

# WILSON SONSINI



## 2020 ANTITRUST YEAR IN REVIEW

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## Introduction

Wilson Sonsini Goodrich & Rosati is pleased to present its 2020 Antitrust Year in Review, which summarizes the most significant antitrust matters and developments of the past year. Antitrust activity has not slowed down during the COVID-19 pandemic and may in fact have accelerated. Continuing the trend of the last several years, antitrust enforcement—both government and private—has become an increasingly prominent part of the public discourse, particularly with respect to technology and digital platform industries. More traditional enforcement has proceeded apace as well, with pharmaceuticals, intellectual property licensing, price-fixing and bid-rigging, and nascent competitor acquisitions in the spotlight.

In this report, we examine the final year of antitrust enforcement under

the Trump administration and analyze actions by both U.S. antitrust agencies and enforcers in other jurisdictions around the world across a range of merger review, civil conduct, and criminal enforcement matters. The mergers chapter highlights a range of new guidance issued by U.S. agencies this year, developments in the treatment of efficiencies in merger analysis, and the growing importance of the UK Competition and Markets Authority in merger clearance. The agency investigations chapter notes continued areas of cooperation and contention between U.S. agencies and discusses the priorities of U.S. enforcers (federal and state) and non-U.S. enforcers (focusing particularly on the European Commission and EU member states). The criminal enforcement and cartel chapter provides updates on the Department of Justice's enforcement

agenda and leniency program. We also describe recent actions in other jurisdictions, including the EU, UK, Canada, South Korea, Japan, China, and Brazil. This report concludes with an update on private antitrust litigation, with particular emphasis on developments in pharmaceutical cases and the increasingly critical class certification process.

We hope you find our 2020 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 Enforcement

The year 2020 was an eventful one for merger review and enforcement around the world. In the United States, the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) published new guidance regarding vertical merger enforcement, merger remedies, and Hart-Scott-Rodino (HSR) filing requirements. The agencies, along with their state-level counterparts, had packed merger enforcement agendas. The challenges to *T-Mobile/Sprint* and *Peabody Energy/Arch Resources* put a spotlight on efficiencies defenses. More generally, the agencies continued to bring traditional merger enforcement cases, focusing on both acquisitions that increase concentration in already concentrated markets and acquisitions of nascent competitors. That said, the FTC did bring two novel actions against consummated mergers, while the DOJ used its authority to resolve a matter in arbitration—a first for the agency.

Internationally, merger enforcers continued to closely review competitive effects arising from merging data or data collection resources. The European Commission saw increased judicial scrutiny of its merger review program, while European enforcers continued to bring tough sanctions against procedural breaches. Finally, the United Kingdom's Competition and Markets Authority continued to increase its jurisdictional reach and to zealously challenge global deals—a trend that is only likely to continue as the Brexit transition period ends.

## Guidance Galore: New Guidelines and HSR Rule Interpretation

### *Vertical Merger Guidelines*

In June 2020, the DOJ and the FTC released the final version of the long-awaited update to the joint Vertical Merger Guidelines, which were last issued in 1984.<sup>1</sup> Recent enforcement activity—such as *AT&T/Time Warner* and *Staples/Essendant*—has exposed deep rifts on key questions of legal doctrine and economic analysis both in the antitrust bar and between and within enforcement agencies.

For example, the new guidelines are silent on the topic of remedies for vertical mergers because of disagreement between the agencies. The FTC has been willing to accept behavioral remedies such as firewalls. The DOJ, on the other hand, has been far more critical of behavioral remedies, recently stating in its Merger Guidelines Manual (discussed below) that “no matter how well crafted, the risk of collaboration in spite of the firewall is great.”<sup>2</sup> The FTC itself was sharply divided along party lines on the new Vertical Merger Guidelines. Both Democratic commissioners dissented from the vote adopting the guidelines, criticizing them for overemphasizing the potential benefits of vertical mergers and failing to consider alternative theories of harm.<sup>3</sup>

The new Vertical Merger Guidelines lay out the following key principles:

- **Market definition, market shares, and concentration.** The agencies will identify a relevant market and one or more “related products,” meaning a product that is supplied or controlled by the merged firm

and is positioned vertically or is complementary to the products and services in the relevant market.<sup>4</sup> Unlike horizontal mergers, the agencies cannot use changes in concentration as a screen for competitive effects.

- **Anticompetitive effects.** The guidelines recognize that vertical mergers can harm competition by raising rivals' costs, causing foreclosure,<sup>5</sup> increasing the likelihood of post-merger coordination,<sup>6</sup> or facilitating access to sensitive business information about its upstream or downstream rivals that was unavailable to it before the merger.<sup>7</sup>
- **Procompetitive effects.** The guidelines also recognize that vertical mergers can generate efficiencies that benefit competition and consumers,<sup>8</sup> such as through elimination of double marginalization (EDM). This efficiency—unique to vertical mergers—results from the merged firm gaining access to an upstream input at cost and avoiding the margin that would be imposed by a separate upstream input provider.<sup>9</sup>

### *Merger Remedies Guidelines*

In September 2020, the DOJ issued an updated Merger Remedies Manual, which lays out the agency's framework for structuring and implementing relief in merger cases short of a full-stop injunction.<sup>10</sup> Key aspects of the new Manual include:

- **Structural versus behavioral remedies.** The DOJ further underscored recent emphasis on its preference for structural remedies involving the sale of businesses or assets by the merging firms over conduct remedies restraining the



merged firm's business conduct or pricing authority.<sup>11</sup> The Manual states that structural remedies are “clean and certain, effective, and avoid ongoing government entanglement in the market,”<sup>12</sup> while conduct remedies are only appropriate in very limited situations.<sup>13</sup>

- **Consent enforcement.** The DOJ is renewing its focus on enforcing obligations against merging parties in consent decrees. The Manual sets out new standard provisions that must be included in consent decrees and highlights the role of the newly created Office of Decree Enforcement and Compliance (ODEC) to oversee compliance efforts across the DOJ.<sup>14</sup>

#### *Changes in HSR Interpretation*

In September 2020, the FTC announced an important change in its interpretation of the HSR Rules' treatment of special dividends.<sup>15</sup> HSR Rule 801.90 states that merging parties cannot use a transaction structure for the purpose of avoiding or delaying their filing obligation. FTC staff determines whether avoidance or delay was the objective by applying a “but for” test.<sup>16</sup> If the transaction's structure was motivated by some benefit from avoiding or delaying HSR filing, then it is an “avoidance device” under the rule.

A 2003 informal interpretation categorically excluded special dividends from consideration as an avoidance device, allowing parties to avoid filing by using special dividends to get under the HSR size-of-person or size-of-transaction thresholds. In September 2020, the FTC withdrew this interpretation. Going forward, FTC staff will evaluate special dividends more holistically, applying the aforementioned “but for” test to

determine whether the parties structured the deal to avoid or delay an HSR filing.<sup>17</sup>

### **Spotlight on Efficiencies Defenses**

Two major enforcement litigations in 2020 put a spotlight on uncertainties in how efficiencies should be evaluated and balanced in merger cases. Both the *T-Mobile/Sprint* and *Peabody Energy/Arch Resources* cases went to trial this year, and both defenses were based in part on the assertion of substantial efficiencies arising from the combinations. T-Mobile and Sprint secured a win based in part on those efficiencies, but the court also relied on other market structure evidence. The court dismissed the efficiencies in *Peabody Energy/Arch Resources* and forbade the joint venture. While these cases breathed some life into efficiencies defenses, they show that efficiencies, standing alone, remain unlikely to carry the day.

#### *T-Mobile/Sprint*

On February 11, 2020, Judge Marrero of the U.S. District Court for the Southern District of New York dismissed a challenge to the proposed merger between T-Mobile and Sprint brought by a group of state attorneys general (the deal received DOJ and Federal Communications Commission (FCC) conditional clearance while the suit was pending).<sup>18</sup> Judge Marrero concluded that the plaintiffs “ha[d] established an initial presumption that, by reason of higher concentration in fewer firms in the relevant market, and New T-Mobile's much larger market share, the effect of the Proposed Merger would be likely anticompetitive.”<sup>19</sup> However, Judge Marrero further ruled that T-Mobile and Sprint had “satisfied their burden of rebuttal” by providing:

evidence that the efficiencies arising from the Proposed Merger will cause New T-Mobile to compete more vigorously with its rivals in the ... market[...evidence that Sprint is a weakened competitor that is not likely to continue competing vigorously in the ... market[...and evidence that the DOJ and FCC...collective efforts to establish DISH as a new vigorous competitor in the ... market[] ameliorate[s] any remaining concern of anticompetitive effect.<sup>20</sup>

The opinion makes it clear that, while efficiencies were an important factor, approval of the merger also hinged on evidence of an effective new competitor entering the market and Sprint's waning competitive significance.

#### *Peabody Energy/Arch Resources*

On September 29, 2020, Judge Pitlyk of the U.S. District Court for the Eastern District of Missouri considered a proposed joint venture between two large coal mining facilities—Peabody Energy and Arch Resources.<sup>21</sup> The defendants argued that the joint venture combining Peabody's NARM mine with Arch's neighboring Black Thunder mine would unlock efficiencies, “strengthening coal's competitiveness against natural gas and renewables”—sources of energy that the FTC had excluded from the relevant market.<sup>22</sup> The court agreed that the joint venture would “clearly make possible substantial efficiencies,”<sup>23</sup> but held that the FTC's proposed market was properly drawn and that the efficiencies, even if fully credited, “would not offset the likely

competitive harm” in the FTC’s coal-based relevant market.<sup>24</sup>

## Traditional Merger Enforcement

Merger review statistics for 2020 have not yet been published,<sup>25</sup> but the FTC and DOJ have continued to bring enforcement actions, focusing particularly on both acquisitions that increase concentration in already concentrated markets and acquisitions of nascent competitors.

### *FTC’s Winning Streak Ends*

Notably, the FTC’s seven-case winning streak of litigated merger challenges came to an end in 2020 when the U.S. District Court for the District of Columbia denied the FTC’s request for a preliminary injunction to prevent Evonik Industries from acquiring PeroxyChem Holdings. The FTC proposed a product market “for the sale of standard, specialty, and pre-electronics grade hydrogen peroxide.”<sup>26</sup> Deviating from the standard practice of defining product markets based on demand-side substitution, the FTC instead relied on evidence of supply-side substitutability.<sup>27</sup> The court soundly rejected the FTC’s relevant market as “ill-conceived”<sup>28</sup> and denied the injunction in part on that ground.<sup>29</sup>

In December, the FTC lost another preliminary injunction, this time in a hospital merger case. The FTC brought suit in the Eastern District of Pennsylvania to enjoin Jefferson Health’s proposed acquisition of Albert Einstein Healthcare pending an administrative trial on the merits. The court denied the FTC’s request, concluding that the FTC’s proposed geographic markets did not align with the commercial realities of providing healthcare in the Philadelphia region.<sup>30</sup> The court found that the FTC

failed to carry its burden to show that insurers would accept a price increase rather than turn to hospitals outside of the alleged markets, noting in particular that insurers’ testimony was conclusory and not credible.<sup>31</sup>

### *Both Agencies Bring Hospital Merger Challenges*

The FTC has had primary responsibility over hospital mergers since at least the mid-2000s, but both the FTC and DOJ are currently litigating hospital merger cases. The FTC filed three administrative complaints in 2020. As noted above, the FTC failed to secure a preliminary injunction in its challenge to Jefferson Health’s proposed acquisition of Albert Einstein Healthcare. Two other suits are pending, one seeking to block Methodist Le Bonheur Healthcare’s acquisition of two Memphis-area hospitals owned by Tenet Healthcare and a second seeking to block Hackensack Meridian Health’s acquisition of hospitals from Englewood Healthcare Foundation in Bergen County, New Jersey.<sup>32</sup>

Both complaints follow the typical pattern for hospital mergers. The *Methodist Le Bonheur Healthcare* complaint alleges that the acquisition of two Saint Francis hospitals in Memphis will reduce the number of providers of general acute care (GAC) inpatient hospital services in the Memphis area from four to three, resulting in Methodist Le Bonheur Healthcare controlling over 50 percent of the market for GAC inpatient hospital services in the Memphis area.<sup>33</sup> Similarly, the *Hackensack Meridian Health* complaint alleges that the deal would consolidate three of the six GAC hospitals in Bergen County, accounting for roughly half of GAC services in the area.<sup>34</sup> Chief Administrative Law Judge D. Michael Chappell has been appointed to preside

over both cases, with trial for *Methodist Le Bonheur Healthcare* set to begin on May 18, 2021.<sup>35</sup>

The DOJ’s challenge to Geisinger Health’s \$100 million acquisition of a 30 percent interest in Evangelical Community Hospital is somewhat unusual because minority acquisitions are rarely litigated.<sup>36</sup> The DOJ alleged the arrangement was intended to dodge antitrust scrutiny, citing the parties’ documents discussing previous attempts to merge. The DOJ further asserted that the parties’ collaboration agreement “fundamentally alter[s] their relationship as competitors and curtail[s] their incentives to compete independently for patients.”<sup>37</sup> Litigation is ongoing.

### *Acquisitions of Nascent Competitors*

In 2020, the FTC and DOJ have continued to challenge mergers they believe would eliminate a nascent competitor, especially in technology sectors. A nascent or potential competition theory of harm appeared in five of the FTC’s 22 merger enforcement actions and three of the DOJ’s 10 merger enforcement actions this year.<sup>38</sup>

On February 3, 2020, the FTC filed an administrative complaint challenging the merger of Edgewell Personal Care Company, a consumer products company that supplies multiple razor brands—including the second-largest brand, Schick—and Harry’s, Inc., an online “direct-to-consumer” supplier of razors that recently expanded its offerings to brick-and-mortar retailers.<sup>39</sup> Despite Harry’s modest market share, the FTC concluded that Harry’s future competitive significance was understated. The complaint cites an Edgewell investor deck referring to Harry’s as “one of the most successful challenger brands ever built”<sup>40</sup> and



alleges that Harry's entry at Target and Walmart "ended the long-standing practice of reciprocal price increases by Gillette and Edgewell," resulting in price reductions and/or increased promotional spend by Proctor & Gamble (P&G) and Edgewell.<sup>41</sup> Harry's introduction of the Flamingo brand for women in October 2018 allegedly also prompted reduced prices and aggressive promotions from both Edgewell and P&G.<sup>42</sup> One week after the complaint was filed, Edgewell terminated the merger agreement. Harry's has threatened litigation against Edgewell, though it appears that no case has yet been filed.<sup>43</sup>

Eleven months later, the FTC filed an administrative complaint challenging another proposed transaction in the razor industry—P&G's acquisition of Billie, Inc.<sup>44</sup> Similar to *Edgewell/Harry's*, the FTC alleged that Billie, a direct-to-consumer seller of women's razors and body care products that launched in 2017, is a nascent, but rapidly growing, head-to-head competitor of P&G's. According to the FTC, competition from Billie spurred P&G to introduce its own direct-to-consumer website promoting its Venus-brand razors for women. The FTC also noted that Billie's rapid growth was likely to expand into brick-and-mortar stores, further challenging P&G's position as the market leader. The administrative trial is set to begin on June 22, 2021, and, in the interim, the FTC will seek a temporary restraining order and preliminary injunction in federal court.

