss claims alleging price-fixing conspiracies as to the first group of drug were filed in October 2017, opposition briefs were filed in December 2017, and reply briefs are due in January 2018. The motions will test the sufficiency of the complaints, and the issues raised in the *Valspar* decision discussed above will be relevant here. Motions to dismiss for the other groups will be filed later in 2018.

In December 2016, attorneys general from 20 states filed a complaint with the U.S. District Court for the District of Connecticut regarding two drugs—a form of doxycycline and glyburide. The JPML consolidated this action (which had grown to include over forty state attorneys general) with the class actions in the MDL in August 2017. At the end of October, the state attorneys general moved for leave to file an amended complaint purporting to expand their complaint to include thirteen additional drugs (none of which are currently at issue in any of the class action suits) and adding numerous additional defendants. Notably, the attorneys general propose to allege an overarching conspiracy covering multiple drugs, whereas the private plaintiffs have maintained individual drug-specific actions. Briefing on whether amendment will be permitted will extend into 2018. WSGR is currently representing Mylan in this litigation.

FTAIA: Litigation Involving Overseas Parties and Commerce. Federal court litigation regarding the extraterritorial reach of U.S. antitrust laws in civil damages cases continues. This subject matters in antitrust cases where a broad scope could draw in non-U.S. defendants and significant non-U.S. sales or commerce as damages into a U.S. class action case. In recent years, multiple cases have been argued in federal Courts of Appeal, with a focus on the interpretation of the Foreign Trade Antitrust Improvement Act (FTAIA). The FTAIA puts limits on the reach of U.S. law to cases that primarily concern foreign commerce that does not directly impact U.S. consumers.

Towards the end of 2016, Judge James Donato of the U.S. District Court for the Northern District of California issued a critical decision interpreting the current state of FTAIA. In *In re Capacitors Antitrust Litigation*, a Section 1 class action litigation following a number of international criminal investigations into an alleged cartel, Judge Donato ordered that as a matter of law, damages are not recoverable on purely foreign transactions (i.e., transactions billed to and shipped to customers located outside of the U.S.) where the plaintiffs are claiming that foreign capacitor manufacturers implemented global pricing increases.[213] Soon after the court's order, all of the parties stipulated that purely foreign transactions are excluded from the case. For the majority of the defendants in this class action and other class actions involving overseas conduct and parties, including WSGR client Hitachi Chemical Co., Ltd., this represents a substantial victory because more than 90 percent of the capacitor sales they made during the relevant time period (2003-2014) could not be claimed as damages.

Monopolization and Single-Firm Conduct Litigation

In re Photochromic Lens Antitrust Litigation. This year brought the successful conclusion of a multiyear MDL faced by Transitions Optical, Inc. (TOI), which was defended by WSGR. Following a consent decree with the FTC regarding TOI's loyalty discounts and exclusive dealing for lens-related products, more than 30 lawsuits were brought by private plaintiffs, including class actions on behalf of direct and indirect purchasers, as well as a suit brought by a competitor (Vision-Ease Lens Worldwide).[214]

Both direct purchasers[215] and indirect purchasers[216] failed to obtain certification of their proposed classes based on extensive economic expert analysis done by all sides. Ultimately, TOI was able to demonstrate that the class plaintiffs could not show higher class-wide prices, and that conflicts of interest between the class members who benefited from the alleged exclusionary practices and those that claimed to have been harmed meant that the class representatives could not fairly and adequately represent the proposed classes.[217] This question—whether a proposed class can show predominance—arises in every antitrust class action and requires specialized expertise by both the counsel litigating the case and economic experts called upon to analyze data, perform regression analyses, and opine on highly complex statistical models.

