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2019 ANTITRUST YEAR IN REVIEW

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Introduction

Wilson Sonsini Goodrich & Rosati (Wilson Sonsini) is pleased to present its 2019 Antitrust Year in Review, which summarizes the most significant antitrust matters and developments of the past year. Over the past few years, the use of antitrust laws and regulations has become a highly debated subject in public discourse, and this year saw antitrust become the fashionable tool to cite on a wide variety of issues. The tech sector continues to be in the spotlight, with both federal antitrust enforcement agencies forming specialized divisions to focus solely on mergers and conduct of technology companies. Meanwhile, government enforcers and private plaintiffs remain focused on the life sciences industry, intellectual property issues, and traditional price-fixing and bid-rigging conduct. We note the trend that state attorneys general offices have taken a much more prominent role in enforcing antitrust laws, sometimes even when at odds with positions taken by federal enforcers.

In this report, we examine the Trump Administration's antitrust enforcement approach and analyze actions by both U.S. antitrust agencies across a range of civil and criminal enforcement matters. We also examine international civil enforcement trends at the European Commission (EC), where tech is also top of mind. The criminal enforcement section provides an overview of trends in the Department of Justice's (DOJ's) criminal enforcement program, including changes in the DOJ's approach to leniency. We also highlight cartel investigations in active jurisdictions outside of the U.S., including in Canada, China, the EU, Hong Kong, Japan, South Korea, and the United Kingdom. This report concludes with an update on private antitrust litigation, where the stakes (and correspondingly, the size of settlements) seem to grow every year. Multi-district litigation and the consolidation of multiple actions presents unique and new procedural and due process issues, as well as substantive challenges.

We hope you find our 2019 Antitrust Year in Review to be a useful resource. As always, should you have any questions or comments on any of the matters, trends, or controversies discussed in the report, please contact your regular Wilson Sonsini attorney or any member of the firm's antitrust practice.

Merger

Merger Enforcement: Focus on Technology and Nascent and Potential Competition

In 2019, antitrust enforcement continued to focus on technology, including acquisitions involving large incumbent firms and nascent or potential competitors. In testimony before the Senate, the Federal Trade Commission (FTC) Bureau of Competition Director Bruce Hoffman highlighted this as an area of concern stating that "the Commission pays particularly close attention when an industry leader seeks to acquire an up-and-coming competitor that is changing customer expectations and gaining sales." [1]

Consistent with that focus, the FTC formed a new division within its Bureau of Competition, the Technology Enforcement Division, to focus on "prospective merger reviews in the technology sector and reviews of consummated technology mergers." [2] The FTC is reportedly examining Facebook's past acquisitions, particularly Instagram and WhatsApp, to determine whether they were part of a strategy to snap up potential rivals and head off competitive threats.[3] The FTC also announced plans for the FTC to publish guidance by the end of 2019 on how to properly apply the antitrust laws to competition within the technology sector.[4]

In addition, both of the agencies brought enforcement actions against technology companies involving nascent or potential competition. In August 2019, the United States Department of Justice (DOJ) sued to block Sabre Corporation's proposed acquisition of Farelogix, Inc.[5] The merging firms provide online platforms for airline booking services.[6] The DOJ complaint described Farelogix as a nascent and growing competitor to Sabre, one that has "spurred innovation and brought more competitive pricing to an industry that has for decades been plagued by tepid competition and outdated technology."[7] The DOJ argued that Farelogix's current market share ($42 million in 2018 revenues, compared to Sabre's $3.9 billion)[8] substantially understates its competitive significance, because its disruptive presence has given airlines leverage to negotiate lower prices[9] and it is poised to grow significantly.[10] The case is scheduled to go to trial in January 2020.[11]

For its part, in November 2019, the FTC upheld the administrative law judge's finding that Otto Bock's acquisition of Freedom substantially reduced both current and potential competition in the market for microprocessor-equipped prosthetic knees (MPKs).[12] The commission found that Freedom's forthcoming MPK product, the Quattro, was poised to compete closely with and take share from Otto Bock's C-Leg product (indeed, Freedom nicknamed the Quattro the "C-Leg killer")[13] and that Otto Bock saw the Quattro as a serious competitive threat.[14]

Traditional Merger Enforcement

The FTC and the DOJ also continued to challenge mergers that would increase concentration in well-established industries, with a keen eye towards the companies' business documents.

The FTC challenged Fidelity's proposed acquisition of Stewart which would have allegedly eliminated one of "the Big 4" suppliers of title insurance underwriting and title information services. The merger agreement acknowledged antitrust risk by requiring Fidelity to divest assets/businesses worth $75-$225 million to address any antirust concern.[15] However, this was insufficient to facilitate clearance for the deal, because it is often difficult to satisfy the FTC's divestiture requirements in a highly concentrated market. Fidelity and Stewart abandoned the transaction days after the complaint was filed.[16]

The FTC also challenged the proposed merger of Evonik and PeroxyChem, two of the five suppliers of hydrogen peroxide in North America, alleging that the merger would reduce competition[17] by increasing the likelihood of coordination in an "already vulnerable" market[18] and eliminating head-to-head competition.[19] Litigation is ongoing in this matter.

The DOJ challenged the merger of Quad/Graphics Inc. and LSC Communications, alleging the transaction would combine the only two significant providers of magazine, catalog, and book printing services.[20] The DOJ's Antitrust Division focused closely on the parties' documents, including statements describing "intense rivalry" between "#1 competitor[s]"[21] and the LSC CEO's comments to investors months before the deal was announced that combining the companies would eliminate competitive "battles" and facilitate "pricing stability."[22] The parties abandoned the transaction shortly after the complaint was filed.

The DOJ also took action to block Novelis's acquisition of Aleris, two of only four North American manufacturers of rolled aluminum sheet for automotive applications. In an unusual step, the DOJ has agreed to refer the matter to binding arbitration to resolve the issue of product market definition. This marks the first time the DOJ's Antitrust Division is using this arbitration authority to resolve a matter.[23]

We continue to see activism on behalf of State Attorneys General, most notably in T-Mobile's proposed merger with Sprint. In July, the DOJ and five State Attorneys General[24] approved T-Mobile's merger with Sprint and imposed conditions requiring sale of some businesses to Dish Network.[25] Departing from typical coordination between state and federal antitrust authorities, several other State Attorneys General filed a suit to enjoin the transaction alleging the transaction would harm competition, with others joining after the suit was filed.[26] The FCC cleared the transaction in November with a 3-2 vote along party lines;[27] the Republican majority found that the transaction and T-Mobile's commitments will help close the digital divide and advance United States leadership in 5G, the next generation of wireless connectivity.[28] Today 10 states have joined the DOJ in settlement while 13 states and the District of Columbia are litigating to block the transaction.[29] The trial is ongoing.

Vertical Mergers

Both agencies continue to examine vertical mergers (those involving business operating at different levels of a supply chain). Vertical mergers most often raise competition concerns when the buyer's competitors are reliant on the asset being acquired, and the buyer has the incentive and ability to withhold the asset's products or services. While the agencies have always reviewed and challenged vertical mergers, they are receiving increased attention in recent years.

The DOJ appealed the 2018 decision dismissing its challenge to the AT&T/Time Warner—the first vertical merger case that has gone to judgment in 40 years. The government argued on appeal that the district court erred in rejecting its theory that the merger would increase the combined firm's bargaining leverage in negotiating with distributors. The D.C. Circuit rejected the appeal finding no clear error that would require reversal.[30] Given the fact-bound nature of the opinion, the government's loss in this case should not be read as a rejection of future vertical merger challenges.

The FTC investigated and cleared a number of vertical mergers during 2019 over the strenuous objections of the two Democratic commissioners, who have called for increased scrutiny of vertical mergers. In January 2019, the FTC found that the merger of Staples, a large reseller of office products, and Essendant, a wholesale distributor of office supplies, was likely to reduce competition in the market for office supply products sold to small and mid-sized businesses.[31] The FTC was concerned that Staples would have access to Essendant's reseller customers' commercially sensitive business information, and would be able to exploit that information when competing against those customers.[32] To resolve those concerns, the parties agreed to implement a firewall that would limit Staples' access to the competitively sensitive information of Essendant's reseller customers.[33] Commissioners Chopra and Slaughter dissented, arguing that the FTC has been too permissive in clearing vertical mergers, and should be challenging more vertical mergers in court.[34] The FTC similarly split 3-2 in the Frenesius/NxStage matter, with Commissioners Chopra and Slaughter dissenting from the majority's finding that the transaction did not support a vertical theory of harm.[35] The Democratic commissioners also raised concerns after the FTC cleared the United/DaVita merger, but did not dissent because the Colorado Attorney General obtained a behavioral settlement addressing the deal's vertical concerns.[36]

Unusual Actions: Tunney Act Review

The Tunney Act requires that a court must independently determine that the DOJ's proposed consent is in the "public interest" before entering the final order but in practice, companies do not typically wait for final court approval before closing their transactions.[37] In an unusual Tunney Act review of the CVS and Aetna settlement, Judge Leon of the U.S. District Court of the District of Columbia held a two-day evidentiary hearing allowing third parties to argue against the merger and the DOJ's proposed settlement. Notably, these third parties raised concerns about the settlement that went beyond the competitive issues identified by the DOJ. Judge Leon rejected the DOJ's argument that the scope of the Tunney Act review was limited to the settlement itself and the problems it was supposed to fix.[38] The settlement was first filed in October 2018 and on September 4, 2019, the court approved the DOJ settlement of the CVS-Aetna merger.[39] "If the Tunney Act is to mean anything," Judge Leon wrote, "it surely must mean that no court should rubber-stamp a consent decree approving the merger of 'one of the largest companies in the United States' and 'the nation's third largest health-insurance company,' simply because the Government requests it!"[40]

Enforcement of HSR Violations

HSR violations continued to be a source of enforcement for the Agencies in 2019. The HSR Act mandates that transactions that meet specific thresholds be notified to the antitrust agencies for review. If after a 30-day waiting period the pertinent agency still has doubts about the antitrust impact of the transaction, the agency will issue a second request, opening an in-depth review. Importantly, the HSR Act applies regardless of any substantive antitrust issues and can apply even where a single investor is acquiring voting securities of an issuer. The agencies frequently bring enforcement actions for failure to comply with HSR obligations, which continued to be true in 2019.

Canon and Toshiba agreed to pay $5 million to settle allegations that the companies devised a scheme to avoid observing the waiting period required by the HSR Act for Canon's acquisition of Toshiba Medical Systems Corporation (TMSC).[41] According to the complaint, the scheme devised by "had no purpose" other than to complete the sale by March 31, 2016, and avoid the HSR Act's waiting period requirements. Canon and Toshiba were also fined in other jurisdictions, as discussed below.

The FTC reached a settlement with three Third Point Funds over HSR violations, resulting in payment of $609,810 in civil penalties.[42] The FTC found that on Aug. 31, 2017, the conversion of shares held by the three Third Point funds from Dow Inc. to the newly formed DowDuPont Inc. following the merger of Dow Inc. and DuPont, were subject to filing under the HSR Act. The three Third Point funds made corrective filings with the federal antitrust agencies on Nov. 8, 2017, and the waiting period for those corrective filings expired on Dec. 8, 2017. The settlement addresses the FTC's allegations that each defendant fund was in violation of the HSR Act each day between Aug. 31, 2017 and Dec. 8, 2017.

International Merger

European Commission Unafraid of Exercising Veto Powers

At ease with its position as one of the more mature and interventionist global antitrust agencies, the European Commission (EC) issued three prohibition decisions in 2019, despite intense lobbying from both industry and national governments.

Prohibition decisions are still relatively rare in the EU, and indeed only 10 vetoes have been exercised since the revamp of the EU's merger rules in 2004. However, on February 6, 2019, the EC announced that it was blocking two deals on one day: Siemens' (Germany) proposed acquisition of Alstom (France), and Wieland's proposed acquisition of Aurubis Rolled Products and Schwermetall (Germany).[43]

In Siemens/Alstom, the parties planned to create a European rail champion through the merger—supported by the French and German governments. The French Minister of Economy was vocal in his support of the creation of a "French-German world champion" while German politicians likewise backed the creation of a European "global champion" to compete with China's state-owned CRRC Corp. Ltd.[44] The parties are the two largest suppliers in Europe (supplying trains to Germany's Deutsche Bahn, France's SNCF/TGV, and the Eurostar) and hold leading positions in worldwide markets. The EC received a number of complaints during its in-depth investigation from a range of stakeholders (customers, competitors, industry associations, and trade unions), and the deal drew criticism from several national competition agencies, with the UK, Belgium, Spain, and the Netherlands submitting a joint letter rejecting the parties' remedies proposal.[45] The EC raised serious concerns that the deal would harm competition and reduce innovation in signaling systems and very high-speed rolling stock, and lead to the foreclosure of smaller competitors and to higher prices and less choice for customers. Rejecting the parties' arguments, the EC found that Chinese suppliers were not present in the EEA and that it was highly unlikely that new entry from China would exert a competitive constraint on the merging parties in the foreseeable future. The EC believed that the remedies offered by the parties (a complex mix of assets from each of the parties, the partial transfer of certain assets, and restrictive licenses subject to carve-outs) were inadequate to address its concerns and would have proven difficult to implement (involving, as they did, the continued dependency on the merged entity for certain licenses and service agreements). Highlighting its well-established preference for clear-cut and standalone structural remedies, the EC blocked the deal to protect competition in the European rail industry.[46]

In Wieland/Aurubis, the EC prohibited a merger which would have combined producers of rolled copper products. According to the EC, a number of European industrial customers expressed strong concerns about the deal during the regulator's in-depth investigation. The EC raised serious concerns that the deal would create a dominant player and significantly reduce competition. Wieland's remedy offer was deemed inadequate and the EC blocked the deal.[47]

The two vetoes lead to a politically-charged debate about merger control reform and the role of industrial policy in EC reviews. In response to the EC's decision, the French and German governments put forward a manifesto outlining proposals to relax EU competition rules to allow the EC to give greater weight to global markets and future competitors, and allow EU ministers to veto EC decisions. With Commissioner Vestager chosen for a second mandate of five years, stakeholders from industry and national governments alike will be keeping a keen eye on the EC's response to the ongoing debate around European champions and the potential politicization of EU merger control.

On June 11, 2019, the EC blocked its third deal of the year: the proposed merger between Tata Steel (India) and ThyssenKrupp (Germany). The parties are the second and third largest steel producers in the EEA and the EC raised serious concerns about the deal's impact upon competition. It concluded that the remedies offered by the parties were inadequate as they addressed only a small part of the overlap between the parties and did not include certain manufacturing assets deemed necessary by the EC.[48] ThyssenKrupp appealed the EC's decision on August 22, 2019, arguing that the EC set overly restrictive product and geographic market definitions and that the proposed remedies would have resolved any competition concerns.

Given the recent criticism of the EC by the EU's highest court in UPS/TNT at the start of this year, it will be interesting to see if the agency is again taken to task for the conduct of its reviews.[49] In UPS/TNT, the econometric model ultimately used in the EC's final decision was materially different from all the versions that had been shared with UPS during the administrative procedure. In a judgment highlighting the importance of respect for the parties' rights and transparency in merger reviews, the court found that this was a breach of the rights of defense and annulled the EC's decision. The judgment notably upheld a lower court's finding that given that UPS's rights of defense were infringed, the decision should be annulled where "there was even a slight chance that [UPS] would have been better able to defend itself" – a relatively low bar for companies seeking to challenge an EC decision on procedural grounds.[50] FedEx has since acquired TNT and UPS is suing the EC for damages arising out of the prohibition.

Continued Enforcement of Procedural Issues

On June 27, 2019, the EC levied a fine of €28 million (approx. $31 million) against Canon for gun-jumping. Canon acquired TMSC by way of a two-step warehousing structure involving an interim buyer, which—ruled the EC—effectively allowed it to acquire control of TMSC prior to obtaining merger approval and in violation of the standstill obligation. Like in the U.S., EU merger control rules require that a buyer notify the EC of a deal that meets its jurisdictional thresholds and refrain from implementation before clearance.[51] The parties were also fined for the same gun-jumping conduct in the U.S., in China (in 2017), and were reprimanded in Japan (2016).

In April 2019, the EC imposed a €52 million fine (approx. $57 million) on General Electric (GE) for providing incorrect information during the 2017 investigation of its planned acquisition of LM Wind.[52] In its original notification, GE stated that it did not have any higher power output wind turbines for offshore applications in development, beyond its existing 6 MW turbine. However, the EC was informed by a third party that GE was in fact offering a 12 MW offshore wind turbine to potential customers. Despite the fact that GE withdrew its notification and re-filed with corrected information, the EC opened a separate procedural investigation and ultimately fined GE for negligently providing incorrect information—notwithstanding that the error had no impact on the EC's substantive review. The decision clearly underlines the importance of ensuring the accuracy of information provided to the EC at all steps of the merger review process, regardless of the impact that it has on the EC's substantive analysis, as the EC is entitled to take enforcement action against both negligent and intentional provision of inaccurate or incomplete information.

In February 2019, the EC sent a statement of objections ("charge sheet") to Telefónica Deutschland alleging the company breached commitments it had offered to secure the EC's approval of its acquisition of E-Plus in 2014.[53] This is the first time that the EC has sent a charge sheet alleging that a company has breached merger commitments offered under the EU Merger Regulation.[54] The EC's investigation is ongoing. If the EC concludes that Telefónica did breach a commitment given as part of the EC's clearance decision, it could impose a fine of up to 10 percent of Telefónica Deutschland's annual worldwide turnover and/or revoke the decision.

UK CMA Flexing Its Procedural Powers

With Brexit on the horizon, the UK Competition and Markets Authority (CMA) has been flexing its muscles and coming down hard on procedural breaches of its merger control regime.

While historically the CMA has tended to use a mix of informal and formal information gathering powers during merger reviews, the publication of updated guidance on internal document production in January 2019 signaled an intention to move towards a stricter approach as standard.[55] This is in line with global enforcement trends, where agencies are increasingly tough on procedural breaches.[56]

In October 2019, in a signal to industry that it will not allow the merging parties to withhold responsive internal documents, the CMA made public its decision in Sabre/Farelogix to penalize Sabre £20,000 (approx. $26,000) for procedural breaches.[57] In April 2019, Sabre had responded to two formal information requests from the CMA. However, in June, the company updated its response with an additional set of documents, of which 188 had not previously been provided to the CMA. These documents had either been entirely withheld from the CMA or produced in redacted form. The issue arose from a disclosure gap with the parallel U.S. review of the transaction, where a number of documents initially withheld as privileged in the U.S. were later re-classified and produced to the U.S. Department of Justice (DOJ). Sabre then provided these documents to the CMA. While the CMA acknowledged that it had been on notice that Sabre was providing the same universe of documents that it had given to the DOJ, that the failure to hand over certain materials was not intentional, that Sabre had been transparent, and that the documents were "only of limited relevance" to its review, the UK enforcer still sanctioned the company. In its decision, the CMA ruled that withholding the documents gave rise to a "material risk" that the CMA's decision would be taken on the basis of incomplete evidence.