Nascent competition was also at the center of the DOJ's challenge to Sabre Corporation's acquisition of Farelogix. The DOJ asserted at trial that both current and forward-looking market share estimates understate the competitive significance of Farelogix

because they "do not account for the leverage that airlines gain from having Farelogix's Open Connect available as an alternative when negotiating contract terms with Sabre."<sup>45</sup> The DOJ also presented evidence that Sabre had a history of engaging in anticompetitive tactics designed to undermine and delay the adoption of Farelogix's technology.<sup>46</sup> The district court acknowledged that Farelogix had been a "pioneering innovator and disruptor of the airline travel services ecosystem," but nonetheless ruled in favor of the merging parties, concluding that the DOJ had failed to prove that Sabre "will likely act consistent with its history [of resisting change] or these incentives [to raise prices, reduce availability of Farelogix's technology, and stifle innovation]."<sup>47</sup> The court, relying on *Ohio v. American Express Co.*, held that Sabre and Farelogix do not compete in a relevant market, thereby extending to merger cases the U.S. Supreme Court's finding that courts must consider interaction between both sides of two-sided platforms to determine whether allegedly anticompetitive conduct harms a market.<sup>48</sup>

Two days after the district court issued its opinion, the United Kingdom's Competition and Markets Authority published its final report prohibiting the proposed transaction, discussed below. The parties' merger agreement expired three weeks later, and on May 1, 2020, the parties announced that they were abandoning the deal.<sup>49</sup> The Third Circuit subsequently granted the DOJ's motion to vacate the district court's decision, holding that termination of the proposed transaction rendered the decision moot.<sup>50</sup>

The DOJ conditionally cleared Intuit's acquisition of Credit Karma in

November 2020. The DOJ alleged that Credit Karma Tax's digital do-it-yourself (DDIY) tax preparation product "poses a unique threat" to Intuit's TurboTax business and other DDIY tax preparation providers because Credit Karma Tax offered an entirely free product, whereas all other providers upsell consumers for DDIY tax preparation products beyond the most basic federal tax filings.<sup>51</sup> The DOJ concluded that this strategy made Credit Karma Tax "the most disruptive competitor for DDIY tax preparation" despite serving only 3 percent of customers.<sup>52</sup> Consequently, the DOJ required Intuit and Credit Karma to divest Credit Karma Tax to Square Inc. as a condition to closing the transaction.<sup>53</sup> DOJ Assistant Attorney General (AAG) Makan Delrahim characterized Square as "another highly successful and disruptive fintech company" and stated that the divestiture of Credit Karma Tax to Square would "ensure[] that taxpayers will continue to both benefit from [disruptive competition from Credit Karma Tax] and benefit from new innovative financial service offerings from both Intuit and Square."<sup>54</sup>

## Unusual Actions

### *Consummated Merger Challenges*

Challenges to consummated mergers are relatively rare, but the FTC brought two such cases in 2020. In January, the FTC filed an administrative complaint against Axon's consummated acquisition of VieVu, alleging that Axon and VieVu competed in the provision of body-worn camera systems to large, metropolitan police departments across the United States.<sup>55</sup> On the same day, Axon filed suit in federal district court in Arizona, arguing that the FTC's in-house administrative proceeding violated due process

because the FTC's commissioners vote both to bring cases and to hear appeals from the administrative law judge. Axon also argued that the FTC/DOJ clearance process—through which the agencies decide which will review a particular merger—violates equal protection.<sup>56</sup> The district court dismissed Axon's lawsuit in April. Axon appealed to the Ninth Circuit, which has yet to rule. The FTC's administrative trial on the merits is stayed pending the Ninth Circuit's decision.<sup>57</sup>

In April, the FTC sought to unwind Altria's acquisition of a 35 percent stake in JUUL and associated agreements between the companies.<sup>58</sup> The FTC alleged that Altria agreed not to compete against JUUL in the e-cigarette market in exchange for the 35 percent ownership interest in JUUL and a presence on JUUL's board.<sup>59</sup> The administrative trial is scheduled to begin in April 2021.

### *The Historic Novelis/Aleris Arbitration*

In March, the DOJ successfully challenged the merger of Novelis and Aleris in the first-ever exercise of its authority to resolve a matter in arbitration. The DOJ alleged that the proposed merger would have combined two of only four producers of automotive aluminum body sheet (aluminum ABS).<sup>60</sup> The DOJ and the parties agreed that there was a single dispositive issue—whether the product market was properly limited to aluminum ABS<sup>61</sup>—and that the matter was therefore suitable for arbitration without the need to file a federal complaint.<sup>62</sup> After full fact discovery supervised by a federal court, the matter was heard in arbitration by Kevin Arquit, an experienced antitrust lawyer and former head of the FTC's Bureau of Competition. The hearing was conducted over 10 days, and a decision

issued in under a week—significantly faster than a typical merger trial in federal court.<sup>63</sup> Mr. Arquit ruled that the DOJ had correctly defined the product market.<sup>64</sup> As a result, Novelis was required to divest Aleris's aluminum ABS operations in North America.<sup>65</sup> In a recent speech, AAG Delrahim stated that arbitration in merger cases can lead to “tremendous” benefits for taxpayers and merging parties in terms of cost savings and efficiency, and that the DOJ will continue to evaluate whether matters may be appropriate for arbitration.<sup>66</sup>

## International Mergers<sup>67</sup>

### *Spotlight on Data (Again)*

Enforcers around the world have continued to closely scrutinize competitive effects arising from data. In January 2020, the Pakistan Competition Commission (PCC) conditionally approved Uber's acquisition of Careem, a player in the ridesharing market. The commitments require Uber to, upon request and if certain criteria are fulfilled, (1) enter into an arm's length agreement to license Careem's points-of-interest map data to competitors and (2) grant riders access to data about their use of Uber in a format that facilitates the transfer of that data to other ridesharing suppliers.<sup>68</sup> The transaction also received approval from competition authorities in the United Arab Emirates, Egypt, Saudi Arabia, Morocco, Kuwait, Jordan, and the Common Market for Eastern and Southern Africa (COMESA).

The European Commission (EC) is conducting an in-depth investigation into Google's proposed acquisition of Fitbit that focuses on the use of data to personalize online advertising. In Phase II of the investigation, Google bolstered its initial Phase I proposal by

committing (1) not to use Fitbit health and wellness data for Google ads and to support other wearable manufacturers on Android and (2) to continue to allow Fitbit users to connect to third-party services via APIs.<sup>69</sup> At the time of writing, the EC has until January 8, 2021, to make a decision on the matter.<sup>70</sup>

### *EC's Merger Review Under Judicial Scrutiny*

In one of its most important rulings in recent years, the General Court in May 2020 annulled the EC's decision to block the proposed acquisition of Telefonica UK by Hutchison 3G UK and criticized the agency's analysis of competitive effects in merger control. The General Court found that the EC had failed to prove that the transaction, which is a four-to-three merger in the UK mobile telephone market, would harm competition and significantly raise prices.<sup>71</sup> The EC has appealed, noting that the case raises important legal issues, such as the legal test for “gap” cases (those that raise competitive concerns despite the merging parties not being dominant), the role of efficiencies, the standard of proof, the value of the EC's economic assessment, and the boundaries of the General Court's judicial control.<sup>72</sup> If the decision is upheld by the European Court of Justice (ECJ), the EC will be required to review, and potentially revise, its process for analyzing non-coordinated effects of mergers in oligopolistic markets.<sup>73</sup>

### *Ramped-Up Enforcement in the UK: Redefining “Voluntary”*

The merger control regime in the UK is, strictly speaking, voluntary. However, the Competition and Markets Authority (CMA) has the power to “call in” deals that have not been notified and that

meet the UK thresholds, namely where the target has more than £70 million (\$85 million) in UK turnover or the merger creates or enhances a company's share of supply of 25 percent or more.<sup>74</sup> Since 2019, the CMA has made increasingly creative use of this test to call in more high-profile deals. Of the 10 deals that the CMA successfully challenged at Phase II in 2020, eight involved a target with minimal UK turnover or presence that the CMA called in using the share-of-supply test.<sup>75</sup>

This virtually limitless jurisdiction is currently being challenged. Sabre is appealing the prohibition of its merger with Farelogix, which, as noted above, was issued just two days after the DOJ lost its bid to block the deal in a federal court. The CMA took jurisdiction over the matter despite Farelogix not being directly active in the United Kingdom.<sup>76</sup> The appeal before the UK's specialist competition court (the Competition Appeal Tribunal, or CAT) will be closely watched, given its importance for mergers involving parties with minimal (or no) presence in the United Kingdom.<sup>77</sup> The CAT is bound by a judicial review standard,

meaning parties need to prove that the CMA's decision was somehow illegal, irrational, or procedurally flawed. This is a high bar, and the CAT has never overruled a CMA decision in full, meaning a successful challenge would be unprecedented.<sup>78</sup>

#### *The UK: A Deal Graveyard?*

The fact that 10 of the deals challenged by the CMA in 2020 were blocked or abandoned by December underscores the CMA's zealous enforcement and increasing interventionism.<sup>79</sup> Nine of the deals challenged by the CMA were blocked or abandoned in 2019. As it stands, referrals for an in-depth Phase II review since January 2019 have resulted in a deal mortality rate over 70 percent. This compares with a 33 percent mortality rate for in-depth Phase II reviews before the EC and a 10 percent mortality rate for the FTC and DOJ over the same period.

#### *Brexit and Its Impact on Global Deals*

The Brexit transition period ends on December 31, 2020, meaning that after that date, the United Kingdom will no

longer be part of the EU's "one-stop-shop" regime. Transactions may be subject to parallel EC and CMA reviews (in addition to other required global filings). Given the CMA's increasingly interventionist stance and deal mortality rate, it will be crucial to factor in the impact of a UK review on deal timetables, long-stop dates, conditions precedent, and risk allocation.

The CMA intends to publish updated jurisdictional and procedural guidance, including guidance on the mergers intelligence function, before the end of the year, with updated merger assessment guidelines to follow in 2021. The updates are designed for a "post-Brexit" world in which the CMA expects between 30 and 50 reviews per year. The guidance will focus on dynamic theories of harm and potential competition, the CMA's controversial jurisdictional test, and post-Brexit cooperation and coordination with other global enforcers. Consultations on the proposed amendments were launched in November.<sup>80</sup>

## Agency Investigations

Despite the challenges posed by the COVID-19 pandemic, the U.S. Department of Justice (DOJ), Federal Trade Commission (FTC), European Commission (EC), and other enforcement agencies around the world remained very energetic in enforcement and advocacy. Enforcement activity has not decreased and may even have

accelerated as agencies rapidly adapted to the new working environment. As expected, many agencies maintained a close focus on technology markets and continued, advanced, or initiated investigations into major U.S. technology firms. Notably, several influential jurisdictions made proposals for substantive changes in the antitrust law. Many of these were focused on digital markets, but others aimed at more comprehensive reforms.

## U.S. Enforcement Agency Collaboration and Disagreement

### *Collaboration Between the Federal Agencies*

In 2020, the FTC and DOJ have continued their traditionally cooperative and collaborative approach. Notable areas of coordination include measures to respond to the COVID-19 pandemic and a continued focus at both agencies

on major technology firms and labor markets.

### COVID-19

In response to the COVID-19 pandemic, the FTC and DOJ have taken several steps to provide guidance and help address the difficulties caused by the disruptions. Some of those measures, such as consideration of exigencies in assessing whether to investigate conduct that may otherwise violate the antitrust laws, are expected to be temporary. Other measures, such as the modernization of processes through the use of e-filing and other technologies,<sup>81</sup> are expected to be made permanent.

On March 24, 2020, the agencies issued a joint statement providing guidance to businesses seeking to collaborate to protect the health and safety of Americans during the pandemic. The statement details an expedited antitrust procedure whereby the agencies will respond to Advisory Opinion or Business Review Letter (BRL) requests connected to COVID-19 within seven calendar days of receiving all necessary information. The statement further provides a list of collaborative activities designed to improve health and safety in response to the pandemic that would be consistent with the antitrust laws, including research and development, sharing technical know-how, development of practice parameters for patient management, joint purchasing agreements among healthcare providers, and private lobbying addressing the use of the federal emergency use authority.<sup>82</sup> The agencies also indicated that they will account for exigent circumstances, such as where health care facilities work together to provide equipment and services to communities without access to them, or where businesses need to combine resources to facilitate the production and distribution of

COVID-19-related supplies. Since the publication of the guidance, the DOJ has issued several BRLs approving proposals for collaboration by health care and pharmaceutical companies.<sup>83</sup>

### Focus on “Big Tech”

Antitrust scrutiny of major technology firms, sometimes called “Big Tech,” was a major issue for legislators and policy makers in 2020. Last year, the House Judiciary Committee began investigating competition in digital markets, focusing on Google, Apple, Facebook, and Amazon (collectively “GAFA”). The committee has held several hearings—one of which involved the companies’ CEOs—and issued subpoenas for documents and other information to both the GAFA companies and third parties. In October of this year, the committee’s Democratic majority released a 449-page report.<sup>84</sup> No Republicans signed on to the Majority Staff Report. Instead, a group of Republican members issued a separate “Third Way” report that endorsed some of the Majority Staff’s allegations and conclusions without endorsing most of the policy recommendations.<sup>85</sup>

The Majority Staff Report concludes that the GAFA companies have high market shares, protected by entry barriers, in a variety of different markets. It also references hundreds of allegations of potentially anticompetitive behavior across nearly all lines of the companies’ businesses. The report advocates for far-reaching changes to antitrust law and policy to redress the issues and allegations it describes, including:

- abandoning the consumer welfare standard in favor of broader consideration of the interests of workers, independent businesses, and other groups;

- structural separations and line-of-business restrictions, which would restrict or prohibit a platform operator from also acting as a platform participant;
- nondiscrimination rules to prevent self-preferencing;
- increasing the difficulty of obtaining antitrust approval for certain transactions, including by placing the burden of proof on the respondent for certain transactions;
- facilitating more Section 2 cases by overturning U.S. Supreme Court precedents like *Trinko*; and
- increasing the level of private enforcement by lowering pleading standards and reducing procedural obstacles such as limits on class action formation.