After class certification was denied for both the direct and indirect purchasers, the litigation was transferred to the U.S. District Court for the District of Delaware for resolution of competitor plaintiff Vision-Ease's claims against TOI. After additional expert discovery and briefing, the court found that TOI was entitled to summary judgment on Vision-Ease's refusal to deal claim, due largely to TOI's demonstration of its willingness to contract with Vision-Ease and Vision-Ease's failure to pursue the relationship.[218]

Prior to a trial that was set for June 2017 concerning a single remaining claim on exclusive dealing allegations, TOI and Vision-Ease reached a settlement to resolve the litigation. The settlement allowed TOI to avoid facing a jury trial on causes of action for which the plaintiff, Vision-Ease, claimed hundreds of millions in damages.

Continuing Litigation Regarding Exclusivity and Exclusionary Conduct. In 2017, there were also several federal court cases in which district courts were unwilling to dismiss antitrust cases. In *Complete Entertainment Resources LLC v. Live Nation Entertainment, Inc. et al*,[219] the district court denied Live Nation and Ticketmaster's motion for partial summary judgment in a suit brought by Songkick, a concert ticketing start-up. Songkick has alleged a variety of antitrust violations, including a monopolization claim under Section 2 of the Sherman Act, stemming from Ticketmaster's contracts with event venues.

Songkick's business model relied on "providing event ticketing services for 'artist presales.'"[220] However, Ticketmaster argued its (typically multiyear) exclusive contracts with venues gave it "exclusive ticketing rights to all tickets at that venue, including artist presales."[221] Songkick alleged that artists have historically expected a certain volume of presale tickets that they could control and distribute to fans and presented evidence that "artists prefer to purchase ticket servicing on an entire tour basis."[222] As such, according to Songkick's allegations, Ticketmaster's "overwhelming market share" allows it to exclude Songkick from presales at venues with contracts with Ticketmaster and thus renders Songkick "effectively . . . unable to acquire any business from artists for the presale ticketing servicing needs."[223]

The court found that there is "no question" that a restraint of trade is at issue in the litigation, and stated for Ticketmaster to win at summary judgment, it will "essentially need to show that [p]laintiff has failed to meet its burden to show an anticompetitive effect derived from the restraints at issue either as a matter of evidentiary production or as a matter of law."[224]

Similarly, in a recent decision, the U.S. District Court for the Southern District of New York issued an order denying Keurig Green Mountain, Inc.'s motion to dismiss the MDL antitrust claims brought by direct purchasers of K-Cup coffee pods.[225] The common allegations across the respective plaintiffs' complaints include claims that Keurig forced distributors into exclusive agreements, improperly acquired competitors, engaged in sham litigation, and attempted to prevent competitors from entering the market.[226]

Immunity from Antitrust Liability

Courts continue to explore the boundaries of immunity defenses to antitrust claims, including circumstances in which parties are immune because they are petitioning the government (Noerr Pennington doctrine), filed rate and other regulatory doctrines, and sports-related antitrust immunity.

Noerr-Pennington Doctrine. This past year, the *Noerr-Pennington* doctrine has frequently been used as a defense in antitrust litigation with varying degrees of success. The *Noerr-Pennington* doctrine shields parties from antitrust claims when they petition the government to take a position. WSGR secured an important victory for Amphastar Pharmaceuticals, Inc. in one such matter, *Amphastar Pharmaceuticals Inc. v. Momenta Pharmaceuticals, Inc*. Amphastar, a manufacturer of generic enoxaparin, alleged that its competitors Momenta Pharmaceuticals, Inc. and Sandoz Inc. violated the Sherman Act when it misled a standards-setting organization called the U.S. Pharmacopeial Convention and its members into adopting a method for testing enoxaparin, an anticoagulant drug, by not disclosing a pending patent application potentially covering that testing method. After the method became the standard, enoxaparin manufacturers like Amphastar alleged that they were required to use it for their Abbreviated New Drug Application (ANDA) submitted to the FDA. Shortly after the FDA approved Amphastar's ANDA, Momenta and Sandoz sued Amphastar for patent infringement and obtained a temporary injunction, which delayed Amphastar's entry into the generic enoxaparin market.

