WILSON
SONSINI

2022 ANTITRUST YEAR IN REVIEW

Table of Contents

Table of Contents (cont.)

Introduction

I am pleased to present Wilson Sonsini Goodrich & Rosati's *2022 Antitrust Year in Review*. This report provides an overview of the significant developments in antitrust law, policy, and enforcement over the past year. The global focus on antitrust has continued to sharpen, with major implications for firms all over the world and in all sectors of the economy. In the United States, aggressive enforcement positions taken by Biden-appointed leadership have ripened into litigation, but the agencies have faced a number of setbacks in court. Nonetheless, the agencies show no sign of backing off and continue to bring new actions and to promulgate updated and more vigorous enforcement guidelines. In Europe, the long-awaited Digital Markets Act has been finalized and will come into full effect this year. The European Commission and national enforcers have continued to focus on enforcement in technology markets, but have seen mixed results in court appeals. The UK Competition Markets Authority has continued to develop its newly independent position following Brexit, particularly in the area of merger enforcement. Cartel enforcement remains a key priority for competition agencies around the globe.

This report proceeds in six sections. First, it spotlights recent outcomes in court for U.S. agency enforcement litigation. Second, it discusses major changes in the law that create substantial new antitrust obligations, as well as updated policy and enforcement guidelines. Third, the merger enforcement section describes significant merger control activity by enforcers in the United States, European Union, and the United Kingdom. Fourth, the civil conduct enforcement section outlines enforcer activity in investigating and challenging non-merger conduct. Fifth, the report provides an update on global cartel enforcement policy and activity. And sixth, the report concludes with a survey of significant private antitrust litigation in the United States and United Kingdom.

I hope that you find our *2022 Antitrust Year in Review* to be a valuable resource. If you have any questions about the matters discussed in this report or any other antitrust matter, or if you would like to receive an ongoing summary of antitrust developments throughout the year, please contact your regular Wilson Sonsini attorney or any member of the firm's antitrust practice.

Finally, I would like to acknowledge and thank the attorneys and staff of Wilson Sonsini's antitrust practice and marketing department for the hard work and expertise reflected in this report.

Brad Tennis
Partner,
Antitrust Practice

Spotlight on Enforcer Litigation

Both U.S. federal enforcement agencies—the Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC)—have taken aggressive enforcement stances under leadership appointed by President Biden, including an increased emphasis on litigation. However, the agencies have not fared well in the courts and have suffered a number of significant losses this year. In some cases, these losses have arisen less from changes in the agencies' policies or substantive views of the law and more from simple failures of proof. In other cases, the losses reflect tension between newly aggressive enforcement positions and judicial views of the state of the antitrust laws. But both the DOJ and the FTC have stated that they are undeterred by these results and will continue to bring litigation consistent with the expanded and more vigorous enforcement guides that have been promulgated under the Biden administration.

DOJ Merger Litigation

DOJ Assistant Attorney General (AAG) Jonathan Kanter opened the year with a speech committing the DOJ to litigate more cases so that there are "published opinions from courts that apply the law in modern markets in order to provide clarity to businesses."[1] With respect to merger cases, Kanter contended that divestitures often result in "concentration creep" as a result of divested businesses underperforming expectations.[2] Kanter reiterated this stance in subsequent speeches throughout the year, including in testimony before the Senate Judiciary Committee where he boasted that the DOJ would argue more merger trials this year than any other and has the largest number of pending civil suits in decades.[3] Unfortunately for the DOJ, courts have largely rejected the cases the DOJ brought, siding with the DOJ in only one merger challenge this year: the challenge to Penguin Random House's proposed acquisition of Simon & Schuster.

U.S. Sugar/Imperial Sugar. The DOJ sued to block United States Sugar Corporation from acquiring Imperial Sugar Company in November 2021.[4] The DOJ claimed the merger would harm competition by combining 75 percent of a market for sugar sales from producers in the Southeast United States.[5] In September 2022, the U.S. District Court for the District of Delaware rejected the DOJ's claims on multiple grounds.[6] The court rejected the government's market, finding that customers purchase sugar from across the nation and interchangeably from both distributors and producers.[7] In addition, the court expressed skepticism of the alleged price effects, noting that the sugar market is subject to price controls and export controls under the USDA. Notably, a Ph.D. economist who had worked at the USDA for 30 years testified in her personal capacity that the deal was unlikely to result in higher prices.[8] The court stated that it is "more than curious that the Government is purportedly concerned about anticompetitive harm and increased prices in an industry where the Government itself keeps the prices high and, in many ways, controls the competition."[9] The DOJ has appealed the decision to the Third Circuit.[10]

UnitedHealth/Change Healthcare. In February 2022, the DOJ filed suit to enjoin UnitedHealth's proposed purchase of Change Healthcare, alleging both horizontal and vertical effects.[11] There were two relevant markets in this case: one involving first pass claims systems, which allow health insurance payers to automatically reject or edit claims, and a second involving electronic data interchange (EDI) clearinghouses, which streamline payments between payers and doctors. The DOJ alleged (i) that the merger would combine the only two providers of first pass claims systems and (ii) that UnitedHealth would be incentivized to foreclose competitors' access to Change's EDI clearinghouse and to unfairly use the sensitive information obtained from Change's EDI clearinghouse customers. After the merger was announced in January, UnitedHealth announced it intended to divest Change's claims editing system and reached a divestiture agreement with a private equity firm in April.[12]

The DOJ and the merging parties disagreed over who had the burden to show the divested company would be competitive in the post-merger market. The District Court for the District of Columbia ruled that the burden was on the government to "litigate the fix" and show that the merger taken as a whole would result in a substantial lessening of competition.[13] The court found that the DOJ failed to carry this burden and that evidence showed the divested firm was likely to maintain its competitive edge.[14] With respect to the DOJ's vertical theories, the court credited trial testimony from UnitedHealth and other industry participants that it was not in UnitedHealth's interest to foreclose access to the EDI clearinghouse and that rivals would continue to innovate.[15] The DOJ has filed an appeal to the D.C. Circuit.[16]

Booz Allen/EverWatch. The DOJ sued to block a merger of defense contractors Booz Allen Hamilton and EverWatch in June 2022, claiming that it would eliminate competition for a single NSA simulation contract named Optimal Decision.[17] A federal judge in the District of Maryland denied the DOJ's motion for a preliminary injunction in October 2022, describing the proposed one-contract market as an attempt to "gerrymander" a way to victory.[18] The court found that the DOJ failed to demonstrate any evidence of "actual detrimental effects on competition" and that the DOJ's arguments as to the merged companies' incentives were "alluring but illusory."[19] Instead, the court was convinced by the defendants' claims that countervailing factors would preserve competition, including Booz Allen's professional reputation and regulatory constraints.[20] Booz Allen closed the transaction after the decision.

Penguin Random House/Simon & Schuster. In November 2021, the DOJ filed suit in the U.S District Court for the District of Columbia to block Penguin Random House's (PRH's) proposed acquisition of Simon & Schuster (S&S).[21] The DOJ alleged that the merger would harm competition by depressing author pay for best-selling books in the United States and decrease the quantity and variety of pieces published.[22] This time, the court found for the DOJ, reversing the agency's streak of merger litigation losses.[23] The court accepted the DOJ's market of top-selling books, demarcated by author advances of more than $250,000,[24] and found the merger would result in a post-merger Herfindahl-Hirschman Index (HHI) of 3,111, making the merger presumptively illegal.[25] The court also cited evidence that fierce competition between S&S and PRH would be lost in the merger.[26] The parties abandoned the deal after the ruling.[27]

DOJ Cartel Litigation

Broiler Chickens. After a mistrial in late 2021, the DOJ retried its case against 10 poultry supplier executives accused of conspiring to fix the prices of broiler chickens in February. A Colorado jury was again unable to reach a unanimous decision, and the court declared a second mistrial in March.[28] When the DOJ indicated that it planned to try the case for a third time, U.S. District Court Judge Brimmer ordered AAG Kanter to appear before the court in Colorado and explain why doing so was appropriate.[29] After dismissing five of the 10 executives from the case, the DOJ moved ahead with a third trial, and in July a Colorado jury acquitted all five executives.[30] The DOJ later dismissed charges against four other executives and two broiler chicken companies, Claxton Poultry and Koch Foods, finally ending the years-long investigation into price-fixing in the broiler chicken industry.[31]

Jindal Wage-Fixing Case. In April, a jury deliberated for less than a day before acquitting the defendants in the DOJ's first trial on criminal wage-fixing charges. Neeraj Jindal and John Rodgers, employees of a Texas healthcare staffing company, were charged with criminally conspiring to fix wages by sharing non-public pay rates for physical therapists and physical therapist assistants and agreeing to reduce those rates between March and August 2017.[32] The not guilty verdict came despite testimony from an alleged co-conspirator that they had agreed to reduce rates paid to physical therapists and their assistants.[33] Jindal and Rodgers were also charged with obstructing justice and making false statements in a related investigation by the FTC, and Jindal was convicted on that count.[34] Jindal was sentenced to 36 months of probation and a $10,000 fine.[35]

DaVita No-Poach Case.[36] Also in April, a Colorado jury acquitted a healthcare company and a former executive in the DOJ's first criminal "no-poach" case.[37] In 2021, the DOJ indicted DaVita, Inc. and its former CEO Kent Thiry on charges that they had entered into agreements with other healthcare companies to suppress competition for employees by agreeing not to solicit certain employees.[38] During the trial, several witnesses testified to the existence of the non-solicitation agreements, and the defendants conceded that such agreements had been reached.[39] Despite that testimony, the jury found that the DOJ had not proved beyond a reasonable doubt that the defendants had allocated the market for employees and eliminated meaningful competition.[40] AAG Kanter was undeterred by the losses in *Jindal* and *DaVita*, casting them as "extremely important cases" that "survived motions to dismiss" and "establish[] harm to workers is an antitrust harm."[41]

FTC Merger Litigation

FTC Chair Lina Khan, like AAG Kanter, has argued forcefully since her confirmation for an increase in vigorous antitrust enforcement, which she has positioned as "critical to the growth and dynamism of our economy."[42] She noted that the FTC has moved to challenge major transactions in critical sectors of the economy in 2022, and that it remains committed to challenging unlawful deals, including by "taking steps to better capture the full set of ways in which mergers can harm competition" and "placing greater weight on assessing both non-horizontal and forward-looking competitive harm."[43] Khan has also played down consent decrees, stating that "[w]e're going to be focusing our resources on litigating rather than on settling."[44] However, the FTC suffered two high-profile losses in its

own administrative court this year. As with the DOJ merger litigation described above, these losses entail both failures to meet the necessary burden of proof as well as skepticism of the agency's more expansive view of antitrust law under Chair Khan.

