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2023 ANTITRUST YEAR IN REVIEW

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Introduction

The Wilson Sonsini Antitrust practice is pleased to present its *2023 Antitrust Year in Review* report. This report highlights the most critical global developments in antitrust law, policy, enforcement, and litigation over the past year, with an emphasis on those that will have a lasting impact in the years ahead. We hope that this report will provide actionable guidance for both experienced antitrust practitioners as well as readers less familiar with competition law.

Please contact a member of the Wilson Sonsini Antitrust practice, identified throughout this report, with any questions you may have.

Mergers and Acquisitions

Substantial Policy and Procedural Shifts for U.S. Merger Review

The Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) made significant changes to both substantive and procedural aspects of the merger review process in 2023. In December 2023, the agencies released new combined merger guidelines replacing both the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines.[1]

Compared to prior editions of the Guidelines, the new Guidelines take a more antagonistic stance towards dealmaking generally and endorse theories of harm that have not been accepted by modern courts. Rather than establishing clear guidance rooted in modern case law, the new Guidelines set out sweeping principles based largely on case law from the 1960s-1970s and agency leadership views about how the law should be applied. Key differences in the new Guidelines include:

- **Greater emphasis on structural presumptions.** The new Guidelines treat increases in concentration as an *independent* basis for challenging a merger, contrary to the effects-based analysis endorsed by the U.S. Supreme Court since the 1974 *General Dynamics* decision. The Agencies state that they may challenge mergers in markets previously considered only moderately concentrated and may even challenge mergers in unconcentrated markets if part of a "trend towards concentration."
- **Harsher treatment of vertical mergers.** The new Guidelines establish a *presumption of illegality* for vertical mergers where either party holds a 50 percent or greater market share. The Guidelines also express more general concerns about potential foreclosure. Notably, the Guidelines state that the Agencies are unlikely to credit claims that rivals will be protected or commitments to do so—evidence that courts have considered both probative and persuasive.
- **Reduced reliance on market definition.** The new Guidelines state that even significant substitutes may be excluded from consideration if loss of competition among a narrower set of products may produce harmful effects. More generally, the Guidelines endorse a "fuzzy" approach that would allow flexibly including or excluding substitutes and state that head-to-head competition may allow inference of a relevant market without one being precisely defined.
- **Lower burden on nascent and potential competition theories.** The new Guidelines suggest that the Agencies will rely on a wider range of circumstantial evidence to identify potential market entrants such as the approach in *Meta/Within*,[2] which is in tension with judicial decisions requiring a reasonable probability of entry. The new Guidelines also presume that new entry would be effective absent direct evidence that the effect on market concentration would be *de minimis*. In the same vein, the new Guidelines endorse challenging acquisition of "nascent threats" even if the threat is uncertain and may not materialize for several years.
- **Focus on labor markets.** Consistent with the Agencies' broader focus on labor issues, the new Guidelines expressly take the view that mergers may be anticompetitive if they lead to a substantial reduction in competition for workers and that labor markets are frequently susceptible to such effects.
- **Return of conglomerate theories.** The new Guidelines endorse a theory that mergers may harm competition even in the absence of competitive overlap by "entrenching" a merging party's market leading position and making it harder to challenge. This theory had been heavily criticized and was abandoned in the 1982 revision of the Merger Guidelines only to reappear in the FTC's complaint in the *Amgen/Horizon* merger.[3]

The new Guidelines were preceded by a proposed rulemaking that would substantially expand the premerger filing requirements under the Hart-Scott-Rodino (HSR) Act.[4] The draft rules would require new narrative responses setting out a competitive analysis, sales and customer information, vertical relationships between the parties, strategic rationales for the transaction, and a closing timeline. Expanded document production requirements would require parties to submit documents relevant to antitrust analysis (even if not prepared in contemplation of the transaction), drafts of otherwise responsive documents, prior agreements between the parties, and organizational charts. The rules also include new requirements related to the Agencies' substantive priorities, including labor markets, minority investments, and

directors. The public comment period ended in September 2023, and a final rule has not yet been adopted.

The new merger guidelines and HSR form reflect agency leadership's increasing skepticism of mergers, and a growing schism between enforcement and judicial decision making. Firms can expect the agencies to undertake deeper and broader reviews (and therefore longer and more expensive reviews). Firms should be prepared for the agencies to explore novel theories of harm or even theories that have been unsuccessfully tested in the courts. Notwithstanding adverse decisions in court, the agencies remain aggressive in litigating merger challenges; firms should interpret these changes as a form of deterrence and not a way to elicit settlements.

U.S. Merger Litigation

The Agencies have continued to aggressively challenge mergers in court notwithstanding significant losses in recent years. In January 2023, the Northern District of California denied the FTC's motion for a preliminary injunction in the *Meta/Within* deal.[5] The FTC advanced both an actual and a perceived potential competition theory, arguing that the merger would forestall Meta's entry into the VR fitness app space. The court declined to dismiss the theory outright—a result the FTC has viewed as a vindication—but did find that the FTC had failed to carry its burden of showing that Meta's entry was "reasonably probable." Although this bar is higher than what the FTC argued (and higher than the bar later incorporated into the new Merger Guidelines), the FTC did not risk appeal.

The DOJ, however, did appeal its loss in the *U.S. Sugar/Imperial Sugar* case only for the Third Circuit to affirm the lower court's decision in July 2023, finding no clear error in its market definition analysis.[6] The government sought a market limited to producers *and* sellers of refined sugar (a narrowing consistent with the approach in the updated Merger Guidelines), while the defendants sought to include distributors of refined sugar. Both the trial court and the appeals court agreed that it was proper to consider market facts—and not solely the hypothetical monopolist test employed by the government—to conclude that distributors were significant competitors in the market for refined sugar.

In a doubly unusual case, the FTC brought and then later settled a case against the *Amgen/Horizon* merger.[7] The FTC challenged the deal in May 2023 on a conglomerate theory: although the two companies' pharmaceutical lines did not compete, the agency considered that post-merger Amgen could engage in cross-market rebating or bundling that would entrench its existing leading positions. Amgen followed the increasingly common practice of announcing a commitment not to engage in this behavior, but the FTC's complaint did not address this potential fix. Despite apparently rejecting them at the complaint stage, the FTC settled the case in September 2023 with an order that mirrored Amgen's earlier commitments and prohibited bundling or rebates involving certain Horizon medications.

The DOJ also accepted a settlement after initially challenging a merger, but otherwise required the parties to "fix it first" rather than enter consent decrees. The DOJ brought a case against Assa Abloy/Spectrum Brand Holdings on a traditional unilateral, loss of head-to-head competition theory.[8] The two companies competed in the sales of residential door locks but had agreed to divestitures that the parties believed would remedy the DOJ's concerns. The DOJ initially rejected the offer but after a few days of trial (and stern messaging from the court) settled on terms that echoed the parties' initial proposal but included a novel provision designed to allow the DOJ to seek additional relief at a later stage if the divestiture is unsuccessful.[9]

Merger litigation remains highly active in the Biden Administration, and the Agencies have shown willingness to litigate based on less conventional theories or weaker evidentiary records that are consistent with the new Merger Guidelines but that are not well established in the courts (and in some cases have even been rejected). Firms caught in the Agencies' crosshairs may need to adjust their responses to account for the Agencies' strategic approach to these litigations. The Agencies are increasingly litigating both with an eye to the merger at issue and to how the litigation will advance or obstruct longer-term goals for the law as embodied in the new Guidelines and new rulemakings.