As a matter of law, there is no obligation to pre-notify mergers to the UK CMA, meaning logically that the parties are free to close their transaction once all other mandatory approvals have been secured. The CMA does however have the power to impose an "initial enforcement order" (IEO) or other interim measures on parties to an anticipated merger (i.e., one that has not yet closed), and does so routinely for completed mergers. These are essentially hold separate orders, which require the parties to cease or undo integration efforts pending completion of the CMA's review. In March 2019, the CMA issued its first order requiring parties to a completed merger to "undo" their completed merger.[58] In Tobii/Smartbox, the parties completed their deal in October 2018. Post-completion, the CMA called the merger in for review and required the parties to cease any further integration activities. The CMA then referred the case to Phase II and issued an "unwinding order", stipulating that all pre-closing acts which prejudiced the CMA's investigation be reversed. For all intents and purposes, this required the parties to undo an agreement that Smartbox discontinue certain products and halt work on R&D. The CMA blocked the deal in August 2019. Similar unwinding orders were issued in the course of CMA reviews in Bottomline/Experian[59] and Ecolab/Holchem.[60]

In PayPal/iZettle, the CMA imposed a record fine of £250,000 (approx. $325,000) on PayPal for failing to comply with the terms of an IEO.[61] The parties completed their deal on September 20, 2018, the day following the CMA's decision to make an IEO that the businesses be held separate, after the CMA's merger intelligence committee had identified the transaction as warranting an investigation. A derogation from the IEO was granted regarding integration planning which did not impact the UK, but the parties were found by the CMA to be in breach when cross-selling campaigns intended to target customers based in France and Germany were found to have hit 76 UK customers. The deal was cleared unconditionally after an in-depth Phase II review, but the penalty levied by the CMA highlights the caution required in global integration efforts while the UK is still subject to a carve-out. The CMA's recent decisions make it clear that the CMA's interim measures impose all the constraints and consequences of a mandatory and suspensory regime.

Minority Stakes Under Review in the UK

While the ability of certain national competition authorities to review non-controlling minority investments is nothing new (e.g., in Austria and Germany), the UK's pending review of Amazon's investment in Deliveroo (an online food delivery business) is likely to be closely watched. The review highlights the increasing scrutiny of the conduct and policies of the largest technology companies, particularly as regards M&A activity, on both sides of the Atlantic. Amazon was the lead investor in a $575 million fundraising round into Deliveroo in May 2019. Stemming from this, the CMA said that it would examine Amazon's stake in Deliveroo as it believed the two companies had "ceased to be distinct" or had made plans to that effect—despite the fact that Amazon is only a minority shareholder in the food-delivery company. The CMA issued an IEO in June this year requesting that the parties cease any integration efforts and formally launched a merger inquiry on October 16. As the year comes to an end, the CMA has decided to open a Phase II investigation into the transaction.[62]

Agency Investigations

2019 was a perfect storm of civil enforcement activity in "Big Tech," with the DOJ, FTC, and state enforcers jockeying to investigate the technology industry.[63] Building on the trend of the past several years, civil enforcers also brought significant actions in the health care industry involving pay-for-delay and other anticompetitive tactics in pharmaceuticals. The federal agencies were joined in their investigations by multiple state attorneys general, who were uncharacteristically assertive this year in conducting investigations separate from, and sometimes in partial opposition to, the federal agencies. The year was also marked by significant and sometimes controversial policy development activity, including the FTC's landmark *Hearings on Competition in 21st Century* and the DOJ's efforts to influence IP policy and reform longstanding consent decrees governing the film, music, and other significant industries.

DOJ

DOJ Ramps Up Investigations of "Big Tech"

The DOJ's Antitrust Division announced on July 23 that it had begun a review of "whether and how market-leading online platforms have achieved market power and are engaging in practices that have reduced competition, stifled innovation, or otherwise harmed consumers."[64] DOJ's initial press release referred generally to "widespread concerns that consumers, businesses, and entrepreneurs have expressed about search, social media, and some retail services online" without specifically naming any companies or practices it may be investigating.[65]

DOJ's announcement of a broad "Big Tech" investigation came several weeks after reports in late May and early June that DOJ was preparing an antitrust investigation of Google.[66] In September, Google announced that it had received a civil-investigative demand from DOJ seeking information about past investigations into the company.[67] Also in September, it was reported that the DOJ would open an investigation into Facebook.[68] The DOJ has not commented on the scope of either of these investigations.

The DOJ investigations come against a backdrop of significant scrutiny of tech giants from state antitrust enforcers and from Congress. In July, the House Judiciary Antitrust Subcommittee obtained testimony from executives from Amazon, Apple, Facebook, and Google.[69] The panel issued requests for documents from the companies in September.[70] On September 9, a group of fifty attorneys general, representing Puerto Rico, the District of Columbia, and every state except California and Alabama, made a high profile announcement of a Texas-led investigation into Google.[71] Shortly before the DOJ investigation of Facebook was reported, a group of state attorneys general led by New York (which has since grown to 47) announced their own inquiry.[72]

DOJ Courts Controversy with Investigation of Automaker Emissions Settlements

On August 28, the Antitrust Division launched an investigation of BMW, Honda, Ford, and Volkswagen based on a voluntary agreement the automakers had made with California regarding vehicle emissions requirements. The DOJ's announcement was met with criticism that the agreement is very likely immune to antitrust challenge under (i) the *Noerr-Pennington* doctrine, which protects government petitioning from antitrust scrutiny, and (ii) the state-action doctrine, which exempts certain conduct done pursuant to state policy from federal antitrust law.

Observers have also expressed concern that the investigation was politically motivated and intended to aid the Trump Administration's separate dispute with California over automotive emission standards. Both the Senate and House Judiciary antitrust subcommittees sent document requests to DOJ and the White House seeking "any information relating to the President's dispute or disagreement with the State of California's position on the auto emission standards." The subcommittees expressed concern over "the weaponization of the antitrust laws for political purposes." AAG Delrahim denied any political involvement in the decision to open the investigation in a September Senate hearing.[73]

DOJ Continues a Policy-Forward Agenda

a) Amicus program

AAG Delrahim has made the filing of amicus briefs a priority since taking over as head of the Antitrust Division in September 2017.[74] At a September 2019 Senate hearing, AAG Delrahim reiterated his support of DOJ's continued intervention, stating that the filings allow the DOJ "to address developments in the case law earlier and more frequently, offering us the opportunity to have an outsized impact with our resources."[75]

During AAG Delrahim's tenure, the DOJ has filed thirty-two amicus briefs, including some submitted to the Supreme Court. Nineteen of the underlying have been resolved to date: eight in favor of DOJ's position, five against, and six dismissed without a ruling on the substance. The DOJ's most notable intervention this year came in the FTC's suit against Qualcomm, spurring an inter-agency dispute regarding the application of competition law to the technical standard-setting process. DOJ submitted three separate briefs—one at the district court level and two on appeal—that contradicted the views of the FTC. DOJ filed amicus briefs in support of Qualcomm's request to stay the district court's injunction pending a Ninth Circuit ruling and another brief arguing that the district court decision should be overturned. The Ninth Circuit is expected to hear arguments on the case in January.

b) Consent Decree Review

In April, the DOJ announced that it would review all of the agency's "legacy" antitrust judgments.[76] The DOJ's statement argued that the "vast majority of these judgments no longer protect competition because of changes in industry conditions, changes in economics, changes in law, or for other reasons."[77] DOJ posted allegedly outdated judgments to its website for public comment and has sought to terminate some of the judgments in the appropriate court.

In June, the DOJ opened a review of the 78-year-old consent decree that dictates the way music performance license agreements are negotiated.[78] The DOJ had previously reviewed this consent decree in 2015, concluding that changes to the decrees were not warranted. The American Society of Composers, Authors, and Publishers ("ASCAP") and Broadcast Music Inc. ("BMI"), two of the US's biggest music license holders, submitted comments to the DOJ to push the agency to terminate. BMI and ASCAP argued that the composition of music licensees has changed in recent decades and "free market" licensing is required. Music licensees expressed concern that termination of the consent decree would enable license holders to arbitrarily raise prices and harm the music industry. The public comment period for the DOJ's review ended August 9, and the comments are published for review.[79] DOJ has not indicated when it will reach a decision on whether to terminate or modify the decree.

The DOJ filed to terminate the Paramount Consent Decrees in November.[80] These decrees were entered in a series of cases from the 1930s and 1940s involving horizontal conspiracies to control motion picture distribution and exhibition markets and required movie studios to separate their distribution and exhibition businesses. The decrees also banned bundling films in a single license, entering a license covering an entire theater circuit, resale price maintenance, and over-broad licenses for specific geographic areas. DOJ concluded that these decrees have served their purpose and "may actually harm American consumers by standing in the way of innovative business models for the exhibition of America's great creative films."[81]

c) Workshops

In May, the DOJ held a public workshop on competition in television and digital advertising to explore industry dynamics in media advertising and the implications for antitrust enforcement and policy, including merger enforcement.[82] AAG Delrahim kicked off the two-day workshop by saying that the agency must understand whether advertisers view ads on digital media as a substitute for television ads or as a "useful complement." The workshop consisted of a series of panels examining (i) television advertising; (ii) internet and mobile advertising; (iii) the competitive dynamics in media advertising; and (iv) trends and predictions for advertising generally. Some of the key topics discussed included whether the Division should recognize increased competition in advertising, the influence of large players in the online and digital advertising industry, and an evaluation of the DOJ's antitrust actions to block mergers of ad networks.

The DOJ held a workshop in September on the role of antitrust enforcement in labor markets and promoting robust competition for American workers.[83] The workshop included, among other things, discussions of labor monopsony, employer collusion in franchise settings and the sharing economy, the competition concerns facing collegiate athletes, and the scope of the statutory and non-statutory labor exemptions for collective bargaining and other labor union activities. The DOJ workshop was the first event in a two-part series with the FTC. The next workshop will be hosted by the FTC and will focus on the legal, economic, and consumer protection issues associated with the use of non-compete clauses.

FTC

FTC Amazon Investigation Ramps Up

The FTC reportedly ramped up its investigation into Amazon's business practices in September, focusing on how Amazon's policies might have an impact on small businesses selling in its marketplace.[84] Earlier in the year, the Commission reportedly conducted interviews with Amazon's competitors regarding Amazon's business practices.[85] The investigation has reportedly now been expanded to cover Amazon's cloud business, Amazon Web Services.[86] The FTC has not confirmed any of these reports. However, in November, Commission Chairman Joseph Simons said that, in addition to its investigation of Facebook, the FTC was conducting investigations of other major tech platforms but that he could not divulge details of those investigations.[87]

New Technology Enforcement Division

Complementing its investigations of "Big Tech" firms, in early 2019 the FTC created a Technology Task Force to monitor technology markets and investigate potential anticompetitive conduct. In October, the FTC announced that its Technology Task Force was now being converted into a permanent division within the Bureau of

Competition. This new division would be called the Technology Enforcement Division or TED.[88]

The FTC is also working on tech platform guidance for antitrust law enforcers grappling with the conduct of large technology platforms.[89] The guidance will examine the application of existing antitrust law to tech platforms and whether new legislation should be considered.[90] The FTC's Office of Public Policy is leading the preparation of this guidance, and it will be released by the end of the year, according to Commissioner Christine Wilson.[91]

Significant Democratic Dissents Seek to Advance Antitrust Policy Debates

Minority FTC Commissioners continued the trend toward more aggressive statements, particularly in matters concerning tech platforms. For instance, Commissioner Chopra issued a strong dissent in the FTC's July settlement with Facebook. In July, the FTC found that Facebook had violated its 2012 consent agreement with the FTC. The settlement between the Commission and Facebook resulted in a fine of $5 billion on Facebook, along with the imposition of a new privacy structure and new tools to allow the FTC to monitor Facebook.[92] Commissioner Chopra dissented, arguing that the settlement did nothing to change Facebook's behavioral advertising business model and the financial incentives which led to the violations, and that the settlement allowed Facebook to continue its mass surveillance and advertising tactics.[93] Commissioner Rebecca Slaughter also dissented, arguing that the FTC should have pursued litigation rather than accepting a settlement, including expressing discomfort with the release of liability for Facebook, the inclusion of officers and directors in the release, and decision not to name Mark Zuckerberg in the complaint and order.[94]

In February, the FTC voted 3-2 on party lines to settle a merger between Staples and office supply wholesaler Essendant with a remedy that would establish a firewall for competitively sensitive dealer information held by Essendant.[95] Commissioners Chopra and Slaughter both strongly dissented in the decision. Commissioner Chopra argued that the Commission was "jumping to conclusions" by not sufficiently investigating the potential for increased buyer power and relying too heavily on an underdeveloped economic model.[96] Commissioner Slaughter's dissent offered a sweeping criticism of the state of vertical merger enforcement, seeking to set the stage for a broader policy discussion:

> Right now, a great debate is taking place in Washington policy circles and even around the country at family dinner tables. The debate concerns the consequences for American citizens of fewer and more dominant companies controlling large swaths of industries and firms across sectors of the economy. While mergers between direct competitors contribute to this phenomenon and raise competitive concerns, vertical mergers that integrate trading partners can be just as pernicious in sapping our economy's vitality.[97]

Commissioner Slaughter argued that vertical mergers are underenforced because close calls are either not challenged at all or are cleared with ineffectual behavioral commitments based on unreliable assumptions and predictions about how vertically-integrated firms will operate.[98] Commissioner Slaughter called for a general policy of retrospectives for "close cases."[99] The *Staples* majority responded pointedly to Commissioner Slaughter's dissent:

> More broadly, the dissent seems to take issue with the Commission's emphasis on bringing cases where theories are supported by facts. But the incipiency standard under Section 7 imposes meaningful obligations on the government before allowing it to block a transaction. Specifically, it requires us to establish more than a theoretical concern—it must be probable (not certain) and substantial. Simply theorizing a harm that might arise out of a merger is not enough. We must be able to explain and to prove with facts how a given vertical merger is likely to cause harm in the case at hand. We must provide evidence.[100]

Commissioners Chopra and Slaughter have been active advocates for changes in antitrust policy outside of FTC enforcement actions as well. For instance, in September, Commissioner Chopra filed a comment criticizing DOJ for failing to use its criminal enforcement authority to curb no-poach and wage-fixing agreements.[101] In written testimony given to the House Judiciary Committee in October, Commissioner Chopra recommended that structural remedies should be applied to bring about a change in the behavior of tech platforms.[102] Commissioner Chopra also proposed opening up intellectual property rights to underlying technologies so that the alleged rule-breakers cannot rely on the legal framework to prevent others from using and copying their intellectual property and that one-sided or take-it-or-leave-it contract terms should be voided by the courts. To manage the issue of data collection and privacy, he argued that the government should place an outright ban on tech companies from collecting and monetizing certain types of data.[103] Commissioner Slaughter suggested at the American Antitrust Institute annual conference that the FTC should more strongly assert its own enforcement views and should sue to block mergers it views as anticompetitive even if it may lose. She said that "an optimal win record is not 100%."[104]

FTC Hearings Seek to Chart Future of U.S. Competition Enforcement

The FTC's *Hearings on Competition and Consumer Protection in the 21st Century* that began in September 2018 continued through June 2019.[105] As the FTC put it, the hearings were intended to assess whether "broad-based changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection enforcement priorities of the Commission."[106] The FTC hearings had a diverse roster of speakers, including FTC Commissioners and staff, state attorneys general, economists, law firm attorneys, academics, and others.

Totaling 14 sessions in all, the FTC Hearings covered numerous topics, including common ownership, consumer protection, and vertical mergers. But it is fair to say that much of the focus was on competition issues related to so-called tech "platforms." Specific sessions covered included nascent competition, privacy, innovation, data security and big data. Numerous speakers advocated for new approaches to these issues, while others defended the applicability of the existing consumer welfare standard. The FTC also accepted public comments for the hearings, which attracted hundreds of comments across all of the topics. In a September speech at Fordham University, FTC Chairman Joe Simons stated that the FTC is preparing a staff report on international aspects of competition enforcement, guidance on antitrust issues for technology platforms, guidance on vertical mergers, and commentary on how nascent competition and non-price competition factors into horizontal merger analysis.[107] A FTC written statement before the House Antitrust Subcommittee in November indicated that the agency was still "distilling" input from the hearings but reiterated the priorities mentioned in Simons' speech.[108]

FTC Wins at Trial in Qualcomm

The twists and turns of the *Qualcomm* case attracted much attention from the legal community this year. The FTC had initially sued Qualcomm in 2017, claiming that Qualcomm used its monopoly position as a supplier of wireless chips to force mobile phone manufacturers to pay high license fees for Qualcomm's patent portfolio. In the Northern District of California, Judge Lucy Koh held a trial in January 2019 and then, in May, issued a lengthy decision against Qualcomm. Judge Koh's decision included a sweeping injunction requiring Qualcomm to renegotiate its contracts with mobile phone manufacturers and license its patents to rivals.

The decision created an unusual amount of tension between the FTC and DOJ. While the FTC pursued the case at the district court level and on appeal to the Ninth Circuit, DOJ filed multiple amicus briefs in favor of Qualcomm, arguing that the FTC's position would have significant negative consequences for the application of antitrust to IP law, and, potentially, for national security.[109] Numerous other interested parties have also filed amicus briefs.[110] Additionally, the case against Qualcomm attracted opposition from FTC Commissioner Christine Wilson[111] and the Departments of Defense and Energy.[112] The Ninth Circuit stayed Judge Koh's decision, concluding that Qualcomm should not have to renegotiate its agreements given the possibility that Qualcomm might prevail at the appellate level.[113] The Ninth Circuit has yet to hear oral argument or issue a decision on the appeal.

Health Care Conduct Cases at the FTC

a) Pay-for-delay

In 2009, the FTC initiated a lawsuit (*FTC v. Actavis*) alleging that the brand-name drug company Solvay entered into illegal patent infringement settlement agreements with generic drug makers, pursuant to which Solvay paid generic drug makers to keep generic versions of AndroGel off the market for a number of years.[114] This lawsuit resulted in the landmark ruling by the Supreme Court in *Actavis*, which held that reverse payment patent settlements were subject to antitrust scrutiny.[115] In February 2019, the FTC reached a settlement with the last remaining defendant in *Actavis*, AbbVie (Solvay's current owner). Pursuant to the settlement, AbbVie is prohibited from entering into patent infringement settlement agreements that restrict generic entry.[116]

b) Product Hopping

Product hopping refers to the strategy of a brand-name drug manufacturer introducing formulation changes, modification of dosage, or other alterations in order to avoid competition from typically lower-priced generic drugs. This can involve a "soft switch," where the brand firm does not withdraw the old version of the drug from market but discourages its use, or a "hard switch," where the brand firm withdraws the old version from market, thus giving consumers and payers no choice but to buy the new version of the drug. 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).