Altria/Juul. In February, an FTC Administrative Law Judge (ALJ) rejected the FTC's challenge to an acquisition of a 35 percent stake in Juul (the e-cigarette market leader) by Altria (the largest tobacco country in the United States).[45] The FTC claimed that the acquisition would reduce competition in e-cigarettes and that the two companies entered into an unlawful non-compete agreement in negotiation of the acquisition.[46] The ALJ found that the FTC had failed to prove either theory.[47] The ALJ found that the post-consummation evidence showed the market had in fact become more competitive since the acquisition.[48] In addition, the ALJ found the non-compete clause in the agreement was not anticompetitive largely because (i) Altria had been so unsuccessful that it had decided to exit the market for reasons apparently independent of the transaction, and (ii) Altria could not be viewed as a viable potential competitor in light of its past failings.[49] The FTC has appealed this decision to the full Commission.[50]

Illumina/Grail. The FTC brought an administrative complaint to enjoin the merger between Illumina and Grail in March 2021.[51] Illumina is allegedly the dominant provider of a DNA sequencing tool called "next-generation sequencing" (NGS), which is an essential input to multi-cancer early detection (MCED) tests.[52] Grail launched Galleri, the first commercially available MCED in the United States, in 2021.[53] The FTC alleged a theory of vertical foreclosure against nascent competition, arguing that the merger would foreclose as-yet-unreleased MCED products from access to the firm's NGS tool.[54] The FTC ALJ found the agency's theory of harm too speculative, noting that the FTC had not shown that Grail's rivals were close to launching a product, that other in-development MCED tests would be interchangeable with Grail's, and that Illumina would be the only viable provider of NGS services.[55] In addition, the ALJ found that Illumina's "Open Offer," a standardized supply contract for NGS available to all for-profit U.S. oncology customers, was sufficient to prevent any anticompetitive foreclosure.[56] The FTC has appealed the decision to the full Commission.[57]

Notably, the European Commission (EC) had blocked the merger less than a week before the ALJ decision and has required Illumina to unwind the transaction.[58] The EC's prohibition decision is directly at odds with the factual findings of the FTC ALJ regarding potential competition, setting the stage for an interesting appeal as the Commission is not required to give deference to factual findings of ALJs and could instead adopt the findings of the EC. For a more detailed analysis of the EC's decision, see the discussion on EU merger enforcement developments below.

Reinvigorated enforcement under the Biden administration has led to a busy federal agency litigation docket in the past two years. The agencies have suffered an unusually high proportion of losses in these cases, reflecting both failures of proof and, in some cases, tension between agency and judicial views of the law. The litigation losses described in this section may therefore amplify calls for legislative reforms that would reduce the burden on enforcers or create new substantive antitrust obligations.

Law and Policy Updates

This chapter collects updates and significant proposals concerning antitrust litigation, enforcement policy and guidelines, and enforcement priorities, covering the United States, European Union, the United Kingdom, and China. Legislators and enforcers around the world remained extremely active in law and policy development over the past year, with a continued emphasis on adapting antitrust to perceived challenges posed by enforcement as to technology industries and platform businesses.

United States

Legislation

A number of antitrust reform bills were proposed this year in both the House and the Senate. While some advanced through committee, none made it to a floor vote except the Merger Filing Fee Modernization Act of 2022, which was ultimately passed as part of the $1.7 trillion spending package in December 2022 after having stalled in the Senate earlier in the year.[59] The Act updates the Hart-Scott-Rodino Act fees table, lowering the filing fee for small transactions while raising the fee for larger transactions.[60] In addition, it exempts state attorney general suits from the multi-district litigation (MDL) process[61]—a provision that is in part a reaction to the Texas-led suit against Google being consolidated into an MDL and transferred to a New York court.[62]

Finally, the Act requires that merging parties disclose whether they have received any subsidies from foreign adversaries.[63]

Other notable antitrust reform bills from the past year reflect two major points of political emphasis: merger reform and expanded conduct enforcement against large technology platform operators. On the merger side, the Prohibiting Anticompetitive Mergers Act, introduced by Senators Warren and Jones, would ban some mergers without any need for judicial review, including those valued over $5 billion, those that create over 33 percent market share for sellers or 25 percent for employers in a relevant market, and those that lead to an HHI above 1800.[64] The bill would also mandate a review of every merger since 2000 that would have been prohibited under those terms.[65] Senator Booker introduced a narrower merger reform bill, which would put an indefinite moratorium on all sufficiently large agricultural mergers, subject to waiver by the attorney general, and create a commission tasked with assessing concentration in food and agricultural markets.[66]

On the conduct side, Senator Klobuchar introduced in the Senate the American Innovation and Choice Online Act (a very similar bill was also proposed in the House of Representatives), which would make it illegal for certain large online platforms to prefer their own products or inhibit interoperability on their platform.[67] The ACCESS Act, introduced by Representative Scanlon, would require large platforms to maintain interfaces that allow for both the transfer of data to other platforms and permit other platforms to interconnect with their system.[68] And the Open Markets Act, introduced by Senator Blumenthal, would prohibit app stores from requiring developers to use the platform's payment system, instituting most-favored nation clauses, or punishing developers for using different pricing tools.[69]

Agency Updates

Turnover at the FTC in 2022 brought the agency more in line with the enforcement agenda championed by Chair Khan. Democrat Alvaro Bedoya was confirmed by the Senate in May and sworn in as FTC Commissioner, filling the vacant seat left by Rohit Chopra.[70] In one of his first speeches as Commissioner, Bedoya criticized contemporary antitrust policy as too permissive due to its focus on "efficiency," and said that antitrust enforcement should instead address a broader mandate to guard against "unfair" commercial practices that may harm smaller firms.[71] Republican Commissioner Noah Phillips stepped down in October,[72] leaving one vacancy at the FTC. The Commission now has three Democrats (Khan, Slaughter, and Bedoya) and one Republican (Wilson).[73] Phillips championed the consumer welfare standard and was an ardent dissenter in many of the policy changes under Chair Khan. Key dissents joined or authored by Phillips include those against the FTC's withdrawal of the prior Section 5 Policy Statement,[74] omnibus resolutions removing mandatory Commission votes for compulsory process,[75] and merger-related procedural changes.[76]

Policy and Enforcement Priorities

This year has seen major shifts in agency enforcement policy, and the table is set for more upheaval in the year to come. Both the DOJ under AAG Kanter and the FTC under Chair Khan have continued to push for reforms staking out expansions for agency enforcement authority, detailing an analytical framework that departs from the consumer welfare standard to include non-transitional antitrust harms, such as impact on labor or small business, and providing streamlined enforcement process.

Merger Guidelines Reform. On January 18, 2022, the FTC and DOJ opened a joint request for further information (RFI) on how to modernize the agencies' Merger Guidelines.[77] The current Horizontal Merger Guidelines have been in place since 2010.[78] In 2020, the agencies jointly issued Vertical Merger Guidelines,[79] but the FTC withdrew its support in September 2021 without promulgating any replacement.[80]

The January RFI sought public input and information on specific areas, including: threats to potential and nascent competition, the impact on monopsony power (including in labor markets), and the unique characteristics of digital markets.[81] To support the RFI, the agencies hosted a series of listening forums throughout 2022 to hear from various groups, including consumers, workers, entrepreneurs, start-ups, farmers, investors, and independent businesses, on merger enforcement[82]—including one forum held by the FTC alone.[83] Agency leaders also held a Spring Enforcers Summit in April to discuss modernizing merger guidelines and facilitating interagency collaboration, which included participation from state attorneys general and international enforcers.[84]

Return of Criminal Section 2 Liability. In a March speech, then-Deputy-AAG Richard Powers announced that the DOJ would use its entire toolkit to enforce the antitrust laws, "including the power to bring criminal charges against

those accused of violating Section 2 of the Sherman Act."[85] Although monopolization offenses have always been criminally prosecutable under the Sherman Act, the DOJ had not brought criminal charges in a Section 2 case since 1977 and prosecutions of standalone Section 2 conduct have been extremely rare.[86] Powers' announcement sparked calls for guidance, but the DOJ asserted that "[a] long history of Section 2 prosecutions and accompanying case law show us the way forward."[87] The DOJ has also made minor updates to the Justice Manual and its guidelines for partner law enforcement agencies that reflect the possibility of criminal Section 2 charges without providing substantive guidance.[88]

In late October, the DOJ made good on its promise and announced a guilty plea in an attempted monopolization case. The president of a paving and asphalt company, Nathan Zito, pled guilty to violating Section 2 of the Sherman Act by attempting to monopolize the market for highway crack-sealing services in Montana and Wyoming by trying (and failing) to reach agreement with competitors to divide customers.[89] The case is similar to *United States v. American Airlines*, in which the Fifth Circuit upheld a criminal Section 2 attempted monopolization charge based on unsuccessful solicitation to enter a price-fixing agreement. These cases demonstrate that Section 2 may be used to reach incipient conduct that, if completed, may have a dangerous probability of conferring market power through a *per se* violation of Section 1. But neither prior case law nor the DOJ's practice to date provides meaningful guidance on what standalone single-firm conduct, if any, may be prosecutable.

Broad New Statement of Section 5 Authority. In November, the FTC released a new Policy Statement regarding Section 5 of the FTC Act, which prohibits "unfair methods of competition in or affecting commerce."[90] Last year, the FTC rescinded its 2015 Policy Statement on Section 5,[91] which had emphasized that the FTC would follow the consumer welfare standard, evaluate conduct under "a framework similar to the rule of reason," and align Section 5 enforcement with the Sherman and Clayton Acts.[92]

The new Policy Statement states that "Section 5 reaches beyond the Sherman and Clayton Acts to encompass various types of unfair conduct that tend to negatively affect competitive conditions."[93] The Policy Statement also emphasized that Section 5 does not require a showing of market power or market definition and does not require "rule of reason" style balancing; instead the statute "focus[es] on stopping unfair methods of competition in their incipiency based on their tendency to harm competitive conditions."[94] Commissioner Christine Wilson filed a dissenting statement criticizing the Policy Statement for, among other things, not providing "clear guidance to businesses seeking to comply with the law" or "a framework that will result in credible enforcement."[95] Instead, she wrote, "Commission actions will be subject to the vicissitudes of prevailing political winds."[96]

Interlocking Directorates. The DOJ has throughout the year indicated an intent to preemptively investigate and challenge interlocking directorates in violation of Section 8 of the Clayton Act, rather than limiting such review to merger enforcement.[97] The DOJ followed through on this announcement, opening investigations and sending subpoenas to multiple companies, investors, and individuals regarding potential interlock.[98] Several individuals have already resigned from boards of directors in response to this effort, including private equity representatives.[99]

Initiatives to Address Supply Chain Disruptions. In February, the DOJ announced initiatives to scrutinize to deter, detect, and prosecute those who would exploit supply chain disruptions to engage in collusive conduct.[100] The DOJ also formed a working group with antitrust enforcement agencies in Australia, Canada, New Zealand, and the United Kingdom. In the wake of this new enforcement initiative, the DOJ this year launched a grand jury investigation of ocean containerized shipping carriers.[101] The FTC is using its investigative powers in this area as well: Pursuant to Section 6(b) of the FTC Act, the Commission ordered nine large retailers (including Walmart, Amazon, and Kraft Heinz) to provide detailed information concerning the causes behind ongoing supply chain disruptions and the effect of the disruptions on consumers and competition.[102]

Developments in FTC Healthcare Policy. The FTC approved a Section 6(b) study into Pharmacy Benefit Managers (PBMs) in June.[103] Through this study, the FTC intends to "shed[] light" on several PBM practices, including "the impact of rebates and fees from drug manufacturers on formulary design and the costs of prescription drugs to payers and patients."[104] Also in June, the Commission issued a statement highlighting concerns that high rebates and fees in the pharmaceutical industry may encourage the higher list prices and the use of higher-cost drugs (with higher rebates) over lower-cost alternatives.[105] In August, the FTC released a policy paper regarding hospital merger Certificates of Public Advantage (COPAs), which shield certain hospital mergers from federal antitrust laws in favor of state oversight.[106] The FTC

criticized COPAs, arguing that research shows that several hospital mergers subject to COPAs have resulted in higher prices and reduced quality of care, notwithstanding regulatory commitments by the hospitals.[107]

Withdrawal of Delrahim SEP Policy Statement. The DOJ, the U.S. Patent and Trademark Office (USPTO), and the National Institute of Standards and Technology (NIST) in June withdrew the 2019 Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary FRAND Commitments issued under former AAG Makan Delrahim.[108] The 2019 Statement had provided that a patent holder's FRAND commitment was not an outright bar to seeking an injunction on the view that disputes about whether FRAND commitments have been honored sound in contract rather than in antitrust. The agencies did not issue a new replacement policy statement.