The antitrust enforcement agencies have focused closely on technology markets as well. In October 2020, the DOJ and 11 state attorneys general filed a Section 2 monopoly maintenance complaint against Google.<sup>86</sup> The complaint arises from parallel state and federal investigations into the company that began in 2019. The DOJ and the states allege that Google has unlawfully developed and maintained market power in markets for general search, search advertising, and general search text advertising through agreements with Apple and Android original equipment manufacturers (OEMs) related to preinstallation and default settings for search. Notably, Assistant Attorney General Makan Delrahim and Deputy Assistant Attorney General Barry Nigro recused themselves during the investigation phase,<sup>87</sup> and the case has been overseen by Attorney General William Barr’s office under the direction of the Deputy Attorney General, Jeffrey Rosen.<sup>88</sup>



Following the DOJ and state attorneys' general lawsuit against Google, the FTC and 48 state attorneys general filed separate suits under Section 2 against Facebook on December 9, 2020.<sup>89</sup> The complaints arise from parallel investigations into Facebook that began in 2019.<sup>90</sup> The states and FTC cooperated on their investigations. The complaints allege that Facebook has unlawfully monopolized the market for "personal social networking" or "personal social networking services" through the acquisitions of Instagram and WhatsApp. The complaints also include allegations that Facebook imposed anticompetitive conditions on third-party software developers' access to Facebook APIs, which restricted developers from developing competing functionalities or connecting with competing social networking services.

The FTC voted 3-2 to file suit, with Chairman Joe Simons joining with Democratic commissioners Rohit Chopra and Rebecca Slaughter. Commissioners Noah Phillips and Christine Wilson voted against bringing suit.<sup>91</sup> The FTC and state attorneys general seek a number of different forms of relief from the court, including divestiture of Instagram and WhatsApp, enjoining various types of conduct, and prior notice of future acquisitions.

On the policy side, the DOJ also issued recommendations this year to reform Section 230 of the Communications Decency Act.<sup>92</sup> Section 230 was enacted in 1996 to protect technology companies by providing that online platforms would not be treated as the publisher or speaker for third-party content appearing on their services, effectively insulating them from civil liability for such conduct. Among other changes, the DOJ recommended that it be made clear that "federal antitrust claims are

not, and were never intended to be, covered by Section 230 immunity."<sup>93</sup> The FTC announced in February that it would conduct a Section 6(b) study of several acquisitions made in the 2010s by Alphabet/Google, Amazon, Apple, Facebook, and Microsoft that were not reported under the HSR Act.<sup>94</sup> The FTC aims to "assess whether U.S. antitrust authorities are receiving adequate notice of transactions that might limit or eliminate competition."<sup>95</sup>

#### Focus on Labor Markets

The FTC and DOJ have continued to examine antitrust issues in labor markets, including new labor market concerns arising from the pandemic. The agencies held a two-part series of workshops together covering a wide variety of labor competition issues, including no-poach and wage-fixing agreements, market definition, agreements between employers on competition for workers, labor monopsony in merger enforcement, antitrust exemptions for union activity and collective bargaining, and the use of non-compete clauses in employer-employee employment contracts.<sup>96</sup> Additionally, in response to the COVID-19 pandemic, the DOJ and FTC issued a statement in April indicating that they would be "on alert" for employers, staffing companies, and recruiters that engage in collusion or other anticompetitive conduct in labor markets, focusing on doctors, nurses, first responders, and those who work in grocery stores, pharmacies, and warehouses, among other essential service providers on the front lines.<sup>97</sup>

#### *FTC and DOJ Clash at Intersection of Antitrust and IP*

In 2018, FTC Chairman Joseph Simons noted, in what would turn out to be

a certain understatement, that "there may be some potential inconsistency" between the approaches of the FTC and DOJ to the intersection of antitrust and IP law.<sup>98</sup> One of the more significant areas of tension has been the antitrust significance of a patent holder's intentionally false commitment to a standard-setting organization (SSO) to license its standard-essential patents (SEPs) on fair, reasonable, and nondiscriminatory (FRAND) terms and subsequent breach of that commitment. DOJ AAG Makan Delrahim has repeatedly expressed his view that disputes about whether FRAND commitments have been honored sound in contract rather than antitrust.<sup>99</sup> In late 2019, the DOJ withdrew from a 2013 joint policy statement with the U.S. Patent and Trademark Office on this issue and joined a new policy statement to clarify its position that SEP holders should be permitted to seek injunctions against implementers after the standard is adopted.<sup>100</sup>

*FTC v. Qualcomm*, one of the most significant antitrust decisions of this year, brought the agencies' disagreement on this point to a head. The FTC alleged that, among other things, Qualcomm violated the antitrust laws by refusing to license its chips on FRAND terms, and sought to enjoin Qualcomm from continuing to do so. The DOJ filed a statement of interest warning the district court against an overly broad remedy.<sup>101</sup> The district court sided with the FTC and issued a permanent worldwide injunction.<sup>102</sup> In a rare move of direct confrontation, the DOJ filed an amicus brief with the Ninth Circuit arguing against the district court decision. The DOJ's brief attacked the basis of the district court decision, which is also the FTC's theory of harm, arguing that "[p]remising liability on 'unreasonably high' prices, as the court did here—



instead of harm to competition—can radically undermine important incentives to innovate.”<sup>103</sup> The DOJ also participated in oral argument on appeal.

The Ninth Circuit ultimately rejected the lower court’s (and thus the FTC’s) reasoning, vacated the judgment, and reversed the injunction against Qualcomm.<sup>104</sup> The decision underscores the importance of proof of anticompetitive effects in monopolization cases. The Ninth Circuit found that the district court had (1) erroneously imposed a duty to deal on Qualcomm, (2) impermissibly looked outside the relevant antitrust market in order to infer an anticompetitive act, and (3) relied on outdated evidence (e.g., agreements that were terminated before the suit was filed) to justify a broad, forward-looking global injunction.<sup>105</sup> The Ninth Circuit further rejected the argument that a SEP holder’s violation of FRAND commitments could independently create antitrust liability, and pointed to patent and contract law as sources for potential remedies.<sup>106</sup> Indeed, the court noted that the FTC had not even shown that a breach of these commitments would hurt Qualcomm’s rivals, and declined “to ascribe antitrust liability in these dynamic and rapidly changing technology markets without clearer proof of anticompetitive effect.”<sup>107</sup>

## Federal Trade Commission

### *Clarification of Authority to Seek Monetary Remedies*

The FTC’s statutory authority to seek monetary remedies under Section 13(b) of the FTC Act is expected to be diminished following *FTC v. AbbVie*. On September 30, 2020, the Third Circuit overturned a district court’s order requiring profit disgorgement, reasoning

that “Section 13(b) of the FTC Act authorizes a court to ‘enjoin’ antitrust violations,” but does not authorize it to seek disgorgement because it is a form of restitution, which is not contemplated by Section 13(b).<sup>108</sup> The panel remanded the case to the district court for further proceedings.

The *AbbVie* decision contributed to the circuit split previously taken up by the Supreme Court in *AMG Capital Management, LLC v. FTC* in July 2020. Noting that eight circuits hold that Section 13(b) does allow the FTC to seek restitution, petitioners in *AMG Capital* argued that the Court should adopt the minority rule instead and hold that Section 13(b) does not permit the FTC to seek monetary relief.<sup>109</sup> The Third Circuit panel in *AbbVie* joined the minority approach, and the decision is likely to strengthen the petitioners’ arguments. The parties in *AMG Capital* have completed briefing and are awaiting a date for oral argument.

### *Decisions Continued to Show Notable Party-Line Split*

FTC decisions across all areas have continued to reflect a sharp split on party lines. Generally, the Democratic dissents have criticized the Republican majority for not taking a more aggressive approach to enforcement and for accepting inadequate remedy packages.

As noted in the Mergers chapter of this report, the FTC vote to issue the Vertical Merger Guidelines in June 2020 was 3-2, with Commissioners Rohit Chopra and Rebecca Kelly Slaughter voting against and arguing in dissenting statements for recognition of additional theories of harm that may result from vertical mergers.<sup>110</sup> Several FTC merger clearance decisions have also entailed

3-2 splits, with Commissioners Chopra and Slaughter arguing in dissent that the majority’s analysis failed to consider all potential harms. Examples include the *AbbVie/Allergan* merger and *Bristol-Myers Squibb/Celgene* acquisition, where the dissents emphasized the need to assess the transactions’ effects on innovation and, more broadly, advocated for industry-wide studies into the potential harms caused by mergers.

The FTC’s investigation into and settlement of market allocation charges against rent-to-own operators is an example of this split arising in a conduct investigation. The complaint alleged that rent-to-own operators Aaron’s Inc., Buddy’s Newco, LLC, and Rent-A-Center, Inc. each entered into agreements that resulted in one party closing stores and exiting a local market where the two parties had previously competed.<sup>111</sup> The exiting competitors allegedly also agreed not to compete within a specified geographic area for a specific time period, typically three years.<sup>112</sup>

The FTC settled the case with a consent order that prohibited the respondents and their franchisees from entering into any reciprocal purchase agreement, or inviting others to do so, and from enforcing the non-compete clauses still in effect.<sup>113</sup> Commissioners Chopra and Slaughter dissented, and Chopra filed a dissenting statement strongly criticizing the decision and remedy. Among other things, he argued that the FTC should have analyzed the conduct under the *per se* framework, rather than the rule of reason, and characterized the majority’s analysis and settlement as “a recipe for weak enforcement that does little to deter market distortions and undermines fair competition.”<sup>114</sup>

### *Continued Emphasis on the Pharmaceutical Sector*

Enforcement activities regarding reverse payment settlements have slowed, but the FTC remained active in the pharmaceutical sector this year by shifting its focus to unilateral conduct.

The FTC filed a complaint in federal court against pharmaceutical manufacturer Vyera (formerly known as Turing) and the company's founders in conjunction with several state AGs. The complaint alleges that the defendants prevented generic competition for the brand drug Daraprim by: (1) restricting sales of reference-listed drug samples to generic manufacturers by instituting a restricted distribution program with distributors; (2) restricting sales of the active pharmaceutical ingredient to generic manufacturers through exclusive agreements; and (3) agreeing with distributors to withhold sales data to prevent generic manufacturers from having a sense of Daraprim's financial viability.<sup>115</sup> Notably, this is the first time the FTC has filed its own complaint based on a restricted distribution system, despite having previously submitted amicus briefs asserting that they had been used anticompetitively.<sup>116</sup> On August 18, 2020, the district court denied the defendants' motions to dismiss almost in their entirety.<sup>117</sup>

In another unilateral conduct case, the FTC secured a \$600 million agreement with Indivior to settle, without any admission of wrongdoing, allegations related to its opioid treatment, Suboxone.<sup>118</sup> The FTC alleged that Indivior performed an unfair "product hop," falsely claiming that its new, patent-protected sublingual opioid film was safer than the tablet dosage form in an effort to persuade patients to switch treatments and thus avoid competition from generic tablet manufacturers.

In 2020, the FTC also argued *Impax Labs. v. FTC*—its first pay-for-delay case since the Supreme Court rejected the agency's view that reverse payments are *per se* unlawful in 2013—before the Fifth Circuit. After a lengthy administrative hearing, the ALJ concluded that "no authorized generic" (no-AG) provisions in settlement agreements related to Opana ER constituted a large and unjustified payment, but nevertheless dismissed the FTC's complaint because the settlement allowed consumers access to generic Opana sooner than they otherwise would have. The commission reversed, reasoning that the settlement had no such procompetitive benefits and that the parties could have chosen "a less restrictive alternative."<sup>119</sup>

In its briefing, Impax argues that the FTC "ignored" the Supreme Court ruling in *Actavis*, substituting the Court's "rule of reason" mandate with a new, bright-line rule that "a reverse-payment settlement has an anticompetitive effect whenever the generic manufacturer 'might plausibly have entered the marketplace prior to the agreed entry date.'"<sup>120</sup> The Fifth Circuit heard oral arguments on June 9, 2020. At the time of writing, the panel had not issued an opinion.

## Department of Justice

### *Renewed Focus on Financial Markets*

Throughout 2020, the Antitrust Division has shown increased interest in financial markets and even reorganized some of its civil sections in August to create a section focused solely on financial services, fintech, and banking.<sup>121</sup> DAAG Michael Murray emphasized in October that the DOJ would "lean in" on enforcement in financial markets.<sup>122</sup>

In June 2020, the DOJ signed a Memorandum of Understanding (MOU)

with the Securities and Exchange Commission (SEC) to increase competition in securities markets.<sup>123</sup> The MOU aims to increase communication and cooperation between the agencies, including through periodic meetings between agency officials and facilitating exchange of information relevant to oversight and enforcement responsibilities. The Antitrust Division also solicited comments on whether it should revise the 1995 Bank Merger Competitive Review Guidelines (Banking Guidelines),<sup>124</sup> which outline a process for the DOJ to identify and clear mergers, which the DOJ reviews independently in parallel with review by the applicable bank regulatory agency, that do not have significantly adverse effects on competition.

On the enforcement side, the Antitrust Division took several notable actions with regard to financial markets. First, the DOJ opened a civil investigation into FICO (formerly the Fair Isaac Corporation), which issues credit scores used in banking, credit cards, and mortgages.<sup>125</sup> Second, the Antitrust Division issued a BRL approving the International Swaps and Derivatives Association (ISDA) proposal to "amend its standardized model documentation for derivatives to account for the potential discontinuation of certain interbank offered rates (collectively referred to as 'IBORs')."<sup>126</sup> Certain IBORs are being transitioned to alternative reference rates used in derivatives contracts after regulatory scrutiny in the United States, UK, and other countries.