In the antitrust litigation, Momenta and Sandoz argued that any damages Amphastar suffered resulted from the patent litigation and thus, they are immune from liability under *Noerr-Pennington*. The district court agreed and dismissed Amphastar's complaint on this basis, but the First Circuit reversed holding that, "The mere existence of a lawsuit does not retroactively immunize prior anti-competitive conduct."[227] The panel went on to observe, "In essence, the mere fact that the defendants brought protected patent litigation against Amphastar does not immunize them from liability for the full amount of damages caused by their alleged antitrust violation."[228] The First Circuit remanded the case back to the district court, where additional motion to dismiss briefing is pending.

In addition to the Amphastar matter, there were other important *Noerr-Pennington* decisions in 2017. In *Polaris Innovations Ltd. v. Kingston Technology Co., Inc.*, the U.S. District Court for the Central District of California denied Samsung's motion to dismiss Kingston's antitrust counterclaims arguing that they were barred under *Noerr-Pennington*.[229] Kingston claimed that Samsung funded Polaris' acquisition of patents so it could then bring sham patent litigation against any infringer and based on this sham litigation, Kingston suffered antitrust injuries. In rejecting Samsung's argument, the court held that *Noerr-Pennington* does not apply to sham litigation. But on the other hand, the Federal Circuit affirmed dismissal of antitrust claims alleging that SNF filed bad-faith litigation against its competitors to gain monopoly power in *Industrial Models, Inc. v. SNF, Inc*.[230] The Federal Circuit found that Industrial Motors failed to show that SNF engaged in objectively baseless litigation or that SNF engaged in a pattern of sham litigation.[231]

Filed-Rate Doctrine. An important challenge to the application of the filed-rate doctrine is currently pending before the U.S. Supreme Court. The filed-rate doctrine generally protects carriers from antitrust litigation regarding rates that have been submitted and approved by federal regulatory agencies.[232] Earlier this year, the U.S. Court of Appeals for the Ninth Circuit held that three airlines (All Nippon Airways, China Airlines, and Eva Airways) cannot escape an action alleging anticompetitive rates that were not filed with the U.S. Department of Transportation (DOT) (e.g., fuel surcharges and discount fares) under the filed-rate doctrine.[233] The airlines argued that these fares should still be covered under the filed-rate doctrine based on the DOT's plenary regulation of airline fares and surcharges, but the panel disagreed, noting that only those fares actually filed with the DOT would be exempt from antitrust claims. The airlines appealed the decision to the Supreme Court arguing that the decision below tramples on the agencies' exclusive regulatory power and could have significant impact beyond the airline industry including the energy, telecommunications, and insurance sectors.[234] The Court is likely to decide whether to hear the case in mid-2018.

Sports Litigation. Another historical area of immunity from antitrust claims arises in sports contexts, including the Supreme Court's recognition in a 1922 case that Congress did not intend to regulate professional baseball under the antitrust laws.[235] Courts have wrestled with this holding ever since, but have ultimately found that any change to the exemption must come from Congress. Major League Baseball's (MLB's) antitrust exemption was unsuccessfully challenged on numerous occasions in 2017, including in a Section 2 case against the Chicago Cubs, brought by building owners whose view of games was obstructed by new video boards.[236] The U.S. Court of Appeals for the Seventh Circuit affirmed dismissal of the case pursuant to the antitrust exemption. In two other cases brought in 2017 by minor league players and scouts, alleging suppressed wages, the Ninth Circuit and Second Circuit rejected arguments to overturn the exemption.[237] It is unlikely that private litigants will surmount MLB's antitrust exemption in court, but instead will have to petition their lawmakers for any meaningful change to occur.

Trends in Pharmaceutical Litigation

Litigation related to pharmaceutical issues is one of the fastest growing and most quickly evolving areas of law. There are several types of antitrust claims that are unique to the pharmaceutical sector, and these cases are particularly complex due to FDA and government regulatory requirements, as well as patent and intellectual property rights that are often implicated. In 2017, a number of developments are worth noting concerning: (1) "pay-for-delay" or "reverse payment" cases in which companies settle patent litigations with an agreement to delay generic entry; and (2) cases in which generic drug manufacturers cry foul over alleged tactics used by market participants to delay or foreclose entry.