Expanded FTC Staff Process Powers. In August, the FTC authorized three new "compulsory process" omnibus resolutions. The rules extend last year's similar resolution to three new "key areas": (i) collusive conduct; (ii) mergers and transactions; and (iii) the car rental industry.[109] In dissent, Commissioners Phillips and Wilson noted that they had asked "what's left?" following the 2021 resolutions and argued that "[t]he answer then was 'not much.'"[110] "[F]ollowing the majority's adoption of two additional resolutions," the Commissioners wrote, "the answer is 'virtually nothing.'"[111]

European Union

Legislation

The Digital Markets Act. On July 18, 2022, the long-awaited Digital Markets Act (DMA) received the final approval of the EU's co-legislators.[112] The DMA imposes stringent and far-reaching obligations on the largest digital platforms, designated as "gatekeepers" under the law. It includes (but is not limited to) bans on gatekeepers ranking their own offerings more favorably than those of third parties, using business users' nonpublic data to benefit the gatekeeper's own competing offerings, employing price parity clauses, and requiring that in-app purchases be routed through the gatekeepers' platform services. The DMA also prescribes several affirmative duties for gatekeepers, including a duty to allow effective interoperability between operating systems, hardware, and software applications; a duty to allow end users to easily uninstall software applications that are not essential for the functioning of an OS; and a duty to ensure that users can access their marketing or advertising performance data. The regulation will give the EC significant new enforcement powers, including the ability to impose fines of up to 10-20 percent of a company's worldwide annual turnover. In case of systematic non-compliance, the EC may also impose behavioral or structural remedies, including a ban on acquisitions.

The DMA came into effect in November 2022 and its obligations will apply beginning in May 2023.[113] The interplay between investigations under the (current) antitrust laws and newly introduced DMA obligations remains to be seen, since the DMA states that it aims to "complement the enforcement of competition law" and it should apply "without prejudice" to EU or national competition rules. Parallel application of the DMA and existing EU antitrust rules to "gatekeepers" is likely to raise a number of questions and concerns, including with respect to the scope of enforcement and double jeopardy issues. The responsibility to apply the DMA will span both the EC's Competition and Connect departments (DGs), led by Executive Vice-President Vestager and Commissioner Thierry Breton, respectively. The scope of each DG's mandate remains unclear: Commissioner Breton wants DG Connect to become "a powerful new digital regulator,"[114] while DG Competition has established a new directorate that will focus on the DMA.[115]

It will also have to be seen how the DMA plays together with similar *ex ante* regulations within EU Member States such as the German provisions addressing companies with "paramount significance across markets."[116] Putting to use these new powers, enacted in 2021, the German Federal Cartel Office (FCO) has already designated Google, Meta, and Amazon with this status[117] and opened formal investigations that might lead to prohibitions of certain practices.[118] The DMA explicitly leaves space for national exercise of competition law, and the EC has already hinted at the possibility to refer cases to the FCO that circumvent DMA provisions.

Agency Updates

In September 2022, in anticipation of its new powers to regulate the largest digital platforms described above, the EU opened an office in San Francisco to engage with companies based in Silicon Valley and the broader Bay Area.[119] The office aims to reinforce the EU's cooperation with the United States on digital diplomacy, as also recently demonstrated in the published Joint Statement by the EC, the FTC, and the DOJ establishing the EU-U.S. Joint Technology Competition Policy Dialogue.[120]

Policy and Enforcement Priorities

Updated Vertical Guidelines. In May 2022, the EC adopted its new Vertical Block Exemption Regulation (VBER) accompanied by new Vertical Guidelines (VGL).[121] The revised rules aim to provide businesses with simpler, clearer, and up-to-date rules and guidance, and help them assess the compatibility of their supply and distribution agreements with EU competition rules. Rules for companies active in online distribution will be relaxed, including allowing online sales restrictions such as different online/offline sales conditions (including dual pricing) and online marketplace bans.[122] There is a one-year transitional period for prior agreements that meet the current VBER requirements.

Updated Horizontal Cooperation Guidelines. In March 2022, the EC published drafts of the revised R&D Block Exemption Regulation and Specialization Block Exemption Regulation, as well as the accompanying Horizontal Guidelines, for stakeholder comments.[123] The current Block Exemption Regulations, which set out how competitors can work together on projects and enter into horizontal agreements without breaching collusion-related prohibitions, were due to expire on December 31, 2022, but their validity was recently extended until June 30, 2023, pending the ongoing review. Proposed amendments include a strong focus on sustainability and updated guidance on information exchange in the era of algorithms.

Revised Informal Guidance Notice. To help businesses navigate novel or unresolved questions regarding the application of EU antitrust rules, the EC also adopted in October a revised Informal Guidance Notice, amending the Notice that had been in place since 2004.[124] While guidance letters will not create any rights or obligations for the applicants, they can help businesses carry out an informed self-assessment of their agreement or conduct.

IoT Sector Inquiry. The EC published a report identifying antitrust concerns relating to consumer Internet of Things (IoT) segments in January.[125] The EC found that developers of voice assistants may be able to control the ability of other firms to benefit from a platform and may obtain unprecedented access to user (and sometimes competitor) data. The EC also found that platform operators may be able to impose unreasonable terms on smart device manufacturers and service providers through control of a key IoT entry point. The inquiry could lead to increased enforcement action with an uncertain interplay with the DMA.

Collective Bargaining for Gig Workers. In September 2022, the EC followed up on its initiative to ease collective bargaining for gig economy workers who, according to the agency, have been "falsely labelled" as self-employed.[126] The EC stated that it will no longer apply competition law principles to self-employed people who are in a situation comparable to workers.[127] Previously, Article 101 TFEU would deter self-employed workers from cooperating by considering them a cartel under EU law. Even though the new guidance does not create any new social right, the Guidance demonstrates the EC's focus on the labor market, which has also been complemented by a proposed Directive that lays out the criteria for determining when a platform worker should be classified as an employee.[128]

Rest of the World

UK Vertical Guidelines. A new UK Vertical Agreement Block Exemption Order (VABEO) entered into force in May 2022, with Guidance issued by the Competition and Markets Authority (CMA) following in July.[129] The UK regime is largely aligned with the new EU VBER, described above, but some differences remain. For example, the UK takes a stricter approach to wide parity clauses (i.e., restrictions on offering better terms on any sales channel) by classifying them as "hardcore restrictions" and prohibiting them in both online and offline scenarios. By contrast, the EU scrutinizes wide parity clauses only with respect to online intermediation services and considers them "excluded restrictions," meaning that any specific parity clauses would need to be assessed individually while the rest of the agreement could still benefit from the VBER. The two regimes also differ regarding their treatment of non-compete obligations extending beyond five years: in the EU, the VBER applies such obligations where tacitly renewable, while in the UK any such obligations must be individually assessed.

Canada Criminalizes Wage-Fixing. In June, Canada amended its Competition Act to criminalize wage-fixing. This amendment will become effective in June 2023.[130] The new law aims to "protect workers from agreements between employers that fix wages and restrict job mobility."[131] The law explicitly prohibits wage-fixing and no-poach agreements, and provides for a penalty of up to 14 years in prison. Other amendments include removing the $25 million limit on fines for price-fixing violations and instead handing full discretion of fines to the court.

China's Anti-Monopoly Law. Amendments to China's Anti-Monopoly Law went into force August 1, 2022.[132] The law strengthens the merger review

powers of the State Administration for Market Regulation agency (SAMR)—including by allowing the agency to stop the clock on reviews or to call in transactions below filing thresholds—and increases the gun-jumping fines. In addition, the amendments add stricter penalties for certain antitrust conduct, including increased maximum fines for anticompetitive agreements that were not implemented. Individuals can now be held criminally liable for their role in anticompetitive conduct, whereas previously criminal liability only arose if an individual engaged in obstruction of justice related to an antitrust investigation. The amendments also introduced safe harbors based on market share for vertical restraints, similar to the EU approach, and clarified that resale price maintenance is no longer a *per se* violation.

Merger Enforcement

This chapter highlights developments in merger control in the United States, European Union, and United Kingdom. Enforcers in each of these jurisdictions have taken aggressive stances on merger enforcement, leading to a significant number of litigations (discussed above) and a relatively high number of abandoned deals. Notably, U.S. and UK authorities have deemphasized conditional clearance, particularly in cases that would involve behavioral commitments. Finally, we highlight a deal that failed to receive clearance in China, despite being cleared by a number of other major enforcers around the world.

United States

DOJ and FTC Merger Litigation

This year was a particularly busy one for merger litigation, as discussed in greater detail in the chapter above highlighting enforcer litigation. The agencies have not fared well in court. The DOJ has litigated the UnitedHealth/Change merger, the U.S. Sugar/Imperial Sugar merger, the Booz Allen Hamilton/EverWatch merger, and the Penguin Random House/Simon & Schuster merger. The DOJ lost three of those four cases—winning only the challenge to Penguin Random House/Simon & Schuster—and has so far announced its intention to appeal two of the losses. The DOJ is currently litigating the ASSA Abloy/Spectrum merger as well. The FTC lost administrative trials concerning the Illumina/Grail and Altria/Juul matters and has appealed both to the full Commission. Both agencies have stated that they are undeterred by these results and intend to continue to litigate cases.

Conditional Merger Approvals

Consistent with AAG Kanter's January remarks emphasizing litigation in merger cases,[133] the DOJ this year appears to have effectively abandoned its practice of approving mergers subject to structural or behavioral relief. The DOJ did not enter any consent decrees conditionally allowing a merger this year.[134] Indeed, the DOJ went so far as using a settlement offer against the merging parties in a complaint. In ASSA Abloy/Spectrum Holdings, the DOJ filed a complaint alleging that the deal would substantially harm competition in markets for premium mechanical door hardware and smart locks.[135] The complaint casts the parties' offer to divest parts of the business as "effectively conced[ing] that their proposed transaction would harm competition."[136] The DOJ's tactic in this case puts firms seeking to develop "fix it first" divestitures into a difficult position—but, as noted above in the discussion of the *UnitedHealth* litigation, the DOJ has been chastised in court for failing to appropriately "litigate the fix" when the parties actually carry it out.