### *Continued Activity on Standard-Setting Organizations and Patent Licensing Issues*

As noted above, in recent years the Antitrust Division has taken a strong interest in SSOs and SEPs. DAAG Alex Okuliar gave a speech to the Intellectual Property Rights Policy Advisory Group

of the American National Standards Institute (ANSI) outlining the Antitrust Division's approach to standards issues.<sup>127</sup> The DOJ also filed a statement of interest in three notable antitrust cases with patents at their core. First, in *Continental Automotive Systems v. Avanci*, the DOJ filed a statement of interest explaining its view that Section 2 antitrust claims cannot be based on breaches of commitments made during the standard-setting process to license patents on FRAND terms.<sup>128</sup> Second, in *Intel v. Fortress*, the DOJ argued that the plaintiffs' proposed market definition was overbroad and that the plaintiffs had failed to adequately plead an impact on competition under Section 1 or Section 7.<sup>129</sup> Third, the DOJ filed a statement of interest and participated in oral argument in *Lenovo v. InterDigital*, discussed below, arguing in favor of InterDigital's motion to dismiss claims related to FRAND licensing disputes.<sup>130</sup>

The DOJ also issued two BRLs in this area in 2020. First, the DOJ updated its 2015 BRL for the Institute of Electrical and Electronics Engineers (IEEE) regarding revisions to IEEE's Patent Policy after concerns were raised about misinterpretations, including that the Antitrust Division had endorsed the Patent Policy.<sup>131</sup> The DOJ also issued a BRL to Avanci regarding its "5G Platform" for licensing 5G telecommunications technology for the automotive industry, concluding that the platform was unlikely to harm competition and noting the safeguards Avanci had installed.<sup>132</sup>

### *DOJ Continues Program to Terminate Decades-Old Consent Decrees*

The DOJ has continued its program, started in 2018, to consider whether termination would be appropriate for hundreds of consent decrees that lacked a sunset date.<sup>133</sup> In August 2020, a

S.D.N.Y. court terminated the Paramount Consent Decrees, which had been in effect for several decades and required that movie studios separate their distribution and exhibition businesses.<sup>134</sup> The decrees also banned certain distribution practices. The Antitrust Division reported that, to date, nearly 800 perpetual consent decrees have been terminated under the program.<sup>135</sup>

In July 2020, the Antitrust Division held a workshop on competition in the licensing of public performance rights, including a discussion of whether the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) consent decrees should be modified.<sup>136</sup> The virtual workshop featured keynotes by LeAnn Rimes and Jon Bon Jovi. The workshop also attracted a large number of public comments afterward. At a conference in November 2020, AAG Delrahim said that the Antitrust Division was aiming to modify the ASCAP and BMI consent decrees before the end of the year.<sup>137</sup>

### *DOJ Drops California Emissions Standards Investigation*

In February 2020, the DOJ informed automakers that it had closed its investigation into their agreement with California for stricter emissions standards than those sought by the federal government.<sup>138</sup> Four automakers had reached a separate agreement with California for higher miles-per-gallon efficiency targets after the Trump administration moved to relax emissions standards.

## State Enforcement

### *Competition and Collaboration with the Federal Agencies*

There is a long history of cooperation between state and federal antitrust

enforcers, but competition and even outright conflict have arisen in high-profile cases. For example, state attorneys general are both competing and collaborating with the federal agencies (and each other) in their various antitrust investigations and lawsuits against Google. In their most notable collaboration, the DOJ and 11 states in October filed a complaint against Google (described further above) related to Google's agreements to promote its search services.<sup>139</sup> On the other hand, some state AGs have announced that their separate investigations into Google will continue even after the joint lawsuit has been filed.<sup>140</sup> Wilson Sonsini represents Google in both the litigation and continuing investigations.

The most prominent instance of direct conflict between state and federal agencies arose in the *T-Mobile/Sprint* merger case, which is also discussed in the Mergers chapter of this report. Wilson Sonsini represented Deutsche Telekom in the matter. Shortly before the DOJ and the FCC announced settlements, 14 states filed suit to enjoin the transaction. This was the first time state enforcers had sought to block a major national merger approved by and subject to consents with federal agencies. The DOJ filed a statement of interest opposing the states, arguing that the court should pay deference to the decisions made by the DOJ and the FCC.<sup>141</sup> Following a trial in December 2019 and January 2020, the court rejected the states' challenge.<sup>142</sup> DOJ AAG Delrahim and some state AGs continued to make public statements defending their respective positions and criticizing the opposition after the court rendered its decision,<sup>143</sup> suggesting that conflict between state and federal agencies may continue in the future.

## Civil Antitrust Enforcement Outside the United States

### *European Union Investigations*

#### Continued Focus on Large Digital Platforms

As expected, the European Commission (EC) has stayed on course and continued to make digital platforms a major enforcement priority following Competition Commissioner Margrethe Vestager's five-year term of office extension in 2019. After closing a series of cases against Google,<sup>144</sup> questioning Google and Facebook about their data use,<sup>145</sup> and opening an investigation against Amazon<sup>146</sup> last year, the EC has in 2020 expanded its focus to include Apple as well.

In June, the EC opened an investigation into Apple Pay policies,<sup>147</sup> including the terms for integrating Apple Pay in iOS apps and limitations on access to the Near Field Communication (NFC) functionality for in-store payments. The EC is also investigating reported refusals of access to Apple Pay. On the same day, the EC opened investigations into Apple's iOS App Store practices as well, with a focus on music streaming,<sup>148</sup> e-books, and audiobooks.<sup>149</sup> The EC has preliminary concerns that Apple is abusing its dual role as the operator of the iOS App Store and a competitor in certain categories of mobile apps. The EC has taken the view that Apple may have exploited this position by forcing competitors to disable in-app purchases and prohibiting them from informing users about ways to purchase outside the app. The EC has further concerns that Apple has cut off competing developers from important customer data, while tapping their apps for data Apple can use to improve its own offerings.

The EC also took its ongoing investigation into Amazon's use of business data of marketplace sellers to the next level and issued a statement of objections in November.<sup>150</sup> The EC has taken the preliminary view that Amazon has breached EU antitrust rules by systematically collecting and using third-party sellers' data to adjust its own retail offers and business decisions. In parallel, the EC opened a second investigation addressing conduct related to Amazon's "Buy Box" and Prime label.<sup>151</sup> The EC is considering allegations that Amazon has systematically favored its own retail offers and the offers of marketplace sellers that use Amazon's logistics and delivery services.

#### Increased Focus on Early-Stage Resolution and Settlements

The EC has shown an increased sense of pragmatism in dealing with alleged infringements while continuing to expand its investigations into major technology platforms. In part due to criticism of its handling of cases where long-running investigations have led to fining decisions with debatable impact for consumers, the EC is seeking to speed up investigations and deliver quicker and more market-oriented results. To this end, the EC has increasingly encouraged informal, pre-investigation remedies and settling cases in the investigation stage through commitments.

This shift in enforcement strategy is reflected in an October 2020 commitment decision against Broadcom, in which the company settled the EC's investigation into its conduct in chipset markets.<sup>152</sup> The settlement follows the EC's 2019 interim measures decision against Broadcom, the first such decision in nearly 20 years.<sup>153</sup> The EC imposed

these measures after finding that Broadcom's system of exclusive dealings and conditional advantages would likely have affected upcoming tenders and thus resulted in serious and irreparable harm to competition. Following the interim measures, Broadcom engaged in remedy discussions that culminated in a binding package of comprehensive commitments entered in Summer 2020. Absent these commitments, the EC likely would have been forced to undertake a protracted two-to-three-year investigation before a cease-and-desist order and fine would issue.

The EC's more pragmatic approach is not limited to technology markets and has also been applied, for example, in the energy sector, where an antitrust investigation into Romanian firm Transgaz's export restrictions was settled through a commitment decision.<sup>154</sup>

#### Scrutiny on Pharmaceutical Markets: Pay-for-Delay and Excessive Pricing

In January 2020, the European Court of Justice (ECJ) handed down a preliminary ruling clarifying its position concerning pay-for-delay agreements in response to a request from UK judges regarding a Competition and Markets Authority (CMA) infringement finding. The ECJ confirmed that potential competition should be viewed broadly in pay-for-delay cases and emphasized that such arrangements can also be analyzed under the rules for an abuse of dominance. To constitute an abuse of dominance, the cumulative effects of the various agreements must have a significant foreclosure effect, depriving consumers of the benefits of new market entries.

The aforementioned trend to early-stage resolution affected pharmaceutical cases as well. In a rare excessive pricing



probe, the EC has been investigating Aspen's 300 percent price increases for an anti-cancer drug. The case was widely expected to lead to a landmark decision, but instead it ended with a settlement with the drug maker in July 2020, wherein Aspen committed to lower prices for six drugs by an average of over 70 percent, cap prices for 10 years, and keep the drugs on the market.

### Proportionality of EC Inspections

Inspections (dawn raids) have historically been used primarily in cartel investigations, but their use has become more and more common in non-cartel cases and has spawned an increasingly large number of EC investigations. Inspections in such cases usually do not start with "smoking guns" provided by leniency-seeking insiders, leading to questions as to the level of evidence needed to initiate an inspection. The ECJ took up the issue and affirmed the EC's decision to inspect the premises of České Dráhy, a Czech train operator.<sup>155</sup> The judges confirmed that where the EC has sufficiently serious indications of a breach of Article 102 TFEU, it is not obliged to balance those indications against contrary evidence when assessing the proportionality of an inspection. In the same vein, the EC is not obliged to precisely define the relevant market or demonstrate an appreciable effect on trade in advance of carrying out an inspection.

### Continued Focus on Market Harmonization

The EC's imposition of a fine against Meliá underscores the EC's continued focus on market partitioning between Member States.<sup>156</sup> The EC fined Meliá €6.7 million for clauses in its standard terms and conditions for tour operators that limited offers to residents of certain EU Member States, preventing tour

operators from making offers across the EU. Meliá cooperated with the EC to receive a 30 percent fine reduction.

### *EU Member State Investigations*

The national competition authorities of EU Member States have been active antitrust enforcers in 2020, including on matters involving major U.S. technology firms. National authorities have pursued investigations both independently and in coordination with the EC.

In March 2020, the French Competition Authority (ADC) imposed a €1.1 billion fine on Apple, the highest fine ever imposed in France.<sup>157</sup> The ADC found that Apple allocated products and customers between its two wholesalers between 2005 and 2013 by instructing them as to the exact product quantities to be supplied to each downstream reseller. The ADC also found that Apple had fixed resale prices for Apple Premium Resellers (APRs) by publishing its own prices on its website and preventing discounts from those prices by monitoring and sanctioning unauthorized promotions. Finally, the ADC concluded that Apple had violated the French commercial law prohibiting the abusive exploitation of a commercial partner's economic dependency by treating APRs differently from Apple's own sales channels.

After judges in Germany's Federal Court upheld the essence of the 2019 Federal Cartel Office (FCO) decision against Facebook, the FCO continued its campaign of technology sector enforcement by launching an investigation into brand-gating arrangements between Amazon and Apple.<sup>158</sup> The investigation focuses on an agreement between Amazon and Apple that ensures that only Apple-authorized sellers may sell Apple products on the

Amazon Marketplace, limiting intra-brand competition.

In March 2020, during the peak of the first wave of the COVID-19 pandemic, the Italian Competition Authority (AGCM) launched two investigations into potentially anticompetitive practices of Amazon and eBay in the market for health and hygiene products, having received complaints alleging excessive pricing.<sup>159</sup> In October, the AGCM launched an investigation into Google's alleged abuse of a dominant position in the Italian market for display advertising.<sup>160</sup>

### *Regulatory Efforts in Europe to Address the Digital Sphere*

In June 2020, the EC announced a Digital Services Act (DSA) package as part of its European Digital Strategy.<sup>161</sup> The DSA mainly seeks to provide an "[e]x ante regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union's internal market." The proposed DSA includes new rules that allow targeted collections of information from large online platforms, blacklist certain business practices, and allow the EC to issue "tailor-made remedies" covering the activities of such platforms. Depending on its ultimate scope, the DSA is to be complemented by a "New Competition Tool" targeting practices such as monopolization strategies of non-dominant companies or parallel leveraging strategies in several adjacent markets.<sup>162</sup> The EC is contemplating several options for addressing such practices that would not involve a finding of infringement or imposition of a fine—and thus would not provide a basis for private actions.

Germany is an early front-runner in implementing the tools and strategies contemplated by the DSA. The German



parliament is expected to adopt a law in December 2020 that will give the FCO new early intervention powers and an ex ante tool to deal with “undertakings with paramount significance for competition across markets.” Several other EU Member States, as well as the UK, are contemplating similar amendments of their antitrust laws. In July 2020, the UK CMA adopted a final report on online platforms and digital advertising, recommending that the British government establish a pro-competition regulatory regime for online platforms.<sup>163</sup> Largely following the recommendations of the Furman report published in 2019,<sup>164</sup> the CMA report advocates for the introduction of an ex ante regulatory regime addressing digital markets, as well as an enforceable

code of competitive conduct and the ability to break up platforms “where necessary.”

#### *Growing Focus on Large Digital Platforms in Asia*

Antitrust enforcers in Asia have stepped up enforcement activity related to technology companies and digital platforms in 2020 as well. In September, the Japan Fair Trade Commission (JFTC) accepted Amazon’s commitments to return \$19 million to suppliers and reevaluate its co-op fees in order to settle allegations of abuse of a superior bargaining position.<sup>165</sup> Korea’s Communication Commission (KCC) imposed a fine and corrective orders on Google for restricting consumers’

rights to withdraw their consent to Google’s YouTube Premium service.<sup>166</sup> Later in the year, the Korean Federal Trade Commission (KFTC) launched an investigation into potentially excessive pricing and other alleged abuses of Google’s and Apple’s app platforms following a class action.<sup>167</sup> Finally, the Competition Commission of India (CCI) continued to investigate Google’s alleged abuse of dominance in the smart television market<sup>168</sup> and launched an investigation into the Google Play Store.<sup>169</sup> However, the CCI also closed an investigation into Facebook/WhatsApp’s alleged abuse of dominance in the market for messaging services, finding no evidence of WhatsApp bundling its payment and messaging services.<sup>170</sup>

## Criminal/Cartel Investigations

This chapter (1) identifies several significant developments in the DOJ’s criminal enforcement program in 2020; (2) summarizes the DOJ’s major criminal prosecutions of corporations and individuals in the past year; and (3) highlights developments in cartel enforcement worldwide in 2020.

### Notable Developments in the DOJ’s Criminal Antitrust Enforcement Program

This year saw developments across a number of significant DOJ enforcement and policy priorities, administrative changes, legislative and international developments, and signals from the DOJ regarding conduct it is closely monitoring.

#### *Enforcement Priorities and Initiatives*

In 2020, the DOJ’s newly formed Procurement Collusion Strike Force (PCSF) opened nearly two dozen grand jury investigations into potential violations of the antitrust laws.<sup>171</sup> The PCSF entails a partnership between the DOJ and other federal law enforcement agencies, including the FBI, aimed at preventing bid-rigging for government contracts. DOJ Assistant Attorney General (AAG) Makan Delrahim indicated that at least 5,500 government employees in roughly 500 state and local agencies have received training under that effort.