Pay-for-Delay

The U.S. Supreme Court's 2013 decision in *FTC v. Actavis*,[238] holding that reverse-payment agreements can violate antitrust laws in certain circumstances, spurred a number of private and government reverse-payment litigations in recent years. A reverse payment occurs in a patent litigation where the plaintiff manufacturer of a brand-name drug agrees to compensate one or more manufacturers of the defendant generic drugs (the alleged infringers) in exchange for a promise of delayed generic entry in the market. The Supreme Court held that such agreements can be unlawful if the compensation was "large and unjustified" and results in harm to competition.

First Pay-for-Delay Jury Trial. Since the 2013 *Actavis* decision, plaintiffs in pay-for-delay cases have faced a number of obstacles in lower courts. In *In re Nexium Antitrust Litigation*, the only pay-for-delay case tried to a jury verdict thus far, defendants prevailed after the jury found that plaintiffs failed to prove antitrust injury (actual harm caused by the defendants' conduct), even though the reverse payment settlement itself was found to be anticompetitive. Specifically, the jury concluded that even if the anticompetitive settlement had not occurred, generic entry still would not have occurred any sooner, which meant plaintiffs were not injured by the settlement. *Nexium* plaintiffs' 2016 appeal and 2017 request for hearing en banc before the U.S. Court of Appeals for the First Circuit failed as well.[239]

Highly Fact-Specific Inquiries Post-Actavis. Other 2017 cases illustrate that the success of a pay-for-delay claim under federal antitrust laws is a highly factual inquiry, on issues such as causation of antitrust injury and the validity of the underlying patent. *In re Lidoderm Antitrust Litigation*,[240] a multidistrict litigation before the U.S. District Court for the Northern District of California, is a case to watch as it heads to trial in 2018. In November 2017, the district court denied defendants' motion for summary judgment, ruling there is enough evidence that generic entry could have happened sooner had defendants not settled their patent litigation with a $266 million reverse payment. In their motion for summary judgment, *Lidoderm* defendants unsuccessfully argued that plaintiffs must prove defendant Watson, the pharmaceutical company who sought generic entry, would have won the patent litigation had defendants not settled. The court disagreed, calling defendants' position that the patent litigation be re-litigated within the antitrust case a "turducken" that is "not only unappetizing as a matter of judicial efficiency" but also "not required (or even suggested) by the *Actavis* opinion."[241] To defeat summary judgment, the court stated, it is sufficient that plaintiffs put forth "some evidence" that the generic could have won the patent litigation or on appeal before the Federal Circuit, a burden that *Lidoderm* plaintiffs have satisfied.[242]

In re Lidoderm highlights that a key issue in pay-for-delay cases is the validity of the patent underlying the patent litigation that gave rise to the reverse settlement at issue. For example, in *In re Wellbutrin XL Antitrust Litigation*, the U.S. Court of Appeals for the Third Circuit affirmed that plaintiffs failed to allege standing in the form of anticompetitive harm caused by delayed generic entry as a result of the reverse payment agreement at issue. *Wellbutrin* defendants successfully raised patent validity as a defense by showing that, because a key patent underlying the challenged settlement agreement was likely to be found valid, generic competitors would not have been able to the enter the market anyway before the patent expired.[243]

But for plaintiffs in pay-for-delay cases who want to argue patent invalidity in the Third Circuit, they should beware that at least one district court has ruled plaintiffs could not use the fact that a patent was found invalid post-settlement to support a finding that the reverse payment at issue was an antitrust violation,[244] consistent with the general approach that in pay-for-delay cases, the court evaluates the reverse payment settlement's reasonableness at the time it was entered into.