The FTC, on the other hand, has continued to approve transactions subject to remedies and has used the opportunity to impose "prior approval" and "prior notice" requirements that would require the parties to notify the FTC about certain future transactions or even seek the FTC's affirmative permission to carry them out. This was standard practice at the FTC prior to a change in policy in 1995 and has become standard practice once again following the FTC's decision to rescind the 1995 policy statement last year.[137] Notable FTC consents from the past year include:

JAB Consumer Partners SCA SICAR, National Veterinary Associates, Inc., and SAGE Veterinary Partners, LLC.[138] The parties to this transaction entered into a consent decree in June 2022 to divest specified veterinary clinics across California, Colorado, Virginia, and Washington, D.C.[139] In addition, JAB will be required to seek the FTC's approval before obtaining veterinary clinics in the relevant geographies and will have to notify the FTC before obtaining a veterinary clinic anywhere in the United States,[140] a remedy Chair Khan described as "first-of-its-kind."[141] This deal seems to have drawn particular attention at the FTC: it was the subject of some of Khan's remarks to the House Subcommittee on Antitrust,[142] and the agency release announcing the remedy colorfully asserted that JAB had been "gobbling up competitors in regional markets that are already concentrated."[143]

Tractor Supply Company/Orscheln Farm and Home LLC.[144, 145] Tractor Supply, a national retailer of supplies for small farmers and rural landowners, sought to acquire Orscheln, a regional

farm store chain in the Midwest and South.[146] The consent decree requires the parties to divest certain Orscheln stores, Orscheln's corporate offices, and an Orscheln distribution center to two divestiture buyers: Bomgaars, an Iowa-based farm store, and Buchheit, a farm store based in Missouri and Illinois.[147] Under the order, the transition process will be overseen by a monitor and both the merging parties and divestiture buyers are subject to lengthy prior approval obligations. Tractor Supply must seek prior approval from the FTC to purchase any other farm and ranch stores within 60 miles of the divested Orscheln stores for 10 years. Additionally, two divestiture buyers must seek prior approval from the FTC to sell the acquired Orscheln stores for a period of three years and must obtain prior approval to sell the divested Orscheln stores to any company operating a farm and ranch store within 60 miles for the following seven years.

ARKO Corp., GPM Investments, LLC, GPM Southeast, LLC, and GPM Petroleum, LLC.[148] GPM acquired 60 gasoline stations in Michigan and Ohio from Corrigan Oil Co. in 2021 in a non-HSR-reportable transaction.[149] The FTC launched a post-consummation investigation, and the parties agreed to a consent decree in June 2022 requiring the divestiture of one retail fuel outlet in each of five relevant local markets.[150] The parties must also obtain prior approval to acquire retail fuel assets within a three-mile driving distance of any of the returned locations in a 10-year period. The FTC took issue with the non-compete clause in the asset purchase agreement, which the majority viewed as not "appropriately limited in geographic scope and duration" and not "facially related to protecting any goodwill."[151] In response, the parties agreed to limit the non-compete clause to a three-year period and to locations within three miles of the acquired gas stations.[152]

Abandoned Transactions

As shown in the following table, a significant number of deals were abandoned in connection with antitrust agency review in 2022, suggesting that the agencies' aggressive enforcement posture and willingness to litigate has produced results.

Parties	Agency	Industry	Date	Complaint Filed?
Lockheed Martin / Aerojet Rocketdyne	FTC	Defense Contracting	February 2022	Yes
RWJ Barnabas Health / Saint Peter's	FTC	Healthcare	June 2022	Yes
Cargotec / Konecranes	DOJ	Shipping	March 2022	No
Marine Container / Maersk	DOJ	Shipping	August 2022	No
Lifespan / Care New England	FTC	Healthcare	March 2022	Yes
Verzatec / Crane Composites	DOJ	Manufacturing	May 2022	Yes
HCA Healthcare / Steward Health	FTC	Healthcare	June 2022	Yes
NVIDIA / ARM	FTC	Semiconductor	June 2022	Yes

Video Game Mergers

Mergers in the digital entertainment industry have seen mixed responses, with some deals clearing FTC review while others received increased scrutiny. The FTC has demonstrated an interest in digital technology mergers involving major platform operators, like Meta or Microsoft, but has cleared mergers between older technology conglomerates or between smaller players in the industry.

Sony/Bungie[153] and Take-Two/Zynga.[154] In July 2022, Sony Interactive, the technology conglomerate and owner of PlayStation, completed its acquisition of game development studio Bungie.[155] The FTC reportedly investigated the deal over concerns that Sony would foreclose rivals by making Bungie's content exclusive to PlayStation.[156] But under the merger agreement, Bungie would continue to retain the "ability to self-publish and reach players wherever they choose to play."[157] In January 2022, Take-Two, a video game developer and publisher, announced its intent to acquire Zynga, a game development studio focused on developing games for mobile and social networking platforms, for $12.7 billion.[158] Some speculated the deal might receive close scrutiny alongside the Microsoft/Activision deal (discussed below),[159] but the deal was closed after five months without any remedies.[160]

Microsoft/Activision Blizzard. In December, the FTC announced that it would file to block Microsoft's $69 billion acquisition of Activision Blizzard, a major cross-platform game development studio.[161] The deal was announced in January 2022,[162] and the FTC issued a second request in March over concerns that the acquisition could foreclose rivals of Microsoft's Xbox console from access to Activision's

games.[163] Similar to the Sony/Bungie matter, Microsoft publicly pledged to continue to make Activision's popular "Call of Duty" games available on Sony PlayStation and to bring the franchise to Nintendo's consoles as well,[164] but this commitment was apparently not enough to resolve the FTC's concerns. In June, Chair Khan stated in a letter to Senator Warren that the FTC's investigation would cover the merger's impact on labor as well.[165]

Meta/Within Unlimited. In July 2022, the FTC sued in federal court to obtain a preliminary injunction blocking Meta's acquisition of Within Unlimited, a virtual reality app developer with a popular dedicated fitness app.[166] The complaint emphasizes a nascent competition theory, alleging that Meta is already a key player in the virtual reality sector and has a pattern of acquiring the most successful VR apps for itself.[167] According to the FTC, Meta's decision to acquire an established app rather than entering by building its own would dampen future innovation and competition.[168] Trial in the case took place in December.[169]

Matters to Watch

Ticketmaster struggling to "shake it off" after botched Taylor Swift tour sale. Ticketmaster has renewed "bad blood" with regulators after its systems crashed during the presale event for Eras Tour tickets in November 2022. The highly publicized failure led to renewed cries that antitrust enforcers "should've said no" to Ticketmaster's 2009 merger with Live Nation Entertainment.[170] The DOJ has reportedly opened an investigation into the consummated transaction, focusing on whether the deal has allowed Live Nation Entertainment (Ticketmaster's parent company) to monopolize the live music industry.[171] Senators Klobuchar and Lee jointly announced a forthcoming congressional investigation as well.[172]

Major grocery merger to test FTC's appetite for divestitures. Kroger and Albertsons Companies, Inc., two of the largest grocery retailers in the United States, have agreed to merge in a deal that has drawn criticism from senators of both political parties.[173] In the merger agreement, the parties agreed to divest up to 650 stores to a newly created entity to secure antitrust approval for the deal.[174] It would be unprecedented for the FTC to accept a divestiture of this magnitude in a grocery store transaction.

European Union

Diverging Review Among Jurisdictions

Illumina/Grail. On September 6, the EC blocked Illumina's acquisition of Grail.[175] The case pushed the substantive limits of EU law and is inconsistent with the outcome reached by the FTC's administrative court, as discussed above. The EC decision for the first time states an innovation theory of harm to prohibit a vertical transaction. While the EC decision states that it is protecting actual competition—a finding at odds with the facts as determined by the FTC court—the contention that the merger would "stifle innovation" features prominently in its reasoning. Illumina filed a sweeping appeal in November, attacking both procedural and substantive aspects of the prohibition decision.[176] The review may also see a record gun-jumping fine: Illumina closed the deal in August 2021, leading the EC to impose measures requiring Illumina to hold Grail separate.[177] Those interim measures are also under appeal.[178] In the meantime, the EC sent a charge sheet to the parties on December 5, informing them of its intended measures to unwind the deal.[179]

Konecranes/Cargotec. The EC approved with divestitures the merger between Konecranes and Cargotec, the largest European (and among the leading global) manufacturers of container and cargo handling equipment.[180] However, the deal was blocked in the UK, and the parties abandoned the deal on the same day as the prohibition order.[181] The DOJ had also threatened a challenge.[182] The divergence in outcomes highlights the stricter views of the UK and U.S. agencies on behavioral remedies. It also highlights the sensitivities of a European regulator that has seen several recent court defeats. By contrast, the UK CMA has limited judicial constraints, with the UK Competition Appeal Tribunal (CAT) having never fully overturned a merger decision by the CMA.

Facebook/Kustomer. In its second case under the new Article 22 referral policy, the EC cleared Facebook's acquisition of customer service platform Kustomer, subject to requirements that Kustomer's rivals receive non-discriminatory access to its messaging channels for 10 years and that Facebook make the same updates and improvements to the functionality of Facebook Messenger, Instagram messaging, or WhatsApp for both Kustomer and its rivals.[183] The deal was cleared unconditionally in the UK and Germany.[184] Ordinarily, the "one-stop-shop" principle under EU merger control would mean that national review of a deal is not possible once the EC has jurisdiction. However, the German regulator disagrees with the EC's new Article 22 policy and has stated that it will not refer deals where there is no original EC jurisdiction.[185] Here, it was unclear whether the German thresholds

were initially met, and the regulator opened its own parallel review to assess. Once jurisdiction was established, the German regulator continued to assert its jurisdiction rather than join the Article 22 referral review made by Austria and nine other EU Member States.

Expansive View of Merger Control Jurisdiction

The Illumina/Grail case, discussed above, also presents an important jurisdictional issue. The case was the first time the EC had exercised a controversial interpretation of its Article 22 powers allowing jurisdiction over mergers that do not meet any national authority's notification thresholds. The parties challenged the EC's jurisdiction, but in July the EU General Court upheld the EC's Article 22 interpretation, noting that it allowed beneficial flexibility to address deals that might fall through the gaps of rigid notification thresholds.[186] Both Illumina and Grail have appealed the decision to the European Court of Justice. In October, Advocate General Kokott recommended another potential means to review deals not meeting notification thresholds, issuing an opinion that antitrust agencies should be able to review deals under abuse of dominance rules even where they are not notifiable.[187] However, where a deal has received merger clearance, it cannot be subsequently investigated under the dominance rules. While AG opinions are non-binding, they are followed in the majority of cases.