In June 2020, the DOJ signed a Memorandum of Understanding (MOU) with the Securities and Exchange Commission (SEC) to coordinate their enforcement activities. Among other measures, the MOU strengthens the

agencies’ cooperation where collusive conduct is uncovered in securities and financial markets.<sup>172</sup> The partnership furthers the DOJ’s goal to more closely scrutinize markets in the financial services, banking, and fintech sectors.<sup>173</sup>

The DOJ made a series of less formal announcements or “warnings” this year that may signal areas the agency is keeping a close watch on from a policy and enforcement perspective. For example, the DOJ singled out information exchanges among competitors as fraught with risk and often a source of collusive, illegal activity such as price-fixing or bid-rigging.<sup>174</sup> Along with regulators in the European Union (EU), the DOJ turned its attention to the risks posed by algorithms and how they can be misused to further anticompetitive goals.<sup>175</sup> AAG Delrahim explained that the DOJ is educating its attorneys and economists

on algorithms, machine learning, artificial intelligence, and blockchain technologies to understand how businesses may use these tools and their possible effect on competition.<sup>176</sup> He also indicated that the DOJ anticipates seeing more algorithmic collusion in the future and noted that the DOJ now expects companies to address risks posed by pricing algorithms and similar tools in their compliance programs.

Notably absent from the DOJ's 2020 enforcement roster was a criminal prosecution stemming from a "no poach" hiring agreement. The DOJ announced in 2016 that such agreements could constitute criminal antitrust violations, and speculation swirled that the DOJ was planning to bring such a case following April 2020 remarks from AAG Delrahim announcing a major forthcoming enforcement action.<sup>177</sup> Although in late 2020 the DOJ indicted an executive for wage-fixing conduct, discussed below, the long-awaited and long-promised criminal "no poach" case has not yet materialized. Still, this remains an enforcement priority for the DOJ and in 2020, the agency continued to aggressively identify and investigate "no poach" and other potential collusion surrounding recruiting and hiring.

#### *Administrative Updates*

In August 2020, the DOJ created an Office of Decree Enforcement and Compliance (ODEC). On the criminal side, ODEC is charged with promoting compliance programs and working with the criminal enforcement sections when parties seek credit for their corporate compliance programs during plea negotiations or at the charging stage, as well as providing advice when compliance monitors are recommended.<sup>178</sup>

The DOJ updated its Civil Investigative Demand (CID) forms and depositions process, which are used in merger and civil investigations, in September 2020.<sup>179</sup> All CIDs issued by the Antitrust Division will now provide notice to recipients that their documents, interrogatory responses, and/or testimony may be used by the DOJ in other investigations—including criminal investigations. Depositions pursuant to CIDs will also feature preliminary questions to ensure deponents understand this possibility.

Early in the year, Deputy Assistant Attorney General (DAAG) Richard Powers gave a speech stating that the DOJ expects that pleading and cooperating defendants will engage in covert monitoring where those opportunities arise, for example by wearing a wire and recording conversations with co-conspirators.<sup>180</sup> DAAG Powers further emphasized that pleading defendants may not make public statements that contradict their admission of wrongdoing in a plea agreement, viewing such acts as incompatible with accepting responsibility and the obligation to cooperate under a plea agreement. Companies defending against follow-on civil damages actions must take great care when litigating to avoid making such statements.

#### *Legislative Developments*

In June 2020, Congress reauthorized and made permanent the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), which provides advantages to leniency applicants that ultimately receive amnesty from the DOJ's leniency program.<sup>181</sup> Under ACPERA, in follow-on civil litigation, recipients of amnesty are only liable for actual damages (i.e., not treble damages) and are not held

liable jointly and severally, assuming they cooperate with plaintiffs in a timely and satisfactory manner. The DOJ, which held a roundtable on ACPERA reauthorization last year,<sup>182</sup> has relied on ACPERA to provide an important incentive to parties coming forward to participate in the DOJ's leniency program.

#### *International Cooperation*

Encouraged by the DOJ, the International Competition Network (ICN) released guidance in June 2020 on leniency cooperation.<sup>183</sup> The guidance is designed to assist competition agencies in engaging and cooperating with their international counterparts when dealing with leniency applicants and other cooperating companies in cross-border investigations.<sup>184</sup> In addition, the DOJ joined the FTC in signing the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities with competition agencies in Australia, Canada, New Zealand, and the United Kingdom.<sup>185</sup> The agreement sets out a framework to strengthen cooperation among the agencies, including sharing confidential information and gathering cross-border evidence in both criminal and civil contexts.

## **Significant DOJ Investigations and Prosecutions**

Criminal antitrust enforcement remained a major focus of the DOJ in 2020. Notably, the DOJ secured \$529 million in criminal fines and penalties, reversing a multi-year decline.<sup>186</sup> The DOJ has continued to investigate and prosecute collusive conduct across a variety of industries, with a few new sectors emerging as areas of enforcement

interest in the past year. Below we summarize some of the significant DOJ enforcement actions of 2020.

#### *Government Procurement*

The launch and evolution of the PCSF, described above, reflects the DOJ's commitment to pursuing procurement collusion and related crimes, even as procurement has grown to become a focus of DOJ enforcement efforts in recent years. In 2020, the DOJ advanced several such investigations.

Online GSA Auctions. In February 2020, Missouri businessman Alan Gaines became the third individual indicted for participating in a conspiracy to rig bids submitted to the U.S. General Services Administration in online auctions for surplus government equipment.<sup>187</sup> Gaines and his co-conspirators allegedly communicated before and during the auctions to decide who would submit winning bids and whether the items purchased would be split among them.<sup>188</sup>

Fuel Supply to the U.S. Military. In April 2020, the DOJ finalized the resolution of civil claims arising from its criminal investigation of bid-rigging and price-fixing for fuel supply contracts to U.S. military bases located in South Korea.<sup>189</sup> Jier Shin Korea agreed to pay \$2 million to resolve antitrust and False Claims Act allegations, an amount that the DOJ noted reflected the value of the company's cooperation, limitations on its ability to pay, and cost savings realized by avoiding extended litigation. In all, civil settlements arising from the DOJ's investigation totaled over \$205 million. Wilson Sonsini represented Jier Shin Korea in this matter.

Welding. In September 2020, Louisiana company Cajan Welding & Rentals, Ltd. pleaded guilty to one count of conspiracy to defraud the United States and to

violate the Procurement Integrity Act.<sup>190</sup> Cajan Welding admitted to conspiring with two unnamed co-conspirators to defraud the United States by obtaining non-public procurement information and using it to gain subcontract awards and payments from the U.S. Department of Energy in connection with the operation of the U.S. Strategic Petroleum Reserve. The charge carries a statutory maximum fine of \$500,000, as well as up to five years' probation.

Drainage Infrastructure. In October 2020, a federal grand jury in North Carolina returned an indictment charging Contech Engineered Solutions LLC and former executive Brent Brewbaker with conspiring to rig bids and defraud the North Carolina Department of Transportation.<sup>191</sup> According to the indictment, Contech and Brewbaker conspired to rig bids for federal- and state-funded aluminum structure projects for nearly a decade. The indictment also included charges of mail fraud and wire fraud.<sup>192</sup>

#### *Generic Pharmaceuticals*

This year saw significant developments in the DOJ investigation of alleged price-fixing affecting generic pharmaceuticals. The DOJ has increasingly relied on Deferred Prosecution Agreements (DPAs) as tools to resolve charges against defendant pharmaceutical companies. The DOJ has entered into DPAs with some corporate defendants—allowing them to both resolve the criminal allegations and continue to participate in federal health care programs—while prosecuting others.<sup>193</sup> The DOJ has also pursued indictments or guilty pleas for individual executive defendants.

#### Corporate Defendants

- *Sandoz Inc.:* In March, the DOJ filed a four-count felony charge against

Sandoz and announced a DPA pursuant to which Sandoz agreed to pay a \$195 million criminal penalty, cooperate fully with the investigation, and admit that sales affected by the charged conspiracies exceeded \$500 million.<sup>194</sup>

- *Apotex Corp.:* In May, the DOJ reached a DPA with Apotex for its role in fixing the price of the generic drug pravastatin.<sup>195</sup> Apotex agreed to pay a \$24.1 million criminal penalty, admit that it conspired with other generic drugmakers, and cooperate fully with the investigation.
- *Glenmark Pharmaceuticals:* In June, the DOJ filed an Information charging Glenmark Pharmaceuticals with conspiring to fix the price of pravastatin with other generic drug companies from approximately May 2013 until December 2015, at a loss of \$200 million to consumers.<sup>196</sup> Glenmark is the first company charged in the investigation not to enter into a DPA. Instead, Glenmark alleges that the DOJ's charge violates federal rules and the Fifth Amendment because the company did not waive indictment by a grand jury but was nevertheless charged by Information.<sup>197</sup>
- *Taro Pharmaceuticals:* In July, the DOJ charged Taro Pharmaceuticals for conspiring to fix prices, allocate customers, and rig bids for generic drugs.<sup>198</sup> The DOJ also announced a DPA pursuant to which the company agreed to pay a \$205.6 million criminal penalty and to pay \$213.3 million to resolve all civil claims related to federal health care programs.<sup>199</sup>
- *Teva Pharmaceuticals:* In August, the DOJ charged Teva with price-fixing conduct across three conspiracies involving Glenmark Pharmaceuticals, Apotex, Taro, and Sandoz, alleging consumers were overcharged by at least \$350

million.<sup>200</sup> While the DOJ has offered Teva a DPA, the company has indicated that it will only accept a non-prosecution agreement to resolve the charges.<sup>201</sup>

### Individual Executives

In February, Ara Aprahamian, a former top executive of Taro Pharmaceuticals, was indicted by a federal grand jury for his role in conspiracies to fix prices, rig bids, and allocate customers for generic drugs and for making false statements to federal investigators.<sup>202</sup> The same month, Hector Armando Kellum, a former senior executive of Sandoz Inc., pleaded guilty for his role in a conspiracy to fix prices, rig bids, and allocate customers in the generic drugs market.<sup>203</sup>

### *Hard Disk Drive Suspension Assemblies*

In February, Hitoshi Hashimoto and Hiroyuki Tamura, two executives of Japanese manufacturer NHK Spring Co. Ltd., were indicted by a federal grand jury for their roles in a long-running antitrust conspiracy to fix the prices of and allocate the market for suspension assemblies, a component found in hard disk drives.<sup>204</sup> These individuals' indictments followed the 2019 guilty plea by NHK Spring, which was sentenced to pay a \$28.5 million fine.<sup>205</sup> A number of private plaintiffs, including hard disk drive manufacturer Seagate Technology—represented by Wilson Sonsini—have since initiated follow-on civil suits for damages.<sup>206</sup> These suits have been consolidated into an MDL in the Northern District of California.<sup>207</sup>

### *Air Cargo and Auto Parts Executive Extraditions*

In 2020, the DOJ successfully secured extradition of executives in two of its most prominent, long-running cartel

investigations. In January, Maria Christina Ullings, a Dutch national and former top executive of air cargo carrier Martinair Holland, was extradited from Italy to the United States in connection with 2010 price-fixing charges, despite having no ties to the United States.<sup>208</sup> Ullings had spent an entire decade as a fugitive until she was apprehended in Sicily. Ullings was sentenced to 14 months in prison, with credit for the time she was held in custody pending extradition, and fined \$20,000.<sup>209</sup>

In February, Eun Soo Kim, a former key accounts manager for Continental Automotive Korea Ltd., was extradited from Germany in connection with the DOJ's auto parts investigation. Kim is a Korean national and had been a fugitive for five years.<sup>210</sup> Kim was sentenced to nine months in prison, with credit for the time he was held in custody pending extradition and prior to sentencing, and fined \$130,000.

### *Financial Services: FOREX*

In September, former JPMorgan currency trader Akshay Aiyer was sentenced to eight months in federal prison and fined \$150,000 for his participation in a conspiracy to manipulate prices for emerging market currencies in the foreign currency exchange (FOREX) market.<sup>211</sup> In December, two days prior to the start of Aiyer's eight-month sentence, the Second Circuit overruled a lower court decision denying Aiyer bail and instead granted Aiyer's motion for bail pending appeal.<sup>212</sup>

In October, former Barclays foreign exchange trader Jason Katz was sentenced to two years of probation and a criminal fine of \$50,000 for his participation in the FOREX

conspiracy.<sup>213</sup> That same month, former Citigroup foreign exchange trader Christopher Cummins, who also cooperated in the investigation, was sentenced to two years of probation.<sup>214</sup> Both executives received leniency for their cooperation in the DOJ's investigation.

### *Food and Consumables*

Packaged Seafood. In March, former Bumble Bee CEO Christopher Lischewski sought to overturn a jury verdict finding him guilty of price-fixing of canned tuna.<sup>215</sup> The court denied his request, stating there was "ample evidence on which the jury could have found a conspiracy between Bumble Bee and Starkist and/or Chicken of the Sea," and going so far as to say the evidence was "legion."<sup>216</sup> At sentencing, the DOJ recommended the most severe sentence proposed to date for an individual convicted of an antitrust crime in the United States: a criminal fine of \$1 million, along with eight to 10 years in prison.<sup>217</sup> In June, the court sentenced Lischewski to pay a criminal fine of \$100,000 and to serve 40 months in prison,<sup>218</sup> in part because of evidence that Lischewski served as the ringleader of the conspiracy, which affected over \$600 million in sales.<sup>219</sup>

Poultry. In June, the DOJ secured its first indictments in an ongoing investigation into price-fixing of broiler chickens,<sup>220</sup> charging two executives of Pilgrim's Pride and two executives of Claxton with conspiring to fix prices and rig bids from 2012 to at least 2017.<sup>221</sup> In October, six additional executives were indicted,<sup>222</sup> and Pilgrim's Pride agreed to plead guilty and pay a criminal fine of \$110.5 million.<sup>223</sup> Tyson Foods—which, along with Pilgrim's Pride, is one of the three top poultry producers in the United



States—has disclosed that it applied for leniency and is cooperating with the DOJ in the investigation.<sup>224</sup>

### *Construction*

**Insulation.** In February, insulation contracting firm Langan Insulation and its co-owner, Thomas Langan, pleaded guilty for their roles in schemes to rig bids and engage in fraud with respect to the insulation contracts for construction projects at universities, hospitals, and other public and private entities in New England.<sup>225</sup> The DOJ noted that the defendants effectuated the scheme using encrypted, disappearing messaging apps on devices with registrations that masked user information, reflecting how the DOJ has and will continue to scrutinize ephemeral messaging during investigations.