The FTC has continued to pursue investigations into pharmaceutical companies that are alleged to have engaged in product hopping and subject these companies to significant fines. In July 2019, Reckitt Benckiser Group plc (RB Group) agreed to pay $50 million to settle the FTC's allegations that RB Group violated Section 5 of the FTC Act via a "deceptive [product hopping] scheme to thwart lower-priced generic competition to its branded drug Suboxone."[117] The FTC alleged that RB Group forced the market to convert from Suboxone Tablets to Suboxone Film by falsely claiming that Suboxone Film was safer than Suboxone Tablets, and by submitting a meritless citizen petition to the FDA requesting that FDA reject any generic Suboxone Tablet applications.[118] The proposed settlement also includes a behavioral component, as the RB Group is barred from engaging in similar conduct and must provide FTC with a detailed explanation if it introduces a reformulated version of an existing product in the future.[119] Notably, in order to resolve related criminal and civil charges, RB agreed to forfeit over $1.4 billion, amounting to the largest recovery by the United States in a case concerning an opioid drug.[120]

c) Group Boycotts

The FTC has continued to demonstrate its willingness to use Section 5 as a tool to pursue unlawful conspiracies. In October 2019, the FTC's Chief Administrative Law Judge found that two of three dental suppliers (Benco Dental Supply Company and Patterson Companies, Inc.) named in an FTC complaint committed a *per se* violation of Section 5 of the FTC Act by conspiring to refuse to provide discounts to, or otherwise compete for the business of, buying groups representing solo and small-group dental practitioners.[121] In coming to this decision, the ALJ relied on explicit emails and text messages between the companies' executives which reflected their desire to avoid dealing with buying groups.[122] The defendants declined to appeal the ALJ's decision in federal district court.[123]

d) Monopoly Maintenance

In April 2019, the FTC filed a complaint against Surescripts in federal court, alleging that the health information Surescripts employed illegal vertical and horizontal restraints in order to maintain its monopolies over two electronic prescribing, or "e-prescribing," markets: routing and eligibility.[124] According to the FTC's complaint, Surescripts prevented customers in the electronic prescription routing market and eligibility market from using other providers of these services through exclusivity agreements, threats, and other exclusionary tactics.[125] The complaint alleges that Surescripts's anticompetitive acts violate Section 2 of the Sherman Act, and thus constitute an unfair method of competition in violation of Section 5 of the FTC Act.[126] The lawsuit is currently pending.

State AGs

Supplementing and in some cases overtaking actions by federal enforcers, state attorneys general have been extraordinarily active in 2019. In the realm of "Big Tech," state enforcers have led broad investigations into Google and Facebook, moving quickly to collect large amounts of documents and data. In other conduct areas, state attorneys general have gone beyond federal enforcers, with the Washington Attorney General staking out an aggressive position on the use of no-poach agreements by franchises, despite skepticism expressed by DOJ.

State AG Investigations into Google and Facebook

A group of state attorneys general led by New York in September announced an investigation into whether Facebook has "endangered consumer data, reduced the quality of consumers' choices, or increased the price of advertising."[127] The investigating group began with just nine states but had grown to forty-seven by October.[128] The AGs are reportedly probing topics that include Facebook's prior acquisitions of startups, including WhatsApp and Instagram, how it handles user data, and whether it used inflated metrics to deceive purchasers of video advertising, a topic on which it recently reached a $40 million settlement with advertising agencies.[129] Separately, Facebook was sued in November by California Attorney General Xavier Becerra, who stated that Facebook had failed by comply with dozens of questions and requests for documents in an 18-month state privacy investigation, reinforcing that user privacy remains a key area of focus for state investigators.[130]

A separate group of attorneys general—representing forty-eight states, Puerto Rico, and the District of Columbia—announced a broad investigation focusing primarily on Google's advertising and search businesses in September.[131] Texas Attorney General Ken Paxton, speaking on behalf of the coalition of states, stated that advertising was the core area of initial concern and that Google "dominate[s] the buyer side, the seller side, the auction side and the video side" of advertising transactions.[132] Other participating attorneys general, including from Utah and Florida, echoed these remarks and expressed diverse concerns related to data, privacy, and online speech.[133] In November, sources reported that the states' investigation into Google would expand beyond advertising to include Google's search and Android practices. Search and Android had previously been the subject of investigations by the FTC and other global enforcers which closed without any finding of wrongdoing, but were the subject of negative decisions in 2017 and 2018 by the European Commission.[134]

Washington Charts a Separate Course on No-Poach

State attorneys general have been active in multiple areas outside of technology during 2019 as well. Perhaps most notably, the Attorney General of Washington engaged in a high-profile campaign to deter the use of no-poach clauses in franchise agreements, which has led to settlement agreements with more than one hundred chains representing 147,000 locations nationwide.[135] In August, the state of Washington settled the initial litigation that It brought against restaurant chain Jersey Mike's, with Jersey Mike's ultimately agreeing to eliminate no poach clauses from all its corporate franchise agreements and paying the state of Washington $150,000.[136]

The Washington Attorney General's activity has at times put it at odds with the DOJ, which has signaled its own intention to vigorously prosecute so-called "naked" no-poach agreements among horizontal rivals as *per se* offenses, but which has not taken a similar position against vertical agreements between franchisors and franchisees. In March, the two agencies filed opposing briefs in a federal case brought by private plaintiffs, with the DOJ taking the position that no-poach agreements should be accorded the same rule-of-reason treatment as other vertical restraints,[137] while the Washington Attorney General took the position that such agreements frequently have horizontal elements, and are often unsupported by legitimate pro-competitive rationales.[138] While the DOJ statement attracted significant interest in the legal press, the Washington Attorney General has signaled that intends to continue to pursue sanctions against such agreements under the laws of Washington, which provide a separate source of authority in addition to the Sherman Act.[139]

Criminal/Cartel Investigations

The criminal antitrust enforcement program remained a high priority of the U.S. Department of Justice (DOJ) in 2019. While fines for corporations continued to trend downward in the last year, the DOJ showed no signs of slowing down in its pursuit of detecting and prosecuting collusive conduct criminally. Notably, the DOJ continued to prosecute individuals aggressively (achieving trial wins in FOREX and canned tuna), continued to investigate several potential "no-poach" agreements and hiring practices criminally, and continued to emphasize compliance and find new means to detect collusion. The DOJ also revealed a number of new investigations, established a task force to identify new cases in government procurement, and announced a potential new approach in analyzing inability to pay defenses.

This section of our Antitrust Year in Review: 1) identifies a few notable developments in the DOJ's criminal enforcement program in 2019; 2) summarizes the DOJ's significant criminal prosecutions of corporations and individuals in the last year; 3) describes recent policy initiatives and priorities in the DOJ's criminal enforcement program; and 4) highlights some significant developments in cartel enforcement outside the United States.

Notable Developments in the DOJ's Criminal Antitrust Enforcement Program

In 2019, the DOJ pursued 15 corporate entities and 41 individuals for criminal antitrust or related conduct, by filing criminal charges, reaching plea deals or deferred prosecution agreements, or securing sentencings or convictions. The largest criminal corporate fine secured by the DOJ was a $100 million fine against StarKist in connection with price fixing of canned tuna fish. The largest individual prison sentence secured by the DOJ in 2019 was 18 months. In its annual spring update, the DOJ noted in that it had 91 pending grand jury investigations, and in November Assistant Attorney General (AAG) for Antitrust Makan Delrahim indicated that number had grown to exceed 100, on par with the number of open grand jury investigations in recent years.[140] The following identifies some of the more notable prosecutions and developments in the criminal program.

Government Procurement. In the last year, procurement and government contracts emerged as a central focus of the DOJ's antitrust enforcement efforts.[141] For example, the DOJ secured not only $75 million from Hyundai Oilbank and S-Oil in criminal fines, but also $52 million in civil penalties related to fuel supply to the U.S. military.[142] New investigations were also announced involving bid rigging at online auctions for surplus government equipment conducted by the General Services Administration. The DOJ also brought Honest Services Fraud charges against participants in Detroit's Demolition Program, which is funded in part by federal tax dollars. In part due to the increased prosecutions in government procurement and contracting, the DOJ announced its Procurement Collusion Strike Force (PCSF), a task force comprised of officials across numerous agencies focused on rooting out anticompetitive conduct in government procurement and contracting processes.

New Means of Detection. Recent investigations into e-commerce and online markets have prompted the DOJ to pay close attention to the use of messaging apps, including encrypted messaging, to facilitate conspiratorial conduct. The Antitrust Division's internal training material for law enforcement personnel now explicitly advises that communications evidencing cartel conduct can be found via "Facebook message, WhatsApp, and encrypted messaging apps like Confide."[143] Similarly, the Criminal Division revised its FCPA corporate leniency program to require that cooperating companies implement measures that preserves communications over such apps.[144] The DOJ has noted in press releases and testimony that antitrust conspiracies are increasingly being carried out through the use of encrypted messaging and social platforms.[145]

Inability to Pay Defense. The DOJ's Criminal Division also issued guidance on how prosecutors should evaluate a defendant's ability to pay, including releasing a detailed questionnaire for defendants seeking to make an inability to pay argument.[146] At least one official in the Antitrust Division has indicated that this guidance closely tracks its current practice already; thus the Criminal Division's formal guidance on ability to pay issues may be instructive moving forward.[147] In recent antitrust cases, ability to pay has emerged as an important issue, with some corporate defendants arguing that penalties within the U.S. Sentencing Guidelines would be financially ruinous and result in the business exiting the market—frustrating the core mission of the antitrust laws in preserving competition.[148] This issue is likely to take on new urgency with the November Chapter 11 bankruptcy petition filed by Bumble Bee. Bumble Bee pleaded guilty in 2017 to price fixing of canned tuna fish and agreed to pay a criminal fine of $25 million; its bankruptcy petition listed the DOJ as its second largest creditor, with $17 million still owed on that judgment.[149]

New Legislation. As far as legislative developments, the U.S. Senate passed legislation to heighten protections for whistleblowers who report antitrust violations, allowing them to sue in court if they suffer termination, demotion, or other retaliation.[150] The Criminal Antitrust Anti-Retaliation Act was first introduced in 2004 to protect whistleblowers in criminal antitrust cases and has been approved by the Senate in previous years. It is unclear whether the House of Representatives plans to consider the bill. It is possible that some of the whistleblower protections offered in the current bill may be incorporated into a revised Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), which is up for renewal in 2020.

Finally, the DOJ continued reviewing its enforcement practices, advocating for strict enforcement and promoting compliance. As examples, in 2019, the DOJ held a roundtable on ACPERA issues and reauthorization this spring. In several cases, the DOJ continued advocating for application of the *per se* standard to horizontal agreements between competitors to fix prices and allocate markets and ultimately convinced a court to reverse a prior ruling and apply that standard. The DOJ also issued new antitrust corporate compliance guidelines, held a roundtable on competition in labor markets, and continued its advocacy related to no-poach hiring agreements. These, and other developments, are discussed in further detail below.

Notable DOJ Prosecutions in 2019: Corporations and Individuals

In 2019, the DOJ continued investigating and prosecuting collusive conduct across a variety of industries, with a few new sectors emerging as areas of enforcement interest. Below, we summarize some of the more significant DOJ enforcement actions of 2019.

- ***E-commerce: Posters.*** In January 2019, Daniel Aston, an executive at e-commerce company Trod Limited, pleaded guilty to price fixing and was subsequently sentenced to six months in prison. Trod previously pleaded guilty to price fixing in 2016 in connection with selling price-fixed posters online via Amazon Marketplace. Aston was in fact a fugitive in Spain for several years until he was arrested in May 2018 and ultimately agreed to return to the U.S. to face the charges.[151]
- ***E-commerce: Promotional Products.*** Also in January 2019, the DOJ advanced its investigation into price fixing of promotional products sold online when a grand jury indicted a maker of insulated beverage containers and its CEO. The DOJ simultaneously secured plea agreements with a maker of wristbands, lanyards, temporary tattoos, and buttons, and two of that company's executives. A third company and its owner were sentenced in June, with both ordered to pay criminal fines and the owner sentenced to eight months in custody to be followed by three years of supervised release. In announcing the sentencing, the DOJ noted specifically how the conspiracy was carried out using social media platforms and encrypted messaging apps.[152]
- ***Real Estate Foreclosures.*** The DOJ's investigation into bid rigging at

real estate foreclosure auctions also continued in the last year. Nine individual investors in Mississippi were sentenced in February, with each ordered to serve four months in prison and pay restitution to victims. Eight of the nine also were sentenced to pay criminal fines ranging from $20,000 to $48,000. In July, a real estate company and its two owners pleaded guilty to mail and wire fraud related to their participation in a scheme to rig bids and receive kickbacks in connection with maintenance and repair contracts for foreclosed properties in Minnesota.

- ***Heir Location Services.*** An heir location services provider and its co-owner pleaded guilty to participating in a market allocation scheme following a protracted court battle regarding the proper legal standard to apply. The DOJ was able to claim victory in that battle when the district court reversed a prior ruling to hold that the "per se" standard should apply to the market allocation conduct at issue. Shortly, thereafter, the defendants entered into pleas, with the company agreeing to a $1.53 million criminal fine. Notably, the plea for the co-owner specifies that the court shall determine what is an appropriate sentence regarding incarceration.[153]
- ***Suspension Assemblies.*** In July, the DOJ secured a plea agreement with a maker of hard drive suspension assemblies. NHK Spring pleaded guilty to conspiring with other manufacturers to allocate market shares and avoid price competition for suspension assemblies sold to makers of hard disk drives. Pursuant to the plea agreement, NHK agreed to pay a $28.5 million fine and cooperate with the DOJ's investigation.[154] Notably, that fine was based on sales directly in the United States as well as sales outside the United States when the assembly was incorporated into products destined for the United States. This continues a significant trend in the DOJ prosecuting conduct that physically occurs in foreign countries, but still impacts U.S. commerce.
- ***Freight Forwarding and Ocean Shipping.*** The DOJ also advanced its investigations into freight forwarding and ocean shipping services. In June, two freight forwarding executives were sentenced to pay $20,000 in criminal fines, and prison sentences of 18 and 15 months followed by supervised release, for conspiring to fix prices for freight forwarding services. Shortly thereafter, their employer, Dip Shipping, agreed to plead guilty and to pay a $488,000 fine. A third executive also pleaded guilty and agreed to pay a criminal fine and cooperate with the DOJ's investigation. Similarly, in July, an indictment for two shipping executives was unsealed regarding their alleged participating in a conspiracy to allocate routes, rig bids, and fix prices for international ocean shipments of roll-on, roll-off cargo.[155]
- ***Financial: FOREX.*** In November, a former foreign currency trader was convicted on charges of participating in a conspiracy to manipulate prices in the global foreign currency (FOREX) market related to emerging market currencies. The DOJ alleged that the trader utilized texts, chats, and other electronic communications to coordinate trades with others for Central and Eastern European, Middle Eastern, and African currencies. The DOJ had previously secured guilty pleas from five banks for colluding in FOREX spot markets for both emerging currencies and for Euro-U.S. dollar trades. Notably, the conviction of this trader followed acquittals late last year of three other traders indicted on similar conduct.
- ***Financial: Pre-release ADRs.*** In May, the DOJ filed its first charges in connection with an investigation into pre-release American Depository Receipts (ADRs), a financial instrument. A corporate-broker dealer pleaded guilty to conspiring with other institutions and individuals to rig bids to borrow pre-release ADRs at artificially low rates and was sentenced to pay over $2 million in criminal fines. The following month, an executive pleaded guilty for his role in the scheme. Also in June, a second broker-dealer pleaded guilty to similar conduct and was sentenced to pay a fine of approximately $3 million. The SEC also announced an investigation as to whether the broker-dealer violated securities laws. A second executive pleaded guilty to similar charges in November.[156]
- ***Construction: Flooring and Insulation.*** In 2019, construction materials emerged as a new area of antitrust enforcement. In April, an executive of a commercial flooring contractor was charged with participating in a conspiracy to submit comp bids such that a predetermined competitor won certain business. Subsequently, a commercial flooring contractor that participated in the conspiracy pleaded guilty and agreed to pay a $150,000 fine. Likewise, three insulation contractor executives pleaded guilty to rigging bids and fraudulent conduct regarding insulation contracts for both public and private construction projects.[157]
- ***Food: Packaged Seafood.*** The DOJ's investigation into price fixing in

the packaged seafood industry moved forward when tuna company StarKist was sentenced to pay a criminal fine of $100 million for price fixing of canned tuna fish in September. Also, in November, the DOJ went to trial against Bumble Bee's former CEO on price fixing charges. After a four-week trial, including testimony from the CEO himself, a jury returned a guilty verdict. The CEO is scheduled for sentencing on April 8, 2020. Notably, in pre-trial rulings, the presiding judge ruled to allow evidence of conversations the defendant had with employees after the initiation of the investigation, and allow the use of attorney proffers on cross examination to impeach testimony.[158]

- ***Transportation: Fuel Supply.*** In March, the scope of the DOJ's investigation into military fuel supply services became clearer when indictments were unsealed for seven individuals participating in a conspiracy to defraud the U.S. government by rigging bids for fuel supply contracts. One executive was also charged with witness tampering. Two corporate entities, Hyundai Oilbank and S-Oil Corporation, pleaded guilty to participating in the scheme and agreed to pay $75 million in criminal fines. In addition, the companies reached civil settlements with the U.S. government pursuant to both the False Claims Act and Section 4A of the Clayton Act to pay a total of $52 million in civil fines. The Antitrust and Civil Divisions, along with the U.S. Attorney's Office for the Southern District of Ohio, jointly conducted the civil investigation which was prompted by a private whistleblower suit filed as a *qui tam* under the FCA.[159]
- ***Generic Pharmaceuticals.*** In May, the DOJ filed an Information charging Heritage Pharmaceuticals with fixing prices, rigging bids, and allocating customers in the market for generic glyburide, a diabetes medication. Heritage entered into a deferred prosecution agreement (DPA) with the DOJ, admitting to the charges, agreeing to pay a $225,000 criminal fine, and agreeing to cooperate with the DOJ's ongoing investigation. The DOJ cited Heritage's substantial cooperation as well as the impact a guilty plea might have on consumers since it would likely lead to Heritage's exclusion from federal healthcare programs as reasons for the DPA. Heritage also agreed to pay $7.1 million in a separate civil resolution to resolve allegations that it violated the False Claims Act (FCA) and the Anti-Kickback Statute (AKS).[160] In December, the DOJ announced a DPA with Rising Pharmaceuticals for similar conduct with regard to Benazepril HCTZ, a hypertension medication. Rising, which is in the midst of bankruptcy proceedings, agreed to pay a criminal fine of $1.5 million and $1.1 million in civil damages to resolve related FCA and AKS claims, as well as restitution.[161]
- ***Government Procurement: Online GSA Auctions.*** Two individuals agreed to plead guilty for rigging bids at government auctions conducted by the U.S. General Services Administration. The GSA conducts online auctions of surplus government equipment, and the DOJ alleged that the individuals conspired to rig bids and pre-determine who would submit bids for particular assets. The DOJ conducted its investigation jointly with the GSA Office of Inspector General.[162]
- ***Government Procurement: Detroit Demolition Program.*** In 2019, the DOJ secured guilty pleas from two individuals—one an executive and another a city official—on charges of bribery and honest services fraud in connection with the City of Detroit's Demolition Program. The program was in part funded by the Treasury Department's Blight Elimination Program, which funds demolition of abandoned or vacant structures. The DOJ charged the individuals with accepting bribes and kickbacks in exchange for providing confidential bid information to others seeking to bid on contracts. Both individuals were sentenced to serve 12 months in prison, forfeit the funds they received, pay fines, and serve two years of supervised release. In addition, the executive was sentenced to a term of community service.[163]
- ***Labor Markets-Hiring.*** In 2019, the DOJ sought to intervene in several private plaintiff litigations alleging antitrust violations based on "no-poach" agreements. Most notably, the DOJ filed a statement of interest in a case brought by medical school faculty against Duke University and the University of North Carolina urging the court to apply the *per se* rule should it determine the two universities entered into a no-poach agreement. A settlement later reached by the parties prohibited such agreements for a period of five years and imposed notification and compliance measures on the defendants. Similarly, the DOJ filed statements of interest in several cases brought by fast-food franchise employees against their employers, although in these cases, the DOJ argued that the rule of reason is the appropriate standard where the restraint is part of a franchise agreement, and therefore part of a vertical agreement, as opposed to a horizontal agreement among franchisees themselves.[164]

Policy Initiatives and Developments

The DOJ announced several new policies and initiatives in 2019. We discuss these in more detail below.