United Kingdom

Meta/Giphy. In June, the UK's Competition Appeal Tribunal largely confirmed the CMA's order for Meta to unwind its $357 million acquisition of Giphy, but did find that procedural flaws in the agency's in-depth probe undermined the agency's findings.[188] Specifically, the CAT held that the CMA had "wrongly excised" all confidential information of third parties, impacting Meta's ability to defend itself.[189] The deal was remitted back to the CMA for a fresh review, where the regulator confirmed its initial views and ordered Meta to unwind the deal.[190] Meta has confirmed that it will not appeal.[191] During the review, the CMA also fined Meta twice for breaching an initial enforcement order that had required it to actively inform the CMA of any "material changes" to the business.[192]

National security concerns to the fore. Governments across the EU and in the UK are demonstrating a clear willingness to review deals for national security concerns, including by calling transactions in for review retrospectively and for acquisitions of less than 25 percent stakes. In July, the UK Secretary of State for the Department for Business, Energy, and Industrial Strategy (BEIS) blocked its first transaction under the CFIUS-like National Security and Investment Act 2021: a proposed licensing arrangement between the University of Manchester and Beijing Infinite Vision Technology Company Ltd.[193] A month later, on August 17, it issued a second block in relation to a proposed acquisition of Pulsic Limited, a UK company specializing in electronic design automation products, by Super Orange HK Holding Limited, which BEIS identified as a Chinese chip manufacturer.[194] And in November, BEIS unwound a completed deal for the first time, ordering a Dutch subsidiary of Shanghai-listed Wingtech Technologies to sell its 86 percent stake in the UK's largest semiconductor manufacturer, Newport Wafer Fab.[195]

China

DuPont/Rogers. DuPont de Nemours's $5.2 billion acquisition of Rogers Corporation fell at the last hurdle in November when it failed to get clearance from China's antitrust regulator.[196] The deal received unconditional clearance in six other jurisdictions (Austria, Germany, Hungary, North Macedonia, South Korea, and the United States), but despite a pull-and-refile, the deal failed to "obtain timely clearance" in China.[197] DuPont will pay Rogers a $162.5 million termination fee.[198] It is the largest deal to fall apart due to review by China's State Administration for Market Regulation (SAMR) since Qualcomm/NXP Semiconductors in 2018.[199]

Civil Conduct Enforcement

This chapter highlights significant developments and ongoing matters in civil conduct enforcement by competition agencies in the United States and the European Union. Enforcers in both jurisdictions continued to focus on large technology companies and pharmaceutical industries in 2022, pushing forward previously filed litigation in addition to launching new cases and investigations.

U.S. Department of Justice

Search monopolization litigation against Google continues.[200] The DOJ and 11 state attorneys general are continuing to press their antitrust claims against Google after filing suit in October 2020.[201] The plaintiffs have alleged unlawful maintenance of monopolies in certain search and advertising markets through agreements related to the placement of Google

Search on mobile phones and in web browsers.[202] The case was consolidated for discovery and pretrial purposes with a suit filed by a separate group of state attorneys general, led by Colorado and Nebraska, that incorporates the DOJ complaint and adds additional allegations. Google filed summary judgment motions in December, and trial in the case is scheduled for September 2023.[203]

Settlement in poultry plant wage suppression case. In July, the DOJ filed a complaint and a proposed consent decree to end a long-running investigation into a conspiracy to exchange information about wages and benefits for poultry processing plant workers and to collaborate on compensation decisions.[204] The proposed consent decree with data consulting firm WMS, and its president in his individual capacity, would ban the surveys or any other services that facilitate the sharing of competitively sensitive information, impose a compliance monitor for the next 10 years, and require the companies to pay $84.8 million in restitution.[205] Two poultry processors will also be prohibited from, among other things, penalizing chicken growers by reducing their base payments as a result of relative performance, due to violations of the Packers and Stockyards Act.[206]

U.S. Federal Trade Commission

Biden administration files first Section 2 case. The Federal Trade Commission and various states sued Syngenta and Corteva under Section 2 for unlawfully foreclosing competitors and charging supracompetitive prices in the crop-protection products market.[207] Given the industry's regulatory regime, "basic" manufacturers like the defendants are first to "develop, patent, and register active ingredients within crop-protection products."[208] For a baseline period of 10 years after EPA approval, those manufacturers enjoy exclusive rights of products containing that ingredient before generic manufacturers can enter; that period may extend beyond the term of relevant patents related to the ingredient.[209] The FTC alleges that the defendants subverted this regime by offering payments to distributors of crop-protection products in exchange for agreements to exclude generics from the market, improperly delaying entry beyond the relevant patent or regulatory exclusivity periods.[210] In addition, the defendants allegedly reinforced these payments by linking them to "loyalty discounts" with very high thresholds.[211]

FTC suit against Meta survives motion to dismiss. Last year in June, Meta successfully dismissed an FTC complaint alleging that the company had unlawfully maintained a monopoly in personal social networking services through its acquisitions of Instagram and WhatsApp, in addition to certain developer policies.[212] The district court held that the FTC had failed to allege sufficient facts to support allegations of market power in a personal social networking market and that claims relating to blocking developer access were brought too late. In January, the FTC's amended complaint largely survived a renewed motion to dismiss (claims related to the developer policies still failed for timeliness).[213] The FTC overcame its initial pleading defects by alleging that Facebook has at least a 70 percent share of the personal social networking market based on average daily users, 65 percent based on average monthly users, and 80 percent based on time spent using its services.[214]

FTC and state AGs prevail against Martin Shkreli. Following a multi-year investigation and litigation against Martin Shkreli, U.S. District Judge Dennis Cote ruled in favor of the FTC and several state AGs in January 2022.[215] First, the court concluded that Shkreli, as CEO of Vyera, had illegally entered agreements to prevent generic drug manufacturers from acquiring samples needed to prove their products would be interchangeable with the branded drug and from acquiring the active ingredient of the drug itself.[216] The court handed down the unusual remedy of an injunction permanently barring Shkreli from working in the pharmaceutical industry.[217] In addition, the court ordered Shkreli to pay approximately $65 million, less any offsets from Vyera's settlement based on a prior holding permitting nationwide disgorgement.[218] This case is being appealed to the Second Circuit.

FTC loses follow-up Opana ER case. In March 2022, the D.C. District Court dismissed the FTC's suit against Endo and Impax alleging that Impax's 2017 agreement to pay Endo a royalty on its new patents was an agreement not to compete that violated antitrust laws.[219] The court viewed the agreement as an exclusive license rather than a non-compete.[220] Moreover, the court found that the concerns expressed by the Supreme Court in *Actavis* that would support potential antitrust claims were not present.[221] Finally, the court expressed skepticism of the FTC's argument that Endo had wholly waived its right to exclude Impax via a 2010 settlement.[222] The FTC is appealing the decision to the D.C. Circuit.[223]

Settlement with Louisiana Real Estate Appraisers Board. In April, the FTC reached a settlement with the Louisiana Real Estate Appraisers Board (LREAB)

shortly before the administrative trial was set to begin.[224] The FTC alleged that LREAB was unreasonably restraining price competition for appraisal services in Louisiana by adopting regulations that 1) required appraisal fees to equal or exceed the median fees identified in survey reports published by the board, and 2) enforced the regulation by sanctioning companies that paid fees below the specified levels.[225] LREAB consented to a settlement order that prohibits it from adopting any regulation or rule that fixes compensation for real estate appraisal services, including enforcing fee schedules or advising or encouraging appraisers to pay any specific range of fees.[226] LREAB had asserted state-action immunity defenses in initial administrative proceedings, but they were rejected.[227]

U.S. State Attorneys General

Google display advertising suit slimmed.[228] This summer, Google filed to dismiss a multi-district litigation, including a suit filed by a group of state attorneys general led by Texas, concerning Google's display advertising business.[229] Google argued the claims were largely untimely and that the plaintiffs had failed to plausibly allege certain claims, including those arising from a Network Bidding Agreement (NBA) between Google and Facebook.[230] In September, the court dismissed claims pertaining to the NBA,[231] ruling that the NBA did not plausibly restrict Facebook's competitive bidding behavior.[232] The district court denied Google's motion as to the other three counts under Section 2.[233]

Continued emphasis on tech company enforcement. State attorneys general have continued to press suits against tech companies in 2022.

- In September, a New York-led group of 46 states sought review of a federal district court decision that they had waited too long to challenge Meta's acquisitions of Instagram and WhatsApp.[234] The D.C. Circuit heard oral argument in September, and a decision is pending as of this writing.[235]

- District of Columbia Attorney General Karl Racine in August filed an appeal of the D.C. trial court's oral dismissal of a complaint against Amazon.[236] The suit alleges that Amazon's most-favored nation provisions prevent sellers from offering products at lower prices on other sites. Racine had previously moved the trial court to reconsider its dismissal, supported by a statement of interest from the Department of Justice, but that motion was also denied.[237]

- The California Attorney General filed a suit in California state court in September challenging Amazon most-favored nation provisions under California's Unfair Competition Law and the Cartwright Act.[238]

New York files lawsuit against CVS. The New York AG filed a lawsuit against CVS in New York state court in June, alleging that CVS violated the antitrust laws by requiring that hospitals and clinics exclusively use a CVS-owned company, Wellpartner, to access federal subsidies on prescriptions filled at CVS pharmacies.[239] The subsidies were available under the 340B program originating in the Public Health Service Act, which requires pharmaceutical companies participating in Medicaid to sell some products at discounted prices to healthcare providers with large numbers of low-income patients.[240] The complaint alleges that hospitals and clinics had higher costs and lost access to subsidies if they did not use Wellpartner as their third-party administrator because CVS would then refuse to contract with them.[241]

States prohibited from seeking monetary relief under federal antitrust laws. In June, U.S. District Court Judge Cynthia Rufe found in the broad-ranging multi-district litigation concerning price-fixing agreements in the generic pharmaceuticals industry that a coalition of state attorneys general could not obtain disgorgement under Section 16 of the Clayton Act and that the statute was limited to injunctive relief.[242] The court relied in part on *AMG Capital Management v. FTC*, which refused to impute a right to retrospective monetary relief into a statutory provision designed to offer prospective relief (there Section 13(b) of the FTC Act).[243] The court noted that states could still pursue other damages theories, including *parens patriae* claims, to the extent permitted by state law.[244]

European Union

Enforcement Against Big Tech Platforms

Apple. In May 2022, the European Commission accused Apple of abusing its dominance in the market for mobile wallets on its iOS devices,[245] a year after also alleging that the company unlawfully leveraged its position in the music streaming market.[246] The EC claims that Apple's practice of limiting access to mobile device technology used for mobile contactless payments amounts to an abuse of dominance. Further investigations regarding Apple's in-app payment system are pending at the EU level,[247] and a Dutch investigation led Apple to reduce its commission

for its in-app payment system from 30 percent to 27 percent and imposed a €50 million fine.[248]

Amazon. In December 2022, the European Commission accepted a proposal from Amazon to settle an investigation of Amazon's alleged use of non-public data from its marketplace sellers and bias related to its "Buy Box" and Prime programs.[249] The EC's investigation into Amazon's use of seller data began in July 2019 and led to a statement of objections setting out preliminary conclusions that Amazon holds a dominant position and that its conduct had distorted competition. At the same time, the agency expanded its investigation to include Amazon's Buy Box and Prime programs. In July 2022, Amazon offered to refrain from using third-party seller data, to allow Prime sellers to choose their own carriers, to show a second Buy Box if another offer was sufficiently differentiated, and to provide equal treatment for all sellers when ranking their offers to select the Buy Box winner (without any preferential treatment for Amazon's own offerings or offerings from retailers who use Amazon's logistics services). The EC market tested Amazon's original commitments, and the results of that testing led Amazon to propose modifications, such as refinements to the second Buy Box presentation and extension of the term from five to seven years. The EC accepted these modified commitments in December. Amazon is subject to a similar investigation in the UK[250] and is also being investigated by EU national authorities for various practices related to marketplace sellers.[251]

Meta. In December, the European Commission issued a statement of objections setting out a preliminary view that Meta has distorted competition in the market for online classified ads.[252] The Commission alleges that Meta gives Facebook Marketplace an unlawful distribution advantage by tying it with Facebook's social network on the user side and that Meta unfairly uses ad-related data from competitors to advantage Facebook Marketplace. Earlier in the year, in June, the French Competition Authority closed an abuse of dominance probe into Meta regarding concerns that access was characterized by a lack of transparency, predictability, and stability and that Meta was favoring its own services by excluding other companies from the market for online non-search advertising (where Meta was found to be dominant in France).[253] Meta will be required to offer access to its partnership program based on quantitative criteria for five years and will also need to reintegrate service providers that were arbitrarily excluded from Meta's ad-bidding API.