**Flooring.** The DOJ has continued to investigate collusive behavior in the commercial flooring and services industries. Executives for flooring manufacturers pleaded guilty in February, March, and November to a conspiracy to rig bids and fix prices, bringing the total number of individual guilty pleas to six.<sup>226</sup> In August, commercial flooring contractor Vortex Commercial Flooring Inc. was charged for its role in the conspiracy.<sup>227</sup> Vortex pleaded guilty and agreed to pay \$1.4 million in fines and restitution, marking the second corporate guilty plea in the investigation.<sup>228</sup>

**Ready-Mix Concrete.** In September, Evans Concrete LLC, a ready-mix concrete company, and four individuals were indicted for fixing prices, rigging bids, and allocating markets for ready-mix concrete used in residential and commercial projects.<sup>229</sup> According to the DOJ, from 2010 to 2016, conspirators submitted rigged bids and accepted

payments through contracts and on projects that were affected by the alleged conspiracy.

### *Health Care Staffing*

In December, a Texas grand jury indicted the owner of a health care staffing company for wage-fixing conduct.<sup>230</sup> The indictment alleged that Neeraj Jindal conspired with competitors to pay lower wages to physical therapists and physical therapist assistants over a six-month period in 2017. The indictment notes that the cost of home health care services is often borne by federal programs like Medicare. In addition to wage-fixing, the indictment charges Jindal with obstructing a related FTC investigation. In announcing the indictment, the DOJ reiterated its commitment to prosecuting collusion in labor markets.<sup>231</sup>

## **Cartel Enforcement Outside of the U.S.**

Cartel enforcement has remained a major priority for antitrust agencies and authorities worldwide. Below we discuss some of the more significant developments in cartel enforcement outside the United States in 2020.

### *European Union and United Kingdom*

While the European Commission (EC) and European courts were active in cartel enforcement in 2020, as detailed below, the UK's Competition and Markets Authority (CMA) largely remained on the sidelines as Brexit continues to unfold. In the year ahead, we may see increased cartel enforcement activity by the CMA, but thus far its impact and influence as an independent enforcer remain unclear.

**Buyers Cartels – Ethylene Purchasing.** In July, the EC fined Orbia, Clariant, and

Celanese €260 million for participating in a purchasing cartel with leniency applicant Westlake from December 2011 to March 2017.<sup>232</sup> The four companies coordinated price negotiation strategies and exchanged commercially sensitive information regarding a component of the ethylene price formula.

Interestingly, the EC considered the value of purchases (rather than sales made by the defendants) as the base amount to determine the fine. Given that the conduct was likely to have lowered the value of purchases, the EC discretionarily increased the amount of the fine by 10 percent. Second, as the first leniency applicant, Westlake avoided a €190 million fine, and since all other participants also applied for leniency, they benefited from fine reductions of 45 percent (Orbia), 30 percent (Clariant), and 20 percent (Celanese). Finally, all participants benefited from a 10 percent fine reduction through settlement. This is the first time the settlement fine reduction procedure—which provides a 10 percent reduction in exchange for cooperation and clear and unequivocal acknowledgement of liability—has been applied to a purchasing cartel.

**Submarine Power – Cable Appeal.** The year 2020 also saw the conclusion of the Power Cables cartel saga. The European Court of Justice (ECJ) largely upheld the EC's 2014 decision fining 11 producers of underground and submarine high-voltage power cables €302 million for a 10-year market-sharing agreement.<sup>233</sup> Two of the appeals, NKT's and ABB's, were partially successful and will likely result in reduced fines.<sup>234</sup> The ECJ's decision has important ramifications for the EC's investigation and enforcement powers:

- *Investigative powers.* In Nexans' and Prysmian's appeals, the ECJ clarified



the procedure applicable to dawn raids.<sup>235</sup> The ECJ found that the EC may copy documents during the dawn raid and only review them at a later stage at the EC's premises. Ruling otherwise would have seriously impeded the EC's ability to effectively carry out dawn raids by *de facto* limiting the timing of its review and substantially increasing the cost of its investigations.

- *Duty to define the scope of the anticompetitive conduct.* The ECJ clarified the EC's duty to appropriately define the scope of the conduct investigated before and after an infringement decision. In ABB's appeal, the ECJ stressed that the EC may not rely on evidentiary shortcuts when determining the material scope of the infringement—demonstrating that both the EC and the ECJ engage in an in-depth analysis of a cartel participant's involvement meeting by meeting.<sup>236</sup> The EC should thus adduce sufficiently concrete and direct evidence that a product category is covered by the practice at stake. The ECJ also found in NKT's appeal that the evidentiary requirement extends to the demonstration of participation in all aspects of the cartel.<sup>237</sup> Thus, if a cartel involves both a market-sharing agreement and a price-fixing agreement for the same products, it should present sufficient evidence on the awareness of all aspects, even if one is non-essential or accessory.
- *Liability.* In Prysmian's appeal, the ECJ found that the EC could hold subsidiary Prysmian CS liable for the entire duration of the infringement under the principle of economic continuity.<sup>238</sup> From 1999 to 2001, the infringement was carried out by Pirelli CS, a Pirelli subsidiary, which in a series of transactions was eventually transferred to Prysmian CS. The

ECJ found that the EC was right to hold Prysmian CS liable for the full duration of the infringement, as the economic activities related to the infringement were transferred to it. In addition, the EC was right in finding that Prysmian was liable for the duration from 1999 to 2001, despite the fact that the legal entity responsible for the infringement during that period of time still existed. The ECJ's judgment thus confirms that the EC has broad discretion to determine which entities to ultimately hold liable.

Evolution of private damages legal framework. As we observed last year, leniency applications have decreased in recent years at least in part because of the rise of follow-on damages actions in the EU. In 2020, the ECJ strengthened the effectiveness of the follow-on damages legal framework by granting standing to any direct customer, indirect customer, or final customer affected by the conduct. Austrian courts dealing with follow-on damages against Otis for its participation in the Elevator Cartel, one of the largest EU cartels to date, asked the ECJ to clarify whether undertakings active in a connected market who suffered harm as a result of the infringement could seek compensation.<sup>239</sup> In this case, the undertaking seeking compensation was an entity responsible for granting subsidies to the buyers of the elevators. The ECJ stressed that any market participant having suffered any loss that has a causal connection with the infringement should have standing.<sup>240</sup>

#### Canada

In July, the Canadian Competition Bureau (CCB) published a draft of its revised Competitor Collaboration Guidelines for comment.<sup>241</sup> The CCB announced that the updates reflect the

bureau's experience since 2009 and the relevant decisions of the Competition Tribunal and courts; they are not meant to substantially alter the CCB's practice.<sup>242</sup> Among other updates, the guidelines provide greater context regarding the types of evidence the CCB will consider in assessing whether firms are competitors, clarify circumstances in which the CCB will investigate agreements between competitors for the purchase of products as a criminal matter, and provide updated examples of conduct that could raise competitive concerns. The final version of the Competitor Collaboration Guidelines is yet to be published.

#### South Korea

In March, the Korea Fair Trade Commission (KFTC) fined Siemens and Canon Medical Systems Korea approximately KRW 54 million for rigging bids to supply computed tomography scan equipment.<sup>243</sup> The KFTC found that the two companies agreed that Canon should submit a false bid in order to help Siemens win a KRW 1.55 billion contract with Chungbuk National University Hospital in 2015.<sup>244</sup> The KFTC's action followed an announcement earlier in the year that it would step up enforcement against collusive conduct related to public safety and public health.<sup>245</sup> Also in March, the KFTC fined Citibank Korea, JPMorgan Chase, HSBC, and Crédit Agricole over \$1 million for rigging foreign exchange swap bids.<sup>246</sup> In July, the KFTC fined seven companies in the steel transportation industry KRW 46 billion (approximately \$38 million) for bid-rigging over a period of 17 years.<sup>247</sup>

In November, the Korean Prosecution Service (KPS) and the DOJ signed an antitrust MOU to promote increased cooperation and coordination on

criminal antitrust enforcement, such as helping to facilitate the extradition process.<sup>248</sup> The MOU reflects the more prominent role that the KPS has pledged to play in South Korea's efforts to pursue criminal cartel conduct. The KFTC and the DOJ signed a similar MOU in 2015.<sup>249</sup>

### *Japan*

In 2020, the Japan Fair Trade Commission (JFTC) adopted new leniency rules and guidelines pursuant to Japan's Antimonopoly Act that promise to significantly impact cartel enforcement in Japan in the years ahead.<sup>250</sup> The guidelines include a number of significant updates, including the following:

Attorney-client confidentiality. The new guidelines indicate that the JFTC will respect a quasi attorney-client privilege in its civil cartel investigations or in connection with leniency applications.<sup>251</sup> Underlying "primary materials or fact finding materials" remain subject to investigation and production.<sup>252</sup>

Calculation of fines. The new rules cap automatic discounts for cartel and bid-rigging self-reporters, but allow the JFTC to adjust the reduction rate according to the degree of cooperation.<sup>253</sup> Previous fine calculations did not

consider cooperation in determining fines that may be imposed. Under the new rules, the limitation that only allowed five applicants to seek leniency has been removed, opening the door for the sixth and later applicants to seek a reduction in fines from 5 percent up to 20 percent.<sup>254</sup>

Obstruction of justice. The new rules increase the threshold for criminal fines imposed for obstructing an investigation.<sup>255</sup>

### *China*

In August, China's State Administration for Market Regulation (SAMR) published formal guidelines relating to the enforcement of China's Anti-Monopoly Law, including guidelines for cartel leniency and commitments.<sup>256</sup>

Leniency Guidelines. The new guidelines explain that leniency is only available to major cartel offenses, such as price-fixing and market allocation.<sup>257</sup> Leniency can typically be granted to up to three parties, and the first applicant can obtain immunity from all penalties if it reports before the agency establishes a case. The second applicant will be considered for reduction in fines by 30 to 50 percent, and the third by 20 to 30 percent. Importantly, the guidelines

make no mention of any confidentiality protections.

In addition, in September, SAMR released final antitrust compliance guidelines to encourage businesses to create in-house capability to evaluate antitrust risk and to avoid engaging in anticompetitive practices.<sup>258</sup>

### *Brazil*

In June, Brazil's antitrust authority, the Administrative Council for Economic Defence (CADE), approved a major collaboration among competing global food and beverage manufacturers—including Coca-Cola, Nestle, and PepsiCo—to respond to the COVID-19 pandemic.<sup>259</sup> In May, the companies signed an MOU to assist small- and medium-sized point-of-sale retail businesses and minimize the economic effects of the pandemic in the beverage industry. To avoid antitrust concerns, the companies agreed not to disclose any sensitive business information, with necessary information to be transmitted through a third party. CADE permitted the collaboration, concluding it was not a collusive attempt to achieve anti-competitive market power and instead was justified by the current economic conditions.<sup>260</sup>

## Civil Litigation

Private litigation has continued to play a central role in the U.S. antitrust enforcement landscape. Major areas of Section 1 litigation in 2020 included challenges to organization rules, intellectual property licensing arrangements, and follow-on cartel suits. Section 2 monopolization challenges against technology companies and challenges to pharmaceutical settlements have also been a focus of private plaintiffs this year. Class certification remains a crucial stage in many private antitrust suits, and 2020 saw important decisions related to the inclusion of uninsured plaintiffs and the use of averages to establish injury. This chapter concludes with an overview of significant developments in civil antitrust litigation in the UK.

### Section 1: Concerted Action

#### *Political Bias Antitrust Claims Fail to Gain Traction*

*Freedom Watch, Inc. v. Google Inc.*<sup>261</sup> The D.C. Circuit Court of Appeals denied a request from Freedom Watch and Laura Loomer to rehear a panel decision affirming the dismissal of a class action case alleging that Google, Facebook, Twitter, and Apple had conspired to suppress conservative viewpoints on their platforms. The suit, filed in 2018, alleged that the companies entered into an “illegal agreement to refuse to deal with conservative news and media outlets” that is “plainly anti-competitive” and a violation of the class members’ free speech rights. In March 2019, the district court dismissed the case on the grounds that the plaintiffs had failed to prove (1) that the platforms colluded in any alleged censorship of conservative viewpoints and (2) that the companies were “quasi-state actors.”

The D.C. Circuit affirmed the lower court’s decision in May 2020. Following the D.C. Circuit’s refusal to rehear the case, Freedom Watch stated that the plaintiffs would seek review from the U.S. Supreme Court.

#### *Mixed Results in Cases Involving Organizations*

*Nat’l Ass’n of Realtors.*<sup>262</sup> Judge Andrea R. Wood of the Northern District of Illinois denied a motion to dismiss made by the National Association of Realtors (NAR), finding that allegations that each class plaintiff would have paid a substantially lower commission but for the NAR Buyer-Broker Commission rules (BBC Rules) were sufficient to state a claim. The court found that the home sellers had not merely alleged parallel conduct, but that the purported anticompetitive restraints were part of the written rules issued by NAR. The court further rejected NAR’s argument that the plaintiffs’ allegations of injury were insufficient because the plaintiffs did not allege that they had attempted to negotiate a lower commission or that the brokers had refused to engage in such negotiation. Judge Wood deemed the argument “perfunctory,” noting that it ignored homeowners’ allegations that the BBC Rules precluded any opportunity for effective negotiation.

*BlueCross BlueShield.*<sup>263</sup> Blue Cross Blue Shield Association and its member plans (collectively BCBS) reached a tentative \$2.7 billion settlement to resolve antitrust claims that the insurance group’s member companies conspired to limit competition and increase prices for policyholders. The plaintiffs alleged that BCBS violated the Sherman Act by: (1) geographically dividing health insurance markets, (2) agreeing not to compete with one another across these geographic markets, and (3) limiting non-Blue competition through

the “National Best Efforts” rule that required a certain percentage of business to come from the BCBS brand. Under the proposed settlement terms, the Blue Cross plans agreed to pay \$2.67 billion and to eliminate the National Best Efforts rule and any other rule that established a cap on non-Blue competition.

*Avanci.*<sup>264</sup> Judge Barbara M.G. Lynn of the Northern District of Texas dismissed a suit from Continental Automotive Systems targeting Nokia, Sharp Corp, and other technology firms that license standard essential patents (SEPs) through the licensing entity Avanci, LLC. The plaintiffs alleged that SEP holders violated the antitrust laws by using a patent pool to coordinate efforts to impose non-FRAND terms on licensees. Judge Lynn dismissed the claims on the basis that SEP holders’ membership in Avanci did not preclude them from negotiating individual licenses with OEMs and, in fact, the plaintiffs had entered into several individual licenses. Significantly, the complaint also alleged that the companies abused monopoly power arising from the standard-setting process to exclude certain implementers from practicing the standard and extract unfairly high royalty rates from those that did take the license. The court held that this conduct sounded in contract rather than antitrust, following a statement of interest that the DOJ had filed in the case.