DOJ Announces Policy Incentivizing Corporate Antitrust Compliance

In July, the DOJ announced a new policy to incentivize corporate antitrust compliance.[165] Going forward, the DOJ will formally consider corporate compliance programs at both the charging and sentencing stages in criminal antitrust prosecutions. The DOJ's new policy is reflected in revisions to the Justice Manual as well as in newly published guidelines. The guidelines ask prosecutors to consider whether a compliance program is: (i) well-designed; (ii) applied earnestly and in good faith; and (iii) works in practice. The guidelines also identify elements to consider in evaluating a compliance program's effectiveness.

The DOJ's new approach instructs prosecutors to consider whether a company has a robust compliance program *prior* to deciding whether to prosecute, i.e., prior to making a "charging" decision. If a company can demonstrate that it has an adequate and effective antitrust compliance program, there may be an opportunity for the company to avoid prosecution, even if it is not the first company to cooperate under the leniency program. For example, the DOJ may consider entering into a deferred prosecution agreement in such a scenario, under which a company may avoid a conviction as long as it cooperates and meets the terms of that agreement.

The DOJ's prior policy rarely offered companies credit, even at sentencing, for having robust compliance programs. The new guidelines identify three ways in which a robust compliance policy can potentially reduce penalties at sentencing: (i) a corporate defendant's culpability score under the U.S. Sentencing Guidelines can receive a reduction if the company has an "effective" compliance program; (ii) prosecutors can consider whether a company implemented an effective compliance program in determining whether to recommend probation; and (iii) prosecutors are encouraged to take into account whether "extraordinary post-violation compliance efforts" justify a reduction in the criminal fine recommended by the DOJ.

The new guidelines reflect an ongoing focus on antitrust compliance by the DOJ and underscore the importance of implementing a corporate antitrust compliance program. Companies that deploy effective and robust antitrust compliance efforts may well be rewarded with credit for their efforts should those programs uncover anticompetitive conduct.

DOJ Launches Procurement Collusion Strike Force

In keeping with an emerging focus on procurement and on conduct where the government itself is a victim, in November 2019, the DOJ announced a Procurement Collusion Strike Force (PCSF) focused on deterring, detecting, investigating, and prosecuting antitrust crimes that undermine competition in government procurement, grant, and program funding.[166] The PCSF is comprised of prosecutors from the Antitrust Division and 13 U.S. Attorneys' Offices, along with agents and investigators from the Federal Bureau of Investigation (FBI) and the Offices of Inspectors General of the Department of Defense, GSA, U.S. Postal Service, and others. At a press conference announcing the PCSF, AAG Delrahim explained how "more than one third of the Antitrust Division's 100-plus open investigations relate to public procurement or otherwise involve the government being victimized by criminal conduct."[167]

In addition to conducting outreach and training for procurement officials across the government, the PCSF will conduct criminal investigations should antitrust violations related to government contracts or procurement efforts be detected. The PCSF will also analyze government procurement data to identify signs of potential collusion. The DOJ will allocate discretionary funds towards the PCSF's effort and assign a trial attorney to each of the 13 partner federal districts. In addition, the U.S. Attorney's Office will assign an assistant U.S. attorney to each district. The FBI will also assign a liaison for each field office.

The PCSF follows a year in which several DOJ enforcement actions involving government procurement have been revealed, including for fuel supply to the U.S. military and pharmaceuticals purchased by U.S. government healthcare programs. The DOJ's emphasis on procurement is notable for any company that deals with government purchasers or payors either directly or indirectly, given the DOJ can seek not only criminal penalties for antitrust conduct but also treble damages on behalf of taxpayers pursuant to Section 4A of the Clayton Act.

DOJ Holds Roundtable on ACPERA

Also in 2019, the DOJ held a roundtable to solicit input from stakeholders in advance of necessary congressional reauthorization of the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) in 2020.[168] ACPERA reduces the civil damages exposure of a leniency recipient if the company provides plaintiffs with timely, satisfactory cooperation thereby limiting it to single damages and dispensing with the joint and several liability that the defendant would otherwise face.

At the roundtable, DAAG Powers commented that ACPERA may be interfering with the DOJ's criminal enforcement efforts. Powers pointed to the fact that ACPERA requires leniency recipients to provide civil plaintiffs a "full account" of known facts, produce all potentially relevant documents, and provide access to potential witnesses in order to qualify for its benefits. When the DOJ's investigation is ongoing, cooperation under ACPERA and the discovery that it generates may interfere with the investigation unless that discovery is stayed by a court. Powers also raised his concern that ACPERA does not sufficiently incentivize companies to self-report and urged transparency in the upcoming reauthorization and possible revision of the statute. The roundtable also debated the meaning of "timely, satisfactory cooperation" and at what stage a court should decide whether an applicant is entitled to the benefits of ACPERA.[169]

For its part, the ABA Antitrust Law Section provided comments that the DOJ should consider how ACPERA can be utilized to facilitate settlement agreements at an early stage and explore whether the de-trebling incentive extends to the pursuit of related damages such as under the False Claims Act, particularly at a time when the DOJ is increasingly considering that and other statutes alongside antitrust charges.[170]

DOJ's Approach to "No-Poach" Hiring Agreements

In 2019, the DOJ continued to scrutinize agreements among companies not to hire or "poach" employees from each other. Indeed, the DOJ launched or continued a number of investigations in various industries into potential "no-poach" agreements throughout the year. Notably, the DOJ launched some of these investigations after uncovering the potential ill-advised conduct in unrelated civil investigations. This is fair warning to any company producing materials to a government agency. But despite announcing that it will prosecute naked "no-poach" agreements criminally in its 2016's Antitrust Guidance for Human Resources Professionals, the DOJ has yet to file criminal charges based on no-poach agreements or conduct. That said, the DOJ reiterated this year that it is working to identify and bring such a case.

In March, DAAG Murray emphasized in a speech the DOJ's position that "naked" no-poach agreements are *per se* violations of the antitrust laws and parties that enter into such agreements face criminal exposure. Only where a no-poach agreement is ancillary to or part of a legitimate vertical arrangement can it be subject to rule of reason analysis.[171] The DOJ also held a public workshop on competition in labor markets to discuss the role of antitrust enforcement and promoting competition for employees and workers. In his opening remarks, AAG Delrahim reaffirmed that criminal prosecution of naked no-poach and wage-fixing remains a high priority for the Antitrust Division.[172] In testimony before the antitrust subcommittee of the House Judiciary Committee Doha Mekki, counsel to AAG Delrahim, testified that the DOJ currently has "a number of active criminal investigations into naked no-poach and wage-fixing agreements" ongoing.[173]

Efforts to Promote and Coordinate Leniency Programs Across Jurisdictions

Despite some recent statistics suggesting that leniency applications have declined in recent years, the DOJ maintained that the Leniency Program remains a key tool in criminal enforcement.[174] In a pair of speeches, AAG Delrahim noted that the "increasing complex realities" of increased cost from civil litigation in multiple jurisdictions can sometimes dissuade companies from seeking leniency. Delrahim said that the DOJ has been examining ways to improve its leniency practices to better ensure that applicants are able to meet the competing demands of other jurisdictions where they may also have exposure. For example, the DOJ is taking steps to safeguard against the imposition of duplicative penalties and its expansion of compliance credit offers a potential reward for cooperating companies even if they are not the applicant.[175]

AAG Delrahim emphasized that leniency programs must be transparent and predictable in order to be effective, and that lack of transparency or predictability in one jurisdiction could undermine enforcement efforts elsewhere.[176] As other jurisdictions have introduced their own leniency or amnesty programs, applicants must navigate an increasingly complex process, and AAG Delrahim indicated that agencies must coordinate to avoid unnecessarily deterring self-reporting by making cooperation too difficult or costly.

Enforcement Against Collusive Conduct Outside the U.S.

As the DOJ observed, leniency programs and cartel enforcement outside of the United States continue to expand, presenting new challenges and new opportunities to companies that uncover anticompetitive conduct. Below, we discuss some of the more significant developments in cartel enforcement worldwide in 2019.

European Commission

In 2019, the European Commission (EC) focused on countering a perceived decline in leniency applications, entering into hybrid-settlements,[177] and revisiting how it calculates fines.

1) Policy Initiatives and Developments

An increase in private cartel follow-on claims has raised doubts as to the future role of leniency—which was recently likened by high-ranking EC official Madero Villarejo to a "fountain becoming more and more dry."[178] Although numbers do not yet show a significant downturn in leniency applications, the EC has reacted with the announcement of more ex-officio cartel investigations and has created a special unit with forensic experts in pursuit of that effort.

To encourage more leniency applications, the EC also launched a new online "eLeniency" application tool which offers the possibility to file statements and submissions online while offering the same degree of confidentiality and legal protection as the traditional procedure.[179] Further to this, the proposal for a directive on the protection of persons reporting on breaches of EU law (the Whistleblower Directive) has been adopted. [180] The directive requires member states to establish safe reporting channels (both external and internal) and applies across all industries.

2) EC "Hybrid" Settlements

The EC employed a "hybrid settlement" approach recently in its FOREX investigation. The commission's investigation revealed that traders employed by several banks exchanged sensitive information and trading plans, and at times coordinated their trading strategies through online professional chatrooms. The commission adopted fining decisions in the FOREX case against five banks, imposing penalties totaling €1.07 billion,[181] but the procedure is still ongoing for Credit Suisse, which decided to suspend settlement talks with the commission last year.

The EC likewise chose a hybrid settlement path in the canned vegetables cartel case.[182] Following a settlement procedure, the EC fined manufacturers €31.6 million for participating in a cartel for the supply of canned vegetables to retailers and service companies. The EC's case is still ongoing against one alleged cartelist.

3) EC Fine Calculations

The EC's calculation of fines have fallen under some scrutiny in 2019. In September, the European General Court annulled a fine imposed on HSBC by the EC.[183] The case dates to 2013 when HSBC refused to settle with the EC for interest rate manipulations of derivatives denominated in Euro and Japanese yen, which led to a decision by the EC in 2016 to fine the bank €33.6 million.[184] In its recent judgment, the European General Court determined that the EC did not provide a sufficient explanation to HSBC as to how it arrived at a fine reduction factor of precisely 98.849 percent compared to the full value of the cash receipts generated by cash flows from their Euro Interest Rate Derivatives portfolios (as a proxy for the sales values generated by the banks).

The European General Court also examined the Commission's fine-setting practices with respect to the YIRD cartel. In 2015[185], the EC imposed a €14.9 million fine on Icap in connection with this cartel. In 2017, the General Court held that although the EC had infringed the presumption of innocence, the infringement was not serious enough to warrant annulment of the decision since the EC's findings were properly supported by evidence.[186] In July 2019, the European Court of Justice (ECJ) disagreed and confirmed that while the EC enjoys broad discretion on how to calculate antitrust fines, it must nevertheless identify the individual factors it takes into account when calculating the amount of the fine.[187]

Doubts concerning the EC's hybrid settlement practice were also raised in the Steel Abrasives cartel case. In 2014 and under the settlement procedure, the EC fined companies involved in the Steel Abrasives cartel €30 million. Manufacturer Pometon decided not to settle with the EC and in 2016 was fined €6.2 million. In 2019, the General Court subsequently decided in favor of Pometon's appeal on grounds that the EC failed to adequately explain the calculation of the fine which did not follow the EC's Fining Guidelines.[188]

Regarding the methodology of calculating fines in purchasing cartels, the General Court dismissed Recylex's application for annulment of a €68 million fine by the EC.[189] The General Court held that the commission is entitled to calculate the fine by reference to the value of purchases, instead of taking into account the value of sales. The judges also upheld the EC's 10 percent increase to the amount of the fine on the grounds that the value of purchases alone would not ensure the fine's deterrent effect. Similarly, in the retail food packings cartel, the General Court sided with a cartelist's appeal, holding that the EC failed to explain why it set a 25 percent fine discount and dropped other parts of the fine.[190]

Finally, the ECJ issued a preliminary ruling regarding the economic continuity of undertakings. The question, submitted by the Finnish Supreme Court, addressed a follow-on damages claim against construction company Skanska.[191] By the time the Finnish competition authority had fined cartelist Sata-Asfaltti, a previous subsidiary of Skanska, Sata-Asfaltti had already been dissolved under a liquidation procedure and its assets acquired by Skanska. The Court clarified that undertakings cannot use such corporate restructuring to fend off liability for cartel damages claims.

United Kingdom

In February, the UK's Competition and Markets Authority (CMA) published revised guidance on director disqualification orders in competition cases. The guidance adopts a more holistic approach, and introduces mitigating factors, such as cooperation by the director during an investigation.[192]

Following a hybrid settlement decision by the CMA, three construction firms received fines of more than £36 million for their involvement in a cartel for the supply of concrete drainage products.[193] From 2010 onwards, the cartel held collectively more than 90 percent of the relevant market. Two companies admitted their involvement and received fine reductions, while the third company refused to accept the fine and announced its intent to appeal the decision. At the same time, the CMA sentenced the CEO of one of the cartel members to a two-year suspended prison sentence, a curfew for six months, and disqualification as a director for seven years. The CMA also secured disqualifications against two former directors for a combined total period of 14 years.[194]

Following a leniency application, the CMA settled with five office refurbishment companies who admitted their collusion to submit low bids to allow a pre-selected company to win a contract. The CMA imposed a fine of £7 million, and secured the disqualification of six former directors.[195] On December 10, 2019 the CMA announced that the court has granted permission to two of the individuals to continue to act as directors, subject to conditions.[196]

Also noteworthy is that the UK Court of Appeal held in a case against British Airways that English Courts lacked jurisdiction to find a standalone infringement with respect to the air cargo cartel before the EU Regulation 1/2003 came into force.

Japan

The Japan Fair Trade Commission (JFTC) took action against two major cartels in 2019. In July, the JFTC imposed a surcharge against eight manufacturers that agreed to increase the sales price of asphalt mixture.[197] The total amount of surcharge was about ¥39.9 billion, the highest total fine imposed by the JFTC to date. One violating company received full immunity via the JFTC's leniency program. Later, in September, the JFTC issued a surcharge payment order to five manufacturers of aluminum and steel cans.[198] The total amount fined was about ¥25.724 billion, and as with the asphalt cartel, one company was granted immunity.

In June, a bill to amend the Antimonopoly Act passed the Japanese Diet. The amendment, to take effect by December 25, 2020 at the latest, has three components.[199] First, under the leniency program the JFTC could reduce surcharges depending on the level of companies' cooperation in the investigation, also taking into account the order in which they come forward.[200] By contrast, under current law, the reduction rate depends entirely on the order of the companies' applications. Second, the new law amends how surcharges are calculated, allowing the JFTC a lookback period of up to 10 years from the beginning of the investigation, as opposed to the current three-year window.[201] Also, the amendment allows for sales from the same group companies that receive the instructions from the violators to be included in the calculation; hence, the amendment possibly brings about an increase of surcharge. Third, the amendment introduces a limited Attorney-Client Privilege, which had not previously been recognized in Japan.[202] Under the new law, this privilege is limited to certain communication between an attorney and a client in connection with an unreasonable restraint of trade, such as a cartel, but does not extend to monopolization or unfair trade practice claims.

South Korea

In 2019, there were several important developments regarding cartel enforcement in Korea: the Korea Fair Trade Commission (KFTC) and the prosecutor's office both welcomed a new chief to lead the agencies, the KFTC announced its plan for more aggressive enforcement with respect to bid-rigging, and the KFTC also announced policy changes to its treatment of corporate compliance programs. With the exception of penalties imposed on companies involved in the automotive parts cartel, there were no major enforcement actions taken against cartel activities involving cross-border or international conduct.

- *New Heads of Agencies.* Both new appointees to the cartel enforcement agencies in Korea promise more aggressive antitrust enforcement. Prosecutor-General Yoon Seok-yeol, appointed in July, is known to be a reformist prosecutor, and also known to have played a role in expanding the communications channels and exchanges with the DOJ. With Yoon's strong support, the antitrust division within the prosecutor's office is drafting guidelines for criminal-antitrust enforcement in South Korea. Likewise, Joh Sung-wook, also known to champion aggressive antitrust enforcement, took her place as the new chief of the KFTC in September. The two agencies are still determining how to share enforcement duties, and thus far have tentatively agreed that prosecutors will be given priority in bid-rigging and cartel cases that have less than a year to run before the statute of limitations expires. The two agencies have also agreed to streamline how they receive leniency applications to minimize case overlaps and enable them to better share related information.