Lessons from Global Review of Microsoft/Activision

Microsoft's acquisition of gaming publisher Activision Blizzard, which closed in October 2023, was one of the most significant global merger reviews of the year. The deal was announced in January 2022, and it instantly drew substantial political and enforcer scrutiny. Concerns about the deal centered on i) Microsoft's treatment of Activision content, particularly the popular Call of Duty franchise which had long been an anchor for both the Microsoft Xbox and Sony PlayStation consoles; ii) Microsoft's cloud gaming service, Game Pass; and iii) Microsoft's PC operating system. The FTC issued

a second request in March 2022.[10] The UK Competition and Markets Authority (CMA) and the EC initiated in-depth reviews in September 2022 and November 2022, respectively.[11] In response to these investigations, Microsoft offered commitments in November 2022 to license Call of Duty to both Sony and Nintendo for 10 years.[12]

The EC issued a nonpublic statement of objections to Microsoft in February 2023, but ultimately approved the deal in May 2023.[13] The EC found that Microsoft had no ability to harm competition among console developers. The EC concluded that Microsoft could harm competition in cloud gaming, but that the commitments to offer free licenses allowing consumers to stream Activision content through any cloud gaming service remedied its concerns.

The CMA issued a preliminary report in February 2023 and its final report in April 2023.[14] Like the EC, the CMA focused on whether the deal would give Microsoft the ability and incentive to withhold Activision content from cloud gaming competitors. Unlike the EC, the CMA found the proposed access commitments to be insufficient. The CMA formalized its final order prohibiting the merger in August 2023. Microsoft and Activision developed a restructured deal that would divest Activision's cloud gaming rights to Ubisoft and submitted it for CMA review. The CMA approved the revised deal in October 2023, and the transaction closed the same month.

The FTC was the most aggressive and immediate opponent of the deal. The agency lodged an administrative complaint in December 2022 and set trial for August 2023.[15] The FTC's complaint focused on the potential for Microsoft to either withhold access to key content, like Call of Duty, or to degrade performance of Activision content on rival services. The FTC pointed to evidence that Microsoft, in connection with a prior acquisition, had made certain titles exclusive to Microsoft, contrary to representations to the EC in connection at the time.

Amid reports that Microsoft might seek to close the deal near the timing of the UK CMA decision because of a looming contractual deadline, the FTC sought a preliminary injunction in federal court in June 2023.[16] The court denied the FTC's request, finding no evidence that distribution of Activision content would be substantially diminished either on consoles or in cloud gaming services.[17] The court focused in particular on Microsoft's commitments to offer licenses. Notably, the court rejected an argument from the FTC that it needed to show only an ability, an incentive, *or* functional factors like a trend to consolidation—a standard the FTC applied in the *Illumina/Grail* case and that is advanced in the new Merger Guidelines. Following the denial, the FTC initially paused its administrative proceedings against the deal but resumed them in September 2023, just before the deal closed. Separately, the FTC argued an appeal of the decision on the preliminary injunction to the Ninth Circuit.[18]

The Microsoft/Activision *case reveals significant differences among global leaders in antitrust enforcement on the treatment of vertical mergers and the use of behavioral commitments. Although there is increasing skepticism of behavioral remedies overall among global enforcers—even in relatively straightforward vertical distribution cases—evaluating them remains a fact-intensive exercise and can give the parties a stronger litigation position relative to the government. That said, different agencies may make different judgments about the behavioral commitments offered. Firms in globally significant deals should not lose sight of agencies' desire to establish leadership and shape global decision making in this evolving area of the law.*

Illumina/Grail Saga Ends in Divestment

Illumina first announced a deal to acquire Grail in September 2020.[19] Enforcers in the United States and Europe pounced on the deal, with the FTC filing an administrative complaint in March 2021 and the EC announcing an in-depth review in July 2021.[20] Both agencies were concerned that the acquisition would give Illumina the ability and incentive to prevent rivals from developing "multi-cancer early detection" (MCED) tests, a product that at that point only Grail had released commercially. Illumina closed the acquisition in August 2021, despite these pending challenges, prompting the EC to immediately open an investigation into whether doing so violated Illumina's standstill obligations and to (for the first time) impose interim hold separate measures.[21] Of note, the FTC moved for a preliminary injunction to prevent the close but dropped that challenge when the EC opened its investigation on the view that the EC's review would preserve the status quo pending resolution of the FTC case.

The EC reached a conclusion first, finding in September 2022 that Illumina would have the ability and incentive to withhold or degrade genetic sequencing systems that its competitors would need to develop MCED alternatives.[22] The EC renewed its hold separate measures.

The next month, the FTC's challenge faltered when the administrative court rejected the agency's challenge. The court made factual findings directly opposed to the EC's: that Illumina would not have the incentive to withhold its systems because entry for MCED tests was both speculative and remote.[23] The FTC appealed to the full commission, which overturned the administrative court ruling and ordered Illumina to divest Grail.[24]

Illumina challenged both the EC and the FTC orders. In Europe, Illumina lodged several appeals, including a jurisdictional challenge to the EC reviewing the deal under Article 22 of the EU Merger Regulation given that the parties had little to no turnover in Europe (which the EC exercised for the first time in this case). In July 2023, the EC concluded its gun-jumping investigation and imposed a record €432 million fine (including a first of its kind symbolic €1,000 fine on Grail, the acquisition target).[25] And in October 2023, the EC finalized restorative measures ordering Illumina to divest Grail.[26] Illumina refused, citing to its pending appeals.

In the United States, Illumina appealed the FTC decision to the Fifth Circuit on both statutory grounds and on the basis that the FTC's structure is unconstitutional. The court rejected both arguments.[27] With respect to the antitrust challenge, the court found that the FTC had produced sufficient evidence to show an ability and incentive to foreclose competition in the market for research and development of MCED tests, noting particularly evidence that Illumina intended the merger to be a cornerstone of a transition from a sequencing to a clinical testing company. The court also addressed Illumina's "Open Offer" to supply MCED tests to rival developers, a fix-it-first remedy Illumina had offered publicly in March 2021. The court found that Illumina had the burden to show that the Open Offer would offset competitive effects, but that the FTC had improperly required Illumina to show that the Open Offer would completely eliminate potential harm to competition rather than sufficiently mitigate it. Accordingly, the court vacated the FTC opinion and remanded for further consideration of the Open Offer. Nonetheless, three days after the Fifth Circuit's opinion, Illumina announced that it would divest Grail.[28]

Illumina/Grail *demonstrates that enforcers are taking increasingly expansive jurisdictional views and are continuing to assert their own prerogatives. In the EU, high profile cases may be reviewed even where turnover is minimal, and the relevant commercial activity is still in the future. And in the United States, the Fifth Circuit's opinion is a significant endorsement of vertical foreclosure theories and a reminder of the risks posed by the FTC's plenary review of its administrative cases.*

Wilson Sonsini's merger practice has deep experience in preparing firms to navigate a shifting landscape in merger enforcement. Wilson Sonsini has defended thousands of transactions before the U.S. DOJ, FTC, and European Commission. While the firm's antitrust merger team is truly global in scope, it operates as a singular unit that tackles the largest, most complex, and most high-profile antitrust mergers throughout the world—and it does so with an unmatched record of success. For more information, please contact Beau Buffier, Maureen Ohlhausen, Ben Labow, Michelle Yost Hale, Taylor Owings, Deirdre Carroll, or Robin Crauthers.