Pleading Causation. In re Actos End-Payor Antitrust Litig.[245] demonstrates that in pay-for-delay cases, pleading causation with sufficient factual allegations can make or break plaintiffs' survival of a motion to dismiss for failure to state a claim. There, the U.S. Court of Appeals for the Second Circuit revived a proposed class action by purchasers of Actos (a diabetes drug) but limited its scope, allowing plaintiffs to pursue their allegations that defendant Takeda delayed generic drug maker Teva's market entry, but not the entry of any other generic drug maker.

The district court in *In re Actos* had dismissed the complaint in 2015 after finding plaintiff purchasers did not plausibly show that Takeda's actions delayed generic versions of Actos from entering the market. With the exception of Teva, the Second Circuit agreed with the lower court that plaintiffs' theory of delayed generic entry is implausible because it rests on the generic drug makers having knowledge of Takeda's description of its patents before the FDA—a premise that is necessary but not supported with sufficient factual allegations in the complaint.[246] Plaintiffs' theory with respect to Teva's delayed entry, however, did *not* depend on Teva having such knowledge of Takeda's conduct, and was considered "highly plausible" by the Second Circuit.[247]

Defendants in *In re Loestrin 24 Fe Antitrust Litigation*[248] continue to face multidistrict litigation after the U.S. District Court for the District of Rhode Island denied their motion to dismiss. The court found that plaintiff purchasers of Loestrin (a birth control medication) sufficiently pleaded their allegations that defendants entered illegal reverse-payment agreements to keep generic Loestrin off the market, but freed two of defendants' parent companies from the suit for lack of direct allegations against them. Note that the same court had previously dismissed plaintiffs' claims in 2014, finding that under *Actavis*, reverse payments have to be cash payments to be considered illegal. On appeal, the First Circuit vacated the dismissal and remanded the case back to the district court, finding that the lower court's interpretation of *Actavis* was too strict and that the *Actavis* precedent applies to non-cash payments as well.[249] Also worth noting is that earlier in 2017, the *Loestrin* defendants had successfully moved to compel discovery regarding the marketing, pricing and sales of *other oral contraceptives*, arguing that when evaluating monopoly power, the relevant market is larger than a "single drug market" because other oral contraceptives are therapeutically interchangeable.[250]

Other Generic Entry Issues

Product-Hopping

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

Only two appellate courts have weighed in via fairly recent decisions: the U.S. Court of Appeals for the Second Circuit's *Namenda* decision in May 2015,[251] finding against the branded defendant; and the Third Circuit's *Mylan* decision in September 2016,[252] finding in favor of the branded defendant. Since *Namenda* and *Mylan*, 2017 developments generally affirm that the ultimate success of a product-hopping claim under federal antitrust laws is a highly factual inquiry, on issues such as whether defendant(s) engaged in a "hard switch" by discontinuing the old version of the drug, versus a "soft switch" by pushing, *but not limiting*, consumers to the new version of the drug through aggressive marketing.

In *In Re Asacol Antitrust Litigation*,[253] the U.S. District Court for the District of Massachusetts's decision highlights the importance of "hard switch" evidence supporting a product-hopping claim. There, direct purchasers of Asacol alleged that before defendant Warner Chilcott's patent on the drug expired, Warner Chilcott product-hopped from Asacol (400 mg tablet) to Asacol HD (800 mg tablet) and later to Delzicol (400 mg capsule enclosing the Asacol tablet). The court found the plaintiffs had alleged sufficient facts supporting their Delzicol product-hopping claim to survive Warner Chilcott's motion to dismiss, but dismissed the Asacol HD piece of their claim. Unlike defendant's "hard switch" from Asacol to Delzicol, where defendant removed Asacol from the market shortly before its patent expired and generics could enter, Asacol and Asacol HD were on the market at the same time. Notwithstanding the plaintiffs' allegations that the defendant had encouraged consumers to switch from Asacol to Asacol HD through "soft switch" marketing tactics, the court found the fact that consumers still had a choice between the two drugs precluded any antitrust liability.

In *In re Suboxone Antitrust Litigation*,[254] a multidistrict litigation before the U.S. District Court for the Eastern District of Pennsylvania, the court denied defendant MonoSol's request to toss a product-hopping suit brought by more than 40 states, finding (at the motion to dismiss stage) plausible allegations that MonoSol violated antitrust laws by delaying generic versions of Suboxone (an opioid addiction treatment).