- *Debarment for Repeat Bid-rigging Offenders.* Bid-rigging offenders that have been sanctioned in severe cases of collusive conduct in South Korean public tenders are likely to be banned from bidding on future public procurement contracts. In July, the KFTC announced plans to impose more stringent re-entry qualifications in future tenders for such offenders.[203] Following this revision, the KFTC will be able to file requests to public procurement agencies to ban from bidding repeat bid-rigging offenders caught in at least two instances involving fines or referrals to prosecutors.
- *Amended Guidelines for Antitrust Compliance Programs*. In October, the KFTC promulgated amended Guidelines on Operation of Compliance Programs and Provision of Incentives. The Amended Guidelines lift previous restrictions that prevented companies with a past history of antitrust violations from applying for compliance evaluation, and exempt companies with the highest rating from the KFTC's order to publish the fact that they received the KFTC's sanction.[204]
- *Auto Parts*. Similar to the DOJ's 2010 enforcement action, the KFTC fined four Japanese manufacturers 9.2 billion won ($7.4 million) for allegedly fixing prices on auto parts, namely alternators and ignition coils, over a decade. Additionally, the KFTC reported two of the manufacturers to the prosecutor's office, recommending criminal sanctions. In its press release, the KFTC noted that the cartel has been subject to antitrust scrutiny in multiple jurisdictions including the U.S., Europe, Japan, and Canada, and emphasized its continued efforts to strictly regulate collusive behavior "regardless of nationality."[205] The agency's decision to impose fines on the auto parts makers came amid growing trade tensions between Korea and Japan.

China

In China, the State Administration for Market Regulation (SAMR) was formed last year as a result of consolidation of three different enforcement agencies. The SAMR announced new antitrust regulations that took effect in September. The new regulations consolidated the antimonopoly regulations of the former agencies, prohibited monopolistic agreements, and set out the requirements of China's leniency program.

The SAMR has been somewhat active in cartel enforcement in 2019. In March, the SAMR alleged that three motor vehicle safety technology testing companies reached an anticompetitive agreement to uniformly raise prices. In response, the SAMR not only imposed a fine on the companies but also required that they disgorge the profits gained from the conduct.[206] In May, the SAMR fined seven concrete manufacturers a total of 7.7 million yuan, alleging they conspired to fix prices and allocate customers.[207]

Canada

In September, Canada's Supreme Court allowed a class action claim against Toshiba, Pioneer, and other makers of optical disk drives to proceed, ruling that even customers who purchased from non-cartelists, i.e., 'umbrella customers,' can claim damages.[208] Notably, in 2013, the Court had found that indirect purchasers had a cause of action upon proving loss as a common issue. With this most recent decision in 2019, the Court officially expanded the scope of potential classmembers; thus, companies that have participated in a conspiracy could now face claims from a much broader class of plaintiffs in Canada. While concerns persist among the defense bar that such a scope would expose defendants to a potentially limitless amount of liability, the Court explained that it was a question of statutory interpretation and that the effect of the ruling would also further the statutory goal of promoting deterrence.

Also in 2019, a former Canadian engineering executive was sentenced to 18 months' imprisonment for his role in a bid-rigging cartel that targeted public works projects in Quebec.[209] The sentence follows the referral of the executive by the Competition Bureau to the public prosecutor, and reflects a renewed focus on big rigging in public projects by Canada's competition commissioner and an increased willingness to bring criminal charges against individuals that engage in anticompetitive conduct. The executive's former employer also settled with the Competition Bureau in February for its role and agreed to pay a C$1.9 million penalty.

Brazil

Brazil's competition authority, the Administrative Council for Economic Defense (CADE), has launched active investigations and undertaken numerous cartel enforcement actions in 2019. Some of these enforcement actions mirrored those taken by antitrust agencies in other jurisdictions, while others were unique to Brazil.

- *Airport Infrastructure.* In April, CADE announced a leniency agreement with construction company Odebrecht which played a core role in an alleged bid-rigging cartel involving 19 companies related to airport infrastructure.[210] This investigation had its roots in the agency's Operation Car Wash corruption probe which thus far has resulted in 16 leniency applications. Further, in July, CADE launched two investigations into a group of construction companies for allegedly forming a bid-rigging cartel for contracts to build World Cup infrastructure and for certain construction projects for Petrobras, the Brazilian oil company at the center of Operation Car Wash.[211] CADE accused nine construction and engineering companies including Odebrecht and Carioca, of rigging bids for World Cup stadium construction, and 13 companies for collusion on construction projects for Petrobras. Previously, in 2018, Carioca and Odebrecht agreed to pay fines of 4.9 million reais (US $1.17 million) and 106.7 million reais (US $ 25.4 million), respectively, in entering into Cessation Terms of Commitment.[212]

- *Trains and Subways.* CADE fined some of the biggest transport manufacturing companies in the world—including Alstom, Bombardier, and Mitsui—a total of 535.1 million reais (US $126.6 million) for rigging public bids to build trains and subways throughout Brazil.[213] In addition to the fines, CADE also banned Alstom for five years from bidding on public tenders in cities impacted by the conduct.
- *LCD.* In 2019, CADE fined Innolux and Hannstar Display approximately US $7 million for their role in the international liquid crystal display cartel after five co-conspirators settled with the agency.[214] CADE reduced Innolux's fine by two-thirds after the company signed a partial leniency agreement once the investigation had begun. In addition to these fines, CADE previously secured settlements and fines from LG, Samsung Electronics, Au Optronics, Chunghwa Picture Tubes, and Hitachi Displays' successor Japan Display.
- *Electricity.* In February, CADE announced that it finalized its 13-year cartel probe into bid rigging related to electricity projects and price fixing for air-insulated switchgear parts by imposing fines on Toshiba and two other electricity component manufacturers a total of approximately US $14.6 million.[215] CADE's investigation revealed that the companies first began conspiring through formal agreements in 1996 and held meetings —so-called "discussion tables"—that divided the market and fixed prices for electrical components sold to electricity supply companies. Eight companies and 14 individuals previously reached settlements worth 235 million reais (US $56 million) in fines.
- *Optical Disk Drive.* In 2019, CADE became the fourth competition authority to sanction members of the global optical disk drive cartel, imposing 19.5 million reais (US $5.3 million) in fines on Hitachi LG Data Storage and Quanta Storage.[216] In January 2017, CADE's investigative branch referred Toshiba Samsung Storage Technology, Hitachi LG Data Storage, TEAC, Quanta Storage, Qisda (formerly known as BenQ) and Sony Optiarc to its Competition Tribunal, which has the power to impose penalties.[217] The tribunal refused to fine Toshiba Samsung Storage Technology and TEAC due to lack of evidence, and dismissed the case against Qisda because the statute of limitations had expired.
- *Aviation Insurance.* In a statement in January, CADE said it has begun a probe into 11 insurance broker companies and 30 individuals that allegedly exchanged data on pricing and other information.[218] This investigation appears to be similar to a probe that the EC undertook in the past.[219]

Civil Litigation

Competitive Restraints of Trade

Private antitrust actions are an important part of enforcement in the American competition framework. Private plaintiffs can pursue claims that are unavailable to public regulators as well as damages on behalf of individual class plaintiffs, large purchaser plaintiffs, or competitor plaintiffs. These unique enforcement tools can lead to significant settlements. For example, merchants who sued Visa, Mastercard, and a group of banks over card-swiping fees received a $6.3 billion settlement; the *In re Namenda Direct Purchasers* class action concerning a product switch settled for $750 million; and Celgene corporation paid a combined $117 million to class and competitor plaintiffs in a monopolization case concerning two blockbuster drugs. Private antitrust actions are also important drivers of the legal framework in which businesses operate. Key decisions this year involved whether the presence of uninjured class members mandates denial of class certification, the proper standard for no-poach agreements in different market scenarios, and clarity from the Supreme Court on the indirect purchaser rule.

Federal antitrust claims are typically pursued under the Sherman Act. Section 1 of the Sherman Act addresses concerted action and prohibits agreements that unreasonably restrain trade. Section 2 of the Sherman Act prohibits monopolization and attempted monopolization by unilateral conduct as well as by combination or conspiracy. State antitrust laws generally mirror federal antitrust law with few exceptions. The majority of antitrust class actions are section 1 claims, and cases involving alleged collusion or anticompetitive agreements were prevalent in U.S. courts this year.[220] The trend of follow-on class action litigation continues, and some of the most significant developments arose in private civil cases brought after enforcement actions or investigations by federal or state government antitrust regulators. There continues to be a spotlight on pricing of pharmaceutical products in cases being brought under federal and state antitrust laws.

Below are some highlights from private antitrust litigation in 2019.

Price Fixing Litigation

Vitamin C. In 2018, the Supreme Court issued an opinion in the long-running Vitamin C case, in which a class of consumers brought Section 1 claims against two Chinese manufacturers for allegedly conspiring to fix the price and output of Vitamin C. The Chinese Ministry of Commerce had filed an amicus curiae brief in the district court for the Eastern District of New York supporting the defendants' position that a Chinese Government export regulation mandated the price coordination. The district court "decline[d] to defer to the Ministry's interpretation of Chinese law,"[221] but the Second Circuit Court of Appeals reversed.[222] Wilson Sonsini's Jon Jacobson argued before the Supreme Court that the Court of Appeals for the Second Circuit correctly granted deference to the Chinese government's official statement that Chinese law compelled the conduct at issue and properly dismissed the action on the basis of international comity. The Supreme Court remanded to the Second Circuit for further consideration, holding that courts should give "respectful consideration to a foreign government's submission, but [are] not bound to accord conclusive effect to the foreign government's statements."[223] Rather, pursuant to FRCP 44.1, courts can "consider any relevant material . . . whether or not submitted by any party." The Court "[took] no position on" the "correct interpretation of Chinese law."[224]

On remand in the Second Circuit, the plaintiffs claimed that the district court applied the Supreme Court's "respectful consideration" standard properly in the first instance and correctly concluded that Chinese law did not compel the anticompetitive conduct.[225] The defendants countered that the Chinese Ministry of Commerce, the entity that regulates the export of Vitamin C, correctly interpreted its own government's law which "unquestionably did require price-fixing."[226] The defendants urged the Second Circuit to rely on its original determination that the "district court's contrary interpretation of Chinese law was 'nonsensical.'"[227] The parties await the Second Circuit's ruling.

Electronic Components. After decades of civil and criminal antitrust actions in the electronic component industry, new price-fixing claims were filed this year concerning hard-disk-drive suspension assemblies.[228] Less than a month after the Department of Justice (DOJ) secured a $28.5 million fine against NHK Spring,[229] private class action plaintiffs filed a complaint against NHK Spring, TDK Corporation and entities related to both, alleging a worldwide price-fixing conspiracy lasting for nearly eight years.[230]

In October this year, Hewlett-Packard Company (HP) won a $176 million verdict after a trial against optical disc drive maker Quanta Storage.[231] A jury found Quanta guilty of bid rigging and exchanging confidential information with the intent to coordinate prices. HP had previously settled claims with Toshiba Corp., Hitachi-LD Data Storage Inc., Panasonic Corp., Sony Optiarc., NEC Corp., and Samsung Electronics Co.[232] Quanta has appealed the damages award.[233]

Wilson Sonsini client Hitachi Chemical continues to litigate against opt-out plaintiffs in the long-running capacitors price-fixing multi-district litigation where Judge James Donato recently employed a seldom-used process called "hot tubbing" in the direct purchaser action.[234] The technique, which is formally called a "concurrent expert witness hearing" involved experts from both sides appearing together in a court hearing to defend their analyses and answer questions from each other and the judge. Judge Donato indicated that this method will help him narrow the complicated economic issues raised in the parties' *Daubert* filings, which also have implications for the defendants' summary judgment motions and any trial. His ruling is not expected until early 2020. Hitachi Chemical previously settled with the direct and indirect purchasers but remains in litigation against several opt-out plaintiffs.

Airlines. This year, the four major U.S. airlines (Delta, American, Southwest, and United) continue to fight claims filed in 2018 that they colluded to limit plane capacity and increase fares. Discovery in the case, that includes a proposed class of approximately 100 million ticket buyers, will continue into 2020 with remaining defendants Delta and United.[235] Southwest and American have already settled out of the case for $15 million and $45 million respectively.[236]

Based on two cases decided last year, the plaintiffs will not be able to prevail on their Section 1 claims if they do not point to concrete evidence of an actual agreement between competitors. In 2018, the Court of Appeals for the Ninth Circuit affirmed dismissal of class action claims against Delta, American, and United alleging that the airlines conspired to fix prices of multi-city flights.[237] The Ninth Circuit found no evidence of a conspiratorial agreement, but rather "conscious parallelism in an interdependent oligopoly" where "it may be in a company's interest to raise prices in the hope that its competitors play 'follow the leader.'"[238] Similarly, in affirming summary judgment in favor of Delta and AirTran regarding claims that the airlines conspired to fix baggage fees, the Court of Appeals for the Eleventh Circuit accepted Delta's argument that its independent decision to implement baggage fees was influenced, in part, by its observation of competitors charging similar fees without experiencing passenger loss.[239]

Tuna Fish. The nation's largest tuna producers have appealed certification of a consumer class action to the Ninth Circuit Court of Appeals claiming that the $2.5 billion in damages that the classes demand would "sound the death knell" of the litigation because the large sum applies unjust pressure on them to settle.[240] (*See Class Certification Section*). The class action in the Southern District of California follows a DOJ investigation into price-fixing by Starkist, BumbleBee, and Chicken of the Sea that resulted in guilty pleas and fines. Despite claiming the sanction would force the company into bankruptcy, Starkist was hit with a fine of $100 million while Bumble Bee's fine was reduced from $81.5 million to $25 million due to the company's inability to pay.[241] The companies now claim that unless the class certification decisions are overturned on interlocutory appeal, they will be forced to settle because they cannot afford to face the crippling damages.[242]

Broiler Chickens. Back on land, a case against poultry producers was paused this year when the judge was forced to continue a stay of discovery as a result of "significant developments" in the concurrent DOJ investigation. Judge Durkin in the Southern District in Illinois did not elaborate on what the developments were, but said in September that the three-month stay that had been in place since June would be extended for a minimum of another three months.[243] The suit, which could potentially involve a class of anyone in the U.S. who purchased chicken, includes claims that poultry producers conspired to fix the price of broiler chickens by coordinating to reduce supply.[244]

Eggs. Egg producers were cleared again this year of allegations that they fixed the price of eggs by instituting an animal welfare program that gave hens more cage space thereby reducing supply. The first trial against the egg producers was brought by a class of direct purchasers and ended in 2018 when a jury in the U.S. District Court for the Eastern District of Pennsylvania decided under the rule of reason standard that, while the defendants had participated in a conspiracy, there was no unreasonable restraint on trade.[245] In the 2019 trial, brought by opt-out plaintiff retailers, another jury in the U.S. District Court for the Eastern District of Pennsylvania determined that there was no conspiracy at all.[246]

Section 1 Litigation in Pharmaceuticals and Life Sciences

Generic Drug Pricing. The *In re Generic Pharmaceuticals Pricing Antitrust Litigation*, which involves allegations that approximately 40 generic drug manufacturers and certain employees conspired to fix the price of more than 100 generic drugs, has continued to evolve as more complaints are filed and the court weighed in on discovery proceedings. The plaintiffs' initial allegations in the litigation focused on only a handful of drugs and put Heritage Pharmaceuticals at the center of the alleged conspiracy. This "universe" of potential drugs at issue in the litigation expanded when, in May 2019, the State Attorneys General filed a new complaint alleging that more than 100 drugs were subject to price-fixing agreements with Teva Pharmaceuticals at the center of that complaint. Following the State AGs' complaint, United Healthcare and Humana Inc. filed copycat complaints outlining similar price-fixing conspiracies (in addition to the complaints each had previously filed). The

District Court for the Eastern District of Pennsylvania also denied the defendants' motion to dismiss the plaintiffs' overarching conspiracy claims—allowing the broadest allegations of price-fixing to proceed.[247]

In a recent development, the court took a controversial position in its Case Management Order, which provides an outline for how discovery is to proceed.[248] The Order requires that the defendants produce documents based solely on to-be-determined, agreed-upon search terms without a relevancy review. The defendants are only permitted to withhold documents for privilege. The defendants filed a Mandamus Petition asking the Third Circuit to vacate the Case Management Order for contravening the requirement in the Federal Rules of Civil Procedure that discovery be limited to relevant information. On December 6, 2019, the Third Circuit ruled against the defendants in a 2-1 decision to allow discovery to go forward under the current Case Management Order.[249] Wilson Sonsini represents defendant Mylan in this litigation and is also one of the Liaison Counsel for all defendants.

"Reverse Payment" Matters. According to a Federal Trade Commission (FTC) report issued this year, the number of patent settlements involving alleged anticompetitive payments has declined since the Supreme Court's 2013 landmark decision in *FTC v. Actavis*, which held that payments from a patent holder to a generic drug manufacturer to settle patent litigation are subject to rule of reason analysis.[250] Despite the drop, litigations concerning reverse payments continued in 2019 as the FTC, private plaintiffs, and state attorneys general continue to pursue cases in this area.[251]

FTC Settlements. In February this year, the FTC entered into a global settlement with Teva Pharmaceuticals that resolved the FTC's claims in three separate antitrust suits: *FTC v. Actavis*, *FTC v. Allergan plc.*, and *FTC v. AbbVie Inc.*[252] In general, the settlement order prohibits Teva from resolving patent litigation by entering into two types of agreements for a period of 10 years. The first type, a "side deal," is when a generic manufacturer receives something of value in an arrangement with the brand company concurrently with an agreement resolving the patent litigation. The second type is called a no-authorized generic commitment. This is where the brand company agrees not to compete by abstaining from selling its own generic version of the drug for a specified period of time. The comprehensive settlement marks the resolution of the FTC's claims against Teva in all three suits and fully resolved the *FTC v. Allergan plc* litigation.[253] A few days later on February 28, 2019, the FTC and AbbVie concluded the *FTC v. Actavis* suit when the two parties entered into an arrangement whereby AbbVie, like Teva, agreed to refrain from entering into patent settlement agreements that include side deals and no-AG commitments.[254] The FTC will no longer continue its appeal against Teva in the third case, *FTC v. AbbVie*, but will continue litigating against AbbVie. The FTC was awarded a $448 million judgment against AbbVie after the District Court found the brand company filed sham patent infringement suits to maintain its Androgel monopoly.[255]

Androgel. A trial is set to begin in related actions in the *In re: Androgel Antitrust Litigation (No. II)* MDL on February 3, 2020. The matter began in 2009 when the FTC sued Actavis, Solvay, Par and Paddock for entering into alleged reverse payment agreements to delay generic entry of the testosterone replacement drug, Androgel. Private plaintiffs filed follow-on suits that were ultimately consolidated into the MDL. The direct product purchaser class, additional retailers, and potentially other plaintiffs from the *King Drug* case who may be transferred into the MDL are scheduled to go to trial[256] after most of the retailer plaintiffs in the MDL, including Walgreens, Rite Aid, and CVS, stipulated to the dismissal of their claims against the AbbVie and Actavis defendants.[257]

Namenda. The *In re Namenda Direct Purchasers Antitrust Litigation* was also resolved this year when Allergan settled with direct buyers of the Alzheimer's drug, Namenda, on the day the case was set to begin trial.[258] The $750 million sum is among the largest ever paid to settle claims that the brand manufacturer sought to prevent generic entry.[259] The plaintiffs accused Allergan of entering into reverse payment deals with generics as well as engaging in a product hopping scheme in which drug makers introduce a new form of their drug, such as an extended-release version, when the patent for another version is expiring.[260] Separately, the District Court in the Southern District of New York had previously accepted the plaintiffs' theory of causation that the generics manufacturer would have prevailed in patent litigation, meaning the generic companies may have been able to enter the market prior to the agreed upon entry date and before patent expiration.[261] By settling, Allergan now avoids trial and admits to no wrongdoing.[262] (*See Monopolization Section for analysis of the product hopping claims*).