#### *Follow-on Litigation from Cartel Investigations Remains Active*

*Capacitors.*<sup>265</sup> On September 17, 2020, Judge James Donato of the Northern District of California granted final approval of the \$232 million settlement between AVX, Panasonic, and other electronic component manufacturers and a class of direct purchasers of

capacitors. The plaintiffs accused more than a dozen manufacturers of colluding to fix prices for aluminum, tantalum, and film capacitors over a decade. Buyers claim that the alleged price-fixing scheme began as early as 2002 and lasted until 2013.

After the September 17 settlement, only two defendants remain with respect to the direct purchaser plaintiffs—Nippon Chemi-Con Corp./United Chemi-Con Corp. and Matsuo Electric Co. Trial had begun in March for the two remaining defendants (along with those only now subject to the September 17 settlement agreement), but a mistrial was declared due to delays stemming from COVID-19 and concerns regarding the safety and logistics of continuing a jury trial at that time. A new 10-day trial against the two remaining defendants will commence January 18, 2021. Claims brought by opt-out plaintiffs remain pending against numerous defendants.

*Dynamic Random Access Memory (DRAM).*<sup>266</sup> In November 2020, Judge Jeffrey S. White of the Northern District of California again dismissed allegations that DRAM manufacturers “conspired in plain sight” to restrict output.<sup>267</sup> The defendants collectively control 96 percent of the global DRAM market and, following “vigorous[]” competition in preceding years, all lowered supply and increased prices in 2016.<sup>268</sup> The court previously dismissed the complaint without prejudice in 2019, finding that the plaintiffs adequately alleged parallel conduct—that the defendants simultaneously reduced DRAM supply—“but failed to allege additional facts (‘plus factors’) to distinguish ‘conscious parallelism,’ and thus raise the claims of conspiracy above the speculative level.”<sup>269</sup>

Despite noting that “the lines between conscious parallelism and conspiracy may blur,” the court found that the plaintiffs’ amended complaint still failed to sufficiently identify “plus factors” to support a plausible finding of a conspiracy.<sup>270</sup> While the court analyzed the plaintiffs’ enumerated plus factors (e.g., price signaling, historically unprecedented changes, supply cuts, etc.) both individually and collectively, it found that the plaintiffs’ allegations merely suggested conscious parallelism and that no factors pushed the analysis toward a plausible conspiracy.<sup>271</sup> In particular, the court noted that “[a] ‘follow the leader’ strategy where the dominant market player increases prices or reduces output with the hope that others follow suit does not become conspiratorial simply because the other competitors do so.”<sup>272</sup>

*Optical Disk Drives.*<sup>273</sup> In June 2020, Hewlett-Packard Company (HP) reached a confidential agreement with Quanta Storage, Inc. to settle claims that had resulted in a \$438 million judgment against Quanta arising from a decade-long conspiracy to rig prices for components used to store and read media and data on DVDs, CDs, and Blu-Ray discs. In late 2019, a Houston jury found against Quanta—the only optical disk drive maker that had not previously settled out of court—and awarded pre-trebling damages of \$176 million. Quanta appealed to the Fifth Circuit, arguing that (1) HP could not recover for overcharges for drives purchased by overseas units and (2) the turnover order was vague and in violation of international comity and Taiwanese law. The Fifth Circuit affirmed the lower court’s decision.<sup>274</sup> The jury award in this case is a striking reminder of the risk of taking price-fixing cases to trial.

*Inductors.*<sup>275</sup> Japanese electronics suppliers Panasonic Corp., Murata Manufacturing Co. Ltd., TDK Corp., Taiyo Yuden Co., and other suppliers won a motion to dismiss antitrust allegations brought by Flextronics International USA. Judge Edward J. Davila of the Northern District of California found that Flextronics had failed to bring forward adequate evidence that it was affected by the alleged price-fixing and bid-rigging conspiracy that targeted a different equipment manufacturer. Flextronics did not attempt to amend its complaint.

*Railroads.*<sup>276</sup> Four railway giants—BNSF, CSX, Norfolk Southern, and Union Pacific—have been battling an antitrust suit since 2009 accusing them of conspiring to hike the cost of freight transportation. Wilson Sonsini represents BNSF in this action. The multidistrict case (now covering over 300 rail freight shipper plaintiffs) originally alleged a conspiracy to change the method of rate calculation and break from the industry norm by switching to an adjustable rate that did not account for fuel. More recent complaints have: (1) added three additional railroads as co-conspirators; (2) added allegations that the defendants coordinated uniform implementation of mileage-based fuel surcharges; and (3) alleged an expanded time frame for the conspiracy and its effects. The defendants urged the court to dismiss these new complaints, or otherwise strike the novel allegations, as time barred by the four-year statute of limitations. However, on August 25, 2020, the district court refused to do so, pointing to the U.S. Supreme Court’s *American Pipe* decision and holding that the consequence of any untimeliness would be to limit the scope of available relief.



## Section 2: Monopolization

### Technology

Uncertain Rules for Standards Essential Patents. In April 2020, Lenovo lodged an antitrust suit accusing InterDigital of violating Section 2 of the Sherman Act by making false and misleading, or ineffective, FRAND licensing commitments, and violating Section 1 of the Sherman Act by agreeing with other unnamed technology holders who were also members of the standard-setting organizations to include their technologies in the relevant cellular standards without adequate restraints on any resulting market power.<sup>277</sup>

In June 2020, InterDigital—represented by Wilson Sonsini—filed a motion to dismiss. InterDigital argues that Lenovo and its Motorola Mobility LLC unit refused to license InterDigital’s portfolio of patents covering the 3G and 4G cellular standards on FRAND terms, despite a decade-long effort to negotiate a deal.<sup>278</sup> The motion further argues that Lenovo’s allegations assume InterDigital has bargaining power in the negotiation, but that InterDigital gave that power up when it agreed to have a neutral third party set the rate.<sup>279</sup> InterDigital argues that if Lenovo’s Section 1 claims are allowed to stand, the court would effectively be branding all standard-setting groups as illegal cartels “for doing nothing more than selecting technologies for standardization and implementing policies that provide for FRAND commitments.”<sup>280</sup> Oral arguments on InterDigital’s motion to dismiss took place on October 27, 2020—with the DOJ participating in support of InterDigital, as noted above in the Agency Investigations chapter of this report—and the court has not yet ruled.

hiQ’s Scrapes with LinkedIn. In 2017, hiQ Labs, Inc., a data analytics company that “scrapes” data from public LinkedIn profiles using automated bots, brought suit for monopolization, attempted monopolization, and unfair restraint of trade against LinkedIn.<sup>281</sup> hiQ asserts that LinkedIn abused its market power in the “people analytics market” by preventing hiQ from accessing the public information on the website.<sup>282</sup> The district court granted a preliminary injunction against LinkedIn on the grounds that there were “serious questions on the merits” and a balance of the hardships heavily favored hiQ.<sup>283</sup> The Ninth Circuit affirmed in 2019.<sup>284</sup> However, the district court dismissed hiQ’s antitrust claims in September 2020. The court found that hiQ had failed to properly define the relevant market because it failed to allege “what substitutes there are for people analytics products such as those offered by hiQ.”<sup>285</sup> The court noted in particular that hiQ did not establish that “useful publicly available information cannot be gleaned from other sources such as ... other industry directories,” such as Google and Facebook.<sup>286</sup>

Epic Showdown with Apple. In August 2020, Epic Games (the maker of Fortnite) sued Apple over Apple’s 30 percent tax for app sales and in-app purchases.<sup>287</sup> Epic argued that Apple monopolized the app distribution streams for iPhones and effectively blocked developers that use the App Store from reaching consumers outside that marketplace. Epic also filed a similar suit against Google related to the Play Store on Android devices.<sup>288</sup> Shortly after Epic sued, Apple removed Fortnite from the App Store, purportedly in response to Epic’s use of a “hotfix” to give players a direct payments option for in-game purchases that would

circumvent Apple’s payment system.<sup>289</sup> Apple also moved to cut off Epic’s access to the Apple tools needed to develop the company’s Unreal graphics engine.

In a motion for a protective preliminary injunction, Epic argued that these moves demonstrated Apple’s market power and anticompetitive intent. In October 2020, the Northern District of California granted in part and denied in part Epic’s request for a preliminary injunction, ruling that Apple can keep Fortnite out of its App Store, but must allow Epic’s affiliates access to developer tools for other applications. The court avoided signaling a view on the merits of Epic’s case, citing the “novelty and the magnitude of the issues, as well as the debate in both the academic community and society at large.”<sup>290</sup> A trial is scheduled for May 2021.

Uber Allegedly Driving Competition Out of Business. Sidecar Technologies provided vehicle-for-hire transportation and delivery services until it went defunct at the end of 2015. SC Innovations (the assignee of certain Sidecar litigation rights) sued Uber in 2018, claiming that Uber monopolized the vehicle-for-hire market and drove Sidecar out of business.<sup>291</sup> In May 2020, the U.S. District Court for the Northern District of California denied Uber’s motion to dismiss. Judge Joseph Spero noted that SC Innovations had plausibly suggested a mechanism by which Uber can “leverage its dominant market share to raise both passenger fares and commissions withheld from drivers without a rival increasing output to restore competitive equilibrium.”<sup>292</sup> Further, the court held that SC Innovations had implausibly alleged that Uber could unilaterally raise its commission on rides “to supracompetitive levels . . . while

insulated by network effects from Lyft or a new market entrant usurping Uber's market share."<sup>293</sup> The court held these claims sufficient to allege market power and "provide[] a plausible means for Uber to recoup its losses from alleged predatory pricing."<sup>294</sup> Motions for summary judgment are due in July 2021.

#### *Miscellaneous*

**Keurig Settles Class Action.** In September 2020, Keurig struck a \$31 million deal with a putative class of consumers alleging violations of Sections 1 and 2 of the Sherman Act.<sup>295</sup> The plaintiffs accuse Keurig of monopolizing the market for refill coffee cups compatible with Keurig coffee makers by blocking competition from alternative manufacturers.<sup>296</sup> They alleged, among other things, that Keurig filed sham lawsuits against potential competitors, threatened companies who did business with its competitors, and redesigned its coffee makers to make them incompatible with competitors' cups.<sup>297</sup>

In 2019, the U.S. District Court for the Southern District of New York dismissed the plaintiffs' claims under federal antitrust law, citing the general bar against recovery by indirect purchasers.<sup>298</sup> However, the court allowed certain of the plaintiffs' claims under state antitrust laws to proceed.<sup>299</sup> Keurig and the plaintiff class ultimately reached a \$31 million settlement that includes a no-reversion provision, whereby any portion of the settlement not claimed by class members will be distributed to a nonprofit consumer protection organization.<sup>300</sup>

**Swisher Finally Prevails in Cigarillo Spat.** After six years of litigation, tobacco company Swisher defeated federal and state monopolization claims

brought by Trendsethah.<sup>301</sup> Trendsethah brought suit alleging antitrust violations and breach of contract arising from disputes over a supply agreement.<sup>302</sup> Trendsethah was awarded \$44 million on its monopolization claims in a jury trial. The district court overturned the award, but the Ninth Circuit reinstated it.<sup>303</sup> In 2019, Swisher filed for relief based on newly unsealed evidence showing that the founder and CEO of Trendsethah falsified financial records to evade import taxes on cigarillos, presented these records to Swisher and the court, and used them as a basis for its damages calculations.<sup>304</sup> The court found that this conduct "distorted Trendsethah's costs, prices, demand and profitability," and thus undermined any basis "to show that there was any injury, or the extent of damages caused by Swisher's conduct." The court therefore dismissed Trendsethah's request to reinstate the jury verdict.

**Monopolization in the Movie Awards Industry?** In November 2020, the U.S. District Court for the Central District of California tentatively dismissed monopolization claims brought by Norwegian entertainment writer Kjersti Flaa against the Hollywood Foreign Press Association (HFPA), the organization that puts on the annual Golden Globes awards ceremony.<sup>305</sup> Flaa brought her action against the HFPA after being repeatedly denied membership in the organization.<sup>306</sup> According to Flaa's complaint, the HFPA monopolizes the market for "foreign reporting of entertainment news emanating from Southern California" by, among other things, allocating foreign entertainment news markets amongst its members, requiring applicants to agree not to compete with existing members, refusing to admit applicants who might compete with existing members, and leveraging

its control over the Golden Globes to monopolize interviews with celebrities and other "hot" industry participants.<sup>307</sup>

The court held that Flaa's geographic allegations did not explain how the entertainment news industry could be local when such news is created and consumed nationally.<sup>308</sup> Moreover, the court held that Flaa failed to "identify the relevant type, source, or medium of entertainment news," and explain how such news is—or is not—interchangeable with other news forms.<sup>309</sup> The court left open a 14-day window for Flaa to file an amended complaint.<sup>310</sup>

## Antitrust Litigation in the Pharmaceutical Industry

The most significant developments in the pharmaceutical sector have been in the law of so-called "pay-for-delay" or "reverse payment" patent litigation settlements. Plaintiffs have continued to challenge settlement agreements between brand and generic pharmaceutical companies, arguing that unique forms of non-monetary value flowing from brand to generic companies should be considered unlawful "non-cash" reverse payments under *Actavis*.

**Glumetza Antitrust Litigation.** Here, a group of class action litigants has argued that a brand and generic company's settlement agreement is unlawful because it allegedly contains a "no authorized generic" (no-AG) agreement.<sup>311</sup> A no-AG agreement is one in which 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 plaintiffs have also alleged that the settlement agreement contains a "Most Favored Entry" (MFE) clause,<sup>312</sup> in which a brand and generic effectively block

competition by leveraging statutory exclusivity and conditional patent licensing language to delay additional generic entry. On March 5, the court rejected a motion to dismiss, finding that the complaint plausibly alleged an antitrust violation based on the non-cash no-AG and MFE clauses.<sup>313</sup> The case is set to go to trial in October 2021.