Google. In March 2022, antitrust authorities in Europe and the UK opened a probe into a deal between Google and Meta on online advertising, alleging that the two companies agreed to divide advertising markets and stifle the development of certain ad bidding technologies.[254] Claims concerning the same deal were dismissed in a U.S. suit brought by state attorneys general, as discussed above. In September 2022, an EU court largely denied Google's appeal of the EC's decision concerning Android,[255] confirming findings that Google abused its dominance over the Android smartphone ecosystem through contractual provisions that prevented manufacturers from pre-installing rival applications on Android devices. These provisions are the subject of ongoing suits by the U.S. Department of Justice and state attorneys general, as discussed above. However, the court reduced Google's fine by €200 million.[256]

Microsoft. Microsoft appears to have reemerged on enforcers' radars. In March 2022, it was reported that three cloud services providers, including the French company OVHcloud, had filed a complaint with the EC alleging that Microsoft abused its dominant position with respect to the cloud computing services market.[257] The complaint alleges that Microsoft software licenses for its popular products such as Office make it more costly to switch to Microsoft Azure alternatives and that Microsoft degrades the performance of its products on rival cloud systems. There are also reports of the EC investigating a complaint filed by Salesforce against Microsoft's alleged bundling of Teams with its Office suite.[258]

Data Access as a Remedy

In June 2022, the EC accepted commitments by Insurance Ireland to facilitate greater access to its claims information database for its non-members on a fair, transparent, objective, and non-discriminatory basis.[259] By conditioning access to the database on unrelated membership criteria, Insurance Ireland was allegedly arbitrarily delaying or effectively denying access to data that was considered key for competing in the relevant market. The impact of the commitments and the preceding investigation are reflected in the draft Horizontal Guidelines (mentioned above), which acknowledge the benefits that pooling data can bring at a market-wide level.

Court Rulings on Evidentiary and Process Requirements

Intel. In January 2022, the EU General Court partially overturned a 2009 EC decision concerning Intel's rebate agreements for chips in laptops and entirely overturned the associated fine of

€1.06 billion.[260] The court was reviewing the antitrust decision for a second time and ruled that the EC's economic analysis was insufficient to support the decision, rejecting that an exclusivity rebate mechanism is *per se* illegal. Intel has filed a claim for approximately $624 million in interest on the fine.[261] A separate EU court ruling from January 2022 seems to support Intel's claim that interest accrues from the payment of the fine, not the decision to annul it. In that case, the EC was ordered to pay default annual interest of a fine previously paid by Deutsche Telekom, though the amount was reduced on appeal.[262]

Qualcomm. In 2022, the EC suffered another setback in court when the General Court annulled its decision imposing a €1 billion fine on Qualcomm for allegedly making large payments to induce Apple to exclusively source iPhone and iPay chipsets from Qualcomm, foreclosing Qualcomm's rivals from access to an important outlet.[263] The court found that the regulator violated Qualcomm's rights of defense by failing to give the company access to the content of discussions with third parties and for not allowing it to adapt its defense to a change in the statement of objections. It also found that the Commission erred in its substantive assessment that the company's conduct was capable of having potential anticompetitive effects by failing to take into account all relevant circumstances (e.g., that Apple had rejected rival chipsets not because of the alleged payments, but due to those chipsets' failure to comply with technical standards). In addition, the court found that the EC had not provided an analysis to support the finding that the payments had actually reduced Apple's incentives to switch chipset suppliers.

The issue of impairments to rights of defense arose in other European court cases this year as well. In October 2022, an Italian court annulled a fine against Apple and Amazon, ruling that the 45 days given to Apple and Amazon to respond to allegations that they colluded to restrict unauthorized third parties from selling Apple's products on the Amazon Marketplace was insufficient.[264] Similarly, in June 2022, an EU court heard arguments from Meta that allegedly excessive data requests in the context of the EC's investigations into Meta's data-related practices amounted to an improper "fishing expedition."[265]

Pharmaceutical Sector

The EC has been active in enforcement in the pharmaceutical sector as well. In October 2022, the EC reached the preliminary view that Teva delayed the entry of generic drugs to treat multiple sclerosis through patent litigation and a damaging communications campaign that discredited its competitors.[266] The EC launched a second probe on a disparagement theory in June 2022, investigating allegations that Vifor Pharma spread misinformation about its only significant competitor for an intravenous iron treatment.[267]

In a notable case of cooperation with the EC, Novartis was raided in early September by Swiss authorities on suspicion of unfairly using patent litigation to secure its market dominance in skin-disease treatments.[268] The Swiss antitrust authority has previously been very reluctant to support EC inspections. This case is also noteworthy because abusive litigation has previously been rarely advanced as a theory of harm, though European enforcers may be starting to pursue it more seriously. For instance, the Spanish national authority issued a €39 million fine this year against Merck for using patent litigation to delay competition in contraceptives.[269]

Cartel Enforcement

This chapter provides updates on global cartel enforcement. Enforcers around the world—including the DOJ, the EC, and other national agencies—have continued robust cartel enforcement activity in 2022, including the imposition of significant fines and jail time in some jurisdictions. Enforcers have also made significant policy announcements that will affect cartel enforcement in the years to come. For example, the DOJ issued new guidance on corporate criminal enforcement and updated its Antitrust Corporate Leniency Policy. Notably, Richard Powers stepped down from his post as Deputy Assistant Attorney General for Criminal Enforcement at the U.S. DOJ in September, leaving the direction of the criminal antitrust enforcement initiatives to his successor.[270]

United States

Corporate Leniency Policy

In April, the Antitrust Division of the DOJ announced updates to its Corporate Leniency Policy[271] and issued a revised set of FAQs.[272] The revised policy introduces a new timing requirement, indicating that companies must report wrongful conduct "promptly,"[273] which means either at the first indication of possible wrongdoing or after conducting a timely internal investigation to confirm that a violation occurred.[274] In either case, the company bears the burden of proving that its self-reporting was prompt.[275] In addition, companies seeking to qualify for leniency must undertake remedial measures to prevent repeat offenses. No specific kind of

remediation is prescribed, but the FAQs note that the DOJ may consider whether a company has disciplined or removed "culpable, non-cooperating personnel" and the need for companies to improve their compliance programs before leniency is granted.[276]

The DOJ also updated the Justice Manual to state explicitly that non-prosecution protection for a company's current directors, officers, and employees "is not guaranteed and is at the Antitrust Division's sole discretion" for "Type B" corporate leniency applicants (those self-reporting after the DOJ has begun an investigation).[277] Previously, the DOJ was often willing to cover such individuals in a Type B corporate leniency situation, but now there is less certainty as to whether such individuals will receive protection from prosecution.

Corporate Criminal Enforcement Guidelines

In September, DOJ Deputy Attorney General (DAG) Lisa Monaco announced pivotal new guidance about the DOJ's corporate criminal enforcement efforts across all divisions, including the Antitrust Division.[278] Her speech was accompanied by a more detailed memo sent to federal prosecutors on the same day.[279] DAG Monaco's speech covered a wide range of enforcement policy topics, the most significant of which for antitrust defendants was a focus on individual accountability.

DAG Monaco announced several policies indicating a focus on prosecuting individuals who profit from corporate crimes, including: (i) efforts to expedite investigations of individuals and limiting cooperation credit for companies that unduly delay individual culpability; (ii) refusal to sign a Deferred Prosecution Agreement (DPA) or Non-Prosecution Agreement (NPA) with a company until it has either commenced any relevant individual prosecution or has fully developed a plan for doing so; and (iii) requiring clawbacks or other financial disciplinary mechanisms for culpable individuals to receive full cooperation credit.

Moreover, the Justice Manual was revised to provide that, outside of its Leniency Policy as discussed above, the Antitrust Division will enter into corporate resolutions that include individual non-prosecution protections "only in extraordinary circumstances"[280]—a sharp departure from prior practice, where individuals were generally covered under corporate pleas. Finally, the Manual now states that a target of an antitrust investigation does not have the right to a pre-indictment meeting with the Antitrust Division, which was typically granted prior to the revision.[281]

Expansion of Procurement Collusion Strike Force

In November, the DOJ Antitrust Division announced that it had expanded its Procurement Collusion Strike Force (PCSF) to include four new national law enforcement partners: the Offices of Inspector General for the U.S. Department of Energy, Department of the Interior, Department of Transportation, and the Environmental Protection Agency.[282] The PCSF is committed to detecting, investigating, and prosecuting antitrust crimes and other fraud that affects the government procurement process and has been a top priority for the DOJ.

Significant Investigations and Prosecutions

The DOJ ended 2021 with 146 pending grand jury investigations—the most in 30 years—and 2022 marked another active year for the DOJ's criminal cartel enforcement across a variety of industries.[283] This section summarizes significant DOJ cartel enforcement activity in the past year.

Criminal Section 2 enforcement. As noted above in the chapter on law and policy updates, then-DOJ Deputy AAG Richard Powers announced in Spring 2022 that the agency would once again bring criminal charges under Section 2 of the Sherman Act.[284] The DOJ secured its first conviction under the changed policy in October when Nathan Zito pled guilty to attempted monopolization in connection with a failed effort to induce a competitor to allocate the market for highway crack-selling services in Montana and Wyoming.[285] The case steps only modestly beyond the DOJ's criminal enforcement under Section 1: the agreement, if completed, would have been a *per se* violation of Section 1, but an unconsummated agreement could only be prosecuted as a Section 2 attempted monopolization claim. Observers have called for guidance as to what conduct the DOJ intends to prosecute criminally under Section 2, but former DAAG Powers refused to provide more detail and has instead pointed to the DOJ's pre-1977 record of Section 2 criminal prosecutions.[286]

Labor markets. In 2022, the DOJ obtained its first criminal conviction for anticompetitive conduct related to labor markets. In October, the healthcare staffing company VDA pled guilty to participating in a conspiracy to allocate nurses among firms and to fix the wages of those nurses.[287] VDA was sentenced to pay a $62,000 criminal fine and to make $72,000 in restitution payments.[288] As noted in the chapter above spotlighting enforcer litigation, the DOJ had suffered two losses in labor market cases in 2022 prior to obtaining the VDA plea in October.