Loestrin. The plaintiffs claim that Warner Chilcott filed sham patent litigation, engaged in product hopping, and entered into reverse payment agreements with generic manufacturers Lupin and Watson. In October, Lupin agreed to a $1 million settlement with a group of end payors to end its involvement in the MDL.[263] Warner Chilcott and Watson Pharmaceuticals remain in the case and will proceed to trial beginning January 2020. (*See Monopolization Section for analysis of the product hopping claims*).

Glumetza. Purchasers of Glumetza, a diabetes medication, also filed a complaint this year alleging that Glumetza owners Assertio and Santarus entered into a no-AG reverse payment agreement with Lupin that kept a generic version of Glumetza off the market from 2012-2016.[264] The plaintiffs further claim that sales of the Glumetza monopoly, first to Salix, then to Valeant allowed those companies to take additional price increases on the drug.[265] According to the complaint, absent the anticompetitive conduct, the price of a 30-day supply of Glumetza would be $55, but, as a result of the overall scheme, drug makers charged more than $3,000 for a one month's supply of the brand medication.[266] Wilson Sonsini is representing Lupin in this litigation.

Sensipar. In the *In re Sensipar* MDL, plaintiffs allege that Amgen and Teva entered into an illegal reverse payment agreement that would have Teva pull its generic version of Sensipar, a calcium control drug, off the market until 2021.[267] Amgen had just settled infringement suits with several pharmaceutical companies pursuant to agreements that included acceleration clauses—provisions that allow the generic company to enter if another company launches a generic version of the product.[268] Teva was not a party to those settlements, but had previously settled patent litigation with Amgen over Sensipar in 2011 that barred Teva from entering until the relevant patents expired.[269] In January 2019, Teva entered and sold generic Sensipar for one week. According to plaintiffs, Amgen and Teva then hastily struck a deal to pull Teva's generic from the market preventing the acceleration clauses from triggering and preserving the brand monopoly.[270]

Humira. In *In Re: Humira (Adalimumab) Antitrust Litigation*, defendant AbbVie contends that granting generic manufacturers early access to European markets is a legal way to settle its patent infringement disputes with those generic manufacturers. AbbVie argues that plaintiffs are conflating these settlements—in which the generic producers pay AbbVie a royalty—with a reverse payment agreement and cites to Supreme Court precedent that early-entry-only settlements (the agreements with the generic producers) stand "in contrast" to reverse payment settlements.[271]

Actavis at the FTC. The full FTC finally had a chance to interpret *Actavis* in March this year, issuing a decision that provides much-anticipated guidance on how the commission will apply the rule of reason analysis imposed by the Supreme Court. In a 5-0 decision, the FTC reversed an administrative law judge's dismissal of a complaint alleging that Endo entered into a pay-for-delay deal with Impax to postpone entry of the drug Opana ER. The ALJ found that while the settlement was a large, unjustified reverse payment, Impax's ability to enter eight months before expiration of the original patents was a procompetitive benefit that outweighed any anticompetitive harm.[272] Relying on the Supreme Court's decision in *Actavis*, the commission held that Endo's reverse payment / No-AG agreement with Impax eliminated the risk of competition, which itself constitutes anticompetitive harm.[273]

Significantly, the commission's decision outlines an expansive view of the kinds of non-cash forms of consideration that should be considered in valuing the size of the reverse payment.[274] The commission also held that Impax failed to establish a "specific link" between the restraint, which was the "payment in exchange for the elimination of the risk of entry," and a procompetitive justification.[275] Even if Impax had articulated such a link, it would still have to show that the restraint was "reasonably necessary to achieve the alleged procompetitive benefits."[276] Impax has appealed to the Fifth Circuit Court of Appeals arguing that the FTC misapplied *Actavis* and created a "jerry-rigged" test that would find almost every reverse-payment settlement unlawful.[277]

Section 1 in the Labor Market

No-Poach Clauses in Franchise Agreements. In recent years, class action litigants have followed the lead of federal and state regulators, filing suits alleging that no-poach provisions in employment contracts, which prevent competitors from soliciting or hiring employees from their rivals, are anticompetitive. The threshold issue in these cases is whether the conduct should be analyzed under the *per se* rule or the more permissive rule of reason or "quick look" standards—a decision that can be critical to the outcome. The plaintiffs typically advocate for their claims to be assessed under the *per se* rule, which means that once an agreement between competitors is established, a court must find a violation of the antitrust laws. Under the rule of reason or the quick look test, by comparison, the defendants can advance business justifications as a defense, and escape liability if they can show procompetitive benefits arising from the conduct at issue outweighed any resulting anticompetitive harms. If the defendants can show that the hiring restriction was ancillary to a legitimate business purpose they may be able to escape the *per se* rule.[278]

The DOJ and the Washington State Attorney General have weighed in with differing views as to which standard should apply to no-poach agreements in employment contracts.[279] Under the DOJ's framework, agreements between franchisor and franchisee not to poach each other's employees are *per se* unlawful under Section 1 unless they are reasonably necessary to a separate, legitimate business transaction or collaboration, in which case the "rule of reason" should be applied.[280] The DOJ considers the relationship between franchisor and franchisee to be vertical and a no-poach agreement between them to be ancillary to their legitimate business collaboration. By comparison, the Attorney General of Washington State has adopted the view that franchise agreements have vertical *and horizontal* components.[281] Where a franchise agreement "restricts solicitation and hiring among franchisees and a corporate-owned store – which is indisputably a horizontal competitor …" the agreement must be analyzed under the *per se* rule."[282]

The issue has been hotly litigated this year in the context of franchise-based chains where the agreement entered into between the franchisor and franchisee includes a restraint on hiring employees of other franchises of the same chain. Recent class actions filed in the Eastern District of Washington against Carl's Jr., Auntie Anne's, and Arby's questioned whether "no-poach" provisions in franchise agreements were *per se* illegal.[283] Both the DOJ and the Attorney General of Washington State filed statements of interest in the cases. The DOJ argued that under federal law a "no-poaching agreement between a franchisor and a franchisee, within the same system" are "vertical" in nature and should be analyzed under the rule of reason because it is likely "reasonably necessary to a separate, legitimate business transaction or collaboration between the companies."[284] The Washington State Attorney General weighed in to guide the district court in applying the Washington State Consumer Protection Act arguing that the proper standard under that law is the *per se* rule. These matters settled before the court decided which standard was appropriate.[285]

Similar cases against McDonald's, Burger King, Jimmy John's, and H&R block are pending in district courts around the country.[286] Following the U.S. Department of Justice's intervention in Carl's Junior, Auntie Anne's, and Arby's, Jimmy John's renewed its bid to dismiss the claims of its employees, arguing that the court's prior order on the motion to dismiss was wrong in light of the DOJ's Statement of Interest advocating the rule of reason.[287] The court denied Jimmy John's renewed motion and left the standard question open, noting it was "too soon" to decide whether the alleged conduct was *per se* illegal.[288] The District Court for the Eastern District of Michigan dismissed a similar case against Little Caesar's for failure to state a claim, but reasoned that the franchisor-franchisee agreements that restrict hiring between franchises are not purely horizontal making them "complex and not amenable to a *per se* approach."[289]

No-Poach Outside the Franchise Context. The DOJ has also intervened in two cases outside the franchise context arguing that the *per se* rule should apply to the conduct at issue. In *Seaman v. Duke University*, the DOJ pointed out that "for a restraint to be ancillary, there must be a separate legitimate collaboration that it renders more effective" and Duke had "not identified any specific collaboration between it and UNCSM" that could legitimate their agreement not to hire each other's faculty and staff.[290] Moreover, for a restraint to be ancillary, it must also be "reasonably necessary to achieve the benefits of the legitimate collaboration." Duke settled with the faculty class for $54.5 million before the case was resolved.[291] In another case, *In RE: Railway Industry Employee No-Poach Antitrust Litig.*, plaintiffs alleged that Wabtec, Knorr, and Faiveley—the top three suppliers of railroad parts and safety equipment—entered into three agreements not to hire one another's employees.[292] The DOJ intervened again urging the court to "reject defendant's argument that no-poach agreements are always subject to the rule of reason" and to hold that plaintiffs had adequately pleaded a per se claim.[293] U.S. District Judge Conti for the Western District of Pennsylvania ruled that the *per se* rule applies because the horizontal agreements were akin to market allocation agreements. Judge Conti noted that the agreements at issue had neither procompetitive results nor were they ancillary to any other agreements with proper business purposes.[294]

Going forward, to avoid *per se* liability, defendants should be careful to identify a "separate, legitimate business transaction or collaboration" to which the restraint at issue is ancillary and then argue why it was reasonably necessary to carry out the purpose of that legitimate undertaking.

Other Section 1 Litigation

Teledentistry Services. In October 2018, teledentistry platform SmileDirectClub and a dentist providing aligner therapy treatments on the platform alleged that the Alabama Board of Dental Examiners and several of its officers violated Section 1 of the Sherman Act when it decided that the plaintiffs could not provide dental imaging services in Alabama without a physical presence in the state. The plaintiffs argued the board's decision was a conspiracy to foreclose SmileDirectClub and affiliated dentists, which resulted in higher prices as a result of eliminating low-cost teledentistry services.[295] The defendants sought immunity from suit under the state action doctrine. On April 2, 2019, District Judge R. David Procter for the Northern District of Alabama held all claims against the board itself were barred by sovereign immunity,[296] while Sherman Act claims against the board members in their official capacities could proceed under the *Ex parte Young* exception because the plaintiffs sought prospective injunctive and declaratory relief against officials alleged to be violating federal law.[297] The board members sought an immediate appeal on the immunity decision.[298] This prompted the FTC and DOJ to file an amicus brief with the Eleventh Circuit Court of Appeals in September.[299] In its brief, the government argued that the state action defense to antitrust liability is limited and should be narrowly construed where—as here—a state elects a board of *active market participants* to decide who can participate in the market.[300] The appeal was still pending as of this writing. On October 16, 2019, SmileDirectClub filed a separate antitrust suit in the District Court for the Western District of California accusing the California Dental Board and several of its officers and members of similar anticompetitive conduct allegedly taken to stifle competition and eliminate low-cost teledentistry services.[301]

Wine and Spirits. A circuit split emerged in September when the Second Circuit Court of Appeals affirmed a decision of the District Court for District of Connecticut upholding the Connecticut Liquor Control Act's pricing structure against a Section 1 antitrust challenge. At issue in *Connecticut Fine Wine & Spirits v. Harris* were three provisions of Connecticut's law— minimum retail price provisions, price discrimination provisions, and post-and-hold provisions—all of which impact the price at which alcohol can be lawfully sold in the state.[302] Connecticut's minimum retail price provisions require retailers to sell to customers at or above "cost," defined by statute as the wholesaler's price plus the shipping and delivery cost.[303] The law's price discrimination provisions ban wholesalers from offering discounts to high-volume retailers.[304] Finally, its post-and-hold provisions require wholesalers to post bottle and case prices each month with the Connecticut Department of Consumer Protection and hold those prices for a month. Under the law, prices can only be amended to match (but not beat) competitors' lower prices.[305] TotalWine, the largest U.S. retailer of wine and spirits, alleged these provisions inhibited meaningful price competition at the retail level and constituted *per se* violations of Section 1 such that they were preempted by the Sherman Act.[306] The Second Circuit ruled that the minimum retail price provisions and the price discrimination provisions were exempt from Section 1 as vertical restraints among private actors.[307] Moreover, the price discrimination provisions were not pre-empted because they were unilaterally imposed by the government and did not give any private actor "a degree of regulatory control over competition."[308] Most significantly, the court held that the post-and-hold provisions were hybrid restraints on trade that did not "authorize concerted action"[309] but merely "facilitate[d] parallel conduct that parties can legally undertake on their own."[310] The Second Circuit denied a rehearing *en banc* following a request for reconsideration brought by a judge of the court.[311] In dissent from the rehearing denial, U.S. Circuit Judge Richard J. Sullivan rebuked the court for perpetuating a circuit split and continuing "to allow de facto state-sanctioned cartels of alcohol wholesalers to impose artificially high prices on consumers and retailers."[312] Taking issue specifically with the majority's prior holding on the law's post-and-hold provision, Judge Sullivan explained that the problem was not that the provision compelled wholesalers to collude to fix prices "but rather that it provides no incentive—or ability—for wholesalers to compete on price."[313] Instead, Judge Sullivan would have joined the Fourth and Ninth Circuits, which have both held that similar provisions constitute *per se* violations of Section 1.[314] Relying heavily on Judge Sullivan's dissent, TotalWine filed a petition for certiorari to take the case to the Supreme Court on December 4, 2019.[315]

Aluminum Warehousing. There were also several significant decisions at the motion to dismiss stage this year. In August 2019, the Second Circuit Court of Appeals reversed a decision of the District Court for the Southern District of New York dismissing aluminum buyers' claims that warehousers of aluminum conspired with financial institutions to inflate the price of aluminum.[316] In 2016, the district court had ruled that Kodak and other aluminum buyers lacked standing to allege anticompetitive conduct involving the warehousing of aluminum because plaintiffs did not operate in the warehouse market. However, the Second Circuit found that although the defendants allegedly manipulated the warehousing market, plaintiffs could allege injury in the aluminum market because it was also affected by the defendants' conduct. The court explained, "the defendants restrained the market for sales of primary aluminum by artificial manipulation of a number . . . that serves as a price component for sales of the metal."[317] Thus, even though the manipulated price was in the warehouse market, because it was a cost component in the aluminum market, the plaintiffs had adequately alleged antitrust injury for their suit to go forward.

Advertising Auctions. In a December 2018 complaint, online travel agent TravelPass claimed that leading hotel chains such as Hyatt, Hilton, and Marriott agreed not to compete in auctions for advertising search terms that included their own brand names, such as "Marriott Dallas." The plaintiff alleged this conduct constituted bid rigging to eliminate interbrand competition and illegal division of the market. Both, it argued, were *per se* violations of Section 1 of the Sherman Act.[318] In August 2019, U.S. Magistrate Judge Caroline M. Craven found in a report and recommendation that TravelPass had sufficiently alleged standing and potential injury to survive the defendants' motion to dismiss.[319] In September, U.S. District Judge Robert W. Schroeder III issued an order adopting the Magistrate's recommendation that the lawsuit was allowed to proceed.[320]

Testing Standards. Two notable cases did not get past the motion to dismiss stage this year. In S*ymantec v. NSS*

Labs, a plaintiff software testing lab refused to cooperate with Anti-Malware Testing Standards Organization's (AMTSO) policy that testing labs give cybersecurity firms a heads-up on their testing plans, claiming that this allows such firms to side-step the test. In response, the plaintiff claimed, AMTSO instituted a group boycott on testing labs that failed to adhere to this standard. Despite the DOJ's intervention and argument that AMTSO should not be exempt from *per se* liability based on "its own conclusory assertion that it qualifies as an SDO under the SDOAA,"[321] U.S. District Judge Beth L. Freeman of the District Court for the Northern District of California dismissed the case, finding the plaintiff failed to allege facts showing the existence of a conspiracy let alone AMTSO's participation in such a conspiracy. Additionally, the plaintiffs failed to state a claim under the rule of reason because they failed to define the relevant market or allege the defendants' power within those markets. NSS subsequently filed an amended complaint but then dismissed its case voluntarily once the defendants renewed their motion to dismiss. Wilson Sonsini represented Symantec in this matter.

Conservative News Media. The plaintiffs in *Freedom Watch Inc. v. Google Inc. et al.*, met a similar fate when their complaint was dismissed in March 2019. Freedom Watch, a conservative organization, claimed Google, Facebook, Twitter, and Apple entered into an "illegal agreement to refuse to deal with conservative news media outlets," alleging both First Amendment and antitrust claims.[322] The plaintiffs alleged the defendants "use[d] their position of influence and great market power" to "willfully suppress politically conservative content,"[323] citing the removal of conservative pundit Alex Jones' (of Info Wars) YouTube channel as just one example.[324] U.S. District Judge Trevor M. McFadden of the District Court for the District of Columbia dismissed the plaintiffs' antitrust claims, finding the complaint offered "only conclusory statements" that tech platforms engaged in a conspiracy.[325] While the plaintiffs sufficiently alleged how each tech platform acted to suppress or censor content, "they fail[ed] to show how the [p]latforms' purportedly parallel actions stem from a conspiracy."[326] The case is now on appeal to the D.C. Circuit. Wilson Sonsini represents Twitter in this matter.

Monopolization and Single Firm-Conduct Litigation

A major development in Section 2 cases this year was the Supreme Court's decision in *Apple v. Pepper* holding that iPhone owners are not indirect purchasers under *Illinois Brick* and have standing to sue Apple for overcharges levied on app developers. Other notable developments include the DOJ's announcement of its "New Madison" approach aimed at interpreting antitrust and patent laws in a way that fosters innovation. As part of this initiative, the DOJ sought to file a statement of interest in support of Wilson Sonsini client Interdigital's position in a FRAND licensing case, but was unable to do so before the case settled. In the Pharmaceutical and Life Sciences industry, product hopping and sham litigation cases continue along with new allegations of monopolization through abuse of "patent thickets." There were also some high dollar settlements this year with Allergan paying $750 million to class plaintiffs in a case involving pay-for-delay and product hopping, while Reckitt Benckiser Group paid $1.4 billion to the FTC and DOJ to resolve claims of product hopping and sham citizen petition filings with the FDA.