Civil Non-Merger Enforcement

Monopolization Cases Against Tech Platforms Multiply

This past year saw a flurry of civil enforcement in the tech sector all around the world, with a particular focus on monopolization cases and investigations involving technology companies. The cases span a range of theories, ranging from acquisition of potential competitors to exclusionary contracting practices to self-favoring.

Google

The search monopolization cases filed by the DOJ and by 49 state attorneys general (state AGs) against Google passed through summary judgment and were tried beginning in September. In the 2020 complaint,[29] the DOJ alleged that Google maintained a monopoly in general search and certain advertising markets, to the detriment of rivals like Microsoft, through agreements setting Google as the default search service in certain browsers and Android mobile devices. The state AGs additionally alleged claims concerning Google's specialized results and software it develops for managing search advertising campaigns across search engines.[30] Judge Mehta granted in part and denied in part summary judgment. The court granted Google's motion concerning the state AG claims that it had designed its "vertical" search results (e.g., for queries concerning hotels or local businesses) in a way that harmed specialized providers of similar information and thereby reinforced Google's alleged monopoly in general search services.[31] The remaining claims were tried in a 10-week bench trial, and

the parties' proposed findings of fact and law are due to be filed in early 2024. Wilson Sonsini, Williams & Connolly, and Ropes & Gray represented Google in these cases.

The DOJ also filed a separate case against Google in January 2023, alleging monopolization of a set of related technologies called the "ad tech stack" that facilitate the sale of online display advertising.[32] Notably, the case was filed in the Eastern District of Virginia "rocket docket," and the DOJ demanded a jury trial. The trial date was initially set for March 2024 but has now slipped to September 2024. A similar suit filed by a coalition of states led by Texas,[33] and recently transferred back to a Texas federal court under the State Antitrust Enforcement Venue Act, is set for trial in March 2025.[34] Google is also facing an investigation by the European Commission, which issued a statement of objections in June 2023 detailing its preliminary view that Google had abused its alleged dominance in publisher ad server and programmatic ad buying tool markets to unlawfully favor its other ad tech infrastructure.[35]

Amazon

In September 2023, the FTC, together with 17 state attorneys general, filed suit in federal court alleging violations of Section 5 of the FTC Act and Section 2 of the Sherman Act based on Amazon's alleged anti-discounting practices and pressure on sellers to use Amazon's fulfillment services.[36] The FTC alleges that Amazon's strategy creates feedback loops that reinforce Amazon's market power in online superstores and online marketplace services by conditioning access to important Amazon features, such as Prime or the Buy Box, on compliance with pricing requirements or use of Amazon fulfillment. Notably, the complaint includes a standalone Section 5 unfair methods of competition claim, consistent with the expansive view taken in the FTC's 2022 UMC Policy Statement,[37] and raises the prospect of structural relief in addition to behavioral changes.

This year, the Attorney General for the District of Columbia sought to revive its monopolization suit against Amazon.[38] The District sued in 2021, alleging that Amazon's "fair pricing policy" for marketplace sellers and policies for suppliers to Amazon's business increased consumer prices.[39] The case was dismissed in March 2022, with the judge finding that the state had not sufficiently pled anticompetitive effects.[40] The District announced its appeal in January 2023,[41] and arguments in the case were heard in December 2023.[42]

Meta

In April 2023, the U.S. Court of Appeals for the D.C. Circuit upheld dismissal of the state-led monopolization suit filed in 2020 alleging that Meta unlawfully monopolized the personal social networking market through acquisitions of potential competitors.[43] The court characterized the complaint as "not only odd, but old," noting that it focused on i) Meta's 2012 acquisition of Instagram and its 2014 acquisition of WhatsApp and ii) developer policies that had been withdrawn in 2018.[44] The court noted that the allegations appeared to depict a rapidly growing and innovative industry and concerned conduct of which the states had notice many years before they brought suit.[45] A parallel case brought at the same time by the FTC, which is not subject to the same timing limitations, remains ongoing.[46]

In Europe, enforcers continued investigations into how Meta uses data gathered from its marketplace to allegedly advantage its own offerings. Meta offered commitments to settle concurrent EC and UK CMA investigations.[47] The EC reportedly rejected the offer in July 2023,[48] but the CMA accepted commitments in November 2023 that would allow advertisers to opt out of Meta collecting and using their data in the Meta marketplace.[49] The CMA accepted commitments from Amazon to settle a similar investigation the same day.[50]

Microsoft

In July 2023, the EC opened its first investigation into Microsoft in a decade to assess whether it has unlawfully bundled or tied its Teams communication and collaboration product with the Office 365 or Microsoft 365 software suites.[51] The investigation follows on a complaint from Slack filed in 2020, at the height of the coronavirus pandemic and a key inflection point in the transition to virtual work.[52] In October 2023, UK media regulator Ofcom referred to the CMA an investigation into Microsoft's and Amazon's joint dominance of the cloud market.[53]

Enforcers have in the past year focused on understanding rapidly evolving AI technologies, including those developed or supported by established technology leaders. For instance, the FTC launched a Section 6(b) market inquiry into investments into generative AI and cloud service providers, including sending information requests to Alphabet, Amazon, Anthropic, Microsoft, and OpenAI.[54] The same month, the EC launched a call for contributors on competition in virtual worlds and generative AI, allowing interested parties to make submissions on the sector in general.[55] The EC has

stated that it will look at agreements between "large digital market players" and "generative AI developers and providers."[56]

Apple

In February 2023, the EC sent a revised statement of objections to Apple in its investigation of Apple's relationship with music streaming providers.[57] The EC dropped its conclusions as to Apple's in-app payment policies but reiterated that it considered policies limiting app developers' ability to tell users how they can subscribe without using Apple's in-app payment system (and thereby pay lower overall prices).[58] In the United States, the DOJ is reportedly in the late stages of an investigation into Apple broadly concerning whether the company is unfairly protecting the dominance of the iPhone and may file suit in the first half of this year.[59] The DOJ is reportedly investigating conduct including Apple Watch integration, Apple's iMessaging service, and Apple's in-app payment services.[60]

Enforcement interest in conduct cases in technology sectors shows no signs of letting up. The tech giants face a complex web of partially overlapping investigations, where different enforcers may collaborate or may investigate separately, potentially leading to inconsistent results. The potential for these cases to shape the development of major technology infrastructure industries is substantial, but these cases also bear watching because the legal theories and the investigation and litigation approaches used by enforcers may make their way to cases involving smaller companies or different industries as well.