*Staley v. Gilead Sciences, Inc.* Similarly, in this litigation, a group of activists associated with the influential HIV advocacy group ACT UP sued Gilead Sciences, Bristol Myers Squibb (BMS), and Janssen for allegedly monopolizing the market for HIV treatments using combination antiretroviral therapies (cART). Like the plaintiffs in *Glumetza*, the *Staley* plaintiffs' challenge to the defendants' no-AG and MFE clauses survived a motion to dismiss. In addition to their reverse-payment claims, the *Staley* plaintiffs alleged an overarching conspiracy among the three defendant drug manufacturers, as well as two separate bilateral conspiracies between Gilead and each of its co-defendants. The court dismissed the overarching conspiracy claim, citing a failure to allege how BMS benefited from a Gilead-Janssen conspiracy and how Janssen benefited from a Gilead-BMS conspiracy.<sup>314</sup> Discovery is ongoing as to the surviving no-AG, MFE, and bilateral conspiracy claims. Trial is tentatively set for February 2022.

*Patent Thickets.* Purchasers of the blockbuster product Humira have pursued a novel "patent thicket" antitrust theory, claiming that AbbVie intentionally amassed invalid, unenforceable, or noninfringed patents to unlawfully maintain its monopoly on the drug. The district court rejected the plaintiffs' argument that litigations arising from AbbVie's patents were shams, stating that while AbbVie

"exploited advantages" in the system, "existing antitrust doctrine does not prohibit it" from doing so.<sup>315</sup> The court also held that AbbVie's agreements providing different early entry dates for the United States and Europe were not unlawful reverse payments because they "did not have the hallmarks of an unjustified and otherwise inexplicable payment because the package either increased competition or preserved an anticompetitive status quo."<sup>316</sup> The plaintiffs are briefing the case for appeal to the Seventh Circuit.

*Orange Book Fraud.* The First Circuit reversed a district court's decision to dismiss a suit against Sanofi for a fraudulent Orange Book listing.<sup>317</sup> The Orange Book (officially known as "Approved Drug Products with Therapeutic Equivalence Evaluations") collects drug products and their associated patents and regulatory applications. To violate Section 2 through an Orange Book listing, a monopolist must have acquired or maintained its power using the listing, and the listing must be an "improper means" of doing so.

Purchasers of Lantus, Sanofi's proprietary insulin product, allege that the company's listing was improper because the listed patent, which claims only a drive mechanism used in an insulin injection pen, does not claim a "drug" within the meaning of the relevant statute. Although the court agreed that the patent did not qualify for Orange Book placement, it nevertheless sided with the plaintiffs, reasoning that it could not yet determine whether the listing was an "improper means" because the record did not "contain any evidence about custom and practice in the industry, or what if any legal opinions Sanofi sought and obtained before submitting the patent."<sup>318</sup> As a

result, the court remanded the case for additional fact finding as to whether Sanofi acted in "good faith" when it listed the patents.

## Class Certification

Class certification remains a key stage in antitrust class action litigation, as the scope of the certified class has significant implications for defendants' exposure. Key developments this year concerned the much-debated issue of whether the presence of uninjured class members constitutes a bar to class certification and to what extent plaintiffs can rely on averages to establish classwide injury.

### *Uninjured Plaintiffs as a Bar to Class Certification*

After the 2018 *Asacol* decision,<sup>319</sup> courts around the country have grappled with whether to certify classes that may have unharmed class members. This year, district courts in the Second, Ninth, and Tenth Circuits certified classes despite the likely presence of such uninjured class members.

*EpiPen.* In February 2020, the U.S. District Court for the District of Kansas certified two classes of purchasers and reimbursement providers of the emergency allergy treatment EpiPen.<sup>320</sup> The defendants opposed certification, arguing, *inter alia*, that the plaintiffs' proposed class definitions contained too many uninjured class members and that the proposal to have such uninjured class members removed at the claims administration stage would violate their due process rights as recognized in *Asacol*. However, the court predicted that the Tenth Circuit "wouldn't follow" *Asacol*,<sup>321</sup> but rather the Seventh Circuit precedent holding that "a class is too broad to permit certification only if it

includes a great number of members who *could* not have been harmed by the defendant's conduct (as opposed to a great number who *ultimately* are shown to have suffered no harm).<sup>322</sup> The plaintiffs claimed that the percentage of uninjured members was less than 5 percent of individual consumers and less than 0.001 percent of third-party payors, figures that the court concluded were "small enough that they don't preclude class certification."<sup>323</sup>

*Restasis.* In May 2020, the U.S. District Court for the Eastern District of New York granted certification to a class of end-payors estimated to include 30,000 to 40,000 health plans and over one million consumers who purchased Allergan's dry-eye treatment, Restasis.<sup>324</sup> Relying on *Asacol*, Allergan opposed certification on the grounds that the proposed class included uninjured buyers and that the plaintiffs' proposal to exclude such members during the claims administration stage would violate their due process rights. The district court found in favor of the plaintiffs, and explicitly "disagree[d] with the First Circuit's conclusion in *Asacol* that defendant has a constitutional right to remove [uninjured class members] at the liability stage of trial."<sup>325</sup>

*Glumetza.* In August 2020, the U.S. District Court for the Northern District of California certified a class of direct purchasers of branded and generic versions of the diabetes drug Glumetza.<sup>326</sup> The defendants opposed certification on the ground that the question of whether the class would include uninjured class members was dependent on various assumptions made by the plaintiffs, including the assumption that a generic version of the drug at issue would have remained

on the market throughout the entire class period. The court did not discuss *Asacol* or specifically focus on whether uninjured class members bar certification, but it did find that the plaintiffs' expert could simply remove any uninjured class members from his damages model at later stages of the case, such as summary judgment or trial.

#### *Use of Averaging*

There was also significant activity this year on the question of whether plaintiffs can rely on averages to demonstrate classwide antitrust injury. In *Lamictal*, the Third Circuit reversed a district court's class certification decision, finding that the court failed to engage in the analytical rigor required under the law in analyzing plaintiffs' proffer as to average price increases across the proposed class. Several district courts followed the Third Circuit's lead and declined certification on similar grounds, suggesting a trend toward a more exacting standard for certification. Yet, two other recent court decisions granted certification despite the plaintiffs' use of averages or aggregate impact estimates.

*Lamictal.* In April 2020, the Third Circuit vacated and remanded a decision by the U.S. District Court for the District of New Jersey that certified a class of direct purchasers of GlaxoSmithKline's (GSK's) anti-epilepsy drug, Lamictal, and Teva's generic version, lamotrigine.<sup>327</sup> GSK and Teva challenged the certification as to Teva purchasers, claiming that injury was not capable of common proof because the support for certification for those plaintiffs impermissibly relied on average price increases. In a market characterized by individual negotiations, GSK and Teva argued, the use of averages could not account for the fact

that many class members likely were not injured at all. The district court rejected this argument and certified the class, but the Third Circuit reversed, holding that the district court abused its discretion by assuming, without rigorous analysis, that average price increases were sufficient to show that the plaintiffs could establish antitrust injury by common proof at trial.<sup>328</sup>

The Third Circuit held that the acceptability of averages as common proof in this case depends on various detailed issues of fact that will require careful and thorough analysis. These issues include: (1) whether the market is characterized by individual negotiations; (2) whether Teva preemptively lowered its pricing in response to GSK's branded discount strategy, which was to offer discounts to pharmacies that continued selling Lamictal instead of lamotrigine; and (3) whether and to what extent GSK, absent the settlement agreement, would or could have both pursued the discounted brand strategy and launched an alternative generic version.<sup>329</sup>

*Niaspan.* In June 2020, the U.S. District Court for the Eastern District of Pennsylvania denied certification to a class of end-payors of Niaspan, a drug used to treat lipid disorders.<sup>330</sup> The defendants opposed certification on the grounds that the plaintiffs' evidence of classwide injury relied on averages. Citing the Third Circuit's *Lamictal* decision, the district court denied certification because the plaintiffs' use of averages in this case hid "several groups of uninjured class members who cannot be easily identified."<sup>331</sup>

*Aluminum.* In July 2020, the U.S. District Court for the Southern District of New York similarly denied certification to a class of direct aluminum purchasers



who alleged that aluminum traders and warehouses conspired to increase prices.<sup>332</sup> Relying on *Lamictal*, the district court denied certification and found that the plaintiffs failed to show classwide injury because their model relied on average price increases, which masked potential uninjured plaintiffs, given factors such as varying contractual pricing arrangements among buyers.<sup>333</sup>

*Zetia*. Breaking from *Lamictal*, an August 2020 decision by the U.S. District Court for the Eastern District of Virginia granted certification to a class of direct purchasers of the cholesterol drug Zetia alleging that Merck and Glenmark conspired to delay the entry of a generic version of the drug.<sup>334</sup> The defendants relied on *Lamictal* to oppose certification, but the district court held that it is “common practice to use averages to determine whether class members suffered a common antitrust injury in cases such as this one, even if the damages calculation, which occurs later in the proceedings, will require a more individualized inquiry.”<sup>335</sup> The court stated that where *Lamictal* “involved evidence of ‘nuance[s]’ in that market that were ignored by the district judge,” the market structure in this case was “fundamentally different” and amenable to the use of averages.<sup>336</sup>

*Suboxone*. In July 2020, the Third Circuit upheld a decision by the U.S. District Court for the Eastern District of Pennsylvania that granted certification to a class of direct purchasers of the drug Suboxone, a prescription drug used to treat opioid addiction.<sup>337</sup> The defendant, Indivior, argued that the plaintiffs failed to provide common evidence of injury or damages because the plaintiffs’ model, which relied in part on aggregate damage estimates, failed to measure how each class member was specifically harmed, despite acknowledging that the

precise damages suffered by each could differ. *Lamictal* was decided while the appeal was pending, and Indivior filed a letter stating that the case supported its arguments. The plaintiffs countered that in *Lamictal*, the issue was whether averages could hide uninsured class members. By contrast, Indivior did not dispute the fact that its price increases impacted all class members.<sup>338</sup> The Third Circuit rejected Indivior’s argument, finding that “[a]lthough allocating the damages among class members may be necessary after judgment, ‘such individual questions do not ordinarily preclude the use of the class action device.’”<sup>339</sup>

## Civil Litigation in the UK

Under the Consumer Rights Act 2015, lead claimants in UK civil antitrust actions are entitled to file suits on behalf of proposed classes.<sup>340</sup> All the members of these classes resident in the UK are included in the scope of the proceedings, provided that they do not opt out (non-UK residents are permitted to opt in). It is the duty of the Competition Appeal Tribunal (CAT) to assess whether (1) the action of the lead claimant as a representative is justified, (2) all the claims raise similar or related issues, and (3) they are suitable for collective proceedings.

In this context, *Walter Merricks v. Mastercard* is one of the most significant and complex cases in the UK’s legal history. In 2007, the European Commission (EC) issued a prohibition decision finding that Mastercard’s multilateral interchanges fees (MIFs) for cross-border payment card transactions were anticompetitive under EU competition law.<sup>341</sup> Relying on the EC’s decision, Walter Merricks, a consumer rights champion, filed a £14 billion (\$18.6 million) class action on behalf of

46.2 million people, alleging that they had suffered damages over a period of 16 years as a result of being overcharged when purchasing from merchants that accepted Mastercard.<sup>342</sup>

In July 2017, the CAT rejected Merricks’ proposed methodology for calculating an aggregate of individual claims and estimate of individual damages.<sup>343</sup> Applying the Canadian “sufficiently credible and plausible test,”<sup>344</sup> the CAT refused to certify the claim due to the insufficient amount of data available and the inability to estimate individual damages. The CAT found that accepting the collective claim would have breached the fundamental principle of compensatory damages, which requires compensation for the exact amount of damages suffered by the claimant.

Merricks lodged an appeal with the Court of Appeal of England and Wales, which sent the claim back to the CAT for reconsideration in 2019.<sup>345</sup> Mastercard appealed to the UK Supreme Court against the Court of Appeal’s judgment, arguing that even if the CAT had applied a less stringent test, the claim still should be rejected based on insufficient evidence that merchants passed on the higher MIFs to final consumers.<sup>346</sup> According to Merricks, requiring such burdensome justification and demonstrations would undermine the purpose of the Consumer Rights Act 2015.

In a landmark ruling, passed down on December 11, 2020, the UK Supreme Court dismissed Mastercard’s appeal and Merricks’ proposed collective claim was referred back to the CAT for a new assessment of whether the claim should be certified as suitable for trial.<sup>347</sup> The Supreme Court said that the CAT made several errors in refusing to certify the claim. Most significantly, the Supreme

Court held that the CAT should not have treated the question of whether the claim was suitable for aggregate damages as a “hurdle” to surmount, but rather as “one of a number of relevant considerations.” The Court further held that, by refusing to certify the claim merely because quantifying

the loss may be very difficult, CAT had ignored the well-entrenched civil procedure principle that it is obliged to allow the claim to go to trial if the claimant has a “realistically arguable claim to have suffered some loss from a breach of duty.” The highly awaited ruling clarifies aspects of the framework

for mass claims over competition law infringements in the UK. Going forward, we are likely to see more parallel cases in the United States and the UK, and cross-border coordination on competition issues will be more important than ever.

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## Conclusion

Antitrust continued to make waves in 2020. Notwithstanding the challenges of the COVID-19 pandemic, high-profile actions in technology sectors shared headlines with vigorous pursuit of more traditional enforcement agendas. We expect that antitrust will continue to be a high priority around the world, with government actions, private litigation, and cartel enforcement remaining active. In addition, a new administration in the United States, a newly independent

CMA, and still increasing attention on major technology firms promise new and evolving challenges in the year ahead.

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

regular Wilson Sonsini attorney or any member of the firm’s antitrust practice.

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

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## Endnotes

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To view the complete listing of endnotes for this report, please visit <https://www.wsgr.com/email/Antitrust-Report/2020/Antitrust-Report-2020-Endnotes.pdf>.

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## 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*. In 2020, *Global Competition Review* ranked Wilson Sonsini No. 13 on its "Global Elite" list, which consists of the top 25 firms practicing competition law internationally. GCR has also hailed the group as "perhaps the best antitrust

and competition practice for high-tech matters in the world," while *Chambers USA* characterized them as "a dominant firm for matters involving the hi-tech sphere, acting for many of the most prominent technology firms," with a "deep and diverse bench of outstanding practitioners."

Based in New York City, Washington, D.C., San Francisco, Silicon Valley, and Brussels, our highly regarded antitrust attorneys advise clients with respect to mergers and acquisitions, criminal and civil investigations by government

agencies, antitrust litigation, and issues involving intellectual property, consumer protection, and privacy. We advise clients on a full range of issues, including pricing, distribution, vertical restrictions, standard-setting activities, joint ventures, and patent pooling. Working with Fortune 100 global enterprises as well as venture-backed start-up companies, our attorneys have expertise in virtually every significant industry sector, including technology, media, healthcare, services, transportation, and manufacturing.

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