The DOJ will have several other opportunities to prosecute labor market cases in 2023. In December 2021, the DOJ indicted Mahesh Patel, a former director of global engineering services at a major aerospace engineering company, and five other individuals for agreeing not to compete for the hiring or recruitment of engineers and other skilled laborers.[289] The federal district court denied the defendants' motion to dismiss on December 2, 2022.[290] In January 2022, the DOJ charged four owners and/or managers of home health care agencies with conspiring to fix the hourly rates of essential workers in the Portland, Maine, area during the COVID-19 pandemic and agreeing not to hire each other's workers.[291] Both cases are expected to go to trial in March 2023.[292] Additionally, Ryan Hee, who had been charged along with VDA for participating in a wage-fixing and no-poach agreement, is scheduled to go to trial in April 2023.[293] Finally, the first company to be charged with entering into an alleged no-poach agreement, Surgical Care Affiliates, LLC, is expected to go to trial sometime in the next year.[294]

Government contracts. In 2022, the DOJ's Procurement Collusion Strike Force secured multiple criminal indictments and guilty pleas related to government contracts, including with the U.S. military. For example, in March, the DOJ announced charges against two South Korean nationals for their roles in a conspiracy to rig bids and fix prices for subcontract work and a scheme to defraud the United States in connection with operation and maintenance work for U.S. military installations in South Korea.[295] In another case, three individuals in Florida were charged in April with conspiring to rig bids for customized promotional products sold to the U.S. Army by exchanging bid templates and submitting bids through shell companies under control of the co-conspirators.[296] And in June, military contractors in Georgia were charged with a fraud scheme involving U.S. government contracts worth over $7 million, wherein the defendants acquired sham quotes from other companies with prices intentionally higher than the defendants in order to secure sole source awards.[297]

Outside of the military context, a PCSF investigation into government contracts for infrastructure projects in North Carolina resulted in a guilty verdict at trial earlier this year. Contech Engineered Solutions LLC and its former executive, Brent Brewbaker, were charged with rigging bids and defrauding the North Carolina Department of Transportation (NCDOT).[298] In 2021, Contech pled guilty to one count of bid rigging and one count of conspiracy to commit mail and wire fraud, and agreed to pay a criminal fine of $7 million along with $1.5 million in restitution to NCDOT.[299] In February, Brewbaker was found guilty after a week-long jury trial.[300] He was sentenced to 18 months in prison in September.[301]

In April, the DOJ announced a guilty plea in its ongoing investigation into bribery and bid rigging at the California Department of Transportation (Caltrans). Choon Foo "Keith" Yong, former contract manager for Caltrans, pled guilty to bid rigging and bribery related to Caltrans improvement and repair contracts.[302] In October, William D. Opp pled guilty to the formation of a separate construction company with his wife for the purpose of submitting sham bids for Caltrans contracts.[303] Opp's sentencing is set for April 2023.[304]

Consumer products. In March, the DOJ secured a guilty plea from a fugitive German national accused of fixing aftermarket prices for parking heaters.[305] Volker Hohensee, former president of Espar Inc., a parking heater manufacturing company, was indicted by a grand jury in 2015 for his role in the price-fixing conspiracy from 2007 to 2012. Hohensee remained a fugitive until December 2020, when he was arrested attempting to enter the Canary Islands. He was incarcerated in a Spanish facility for 15 months until his guilty plea. The Eastern District of New York sentenced Hohensee to time served. Hohensee's indicted co-conspirators, Harald Sailer and Frank Haeusler, remain fugitives.[306]

European Union

Dawn Raid Activity

With COVID-19 protocols no longer an obstacle to unannounced inspections, the EC and national authorities have significantly ramped up dawn raid activities in 2022. Most notably, the EC conducted concerted unannounced inspections targeting the premises of automotive companies and associations located in several Member States in March. The inspections concern possible collusion in relation to the collection, treatment, and recovery of end-of-life cars and vans.[307] In May, the EC conducted dawn raids in the fashion sector following concerns that companies may have engaged in cartel behavior.[308] As a final example, the EC also carried out unannounced inspections at the German and Spanish offices of Delivery Hero and Glovo on suspicion that they were allocating online food and grocery delivery markets.[309] While these inspections still took place on companies' business premises, several regulators have underlined intentions to search private homes as well, given increased work-from-home activity.

Court Rulings on Procedural Rights

As noted above in the civil conduct enforcement chapter, EU courts have in the past year engaged heavily in questions of defendants' procedural rights in antitrust investigations. The same is true in the criminal context. For example, in February 2022, the EU's lower-tier court delivered its judgment relating to Scania's participation in the trucks cartel and confirmed the EC's decision imposing a fine of €881 million.[310] While the other participants in the trucks cartel had settled with the EC in 2016, Scania refused to do so, resulting in an uncommon "hybrid" resolution when Scania's fining decision was adopted in 2017. Scania alleged on appeal that this violated its procedural rights because the prior settlement *de facto* impaired Scania's presumption of innocence. The court rejected Scania's arguments. The judgment in the *Scania* case also provided interesting clarifications as to the strict European approach of qualifying certain types of information exchanges between competitors as by object (*per se*) violations of competition law. The court found that Scania's exchange of gross price lists that had already been communicated to dealers constituted a prospective exchange—which is a well-established *per se* violation under EU law—because Scania could not show how communication to dealers would have also made those lists available to competitors.[311]

The ongoing case of Crown and Silgan, two companies active in the German metal packaging sector, is also interesting in regard to antitrust defendants' procedural rights. In July, the EC fined the companies €31.5 million for exchanging sensitive information and coordinating their commercial strategies for the sale of metal cans in Germany over a period of three years.[312] In an unusual move, Crown and Silgan appealed the settlement, claiming an absence of jurisdiction by the EC, which had seized jurisdiction in 2018 to prevent the metal packing companies from using a loophole under German rules to escape a fine. Apart from the jurisdictional questions involved, this case bears watching, as the judges may answer the much-discussed question of whether EU courts can retroactively strip the companies of settlement discounts if their appeal is unsuccessful.

Impact of Procedural Errors on Fines

In a June ruling, the European Court of Justice partially annulled the EC's decision against participants in the optical disk drive cartel on procedural grounds.[313] The judges held that the EC did not provide proper reasons for its finding that, on top of taking part in a "single and continuous infringement," the companies had also participated in several separate infringements, thus infringing the participants' rights of defense. Notwithstanding the procedural error, the decision did not result in a reduced fine; violations of procedural rights result in fine reductions only where it can be shown that the fine would have been different had the violation not occurred.

Moreover, a win in the first round in court may ultimately prove fruitless for defendants, as the EC can seek to cure errors and readopt its initial fining decisions. For example, in March 2022, the EU's lower-tier court largely upheld the EC's readopted fine of €790 million against air cargo cartelists (the original 2010 decision was annulled by the court in 2015 and the fine was readopted in 2017). While the judges reduced fines for, *inter alia*, Air Canada and British Airways (which were found not to have participated in all elements of the cartel), they upheld fines against companies such as Air France and KLM.[314]

This risk is further underscored by a 2022 EU court judgment against Italian reinforcing steel-bar makers, which held that the cartelists can still be fined for cartel conduct dating back over 30 years.[315] EU judges annulled the initial 2002 decision for using the wrong legal basis, and the EC's corrected decision, readopted in 2009, was again reversed by the Court of Justice due to violations of the companies' right to be heard. The EC nevertheless reimposed its fining decision for a third time in 2019, albeit with fines cut by 50 percent due to the long duration of proceeding. The EU court this year confirmed the decision and rejected arguments that the fine should be annulled entirely due to the long duration of the proceeding.

Other Jurisdictions

Below we discuss major cartel enforcement activity in select jurisdictions outside of the United States and European Union. Many other jurisdictions—in addition to those discussed here—are active in cartel enforcement.

South Korea

South Korea continued active and vigorous cartel enforcement this year. The regulator fined five ice cream companies a total of 135 billion won ($112.8 million) for colluding to increase delivery fees for retailers between 2016 and 2019.[316] All five companies had previously faced fines in 2007 for fixing prices of ice cream cone products.[317] The Korea Fair Trade Commission (KFTC)

also fined 11 companies a combined 256.5 billion won ($202 million) this year for rigging bids to purchase steel reinforcing bars. Seven companies and nine executives may face criminal prosecution,[318] with individuals potentially receiving up to three years in prison.[319] This marked the third round of major fines on the steel industry in the last five years, with fines totaling at least $530 million since 2018. As a final example, the KFTC also investigated a shipping cartel and ultimately fined 15 freight shippers a total of 83.3 million won ($63 million) for operating a 17-year cartel that fixed prices on routes to Japan.[320] The KFTC declined to impose any fines on different liner operators for similar conduct affecting routes to China, as the anticompetitive harm was insignificant. The Chinese government also reportedly threatened potential retaliation.[321]

Naver was criminally charged in September 2022 by the Korean Prosecutors' office on charges of breaching competition law and abusing its dominance in the market for real-estate market information.[322] This case stems from the KFTC investigation in 2020 in which the KFTC imposed a 1 billion won ($764,000) fine and corrective orders for the conduct. Naver has appealed the KFTC decision, and an appeal hearing is scheduled in February 2023.[323] Trial in the criminal case started in November 2022 and is expected to resume in March 2023.[324]

Japan

The Japan Fair Trade Commission (JFTC) had a notably busy year in cartel enforcement as well. For instance, this year the JFTC imposed fines stemming from a 2020 criminal complaint[325] against three companies and seven executives for rigging bids for public hospital supplies contracts for Japan Community Health Care Organization, which is publicly funded and supplies products to 57 public hospitals.[326] Alfresa and Suzuken, two of the participating companies, both received leniency discounts.[327] In April 2022, the JFTC raided four electricity companies after receiving a leniency application from company Kansai Electric concerning an agreement not to lure customers from certain territories.[328] In November, the JFTC issued what are believed to be its largest fines ever, with Chubu likely to pay ¥27.6 billion ($200 million) (details of other fines have not been disclosed).[329] As a leniency applicant, Kansai will avoid fines.[330] Finally, the JFTC and Tokyo District Public Prosecutors Office are jointly investigating potential bid-rigging of test-event planning contracts for the 2021 Tokyo Olympics.[331] The investigation expanded from a bribery investigation of the Tokyo Olympic and Paralympic Organizing Committee.[332]

Australia

In September, Australia issued its first prison sentences for cartel violations to four individuals charged with conspiracy to fix exchange rates of Vietnamese dong and Australian dollars,[333] though no defendants will actually serve time contingent on compliance with "good behavior orders."[334] The competition agency secured a second prison sentence in December for Christopher Kenneth Joyce in connection with a cartel fixing prices of scopolamine butylbromide, the main ingredient used in medication for irritable bowel syndrome.[335] Joyce pled guilty to three price-fixing charges in 2021, and the Federal Court of Australia sentenced Joyce to prison for two years and eight months, which may be served under an intensive correction order with 400 hours of community service. The Court also imposed a fine of 50,000 AUD (approximately $33,000) and director disqualification for five years.[336]

Brazil

Brazil's antitrust enforcer, CADE, investigated healthcare hiring practices and reached settlements with six healthcare companies that exchanged information about employee salaries and hiring practices.[337] CADE also investigated and imposed criminal fines for both companies and individuals in the coating resin and liquefied petroleum gas (LPG) industries. Resin cartel companies were fined 43.3 million reais ($8.63 million), and five individuals were fined a total of 3.4 million reais ($677,000).[338] As to the LPG cartel, this year CADE imposed fines on 11 individuals for 1.9 million reais ($383,000) and fines totaling $129 million on three companies that held meetings and exchanged information about resale prices.[339]

CADE also focused on public procurement cartels, which it defines as "hard-core."[340] This year, CADE fined companies that rigged bids for public airport procurement projects involving cafes and prohibited the companies from participating in any public procurement bids for five years.[341] In addition, the regulator recommended convictions for two companies and three individuals that participated in a cartel targeting state-owned hydroelectric power station Belo Monte.[342] The conduct at issue included the joint completion of

a technical feasibility study, which was required to build the power station.