Section 2 Litigation

Apple Store Overcharges. On May 13, 2019, the Supreme Court, in a 5-4 decision, held that Apple's App Store customers have standing to sue Apple for alleged monopolistic conduct related to the sale of apps.[327] The plaintiff iPhone owners claim that Apple established an unlawful monopoly and inflated the price of apps by charging developers a 30 percent commission fee and limiting app distribution to the App Store only.[328] The plaintiffs sued under the federal antitrust laws. The District Court for the Northern District of California dismissed the consumers' claims after finding that the plaintiffs were indirect purchasers and thus did not have standing to sue Apple under *Illinois* Brick—the 1977 Supreme Court precedent establishing that indirect purchasers cannot seek damages under the federal antitrust laws.

The District Court found that independent app developers set their own prices for sale of their apps in the App Store, but also agreed to directly pay Apple a 30 percent commission on each app sold.[329] Because a portion of this 30 percent commission was then passed on to consumers who were indirectly paying part of a developer's costs to Apple, the judge held that the consumers were indirect purchasers.[330] In January 2017, the Ninth Circuit Court of Appeals reversed the holding that Apple is a distributor of apps and that the plaintiffs who purchased apps directly from the App Store were not indirect purchasers and therefore had standing to sue.[331]

The United States Supreme Court decision delivered by Justice Kavanaugh focused on the relationship between Apple and the consumers. Unlike the end-consumers in *Illinois Brick*, iPhone owners were purchasing apps directly from the alleged antitrust violator.[332] Accordingly, the app consumers were direct purchasers who could be proper plaintiffs under the bright line rules of *Illinois Brick*. The Court pointed out that under Apple's theory, the *Illinois Brick* standard would only allow a plaintiff to sue the party who sets the actual price.[333]

The Court rejected this interpretation, reasoning in part that following a who-sets-the-price rule could allow for a form over substance application of *Illinois Brick* where a seller could avoid antitrust liability simply by the way it structured its retail arrangement with a supplier. The correct question is whether the seller's conduct caused a consumer to pay the seller a higher-than-competitive price. The Court also allowed for the possibility that an app developer plaintiff might have the right to recover for its own distinct damages.

In the dissenting opinion, Justice Gorsuch presented reasoning that was more in line with the District Court. For the dissenting justices, the app developer would be the directly injured party and any alleged injury to the app consumer would be the type of passed-on injury that *Illinois Brick* was intended to forbid.[334] Like the majority, the dissent also cautioned against evaluating standing based on a question of form rather than substance, but, the dissent reasoned that *Illinois Brick* was concerned with issues related to causation rather than the form of what made a party a direct purchaser.[335] The case has been remanded back to the Northern District of California and is currently in discovery.

Following the Supreme Court's decision in *Apple Inc. v. Pepper*, app developers for the iPhone also brought a class action suit against Apple in the District Court for the Northern District of California alleging that Apple's monopolization of the market for IOS app distribution services allows it to charge app developers an excessive 30 percent commission and $99 annual fee on app sales.[336] According to the developer plaintiffs, Apple's conduct reduces output in the app market and harms them in two ways. First, because apps are usually sold to consumers for low prices and Apple charges developers such high fees, it is not economically rational for many developers to create apps for the iPhone. This leads to lower app output than would exist without the 30 percent commission and annual fee.[337] Second, because the App Store is the only store for iPhone apps and so many apps are available in the store, fewer consumers ever discover a developer's application, reducing the overall number of transactions in the market.[338] Apple answered the complaint in November 2019.

Digital Images. On January 28, 2019, Google, represented by Wilson Sonsini, prevailed on its motion to dismiss antitrust claims in Dreamstime's case against it in the Northern District of California.[339] Dreamstime supplies stock photography and had contracted with Google to promote its digital images through sponsored advertisements. Dreamstime claims that it was initially able to secure first-page results, but in 2015, those results began to appear on later pages causing Dreamstime's rate of new customers to drop by 30 percent within a year.[340] Dreamstime sued Google under a section 2 theory alleging that Google was attempting to maintain a monopoly position in the online search advertising market by excluding Dreamstime in favor of directing traffic to its own image searches.[341] Citing to *Verizon v. Trinko*, the Court allowed for the possibility that Dreamstime may have been mistreated in some way, but Dreamstime failed to sufficiently allege anticompetitive conduct to make out a Section 2 abuse of monopoly power claim.[342] The court, categorizing Dreamstime as a Google customer in the online search advertising market, held that a showing of harm to one customer would not on its own demonstrate this required anticompetitive conduct. To adequately allege this anticompetitive conduct, a plaintiff would also need to show that a rival or competition had been excluded from the relevant market. Importantly, given the current public focus on data collection, the court said, in relation to "Google's capturing of data, Dreamstime has not demonstrated that this data is captured through a means other than Google's 'ability, economies of scale, research, natural advantages, and adaptation to inevitable economic laws.'"[343] Accordingly, "[a]lthough the data collection likely gives Google an advantage in the online search advertising market over its rivals, a monopolist utilizing its competitive advantage does not equate to anticompetitive conduct."[344]

Dentistry Revisited. Similarly, in *3Shape Trios A/S v. Align Tech.*, Inc., the district court dismissed plaintiff 3Shape's claims, finding that where none of defendant Align's individual actions violated antitrust law, 3Shape could not argue that the Align's acts violated Section 2 of the Sherman Act when viewed as a broader pattern of conduct.[345] 3Shape, a manufacturer of oral scanners used to create orthodontic aligners, sued Invisalign, which makes both oral scanners and orthodontic aligners.[346] 3Shape alleged that a wide range of actions taken by Align, including patent litigation against the Plaintiff, discounts to customers, termination of agreements with 3Shape, and offers to 3Shape of exclusive dealing arrangements, when taken together, amounted to monopolization of the market for aligners and attempted monopolization of the market for scanners under Section 2 of the Sherman Act.[347]

Hop-On Hop-Off. In *Go New York Tours, Inc. v. Gray Line New York Tours, Inc. et al*, a tour bus operator sued two of its competitors and other members of their corporate families alleging violations of Sections 1 and 2 of the Sherman Act.[348] The complaint alleged that the defendants conspired with each other and with third parties to exclude the plaintiff from the hop on, hop off sightseeing tour bus market by preventing it from selling its services through tickets that covered both bus rides and entry to tourist attractions.[349] The plaintiff also alleged that the defendants monopolized the same market.[350] The District Court for the Southern District of New York dismissed the plaintiff's monopolization claims, ruling that the complaint described a market with two dominant players and alleged that each exercised monopoly power, barring any monopolization claim because Section 2 does not permit allegations that two firms monopolized the same market.[351] The district court also dismissed the plaintiff's Section 1 claims, holding that the plaintiff's allegations of conspiracy between entities within the defendants' corporate networks failed because the plaintiff did not allege that the conspiring entities were independent of one another, as is required for a claim of conspiracy between firms with common ownership.[352] Wilson Sonsini represented Twin America, LLC in the matter.

Telecom Standards. In 2018, Wi-LAN sued LG, alleging that any LG products that complied with a telecom SSO's standards necessarily violated Wi-LAN's patents.[353] LG filed antitrust counterclaims, alleging that Wi-LAN violated section 2 of the Sherman Act by (i) failing to disclose its patents to the standard-setting organization, and (ii) filing false FRAND declarations with the SSO.[354] Both of LG's counterclaim theories faced heightened pleading standards because they alleged fraudulent conduct, which requires a party to allege more details than are required for non-fraud allegations.[355] Nonetheless, the court found that LG had sufficiently stated antitrust claims because it alleged with specificity both representations Wi-LAN made to the SSO that induced adoption of a standard covered by Wi-LAN's IP and the details of the alleged false FRAND declarations.[356]

In another FRAND case, U-blox AG filed a Section 2 claim against Interdigital on January 1, 2019, alleging that Interdigital held standard essential patents (SEPs) on 2G, 3G, and 4G technologies and failed to license them at fair, reasonable, and non-discriminatory (FRAND) terms.[357] Shortly thereafter, the DOJ announced its intention to intervene in the case to argue that U-blox's allegations were not proper antitrust claims.[358] The DOJ expressed concern that U-blox was attempting to force Interdigital to forego royalties on patents that it could rightfully collect from U-blox's customers after Interdigital's earlier licensing agreements with U-blox had expired.[359] The DOJ stated that it was their "view that it would unhelpfully distort licensing negotiations if patent implementers … could effectively negate the statutory right to exclude under patent law through court order whenever a patent holder makes a FRAND commitment."[360] On April 11, 2019, despite the DOJ's position, the court denied Interdigital's motion to dismiss the Section 2 claims.[361] Citing to the Third Circuit's opinion in *Broadcom Corp. v. Qualcomm Inc.*, the District Court for the Southern District of California determined that Interdigital had an obligation to license its proprietary technology on FRAND terms and that it was exploiting its position by not doing so. U-blox and Interdigital eventually entered into a new licensing agreement and settled the case on November 4, 2019.[362] Consequently, the DOJ never filed its Statement of Interest in the case, though it was prepared to advocate for its "pro-innovation policy" and has stated its intention to continue such advocacy going forward.[363] Wilson Sonsini represented Interdigital in this matter.

Monopolization Cases in the Pharmaceutical Industry

Section 2 cases in the pharmaceutical/life sciences sector were a little less active this year than in 2018. Several significant cases settled, and many more are proceeding through discovery. For example, *In re Restasis Antitrust Litigation*, a group of class action cases involving allegations of an overarching monopolization scheme with several components, survived a motion to dismiss in 2018 and discovery is in full swing. The plaintiffs' allegations of anticompetitive conduct include serial and meritless citizen petitions, defrauding the U.S. Patent and Trademark Office (USPTO), wrongful patent listing in the Orange Book, sham patent litigation, and the improper assignment of patents to the Native American St. Regis Mohawk Tribe to avoid invalidation.[364]

Acthar Market. In another case alleging an overarching monopolization scheme, Humana filed suit against Mallinckrodt this year alleging the company's anticompetitive conduct raised the price of Acthar 97,500 percent from 2001 to 2018.[365] The three prongs of the alleged monopolization scheme involved 1) buying up the competition, 2) bribing doctors to prescribe the drug, and 3) using a charitable foundation to subsidize copays as a form of kickbacks. This action follows Mallinckrodt's $100 million settlement with the FTC in 2017 for its unlawful monopolization of Acthar.[366]

REMS Abuse. Risk Evaluation and Mitigation Strategies (REMS) are FDA-imposed safety protocols designed to monitor and prevent specific serious risks associated with the use of some medications. They may include patient counseling and monitoring, specialized patient management databases, additional labeling requirements or special certifications for those dispensing the drug.

REMS abuse was at issue in the *Mylan v. Celgene* litigation that settled in July of this year. Wilson Sonsini client Mylan alleged that Celgene unlawfully extended its monopoly over the life-saving cancer drugs Thalomid and Revlimid by blocking Mylan's access to samples of the drugs on the pretext that Celgene could not sell the drugs outside the REMS program. Samples of the drugs, which were not available through normal distribution channels, are necessary for a generic manufacturer like Mylan to conduct the bioequivalence testing required for final approval of generic versions of the medications. Under a rule of reason analysis on a motion for summary judgment, the district court held that Celgene's conduct was reasonable until the time that the FDA approved Mylan's testing protocols, and dismissed Mylan's claims of harm prior to that point.[367] But, the court found there was a triable issue on whether Celgene's continued refusal to provide the samples after the approvals was reasonable, as well as whether Mylan should be entitled to injunctive relief on Revlimid, the newer analog of Thalomid.[368] Celgene settled with Mylan for $62 million within weeks of agreeing to pay $55 million in a settlement with class plaintiffs in a related class action regarding the same issues.[369] In March 2019, Humana filed a complaint against Celgene raising substantially the same allegations regarding REMS abuse as those raised in Mylan's case and the class action, as well as other allegations of anticompetitive conduct concerning Thalomid and Revlimid. That litigation is ongoing.

Abuse of Standard-Setting. In *Amphastar v. Momenta*, plaintiff Amphastar alleged that Momenta, and its licensing partner Sandoz, had deceived a standard-setting organization in order to foreclose competition, including Amphastar, from the enoxaparin market. The Court of Appeals for the First Circuit had previously ruled that the *Noerr-Pennington* doctrine did not shield defendants from liability for their alleged conduct, which included misleading a standards-setting organization called the United States Pharmacopeia Convention (USP) into adopting a method (the 207 Method) for testing the drug at issue.[370] On remand, the U.S. District Court for the District of Massachusetts denied defendants' Momenta and Sandoz's motion to dismiss. The court found that Amphastar had plausibly pled a claim that defendants acquired monopoly power by deceiving the USP.[371] With respect to Amphastar's allegations of a conspiracy between Sandoz and Momenta in violation of Section 1, the court found that "Amphastar plausibly alleges that the collaboration agreement between Sandoz and Momenta created financial incentives for the companies to exclude other producers of generic Enoxaparin from the marketplace."[372] The parties settled in June 2019, with defendants agreeing to pay Amphastar $59.9 million, after Amphastar filed a motion for summary judgment seeking the application of estoppel to issues already decided in the patent case. Wilson Sonsini represented Amphastar in this action, as well as in the related patent case in which Amphastar won a defense jury verdict.

Product Hopping. "Product hopping" in the pharmaceutical industry refers to the strategy of a brand-name drug manufacturer marketing a new version of its drug just as generic versions are about to enter. Generic manufacturers must show that their version of the drug is bioequivalent to (i.e., has a similar formulation and effect as) the currently marketed brand drug, so if the brand manufacturer changes the formulation or dosage of its product, the generic company is forced to develop a new product as well. The time it takes to develop and approve the new drug delays competition. The brand firm's conduct can involve a "hard switch," where the brand firm pulls its original drug off the market—forcing consumers to buy the new version of the drug—or a "soft switch," where the company leaves its drug on the market but discourages its use.

As discussed above, in addition to Section 1 claims, the *In re Namenda Direct Purchaser Antitrust Litigation* also involved allegations of product hopping. This class action case follows the New York Attorney General's lawsuit in which the court granted an injunction to prevent the defendant brand firm from withdrawing the drug Namenda IR from the market,[373] conduct that would have effectuated a hard switch from Namenda IR to Namenda XR. At summary judgment in the private plaintiffs' action, the court found there was a genuine issue of material fact as to whether the hard switch caused antitrust injury to the plaintiffs.[374] The end payor class litigation did not settle and remains ongoing.

The plaintiffs in another case slated for trial in 2019, *In Re Loestrin 24 FE Antitrust Litigation*, also alleged a hard switch, product hopping scheme. The plaintiffs claim that defendant Warner Chilcott slightly reformulated a drug into a new version, Minastrin, when the patent on the older product (Loestrin) was set to expire and generic competition was imminent. The defendant also took the old product formulation off the market. The plaintiffs also claim that Warner Chilcott obtained the patent for Loestrin by withholding information from the PTO and filing sham patent suits to prevent competition. The trial has been bifurcated such that the first trial and jury will address the antitrust claims of all three plaintiff classes—the direct purchasers, end payors, and retailers—and the second trial and jury will determine overcharge damages of each plaintiff group if liability has been established.[375]

In July of this year, the Reckitt Benckiser Group (RB) settled with both the FTC and the DOJ for a total $1.4 billion ending the agencies' investigations into the company's anticompetitive conduct in the market for Suboxone, a drug that helps limit withdrawal symptoms in patients recovering from opioid addiction.[376] The government claimed that RB coerced patients into switching from the original tablet form of Suboxone to a newer, patent-protected film by falsely claiming the new version was safer. At the same time, the agencies contend, RB filed sham citizen petitions asserting the same unsupported safety claims and asking the FDA not to approve any generic applications for the Suboxone tablet.[377] The case marks the first time the FTC has brought product hopping allegations. The settlement agreement with the FTC requires RB to 1) justify any reformulations of an existing product to the agency; 2) continue to market original versions of its medications after generics enter; and 3) submit to the FTC and FDA information underlying any citizen petition the company files. The company also entered into a non-prosecution agreement with the DOJ.

Abuse of Citizen Petitions. In a significant blow to the FTC's power, the Court of Appeals for the Third Circuit affirmed the denial of the FTC's request for a permanent injunction against Shire ViroPharma.[378] The FTC alleged Shire used repetitive, unsupported FDA filings to delay the approval of generic Vancocin capsules between 2006 and 2012. These citizen petition filings were made with the knowledge that the FDA would not approve generics until such filings were resolved and were thus an effort by Shire to maintain its monopoly. The FTC sought an order under Section 13(b) of the FTC Act permanently prohibiting Shire from submitting repetitive, baseless FDA filings. Section 13(b) allows the FTC to seek injunctions in federal court to stop conduct that "is violating, or is about to violate" the law.[379] The FTC argued that showing a past violation and a "reasonable likelihood" it would happen again in the future was sufficient, but the panel disagreed. Despite Shire's history of abusing citizen petitions, the Third Circuit held that Section 13 of the FTC Act was not designed to address the "mere suspicion" that future unlawful conduct would occur.[380]

Actos Market. In another case involving abuse of FDA processes, the U.S. District Court for the Southern District of New York in *In Re: Actos Direct Purchaser Antitrust Litigation*, dismissed claims that Takeda, Mylan, and other pharmaceutical companies illegally conspired to restrict trade of the diabetes drug Actos.[381] However, the court denied Takeda's motion to dismiss monopolization claims brought by direct purchasers. The direct purchasers alleged that Takeda falsely told the FDA that two patents covered Actos ingredients rather than methods of use. The misrepresentation started a six-month period of exclusivity for the three companies that first sought FDA approval for generic versions of the drug. Direct purchasers sufficiently alleged that statements Takeda made to the FDA "caused antitrust injury by delaying both Teva's entry, and the entry of the other generics, into the Actos drug market."[382] Wilson Sonsini represents Mylan in this matter.

Biologic Frontier. Competition between biologics and biosimilars is a new frontier in pharmaceutical antitrust practice. Biologic drugs refer to "any therapeutic product derived from a biological source, including vaccines, antitoxins, blood products, proteins, and monoclonal antibodies."[383] Unlike traditional, or "small molecule" drugs, biologic therapies are far more structurally complex making it challenging to create precise replications. For this reason, potentially competing versions of biologic drugs attempt to duplicate the licensed drug's manufacturing process instead of its chemical composition and are not referred to as "generic biologics," but rather "biosimilars."