EC Updates Its Approach to Abuse of Dominance

In 2023, the EC stated that its current guidance on abuses of dominance, which dates back to 2008, no longer reflected the EC's typical approach.[61] The EC issued an Amending Communication and has now begun consulting on revisions, with the goal of publishing new guidance in 2025.[62] The amendments confirmed the agency's "effects-based approach" but allowed for broader latitude in proving those effects. For instance, in foreclosure analysis, the EC may demonstrate that, rather than leading to outright exclusion or marginalization of competition, conduct adversely impacted an effective competitive structure and negatively impacted parameters of competition, such as prices, production, innovation, variety, or quality. Additionally, the EC recognized that potentially abusive conduct must not always be judged by its effect on "As-Efficient-Competitors" and provided other criteria for assessing price-based conduct.[63]

The EC's updated guidance expands potential liability for abuse of dominance beyond the EC's 2008 guidelines and aligns more closely with recent practice. While the guidelines continue to confirm the EC's commitment to economic analysis, they also endorse modes of proof that depart from well-established economic tests, such as the as-efficient competitor test. Potentially affected firms should carefully review the draft new guidelines, expected in mid-2024.

FTC Looks to Exercise Competition Rulemaking Power with Noncompete Prohibition

In January 2023, the FTC released a draft rule to ban all post-employment noncompete clauses as violations of Section 5 of the FTC Act's prohibition on unfair methods of competition.[64] A number of states now ban—or otherwise hold unenforceable—noncompetes in employment contracts as well, including California, Colorado, Minnesota, North Dakota, and Oklahoma.[65] The FTC had never issued a standalone unfair methods of competition rule, but it now asserts that it has had the power to do so under Section 6(g) of the FTC Act—an interpretation that has drawn substantial criticism.[66] The vote to issue the proposed rule was 3-1, with Christine Wilson issuing a dissent arguing that the FTC's rulemaking authority was at best unclear and that a blanket conclusion that noncompete provisions were unlawful was overbroad.[67] The proposed rule underwent public comment throughout the spring and summer of 2023, and the FTC is expected to vote on a final rule in 2024.[68]

The agencies' focus on labor monopsony cases has also led to investigations. Just prior to announcing the noncompete rule, the FTC entered into settlements with Prudential Security, Owens-Illinois Glass, Inc., and the Ardagh Group, S.A., under which the companies could not enter into noncompetes with many of their workers.[69] The DOJ in April 2023 brought and settled a monopsony action against Activision Blizzard, alleging the company limited competition for esports players and thereby suppressed their wages.[70] The consent decree prohibits Activision from implementing a "competitive balance tax" or otherwise restricting player compensation.[71]

The rulemaking on noncompete clauses is consistent with Agency leadership's expansive view of its enforcement powers and the promise of using all available tools to address strategic priorities. Labor markets have become a top priority for both Agencies, and going forward civil enforcement of labor agreements and allegedly monopsonistic hiring practices can be expected to complement the DOJ's criminal enforcement agenda in labor cases and an increased consideration of labor effects in merger cases.

Return of the Robinson-Patman Act

This year saw significant new investigations brought under the Robinson-Patman Act (RPA), a marked shift from the prior strong bipartisan consensus that RPA enforcement frequently harmed consumers. The RPA prohibits price discrimination for goods of like grade and quality unless the difference can be justified by differences in cost of manufacture, sale, or delivery (meaning that volume discounts are generally permissible), or when made to meet a competitor's price.

In March 2023, the FTC's investigation into Southern Glazer's Wine and Spirits—under both the RPA and Section 5 of the FTC Act—was made public.[72] In October 2023, Total Wine & More, one of Southern Glazer's retail customers, filed a petition to limit the scope of the FTC's civil investigative demand.[73] The FTC denied the petition.[74] Total Wine resisted further productions, particularly with respect to the FTC's requests for information about Total Wine's business strategies and competitor assessments, because Total Wine considered the requests unduly intrusive for a company that was a customer of an investigation target and not a target itself. The FTC filed in federal court to enforce the demand.[75] On December 18, 2023, before a ruling issued, the FTC and Total Wine notified the court that they had reached a settlement, the terms of which were not made public.[76]

The RPA applies only to the sale of commodities, limiting its reach considerably. But an aggressive investigative stance from the agencies means that firms that sell tangible commodity products at differentiated prices to different purchasers should carefully review their compliance. Although there are often good justifications for these price differences, the FTC's greater focus may increase the risk and regulatory costs associated with some pricing conduct. Moreover, the FTC's treatment of Total Wine suggests that even non-targets may be swept into burdensome investigation process.

Information Exchanges

In February 2023, the DOJ withdrew three policy statements concerning information exchange in the healthcare industry: the DOJ and FTC Antitrust Enforcement Policy Statements in the Health Care Area (issued in 1993); the Statements of Antitrust Enforcement Policy in Health Care (issued in 1996); and the Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Saving Program (issued in 2011).[77] The DOJ considered that these policy statements were too permissive but did not offer any replacement guidelines.[78] In a noteworthy enforcement action in this area, the DOJ sued Agri Stats in September 2023 over an information exchange among broiler chicken, pork, and turkey processors—all industries that have been subject to price fixing suits in recent years.[79]

The elimination of safe harbors found in the rescinded policy statements is consistent with a trend toward the expression of more flexible enforcement principles and away from more concrete guidance. Firms that previously relied on the guidelines in the rescinded statements should reevaluate any information exchanges in which they participate against more recent statements of policy from Agency leadership. The Agri Stats suit underscores Agency efforts to attack alleged anticompetitive behavior from multiple directions.

Developments in Pharmaceuticals Enforcement

The FTC has continued to enforce alleged misuse of pharmaceutical patents. But the FTC's efforts hit a stumbling block in August 2023, when the D.C. Circuit affirmed a decision dismissing the FTC's suit against Endo Pharmaceuticals and Impax Laboratories.[80] In its complaint, the FTC challenged a 2017 agreement to settle a long-running string of disputes between Endo and Impax, under which Endo would not reintroduce its branded oxymorphone (Opana ER) in exchange for a substantial royalty from Impax on Endo's patents related to the drug.[81] The FTC alleged that this agreement was an anticompetitive exclusive license, but both the trial court and the D.C. Circuit disagreed, holding that the license did not extend beyond the scope deemed permissible under patent law.[82]

In the past several months, the agency has made allegedly improper Orange Book listings a focus of its enforcement and deterrence efforts. In September 2023, the FTC issued a policy statement making clear that it believed that Orange Book listings not meeting statutory requirements could harm competition in violation of Section 5 of the FTC Act by distorting investment and planning decisions by generics firms.[83] In November 2023, the agency publicly announced that it had sent letters to 10 companies identifying more than 100 patents that the agency believed were improperly listed.[84] The FTC's announcement included a warning that holders of Orange Book patents should carefully evaluate their portfolios and ensure their listings meet statutory requirements.[85]

The deterrence strategy evident in the FTC's Orange Book letters may also be reflected in other Agency activity, such as policy statements concerning interlocking directorates and in the withdrawal of information-sharing policy guidelines in the healthcare sector. These efforts are backed by the Agencies' aggressive enforcement agenda but may be somewhat undercut by court losses in specific challenges.