As background, the FDA had granted brand drug manufacturer Indivior a seven-year market exclusivity after Indivior first launched Suboxone tablets in 2002. The plaintiffs allege that Indivior's sister company signed an agreement with MonoSol to develop and market a dissolvable film version of Suboxone that would beat the market entrance of generic tablets, with the intent of product-hopping away from tablets to film and extending Indivior's market exclusivity on the Suboxone franchise. The defendants allegedly used a combination of "soft switch" (e.g., marketing the film version as "film is safer" and pricing it lower to incentivize a switch away from tablets by healthcare providers) and "hard switch" (e.g., announcing plan to remove tablets from the market) tactics as part of their product-hopping scheme. In denying MonoSol's motion to dismiss, the *Suboxone* court found that, at least at the motion to dismiss stage, allegations that MonoSol suggested "hard switch" tactics to Indivior helped the plaintiffs create a plausible inference that MonoSol participated in the alleged conspiracy.[255]

Risk Evaluation and Mitigation Strategy (REMS)

The *In re Suboxone* court denied MonoSol's motion to dismiss, in part because Indivior allegedly delayed generic entry by refusing to cooperate with generic competitors in finalizing and submitting a shared Risk Evaluation and Mitigation Strategy (REMS) to the FDA, notwithstanding the fact that the FDA had ordered Indivior to cooperate in a shared REMS.[256]

REMS are safety protocols that the FDA requires the manufacturer to undertake as part of the approval of particular drugs, like Suboxone, that pose substantial risk to certain patients and others that handle the drug. Often these protocols can include restricted distribution, additional labeling, or specialized patient management databases. Shared REMS, like individual REMS, are used to address safety concerns of pharmaceutical products, but are designed to cover situations where multiple manufacturers are marketing versions of the same drug.

In 2017, REMS has been one area of particular focus for the FDA's efforts to remove regulatory obstacles to generic competition and accelerate consumers' access to generic drugs. When the FDA's new working group of experts met in August 2017 to discuss increasing generic competition and modernizing the Hatch-Waxman Act, REMS was one of the issues that came up as needing improvement. The concern is that REMS as it currently stands unnecessarily complicates the FDA approval process for generic drugs. For example, under which generic drug makers need to obtain samples from brand drug manufacturers to prove bioequivalence. For drugs that are subject to REMS, brand drug manufacturers could argue that they are not allowed to provide such samples to their generic competitors, or are bound by distribution restrictions under the REMS.

Moreover, the FDA currently encourages brand and generic manufacturers to negotiate a shared REMS, and brand manufacturers often prolong this negotiation so they enjoy market exclusivity while the negotiation is pending.[257] Congress has also taken action to improve the current REMS system. In April 2017, a bipartisan group of U.S. senators introduced a bill intended to streamline the generic drug approval process that, among other things, allows generic drug makers to participate in the brand drug's REMS.[258]

Citizen Petitions

Citizen petitions, which allow individuals and organizations to petition the FDA to make certain changes to health policy, are another method by which pharmaceutical companies allegedly seek to delay or foreclose competition. In February 2017, the FTC filed a first-of-its-kind lawsuit pertaining to 46 public filings, including 24 citizen petitions, that ViroPharma has submitted in recent years concerning a single product.[259] According to the FTC, ViroPharma abused the citizen petition process with excessive filings that purport to raise scientific concerns, but were really intended to delay generic versions of its brand-name drug Vancocin from entering the market. Although the FDA rejects most citizen petitions, the review and analysis process can divert the agency's limited resources and potentially cause delays in approval of products. The FTC, through its lawsuit hopes to signal to pharmaceutical companies that they can no longer manipulate the citizen petition process to delay generic entry with impunity, marking a milestone for ongoing concerns over abusive citizen petitions that date back more than a decade.[260]