In two of the first cases to test antitrust jurisprudence in the biologic/biosimilar context, *Pfizer v. Johnson & Johnson* and *In re Remicade Antitrust Litigation*, discovery continued throughout 2019. In both cases, plaintiffs claim that defendant Johnson & Johnson (J&J), brand manufacturer of the biologic Remicade, foreclosed competition through exclusive agreements and bundled rebates.[384] In June of 2019, the FTC issued a civil investigative demand to J&J in connection with its investigation of "whether Janssen's REMICADE® contracting practices violate federal antitrust laws."[385]

In another biosimilars case, *In Re: Humira (Adalimumab) Antitrust Litig.*, plaintiffs accuse AbbVie of illegally shielding its biologic drug Humira with a "thicket" of over 100 unoriginal, overlapping patents.[386] The complaint alleges AbbVie caused harm through its 1) compilation of patents covering Humira and helping to keep biosimilar versions off the U.S. market until 2023; 2) deals to authorize biosimilar versions of Humira in Europe in exchange for entry in the U.S.; and 3) a deal granting Amgen exclusive early entry.[387] The action represents a first-of-its-kind lawsuit challenging patent thickets and claiming that accumulating a substantial amount of allegedly weak intellectual property is anticompetitive.

Class Certification

Class certification is a key stage in antitrust class action litigation. The plaintiffs bear the burden of demonstrating various factors to justify certification, including that legal and factual issues are common among proposed class members and individualized inquiry is not required. In ruling on class certification, a court defines the scope of the class, and with it, the possible extent of damages. Defeating a motion for class certification may significantly reduce a defendant's exposure in a class action lawsuit.

Uninjured Class Members as a Bar to Class Certification – the Progeny of *Asacol*

To certify a class under Federal Rule of Civil Procedure 23(b)(3), plaintiffs must demonstrate that common questions of law or fact predominate over individual issues. The court must determine whether all class members' claims could be evaluated by answering the same set of questions about liability and damages, or whether legal and factual questions relevant to individual plaintiffs in the class would overwhelm the issues that plaintiffs have in common. Where some members of a proposed class were uninjured, courts may find that the individual inquiries required to determine which class members were injured and which were not may cause individual issues to predominate over common issues, making class certification inappropriate.

Several cases this year relied on the First Circuit's reasoning in *In re Asacol Antitrust Litigation.* In that case, the district court had certified a class despite finding that around 10 percent of the class members had not been harmed by Warner Chilcott's alleged efforts to prevent entry of a generic Asacol product. The U.S. District Court for the District of Massachusetts had approved a plan whereby class members could submit affidavits after trial stating whether they would have switched to the generic drug and a claims administrator could remove uninjured members from the class at that point.[388] The Court of Appeals for the First Circuit rejected the district court's holding because the proposed procedure would not sufficiently protect the defendants' due process rights, since it would provide "no meaningful opportunity [for the defendant] to contest whether an individual would have, in fact, purchased a generic drug had one been available."[389]

Following the First Circuit's decision, the plaintiffs moved to certify a narrower class by removing individual purchasers and including only third-party payors, like insurance plans. In April of this year, U.S. District Judge Casper rejected this class, concluding that it would not necessarily remedy the First Circuit's concerns because both individual consumers and insurers suffered the same economic injury—they were both overcharged as a result of Warner Chilcott's purported anticompetitive scheme. In addition, allowing a renewed motion for class certification on the eve of trial that would involve additional expert reports and potentially more fact discovery would lead to unjust delay.[390] Following this denial, Allergan settled with the named plaintiffs for a total of approximately $2.7 million.[391]

The decision in *Asacol* has implications for both plaintiffs and defendants and ultimately makes certifying a class with uninjured members more difficult. Going forward, the plaintiffs must either certify a class with an acceptably low number of uninjured members or provide a fair method for identifying and removing uninjured members either before or during trial.[392] The defendants should be prepared to challenge that methodology and provide evidence that a significant number of members were not injured.[393] Relying on *Asacol*, several courts this year have declined to certify a class where some proposed members were not harmed.

For example, in *In re Loestrin 24 Fe Antitrust Litigation*, the plaintiffs again took aim at Warner Chilcott, this time alleging that the brand manufacturer delayed generic Loestrin 24 via sham litigation, reverse payments, and product hopping. Based on *Asacol*, the district court declined to certify a class of consumers. However, contrary to *Asacol*, the court in *Loestrin* certified an indirect purchaser class consisting of third-party payors.[394] The court reasoned that, even if an individual consumer was not injured because she was a brand loyalist or had a flat co-pay plan, a third-party payor was injured because it almost certainly paid more for branded or generic Loestrin.[395] The U.S. District Court for the District of Rhode Island also certified a class of all direct purchasers of Loestrin and generic Loestrin because Warner Chilcott's conduct could have raised prices for the both the brand and generic drug and the overcharges could be proven on a class-wide basis.[396] Warner-Chilcott has appealed certification of both classes.

Similarly, in *In re Intuniv Antitrust Litigation*,[397] the court found that the indirect purchaser plaintiffs had not "put forth a reasonable and workable plan to weed out uninjured class members."[398] The experts had concluded that thousands of class members (at least 8 percent) were uninjured because they used coupons to purchase the brand drug, thereby eliminating the price discrepancy with the generic version. The court stated that under *Asacol*, it must allow the defendants to challenge at trial whether particular class members were injured. Accordingly, because the plaintiffs could not prove that "questions of law or fact common to class members" would "predominate over any questions affecting only individual members" the trial would be unmanageable.[399] However, as in *Loestrin*, the district court certified the DPP class.[400] The DPPs' expert opined that all or nearly all class members paid more than they would have absent the alleged reverse payment.[401] The court concluded that the number of uninjured class members was low enough to be permissible under *Asacol*.[402] Notably, the court denied one of the plaintiffs' proposed class representatives, FWK, as it was "functionally an investment vehicle that is the brainchild of class counsel."[403]

Even courts outside the First Circuit have relied on *Asacol*. The U.S. District Court for the District of New Jersey denied class certification to a consumer class suing Celgene for delaying the entry of generic versions of its drugs Thalomid and Revlimid.[404] The court agreed with defendants that the class contained large numbers of brand loyalists who would never have switched to a generic and concluded that individual questions would predominate over common questions such that class certification was inappropriate.[405] Echoing the reasoning in *Asocol*, the court added that class certification was inappropriate where the plaintiffs failed to put forward a reliable method of determining class membership.[406] The plaintiffs then filed a renewed motion that sought two classes. First, the plaintiffs sought to recertify the original class, this time arguing that even brand-loyalist and flat co-pay consumers were harmed by the reduction of choice and that the number of flat co-pay consumers was *de minimis*. Moreover, the number of potentially uninjured class members would be even lower if the relevant time period was adjusted to account for the entry of additional generics and the resulting drop in the rate of brand loyalists.[407] Second, plaintiffs proposed a class consisting of third-party payors exclusively, in line with the proposed class rejected in *Asacol* following the First Circuit's decision and the class approved in *Loestrin*. While this motion was pending, Celgene settled with end-payors for $55 million.[408]

If defendants prevail in *In re: Lamictal Indirect Purchaser and Antitrust Consumer Litigation*, it could become harder to certify classes of uninjured direct purchaser plaintiffs as well. In this case, the plaintiffs alleged an anticompetitive reverse payment between GlaxoSmithKline and Teva. In December 2018, the district court certified a class of all direct purchasers from GlaxoSmithKline or Teva during the class time period.[409] The defendants have appealed that decision arguing that the district court improperly certified a class where the plaintiffs could not prove that each direct purchaser actually suffered an overcharge. Rather, the defendants contend that because DPPs negotiate drug prices on an individualized basis it is impossible to use class-wide evidence to prove that every class member was harmed. Additionally, when excluding the putative class members that only allegedly suffered harm due to increased generic prices, the class would not satisfy numerosity. The appeal is pending.

Outside of the pharmaceutical industry, the D.C. Circuit in *Dakota Granite Co. v. BNSF Ry*. also sustained the district court's refusal to certify a class containing uninjured members.[410] In this case, the plaintiffs alleged that the largest railroads in the U.S. had conspired to fix rate-based fuel surcharges. The U.S. District Court for the District of Columbia declined to certify the proposed class because it consisted of thousands of uninjured purchasers due to "negative overcharges," meaning these purchasers ended up paying less than they would have in a but-for world. The D.C. Circuit Court of Appeals affirmed the district court, concluding that a class may, at most, contain a *de minimis* number of uninjured plaintiffs. As the district court concluded, 12.7 percent uninjured class members numbering in the thousands was large enough to defeat predominance. This was especially true because the plaintiffs had not proposed any way short of full trials to cull out the uninjured class members.

Together, these cases require that putative classes adequately identify either that the class contains very few, if any, uninjured class members or that any uninjured class members can be culled out before or during trial. *Rail Freight* also makes clear that this issue will need to be assessed in every antitrust class action and not just in pharmaceutical cases. Finally, these arguments have been advanced for both direct and indirect purchasers and have resulted in denials of class certification for both groups, though more frequently for indirect purchasers.

Nationwide Class

This year, the Court of Appeals for the Ninth Circuit is still considering whether to overturn certification by the U.S. District Court for the Northern District of California of the largest class ever in *In re Qualcomm Antitrust Litigation*.[411] The plaintiffs allege that as many as 250 million cellphone buyers paid overcharges on cell phones because of the licensing rates Qualcomm charged phone manufacturers for the use of its modem chips. The consumers claim that Qualcomm requires phone manufacturers to license chips at costs above FRAND rates required for IP holders whose patents are essential to standards set for telecommunications by standards-setting organizations and that these overcharges are passed on by the manufacturers to consumers. Despite the considerable number of potential class members, the court found that all elements of Rule 23 were satisfied and, in September 2018, certified a nationwide class of consumers who may recover damages under California's antitrust law and injunctive relief under the Sherman Act.

Qualcomm petitioned the Ninth Circuit Court of Appeals to overturn the grant of class certification, arguing that the size of the plaintiffs' class makes a class action unmanageable, and will raise due process problems because of notice concerns and because Qualcomm has the right to challenge individual damages. Qualcomm further argued plaintiffs had failed to demonstrate a reliable method to calculate pass-through harm across the class because the pass-through may vary depending on the source from which consumers purchased their phones, the type of phone purchased, which chips were in a purchased phone, how much the consumer paid for the phone, and other variations. Additionally, Qualcomm argued that allowing a nationwide class to recover under California law would contravene the public policy choices of states that, unlike California, do not allow recovery for indirect purchasers.

The Ninth Circuit agreed to hear an interlocutory appeal and U.S. District Judge Koh stayed the district court proceeding pending the appeal. The Ninth Circuit has not issued its decision yet. Resolution of the class certification question could drastically affect the ability of the plaintiffs to seek nationwide class actions for antitrust violations, particularly for indirect purchasers, and may clarify the level of individualized damage inquiries that can be properly performed in a class action before certification becomes improper

Damages

Voice and Data Services. In *Ward v. Apple*, the U.S. District Court for the Northern District of California denied class certification to a group of plaintiffs alleging that Apple and AT&T entered illegal agreements that locked customers into using AT&T's voice and data services, preventing them from switching carriers even after their contracts expired.[412] The court found that the plaintiffs had submitted an expert report "essentially lacking any data-driven analysis," which prevented the court from determining that the plaintiffs would be able to prove damages on a class-wide basis.[413]

The Court of Appeals for the Ninth Circuit agreed to hear an interlocutory appeal of the denial of class certification. The plaintiffs argued that: 1) they do not need to present individualized damage calculations at the certification stage and instead only need to present a method that can be used at trial; and 2) the district court erred by failing to credit the expert's methodology when it was sufficient to calculate damages at later stages of the litigation.

On November 13, 2019, the Ninth Circuit issued a non-precedential opinion denying the plaintiffs' appeal. The majority opinion concluded that under *Comcast Corp. v. Behrend*,[414] the plaintiff must proffer sufficient evidence to satisfy the court that Rule 23 is satisfied after a "rigorous analysis."[415] Without a developed model for class-wide impact, the district court would be unable to conduct this "rigorous analysis."[416]

Auto Parts (Ball Bearings). In January 2019, in the first-class certification decision of the *In re Auto. Parts Antitrust Litigation* MDL, the U.S. District Court for the Eastern District of Michigan denied a putative class of direct purchasers of ball bearings.[417] Ball bearings are used in both automotive and industrial machines and are sold to different sized purchasers who have different purchasing strategies. The proposed class representatives were small distributors of mostly aftermarket bearings. The court concluded that these representatives were inadequate and atypical because their interests were so different from the major purchasers of ball bearings, such as Toyota or Caterpillar, that likely purchased ball bearings directly from manufacturers at heavily negotiated prices. The difference was important because larger equipment manufacturers like the ones that were not named plaintiffs purchase the vast majority of ball bearings. Representatives from the smaller after-market distributors would be incentivized to ignore or minimize the bid rigging allegations that likely resulted in more damages to large equipment manufacturers. This decision may make it more challenging for the plaintiffs to find adequate class representatives, particularly in industries dominated by power buyers.

Another Can of Tuna Fish. In July 2019, the U.S. District Court for the Southern District of California certified multiple classes of buyers alleging to have suffered as a result of supra-competitive prices paid for packaged tuna products.[418] The litigation spawned from a DOJ investigation, announced in 2015, into a proposed merger between Thai Union Group and Bumble Bee Foods that led to a lengthy investigation into antitrust violations in the tuna industry as well as multiple follow-on civil actions alleging that packaged seafood manufacturers engaged in anticompetitive conduct, including agreements to fix prices of packaged tuna products.

The court certified multiple classes including a nationwide class of direct purchasers, multi-state classes of end-payors and commercial food preparers certified under California's Cartwright Act, and 32 individual statewide classes of end payers under the antitrust and consumer protection laws of those states. The defendants had objected to the multi-state classes certified under the Cartwright Act arguing that applying California law to multistate classes violated their due process rights.[419] The court rejected the defendants' arguments noting that all defendants carried out conspiracy-related conduct in California and that conspiracy-related conduct caused harm to California residents.[420]

Beyond Uninjured Class Members – Class Certification in the Pharmaceutical Industry

Suboxone Market. In September 2019, in *In Re: Suboxone Antitrust Litigation*, the U.S. District Court for the Eastern District of Pennsylvania specifically declined to certify a nationwide class of end payor plaintiffs seeking injunctive relief under Rule 23(b)(2).[421] The plaintiffs alleged a product-hopping scheme and misinformation campaign concerning Suboxone, a drug used to treat opioid dependence. End-payors were seeking injunctive relief including, among others things, a mandated price reduction and/or corrective safety disclosures to remedy the alleged ongoing anticompetitive effects of Indivior's (formerly Reckitt's) false representations that the older version of the drug was unsafe. In denying the end payor's class, the judge held that that "class members face no impending violation or any nonspeculative threat of future injury" because there was no claim that the safety misrepresentations were ongoing.[422] However, the court did grant certification to an "issues" class on the issue of liability (that excluded antitrust injury and damages) noting that the resolution of such an "issues class" will "either obviate the need for further individual trials or will fairly and efficiently advance those individual trials by definitively resolving multiple questions common to the class."[423] The certified issues included whether the defendant engaged in anticompetitive and deceptive conduct, whether the defendant willfully maintained monopoly power through such conduct, whether the defendant had a specific intent to monopolize; whether the defendant offered a non-pretextual procompetitive justification that could not have been obtained through less restrictive means, and if so; and whether the anticompetitive effects of the defendant's conduct outweigh their procompetitive justifications.[424]

Niaspin. In August 2019, the U.S. District Court for the Eastern District of Pennsylvania certified a class of direct purchasers of the cholesterol drug Niaspan in the pay-for-delay MDL against Teva and AbbVie.[425] The Niaspan pay-for-delay MDL concerns allegations by direct purchasers and end-payors that the settlement agreements entered into between Teva and AbbVie's predecessors (Barr and Kos) prevented generic versions of Niaspan from entering the market at an earlier date. End-payors' motion for class certification is pending.

Teva and AbbVie had argued that there is a conflict between named plaintiffs who all purchased brand Niaspan and other class members who only purchased the generic version because class members who purchased brand Niaspan would prefer an overcharges theory of injury, whereas the generic-only purchasers could theoretically pursue much larger lost-profits damages. The court sided with plaintiffs, noting that the possibility that a few plaintiffs may prefer pursuing a lost profits damages theory rather than the typical overcharge theory does not create the type of fundamental conflict required to defeat adequacy.[426]

Teva and AbbVie further argued that plaintiffs failed to provide common evidence of antitrust injury on the grounds that they raise three distinct theories of overcharge injury: (i) one for class members who only purchased the generic version of Niaspan, (i) one for class members who purchased brand Niaspan but ceased business operations before generic Niaspan became available, and (iii) one for class members who purchased both generic and brand versions. The court disagreed and held that direct purchasers "advance a single liability theory of unlawful conduct delaying generic competition that resulted in three types of overcharges" and are entitled to "seek several types of overcharge damages arising from that theory."[427]

Lovenox Market. In September 2019, the U.S. District Court for the Middle District of Tennessee certified a class of plaintiffs alleging that Momenta and Sandoz conspired to monopolize the market for the blood-clot drug Lovenox and its generic version by deceiving a standard-setting organization into adopting a standard incorporating the defendants' pending patent and gaining the ability to foreclose generic competition.[428] The court certified a class of thousands of hospitals, uninsured patients and third-party buyers that indirectly bought brand-name Lovenox or generic enoxaparin in 29 states and Washington, D.C.

Conclusion: Outlook for 2020

In 2019, media pundits started becoming conversant in antitrust parlance, especially as political candidates ramped up their use of antitrust as a talking point. With the presidential election coming up in 2020, we expect this to continue as candidates jockey for position and favor. The year ahead will bring new challenges and continued change, in the United States and globally. Technology companies will continue to be under close scrutiny, with the agencies looking for ways to show they are being responsive to calls for action in the sector. Both antitrust litigation and cartel enforcement in key markets around the world should continue at a steady pace and remain active.

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

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

Endnotes

To view the complete listing of endnotes for this report, please visit https://www.wsgr.com/email/Antitrust-Report/2019/Antitrust-Report-2019-Endnotes.pdf.

About Wilson Sonsini's Antitrust Practice

Wilson Sonsini's antitrust attorneys are uniquely positioned to assist clients with a wide range of issues, from day-to-day counseling and compliance to crucial bet the-company matters. Our accomplished team 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. We also advise clients on a full range of commercial issues, including pricing, distribution, vertical restrictions, standard-setting activities, joint ventures, and patent pooling. Working with Fortune 100 global enterprises as well as venture-backed start-up companies, our attorneys have expertise in virtually every significant industry sector, including technology, media, healthcare, services, transportation, and manufacturing.

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