Digital Regulation in the EU and the UK

In 2023, both the EU and the UK advanced digital regulation laws. In September 2023, the EC designated six companies as "gatekeepers" under the Digital Markets Act (DMA): Alphabet, Amazon, Apple, Meta, Microsoft, and Tik-Tok owner ByteDance.[86] The designation imposes upon the companies a duty to ensure that their "core platform services" comply with the DMA, including ex-ante obligations and prohibitions on interoperability, the use of data, and self-preferencing.[87] The designation also starts a six-month compliance countdown; the companies have until March 2024 to reach compliance.[88]

Meanwhile, the UK advanced the Digital Markets, Competition, and Consumers Bill (DMCCB). If approved, the DMCCB would grant the CMA similar enforcement powers against large technology companies, including the power to designate firms that possess Strategic Market Status (SMS) with respect to digital activities linked to the UK.[89] Unlike the DMA, however, designation under the DMCCB would only occur after an investigation and the CMA would be able to impose tailored rules of conduct on SMS companies.

The EC's designation of its first group of gatekeepers and the UK's advancement of the DMCCB underscore the new push for digital regulations around the world. These regulatory pushes may have significant spillover effects on, for example, commercial partnerships with data use at their core given the cross-border portability of data.

Wilson Sonsini is a global leader in counseling and investigation response for civil conduct matters. Due to our extraordinary track record, we are regularly called upon to represent all manner of companies, either in connection with an antitrust agency's investigation into the company's business practices or in helping an agency investigate the conduct of others. For more information, please contact Susan Creighton, Maureen Ohlhausen, Franklin Rubinstein, Brad Tennis, Taylor Owings, Jindrich Kloub, Deirdre Carroll, Keith Klovers, or Lisa Davis.

Private Litigation

The Two Epic Games Suits Reach Sharply Divergent Outcomes

Epic Games, maker of the popular video game Fortnite, sued both Apple and Google in on the same day in 2020 alleging that they had unlawfully monopolized app stores on iOS and Android, respectively, and required the use of first-party in-app payment systems. Although based on similar overarching claims, the two cases have reached sharply different outcomes. Following a May 2021 bench trial, Apple prevailed on the federal antitrust claims, but the court found that Apple's policy of preventing developers from using third-party in-app payment services as an alternative to Apple's violated the California Unfair Competition Law.[90]

In April 2023, the Ninth Circuit affirmed the substantive portions of the trial court's decision.[91] The court found that Apple had advanced cognizable and non-pretextual rationales for its app-distribution and in-app payment restrictions related to user privacy and security. The court observed that users could choose at the platform level between iOS and Android, with iOS offering marginally higher prices but better privacy and security through requiring first-party systems and with Android allowing the possibility of using third-party app stores or payment systems that might have reduced privacy and security. The court affirmed denial of Epic's tying claim and monopoly maintenance claim on the same basis, reasoning that it amounted to a challenge to Apple's overall structure of the app distribution system on iOS devices. The Supreme Court denied writs for certiorari from both sides.

Epic's case against Google proceeded on a later track than the case against Apple. In July 2021, a group of 36 states and the District of Columbia sued Google for the same conduct. Google and the states announced a settlement in September 2023, but did not release details until after the trial with Epic Games had concluded. Under the settlement, Google will pay $700 million and allow certain apps to use User Choice Billing—a program allowing apps to use alternative payment methods that had been previously rolled out internationally—in the United States.[92] In October 2023, Google settled a similar suit filed by the Match Group for $40 million and an agreement that Match could use User Choice Billing.[93]

After a six-week trial that began in November 2023, a jury found in Epic's favor, concluding that Google had maintained a monopoly over Android app distribution and in-app payments through agreements with app developers intended to keep them in the Play Store and agreements for installation of Google Play Store on Android devices manufactured by third parties such as Samsung.[94] Google announced that it will appeal the verdict.[95]

Although the Google and Apple cases were conceptually similar, they involved different facts and were tried to different finders of fact (one was a bench trial and one a jury trial). Observers should not over-read either of these cases, which underscore that antitrust litigation is a highly fact-intensive exercise.

Private Plaintiffs (and the DOJ) Test the Waters on Algorithmic Pricing Claims

Antitrust enforcers have in recent years focused on the potential for increasingly sophisticated algorithms to magnify the anticompetitive impact of shared information. For instance, in February 2023, DOJ Deputy AAG Doha Mekki highlighted the potential for pricing algorithms to extract competitively sensitive information even from stale or aggregated data and noted that concerns could be heightened where competitors adopt the same pricing algorithms. Private plaintiffs have begun to test these theories of harm in the courts.

In January 2023, a class action complaint was filed in *Gibson v. MGM Resorts Int'l*,[96] against four Las Vegas hotel operators (Caesars, MGM, Treasure Island, and Wynn) as well as Cendyn, developer of a revenue management platform called Rainmaker that is commonly used by Las Vegas hotels. The suit alleged that common use of Rainmaker for pricing recommendations effectively shared pricing and availability information among hotel operators, leading to higher prices. In October 2023, a federal judge dismissed the complaint on the grounds that the complaint failed to allege any direct agreement or a hub and spoke conspiracy, in part because of the complaint lacked requisite specificity about which pricing algorithms the defendants used.

Similar algorithmic-pricing-related claims were made in *In re RealPage Rental Software Antitrust Litigation (No. II)*,[97] an MDL consolidating dozens of cases in two groups: one targeting student housing developers and one targeting multifamily housing developers. On November 15, 2023, the DOJ, which had opened an investigation into RealPage's software in 2022, filed a Statement of Interest in the litigation. (Less than two weeks later, the plaintiffs in *Gibson* filed a 255-page amended complaint alleging that the conduct is equivalent to that alleged in *RealPage*.). The DOJ argued that the plaintiffs had adequately alleged concerted action based on RealPage's open solicitation and use of nonpublic pricing and supply data. The DOJ further argued that using an algorithm to mediate prices warranted *per se* treatment when "competitors knowingly combine their sensitive, nonpublic pricing and supply information in an algorithm that they rely upon in making pricing decisions, with the knowledge and expectation that other competitors will do the same" (even when the conspiracy involves a vertical player like RealPage). Wilson Sonsini represents one of the defendants in the case.

In January 2024, the court denied the *RealPage* defendants' omnibus motion to dismiss.[98] The court addressed both groups' allegations, finding that plausible allegations of parallel conduct together with numerous plus factors supported a reasonable expectation that discovery would reveal evidence of an illegal agreement. However, the court found that neither group alleged the kind of straightforward conspiracy subject to *per se* condemnation and instead examined both using the "rule of reason" analysis. The court found that multifamily plaintiffs plausibly alleged an anticompetitive restraint of trade under this standard but granted the motion to dismiss filed by defendants who own and manage certain student housing properties, finding that the student housing plaintiffs failed to allege appropriately tailored geographic markets or to sufficiently support allegations of price increases covering years and towns across the entire country.