Sovereign Immunity

Several recent decisions by the USPTO Patent Trial and Appeal Board (PTAB) indicate that state actors enjoy sovereign immunity protection for patents challenged in the PTAB's *inter partes* review process. In a bid to stave off generic competition to its dry-eye drug Restasis, the drug company Allergan entered a deal with the Saint Regis Mohawk Tribe, a Native American tribe in upstate New York. As part of the deal, Allergan transferred its patents to the tribe and agreed to pay the tribe $13.75 million upfront; in exchange, the tribe would claim sovereign immunity as grounds to dismiss generic drug maker Mylan's challenge of the patents' validity before the USPTO, lease the patents back to Allergan, and receive $15 million in annual royalties as long as the patents remain valid.

This unorthodox arrangement triggered Congressional investigation soon after. The House Committee on Oversight and Government Reform sent a letter dated October 3, 2017 to Allergan's CEO, demanding more information about its transfer of Restasis patents to the tribe,[261] and U.S. Senator Claire McCaskill drafted a bill in response as well.[262] Also in October 2017, mere weeks after Allergan's patent transfer to the tribe, the U.S. District Court for the Eastern District of Texas invalidated Allergan's Restasis patents on grounds that the claims asserted by Allergan are obvious.[263]

Class Certification

Class certification has become a critical stage of antitrust lawsuits because it is at this point of the case that the scope of the class—and relatedly, potential damages—is decided. Success in defeating class certification may drastically reduce the overall exposure a defendant has in a class action case. Among the key developments this year were: (a) the motions for class certification that have been granted in a series of class action litigations against pharmaceutical companies concerning pay-for-delay agreements; (b) the decisions denying motions for class certification by indirect purchasers due to the failure to prove questions of law or fact common to the proposed class; and (3) sharply divided views from various circuit courts over whether and how the plaintiffs must demonstrate ascertainability.

Class Certification in Pay-for-Delay Cases

Plaintiffs in several pay-for-delay cases won class certifications in 2017. Both direct and end-user purchasers of lidocaine pain patches won class certification in a multidistrict antitrust litigation before the U.S. District Court for Northern District of California, after the plaintiffs successfully proved that the defendants' reverse-payment settlement allegedly led to class-wide injuries in the form of inflated costs for lidocaine patches.[264] Direct and end-user purchasers also won class certification in *In re Solodyn Antitrust Litigation*, another pay-for-delay case before the U.S. District Court for Massachusetts.[265] The same court also granted class certification to end-payor plaintiffs in *In re Asacol Antitrust Litigation*, a case in which the plaintiffs allege that Warner Chilcott unlawfully blocked competition for its Asacol franchise by product-hopping and entering pay-for-delay agreements with a potential competitor.[266]

One common issue argued in these litigations was whether the plaintiffs sufficiently proved class-wide common injury or damages at the class certification stage. The courts in these litigations found that the plaintiffs used reliable and statistically sound methods to show class-wide injury and that the proposed classes should not be rejected at this stage (which would effectively end the litigation), because the defendants would have the opportunity later to challenge potential flaws in damage calculations or substantive matters before the jury.

Indirect Plaintiffs' Failure to Survive Class Certification

Indirect purchasers continue to have difficulty in satisfying the typicality and predominance requirements, especially in cases involving complicated distribution channels and price mechanisms.

On February 9, 2017, the U.S. Court of Appeals for the Third Circuit affirmed the U.S. District Court of Delaware's decision in *In re Class 8 Transmission Indirect Purchaser Antitrust Litigation*, denying a motion for class certification due to the proposed class's failure to meet adequacy and predominance requirements.[267] The indirect purchaser plaintiffs claimed that Eaton Corporation entered into exclusive dealing agreements with several truck manufacturers to maintain its monopoly power over heavy-duty truck transmission. The Third Circuit agreed with the district court that the plaintiffs failed to show antitrust impact would at least be capable of proof at trial by common evidence, and emphasized the necessity to conduct a rigorous analysis of plaintiffs' theory of class-wide impact with sufficient sales data on issues such as overcharge and impact of pass-through costs.[268]