The RealPage *decision is significant, but the court acknowledged explicitly that inexperience with algorithmic pricing counseled against* per se *treatment, and so greater familiarity may lead to greater scrutiny in time. Remarks from the DOJ leadership, together with its investigative and* amicus *activity, suggest that the Agencies will be looking for cases—both enforcement actions and private actions—to push the law toward* per se *treatment.*

Gilead and Teva Vindicated in $3.6 Billion Pay-for-Delay Suit

In June 2023, the jury returned a verdict for Gilead and Teva Pharmaceuticals in a class action claiming $3.6 billion in damages arising from an allegedly unlawful pay-for-delay scheme for HIV medications Truvada and Atripla.[99] The case was the third verdict for the defendants in a pay-for-delay case since the *Actavis* decision; there have been no

successful private plaintiff suits.[100] This case arose from a 2008 patent dispute between the companies, which was settled in 2014. The plaintiffs alleged that Gilead unlawfully agreed to give Teva a six-month exclusivity period for generics starting in September 2020 in exchange for Teva dropping its challenges. Because there was no direct money payment in the deal, the plaintiffs argued that this the exclusivity period constituted a payment to Teva.

The jury found that the plaintiffs failed to prove that Gilead exercised market power and failed to prove the existence of a reverse payment. As to market power, the jury evidently accepted the defendants' argument that the relevant market should include alternative HIV therapies and should not be limited to the specific branded drugs at issue and their generics. As to the payment, this case was somewhat unusual in that Teva waived privilege over documents from the underlying patent litigation showing that Teva knew Gilead's patents were strong and that Teva was unlikely to succeed in its case.[101] Gilead maintained privilege over its own documents, creating an asymmetry reinforced by a motion *in limine* preventing the plaintiffs from arguing any adverse inferences from Gilead's assertion of privilege.[102] The defendants further argued that Teva was not in fact delayed entering the market under the settlement and that other generics providers could have entered even earlier than Teva if they had successfully challenged the patents.

Previous losses in pay-for-delay cases tried to a jury were based on 1) a failure to show that defendants would have agreed on an earlier entry date but for the anticompetitive effects of the deal they made[103] and 2) failure to show that anticompetitive effects outweighed procompetitive benefits of the challenged deal.[104] A loss based on market definition reinforces that plaintiffs in pay-for-delay cases face many varied hurdles in making a successful claim. These hurdles are all the greater where there is not a direct monetary payment and defendants are able to cast doubt on the strength of the underlying patent litigation. As to this latter point, one-sided waiver of privilege may be a powerful tool for defendants.

Summary Judgment Ruling in Suboxone Litigation Acknowledges Brand Contracting Practices Can Harm Competition by Foreclosing Generic Competition as Part of an Overarching Scheme

In response to patent infringement claims brought by Indivior, Alvogen lodged antitrust counterclaims alleging "a prolonged and overarching anticompetitive scheme to protect Indivior's monopoly power for" Suboxone Film. This multi-pronged conduct included sham patent litigation and a series of anticompetitive exclusionary agreements with third-party payors and pharmacy benefit managers (PBMs). As part of its counterclaim, Alvogen alleged that Indivior put in place rebate structures that subjected payors to a "substantial, punitive price increase on branded Suboxone Film" if they switched to generics. The court found on summary judgment that Alvogen had put forth sufficient evidence to take the case to trial.[105] The court focused on economic evidence of foreclosure—absent in *Eisai*—in the form of analysis showing that Indivior's share after the launch of generics was higher than predicted by internal studies of analogous situations. The fact that Alvogen was able to gain some share was not dispositive; the question was whether Alvogen gained substantially less share than it would have absent the illegal exclusionary conduct. The court also emphasized evidence that Indivior intended for its rebate strategy to foreclose competition but discounted evidence that Indivior had not directly coerced or threatened payors. Finally, the court rejected Indivior's arguments that Alvogen had not shown absolute price increases, holding that the standard was to show increases above the but-for world.

The Indivior *decision provides important touchpoints for plaintiffs seeking to challenge exclusionary conduct by brands, especially in the context of multifaceted schemes that prolong monopoly power through a combination of mechanisms.*

FTC Backs Mylan's Improper Orange Book Listing Claim Against Sanofi

In May 2023, Mylan, represented by Wilson Sonsini, filed suit against Sanofi.[106] Mylan alleged that Sanofi employed exclusionary bundled discounts for its branded injectable insulin glargine products Lantus and Toujeo and also improperly listed patents in the Orange Book to delay the introduction of Mylan's generic version, Semglee. Listing a patent in the Orange Book has significant consequences: if a patent-holder timely sues for infringement of a listed patent, the U.S. Food and Drug Administration (FDA) is automatically barred from approving the defendant's allegedly infringing drug for up to 30 months. The FDA historically has verified that Orange Book applicants make the proper representations but has not independently verified that the statutory criteria for inclusion are actually met.

Sanofi moved to dismiss Mylan's claims in September 2023.[107] In November 2023, the FTC filed an *amicus curiae* brief arguing that improper listing in the Orange Book can cause significant harms to competition—without taking any position on Mylan's factual allegations.[108] The FTC noted that the 30-month block on generic competition provides a powerful incentive for brands and, if improperly triggered, can substantially distort the planning and incentives of generics competitors. As of this writing, the court's decision on the motion to dismiss is pending.

In addition to filing in this case to support Mylan's legal theory, the FTC sent numerous letters to pharmaceutical manufacturers identifying potentially improperly listed patents and has indicated that improper listings could be viewed independently either as monopolization or a violation of Section 5 of the FTC Act.[109]

Increased focus on the Orange Book listing process itself is consistent with FTC leadership statements that the agency will look to use all available tools—here FDA regulatory requirements—to address potential competition concerns.

Wilson Sonsini's antitrust litigation practice has deep experience in both plaintiff and defense litigation across industries and has been at the forefront of developments in the law. Wilson Sonsini has delivered superior results for clients and is regularly called on to represent companies in their most important and strategic litigation matters. For more information, contact Wendy Waszmer, Chul Pak, Seth Silber, Jeff Bank, Ken O'Rourke, Brad Tennis, Brendan Coffman, or Rachael Racine.

Cartels and Criminal Enforcement

The DOJ Obtains Notable Enforcement Wins but Also Faces Some Setbacks

The DOJ has continued to focus heavily on individual prosecutions over the past year. Indeed, during its fiscal year 2023 (ending September 30th), the DOJ filed nine criminal cases that resulted in 22 charges against individuals. For instance:

- In February 2023, it secured a conviction against Michael Flynn in connection with bid-rigging and fraud schemes concerning insulation installation for public and private entities in Connecticut (including the University of Connecticut, PepsiCo, the City of Hartford, Stamford Hospital, and Yale University).[110] Flynn was sentenced to 15 months imprisonment and restitution of more than $1 million.

- In August 2023, Dr. William Harwin pled guilty to a conspiracy spanning 17 years to allocate chemotherapy and radiation treatments among different providers.[111] Harwin was sentenced in November 2023 to three years of probation and a $50,000 fine.[112]

- Also in August 2023, two military contractors, Aaron Stephens and John Leveritt, were sentenced for their involvement in a scheme to coordinate bids for military vehicle repair and maintenance.[113] Stephens was sentenced to 18 months in prison and a $50,000 fine while Leveritt was sentenced to six months in prison and a $300,000 fine.

As for companies, criminal antitrust prosecutions remained low this past year, with corporate fines near record lows. But the DOJ nevertheless took noteworthy enforcement action against several companies in 2023.

- In August 2023, the DOJ entered into a deferred prosecution agreement (DPA) with Teva Pharmaceuticals and Glenmark Pharmaceuticals.[114] Teva admitted to participating in conspiracies to fix prices for pravastatin (cholesterol medication), clotrimazole (skin infection medication), and tobramycin (eye infection and cystic fibrosis medication), and Glenmark admitted to a role in the pravastatin conspiracy. The agreement follows a number of other individual and corporate settlements related to the same alleged conspiracies running back to 2020. Teva agreed to a $225 million criminal penalty (the largest to date for a domestic antitrust cartel) and to make a $50 million donation to humanitarian organizations. Glenmark agreed to a $30 million criminal penalty. The case also involved a highly unusual remedy for criminal antitrust cases: both Teva and Glenmark were required to divest their pravastatin lines. The DOJ has now settled all corporate criminal charges arising from these alleged conspiracies, with the seven companies involved paying a total of more than $681 million in criminal penalties.

The DOJ's Procurement Collusion Strike Force (PCSF) also remained active in investigating anticompetitive collusion in connection with government

contracts. In September 2023, the DOJ secured a guilty plea arising from an investigation into bid-rigging and fraud for subcontracting work in U.S. military bases in South Korea. J&J Korea was sentenced to pay a $5 million fine and make restitution of $3.6 million for its role.[115]

But the DOJ's PCSF prosecutions have hit speedbumps in court this past year. In May 2023, the DOJ suffered its first loss in a PCSF-based prosecution. A jury acquitted Kamida Inc. of Hamel, a Minnesota concrete repair and construction corporation, as well as its CEO, Steven Dornsbach, of criminal charges for conspiring to rig bids on concrete repair and construction contracts for municipalities in Minnesota from at least 2012 through 2017.[116] The case was the DOJ's second indictment arising from the investigation. The first indictment, against contractor Clarence Olson, had resulted in a guilty plea in 2021.[117] Olson testified against Kamida and Dornsbach during the trial.

Also, in December 2023, the Fourth Circuit overturned the DOJ's first bid-rigging conviction via a jury trial arising from the PCSF and complicated the DOJ's prosecutions going forward. Contech Engineered Solutions and its employee Brent Brewbaker were indicted on charges of coordinating bits for aluminum-structure projects with Contech's distributor Pomona Pipe Products.[118] In 2021, Contech pled guilty and was ordered to pay a $7 million criminal fine,[119] and Brewbaker was convicted of *per se* violation of Section 1.[120] In 2023, however, the Fourth Circuit overturned the Brewbaker conviction, reasoning that because Contech and its competitor Pomona were in a hybrid horizontal and a vertical relationship, the indictment failed to state a *per se* antitrust offense.[121] The holding is a significant blow to the DOJ's position that collusion among competing bidders is a *per se* violation regardless of their other relationships.

In sum, the DOJ's criminal enforcement in 2023 continued to focus on holding individuals accountable, prosecuting coordination around government bidding, and taking new approaches to prosecuting companies (see, e.g., Teva/Glenmark DPAs). The DOJ also continued its efforts to broaden the per se *standard of liability (which is necessary to bring more criminal cases) but faced some judicial resistance to this attempt as noted above and below. This might make prosecution of future coordination cases more difficult.*

No Traction for No-Poach in U.S. Courts, but International Enforcement May Pick Up

The DOJ's campaign to bring criminal no-poach prosecutions has not ended,[122] but it faced some significant setbacks in 2023. In total, the DOJ brought six criminal cases against collusion around hiring since 2021. Although these cases have generally survived motions to dismiss on a *per se* theory of liability, the DOJ has been unable to meet its burden to achieve convictions at trial. In March 2023, a jury acquitted defendants on combined no-poach and wage-fixing charges in *United States v. Manahe*.[123] The jury was apparently persuaded by arguments that there was no agreement, as the defendants frequently broke ranks from what was allegedly "agreed."

Also, in April 2023, a court entered an order of acquittal for all defendants in a separate case alleging a conspiracy to allocate skilled aerospace employees among the defendants' employers.[124] The defendants convinced the court to allow them to present evidence showing a lack of impact on wages or employee mobility and potential procompetitive benefits. The defendants reasoned that the evidence presented by the DOJ was irrelevant to the existence of an agreement and does not show the defendants' intent to join a market allocation agreement. The defendants further argued that they deserve a chance to prove that the agreement, if any, was ancillary to a legitimate purpose. The court ultimately put the burden on the DOJ to prove that the alleged agreement meaningfully allocated the market for aerospace employees and lacked any redeeming value. After the government put on its case at trial, the court granted a motion for judgment of acquittal, finding that the DOJ had not carried that burden.

Finally, in November 2023, the DOJ voluntarily and without explanation dismissed its last no-poach case, involving charges that Surgical Care Associates conspired with rivals not to solicit senior employees.[125]

At the same time the DOJ is winding down its recent no-poach prosecutions, enforcers in other jurisdictions are increasing their scrutiny. In February 2023, the UK CMA issued guidelines for employers identifying no-poach agreements (along with wage-fixing agreements and information sharing) as conduct that could potentially support finding an unlawful cartel.[126] In June 2023, new criminal prohibitions against wage-fixing and no-poach agreements in Canada came into effect. The Competition Bureau of Canada released enforcement guidelines indicating that the offenses would be treated prospectively as *per se* violations.[127] And in November 2023, the EC announced that it had extended its 2022 antitrust

probe into online food delivery services and conducted additional unannounced inspections to investigate alleged no-poach agreements in the industry.[128]

Although the DOJ received some setbacks in no-poach prosecutions in 2023, it continues to bring wage-fixing cases. In March 2023, the DOJ obtained an indictment against Eduardo Lopez for a conspiracy to fix wages for nurses in Las Vegas between 2016 and 2019.[129] In September 2023, the DOJ obtained a superseding indictment that added charges that Lopez had fraudulently concealed both the conspiracy and the government's investigation in order to sell his company.[130]

Firms should not over-read the DOJ's record in no-poach cases. Although the DOJ has not found success on the merits, it is significant that the DOJ has consistently beaten motions to dismiss while advancing per se *liability theories. The Agencies have continued to place substantial emphasis on conduct affecting labor markets more broadly and have emphasized in public remarks throughout the year that criminal enforcement in this space remains on the table. Of particular note, DAAG Mekki noted in December 2023 that credibility concerns may have hampered the DOJ's no-poach cases and suggested that in future cases it might rely more heavily on covertly gathered evidence, such as wiretaps.*

ESG Collaborations Closely Monitored by Enforcers

Environmental, social, and governance (ESG) initiatives have been increasingly important to companies and their shareholders, but pressure from enforcers and legislators has created substantial uncertainty about possible antitrust risks, particularly in the United States. In 2022, DOJ AAG Jonathan Kanter and FTC Chair Lina Khan gave testimony emphasizing that there is no exemption in U.S. antitrust law for ESG agreements.[131] While U.S. enforcers have not increased enforcement against any such collaboration, the enforcers' reminder should be noted, as they remain on high alert for improper coordination around ESG.