Further, on April 12, 2017, the U.S. District Court for the Northern District of California denied motions for class certification in *In re Lithium-Ion Batteries Antitrust Litigation*[269] by both indirect and direct[270] purchasers alleging price-fixing conspiracy among lithium-ion battery manufacturers. The defendants challenged the absence of prerequisites such as typicality and predominance. Though the court found the indirect purchaser plaintiffs "have the same or similar injury based on the same conduct,"[271] the court found that the *Illinois Brick* non-repealer states' interests in precluding a national indirect purchaser class outweighed other interests.[272] As such, the proposed national indirect purchaser class was denied.

Different Standards for Ascertainability Requirement

In addition to the requirements set forth in Rule 23 of the Federal Rules of Civil Procedure, the U.S. Courts of Appeal for the First, Third, Fourth, and Eleventh Circuits require plaintiffs to prove an administratively feasible way for the court to ascertain what persons or entities make up the proposed class. In contrast, the Second, Sixth, Seventh, Eighth, and Ninth Circuits have declined to adopt administrative feasibility as an independent requirement.

This Circuit Court split was on display in 2017. In *In re Domestic Drywall Antitrust Litigation*, Judge Balyson of the U.S. District Court for the Eastern District of Pennsylvania denied class certification to the indirect purchaser class, finding that the indirect purchasers failed to present a reliable or administratively feasible method for ascertaining members of their class, since the proposed definition covered purchases dating back up to six years and likely included millions of plaintiffs situated across a wide variety of consumer types (including homeowners, business owners, residential tenants, and commercial tenants, and involving residential homes, commercial buildings, and factories).[273] Further, the judge noted that there was no evidence of “proof of purchase” proving that indirect purchasers purchased drywall in any of the particular states at issue or that the purchased drywall was actually manufactured by a defendant.[274]

By contrast, the U.S. Court of Appeals for the Ninth Circuit explicitly declined to adopt administrative feasibility as a class certification requirement in *Briseno v. ConAgra Foods Inc*.[275] There, the plaintiffs argued that they were deceived or misled by a cooking oil manufacturer’s “100% Natural” label. The *Briseno* court clearly pointed out that, unlike some of its sister appellate courts, “[a] separate administrative feasibility prerequisite to class certification is *not* compatible with the language of Rule 23” in the Ninth Circuit.[276] *Briseno* confirms that there appears to be a split within the U.S. federal appellate courts on whether ascertainability is a requirement for class certification, which can have important effects on the future litigation strategy of putative class action plaintiffs.

Conclusion: Outlook for 2018

We expect that 2018 will mirror this past year’s upward trend in antitrust litigation, which often follows on the heels of government investigations. The Trump Administration’s transition at the antitrust agencies will continue, as there remain multiple high-level open positions at the U.S. Department of Justice and the Federal Trade Commission that await Senate confirmation or an appointment. As we detailed in this report, the first six months of 2018 will bring a high-profile merger challenge, the U.S. Supreme Court’s decisions on whether to hear international price-fixing and airline antitrust cases, and a corporate criminal trial in the capacitors cartel investigation.

This coming year will bring new challenges and continued change in the U.S. and globally. We look forward to the opportunity to continue to keep our clients and colleagues updated on the latest developments, particularly as we expect WSGR’s antitrust attorneys to continue to play a significant role in matters of importance throughout the year. We invite you to contact your regular WSGR attorney or any member of the firm’s antitrust practice for additional information on any of the matters, trends, or controversies detailed in this report.

In closing, we would like to acknowledge and thank the partners, attorneys, and staff of WSGR’s antitrust practice in the Washington, D.C., New York, San Francisco, Silicon Valley, and Brussels offices, for their contributions to the *2017 Antitrust Year in Review.*

About WSGR's Antitrust Practice

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

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

To view the complete listing of endnotes for this report, please visit https://www.wsgr.com/PDFs/2018-antitrust-endnotes.pdf.

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