Indeed, the antitrust agencies are getting pressure from lawmakers to find and prosecute improper ESG coordination. For instance, in June 2023, Representative Jim Jordan, chair of the House Judiciary Committee, drafted a letter to Ceres, alleging that the organization was facilitating collusion through its sponsorship of the Climate Action 100+ investor coalition, including a subpoena.[132] In November 2023, Representative Jordan issued additional subpoenas to As You Sow, a member of Climate Action 100+, and to the Glasgow Financial Alliance for Net Zero, following up on letters requesting document and information that had been sent over the summer and again asserting that the organizations were facilitating collusion that may violate the antitrust laws.[133] Wilson Sonsini represented As You Sow in connection with Congressional interviews. Additionally in December 2023, the House panel subpoenaed The Vanguard Group and Arjuna Capital,[134] and Representative Jordan again subpoenaed BlackRock and State Street[135] for documents and communications related to its probe into whether their ESG efforts violate antitrust laws.

Other global enforcers have both provided more concrete guidance and generally been more permissive in their treatment of ESG collaborations. In June 2023, the EC revised its rules and guidelines governing cooperation among competitors.[136] The revised guidelines signal the EC's newly accommodating stance for joint sustainability initiatives and clarify the ones that are unlikely to raise competition concerns, e.g., because their exclusive aim is to comply with "sufficiently precise" international treaty requirements. In addition, the EC creates a "soft" safe harbor for certain standard-setting sustainability agreements, provided that cumulative conditions are met (e.g., possibility for participants to adopt higher standards). Under the revised guidelines, sustainability agreements that negatively impact competition can benefit from an exemption if, *inter alia*, they generate broadly defined efficiencies that outweigh the harm to consumers.

In parallel, the UK CMA in October 2023 published guidance on collaboration to further sustainability goals.[137] The guidance builds on the approach taken in the EU Guidelines and includes even more permissive stance towards agreements directed to addressing climate change. Earlier in the year, in March 2023, the Japan Fair Trade Commission published "Green Guidelines," which establish generally that collaborations legitimately directed to sustainability goals are likely to be unproblematic.[138] Such initiatives should generally be evaluated by balancing limitations on competition against benefits to innovation and consumer choice.

Many common ESG initiatives or ESG shareholder activism do not appear to create substantive antitrust risks under U.S. law. But the evident political interest in ESG initiatives, coupled with the lack of meaningful guidance from antitrust authorities, creates uncertainty and may chill efforts at ESG initiatives. Guidance from ex-U.S. jurisdictions has been clearer

and more protective of sustainability initiatives. Such guidance generally directs competition authorities to consider the pro-competitive effects of legitimate sustainability collaborations but making clear that clearly harmful collusion cannot be "greenwashed."

Enforcers Employing Increasingly Varied Detection Tools

Cartel formation has moved beyond the "smoke-filled room," and antitrust enforcers around the globe have had to update their detection techniques to keep up with increasingly sophisticated formation and management of unlawful cartels. In March 2023, both U.S. enforcement agencies announced a focus on ephemeral messaging applications. The FTC stated that its newly formed Criminal Liaison Unit would focus on crimes facilitated with ephemeral messages,[139] and DOJ AAG Kenneth Polite, Jr. announced changes to how a company's use of personal devices and ephemeral messaging applications will be considered under the Evaluation of Corporate Compliance Programs.[140] Enforcers are also taking steps to improve detection of collusion facilitated through algorithms. In remarks at the South by Southwest festival, DOJ AAG Jonathan Kanter detailed the agency's effort to build artificial intelligence expertise to monitor and analyze algorithmic coordination—a project called "Project Gretzky," in reference to the hockey legend's famous line about "skating to where the puck is going."[141]

International competition agencies are increasingly cooperating as part of their cartel investigations. In particular, the EC conducted dawn raids after consulting with the DOJ, the CMA, and other agencies such as the Swiss Competition Commission and the Turkish Competition Authority.[142] In January 2024, senior EC and DOJ officials mentioned an "intensified" cooperation in the context of leniency applications, in particular by sharing information from informants.[143] At the same time, enforcers continue to rely on traditional tools as well, such as leniency programs, dawn raids, and market monitoring programs. In October 2023, the U.S. DOJ announced that it would provide leniency to buyers in mergers and acquisitions that report criminal conduct of the acquired company within six months from the date of closing.[144] This announcement bolsters the DOJ Antitrust Division's current leniency program for antitrust offenses. In Europe, the EC carried out seven publicly confirmed dawn raids in 2023 across a range of industries, including online food delivery, construction chemicals, medical devices, and fragrances—nearly twice as many as it carried out the year before.[145] Courts have been careful to protect procedural safeguards governing dawn raids. In March 2023, the European Court of Justice annulled two EC dawn raids on supermarket chains because the agency failed to record the interviews relied upon to justify the searches.[146] And in the United Kingdom, the Competition Appeal Tribunal (CAT) made clear that the bar for raiding a home—an increasingly likely occurrence in an era of hybrid work—is quite high and requires a specific showing of a likelihood that the documents sought would be destroyed rather than produced.[147]

Cartel detection has become more complicated by technological and social trends over the past several years. Enforcers are reacting to these trends by developing and employing new detection tools and adjusting existing tools—both those based on self-reporting and those based on agency action—to keep pace. As enforcers gain experience with these tools, they may begin to discover collusive activity that had previously gone undetected.

Wilson Sonsini's criminal antitrust practice is a global leader and leverages the deep government enforcement experience of its members to deliver outstanding results for both individual and corporate clients. For more information, contact Brent Snyder, Mark Rosman, Jeff VanHooreweghe, Jindrich Kloub, or Karen Sharp.

Conclusion

Over the past several years, antitrust issues have come to the fore in public discourse, and that focus has been reflected in significant changes in antitrust law and policy and in more wide-ranging and aggressive enforcement activity. Wilson Sonsini will continue to provide updates and guidance on these developments to its clients and colleagues throughout the coming year. If you have any questions about the matters discussed in this report or any other antitrust matter, or if you would like to receive an ongoing summary of antitrust developments throughout the year, please contact your regular Wilson Sonsini attorney or any member of the firm's antitrust practice.

Endnotes

To view the complete listing of endnotes for this report, please visit
https://www.wsgr.com/email/Antitrust-Report/2023/Antitrust-Report-2023-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 is consistently recognized among the leading antitrust practices worldwide by such sources as *Global Competition Review*, *Chambers*, and *Law360*. *Global Competition Review* has 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, Brussels, and London, our highly regarded antitrust attorneys advise clients with respect to mergers and acquisitions, criminal and civil investigations by government agencies, antitrust litigation, and issues involving intellectual property, consumer protection, and privacy. We advise clients on a full range of issues, including pricing, distribution, vertical restrictions, standard-setting activities, joint ventures, and patent pooling. Working with Fortune 100 global enterprises as well as venture-backed start-up companies, our attorneys have expertise in virtually every significant industry sector, including technology, media, healthcare, services, transportation, and manufacturing.

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