Private Litigation

This chapter discusses select significant private antitrust litigation matters from the past year in the United States and the United Kingdom. Private litigants are active across all areas of antitrust both in original actions and in cases following on from government investigations.

Section 1 – Concerted Action

Government Action

Vitamin C manufacturers secure final victory in price-fixing case.[343] 2022 marked the end of the 17-year-old case *Animal Science Products v. Hebei Welcome Pharmaceuticals*. The Second Circuit previously ruled for the defendant Chinese vitamin C producers on price-fixing claims based on comity and deference to a submission from China's Ministry of Commerce stating that the challenged conduct was compelled under Chinese law.[344] In 2018, the Supreme Court overturned the decision, explaining that the standard applied was too deferential and instructing the Second Circuit to "carefully consider" the meaning of the relevant Chinese law.[345] In 2021, a split Second Circuit again ruled that Chinese export controls required vitamin C manufacturers to coordinate and set prices and therefore they could not be held liable under the antitrust laws.[346] A second certiorari petition was denied in October.[347]

"Act of state" doctrine no bar to Haiti aid price-fixing suit. In a March opinion in *Celestin v. Caribbean Air Mail, Inc.*, the Second Circuit revived a price-fixing suit alleging that Haitian government officials and multinational corporations conspired to fix prices of international phone calls, food remittances, and money transfers made to and from Haiti.[348] The Second Circuit ruled that the "act of state" doctrine did not foreclose this antitrust claim because no official act of the Haitian government had to be deemed invalid in order for the defendants to be liable under federal law.[349] The circuit court also vacated the dismissal of 15 state law claims and alternative dismissal under *forum non conveniens*.[350]

Failures to Prove Conspiracy

Amazon-publisher agreement litigations dismissed. In September, Judge Woods of the Southern District of New York granted motions to dismiss in two cases brought against Amazon. *Bookends & Beginnings LLC v. Amazon.com* concerned allegations that the "Big 5" publishers and Amazon entered into discriminatory book distribution agreements for the sale of physical books, which "steeply" discounted prices and included a "meeting competition" clause, allegedly leading to higher prices for bookstores.[351] Similarly, a group of ebook buyers sued Amazon and the Big 5 in *In re Amazon.com eBook Antitrust Litigation*, alleging a hub-and-spoke scheme whereby Amazon and the publishers conspired to fix prices through agreements providing Amazon an agency commission on each individual book sale.[352]

Both complaints were dismissed based on a lack of evidence of collusion between Amazon and the publishers. In the physical book case, the court found the contracts more readily explained by the fact that Amazon's share of the market would make it an attractive distributor to publishers.[353] In the ebooks case, the court held that the plaintiffs provided no plausible explanation as to why the publishers would want to conspire and further enhance Amazon's dominance as an ebook retailer.[354] Judge Woods granted the plaintiffs in both cases leave to amend.[355]

DRAM conspiracy claims fail. In March, a three-judge panel of the Ninth Circuit, as part of *In re DRAM Indirect Purchaser Antitrust Litig. v. Samsung Electronics Co., Ltd.*,[356] affirmed a California district court's decision to dismiss an indirect-purchaser class action alleging that manufacturers of semiconductor dynamic random access memory (DRAM) devices conspired to reduce output in 2016.[357] Samsung, a DRAM manufacturer, cut its production rates in an attempt to limit industry-wide pricing declines,[358] and other manufacturers subsequently followed suit.[359] The court found insufficient evidence of "plus factors" suggesting a conspiracy and that the conduct was best explained by the so-called "follow-the-leader" theory of conscious parallelism, where parties independently choose to follow the market leader in the industry (in this case, Samsung) as a means of reducing economic risk.[360]

Real Estate Collusion

Over the past several years, the National Association of Realtors (NAR), a real estate trade association, has been closely scrutinized for alleged anticompetitive rules governing how realtors are allowed to market properties and how commissions are set. These lawsuits often explore the significance of NAR's control over multiple listing services (MLSs), which are online databases that list homes for sale in a particular region. The following case summaries discuss recent developments in this area.

Group boycott claim against NAR reinstated. In April, the Ninth Circuit in *The PLS.com, LLC v. NAR*[361] reversed a California district court's decision to dismiss a lawsuit by a private real estate listing service alleging that NAR, through its Clear Cooperation Policy, orchestrated a group boycott to drive competitor listing services from the market.[362] The Clear Cooperation Policy is an NAR rule requiring listing brokers who use private listing services to also list those properties on MLSs, many of which NAR controls.[363] Agent noncompliance can lead to significant fines or termination of MLS access.[364] Reversing the district court, the Ninth Circuit found that real estate agents are "consumers" under the antitrust laws and that PLS had adequately alleged a *per se* unlawful group boycott.[365] In late September, NAR appealed the decision to the Supreme Court, and the decision on certiorari is pending.[366]

Home buyer suit concerning commission rates falls under *Illinois Brick*. In May, Judge Wood of the Northern District of Illinois dismissed without prejudice a suit, *Leeder v. The National Association of Realtors*,[367] from a class of home buyers alleging that certain NAR rules requiring seller-brokers to make fixed offers of compensation to buyer-brokers led to price fixing within MLSs.[368] As a result of the rule, compensation for buyer-brokers is allegedly a uniform fixed 5-6 percent of the home's sale price, regardless of broker quality or experience.[369] The plaintiffs alleged NAR's commission rule artificially inflates home purchase prices and reduces broker quality, thereby harming consumers.[370] Judge Wood dismissed the case, citing *Illinois Brick*, noting that Leeder, as a buyer, was indirectly injured because sellers pay the commission (and indeed there is also a seller class action pending before Judge Wood).[371] The plaintiffs filed an amended complaint in July terminating Leeder as class representative, but the class continues to be made up of home buyers.[372] A renewed motion to dismiss is pending.[373]

Other Significant Cases

Sutter Health wins jury verdict in tying case. In March, as part of *Sidibe v. Sutter Health*,[374] a California federal jury found in favor of defendant Sutter and rejected claims that it had engaged in unlawful tying and anti-steering arrangements.[375] The plaintiffs alleged that Sutter improperly tied its higher-priced inpatient hospital services in four regions to its lower-priced inpatient hospital services in eight other regions when contracting with health plans.[376] The plaintiffs were allegedly coerced into this arrangement because Sutter is a "must-have" service.[377] The plaintiffs further alleged that Sutter prohibited health plans from steering their members to lower-cost providers within their networks.[378] Sutter argued that it did not have sufficient market power to successfully implement a tying arrangement and that its contract terms were necessary to offset the high costs of providing care for Medicaid patients.[379] Ultimately, the jury agreed.[380]

Section 2 – Monopolization

Gaming Store Cases

Sony wins dismissal of PlayStation store claims. In July, a court in the Northern District of California dismissed claims that Sony's practice of not permitting third-party sellers in its online store and only allowing purchases from Sony itself was anticompetitive.[381] The court analyzed the case as a refusal to deal under *Aspen Skiing*.[382] The court rejected "conclusory statements that Sony voluntarily terminated a profitable practice" based on a lack of facts supporting claims that Sony had previously "generated a revenue stream from the sale of download codes by third party retailers."[383] The plaintiff was granted leave to amend.[384]

Monopolization claims against Steam allowed to proceed.[385] Several plaintiffs have filed similar actions alleging that Valve unlawfully used "most-favored nation" clauses (MFNs) and certain mechanisms of the Steam platform to support a supracompetitive fee from developers. These cases were initially dismissed, but in May a federal district court denied renewed motions to dismiss made on amended complaints.[386] The court noted that the amended complaints added significant context, including allegations that Valve enforced its MFNs through interpretation and enforcement of the Steam Distribution Agreement.[387] On a motion from the plaintiffs, the cases were consolidated into a single action, and a consolidated amended class complaint was filed in August.[388]

Market Definition Issues

Zillow case dismissed on market definition grounds. In September, a district court granted Zillow's motion to dismiss due to the plaintiff's failure to adequately allege a proper relevant market.[389] The plaintiff alleged that Zestimates misinform prospective buyers about the true value of real estate, that Zillow exploits an information asymmetry achieved through its acquisitions to gain market power, and that Zillow's preferred treatment of participating Advertising Agents steers prospective buyers away from the listing agents towards the participating agents that do not have any relationship with the listing.[390] The court found that "the residential real estate market

in Connecticut" was too broad to evaluate and that the plaintiff failed to include allegations regarding whether interchangeable alternatives outside of that market were available or whether competitor websites like Redfin or Realtor.com could restrain Zillow.[391] The court further noted that the plaintiff's alleged "loss of competitive standing" because it did not sign up for Zillow's paid Advertising Agent feature was not an injury within the definition of the antitrust law.[392]

Seventh Circuit overturns district court's dismissal based on geographic market definition. In July, a panel on the Seventh Circuit reversed a district court's dismissal of a monopolization claim against Indiana University Health on geographic market grounds.[393] The plaintiff, an independent vascular surgeon, alleged that IU Health obtained and exercised market power through an acquisition of a local independent physician group.[394] The district court held that the plaintiff's allegation of a relevant market of Bloomington, Indiana, was insufficient, but the Seventh Circuit reversed, holding that vascular surgery patients often need a prolonged, sometimes lifelong, treatment locally and therefore insurers are pressured to provide vascular surgery in or near Bloomington.[395] The court also addressed an apparent inconsistency between allegations that patients both preferred to stay within the geographic area to receive care and also traveled from rural areas.[396] The court explained that contradictory pleadings are permissible and that these inconsistencies were inconsequential to the plaintiff's geographic market theory.[397]

Other Significant Cases

Ninth Circuit affirms dismissal of Dreamstime suit against Google.[398] In December, the Ninth Circuit affirmed the district court's dismissal of a Section 2 case brought against Google.[399] The plaintiff, an online supplier of stock images, alleged that Google maintained a monopoly in the online search advertising market by self-preferencing in its organic search results and thereby harming the plaintiff's search ranking. The district court dismissed on the ground that the plaintiff failed to adequately allege anticompetitive conduct in the alleged online search advertising market.[400]

On appeal, the plaintiff argued that it had defined markets for both online search advertising and general search, but the appellate court noted that the plaintiff had repeatedly assured the district court that it was not alleging a two-market monopoly leveraging theory, only a one-market theory based on Google's conduct in the online search advertising market.[401] The Ninth Circuit then found that the plaintiff's allegations concerned harm to a single firm rather than harms to competition and that the plaintiff had not plausibly alleged that its diminished rank in Google search had any anticompetitive impact on online advertising.[402]

Product design arguments fail to sustain Apple motion to dismiss. In March, the Northern District of California denied Apple's motion to dismiss AliveCor's allegations that Apple had monopolized the markets for heart rate smartwatch apps and ECG-capable smartwatches.[403] Specifically, the plaintiff alleged that Apple excluded competitors by pre-announcing its own heart rate technology and changing the device's heart rate algorithm, which prevented third parties from developing watchOS heart rate products.[404] Apple argued that the change in algorithm was a design improvement. The court agreed that a design improvement "does not violate Section 2 absent some associated anticompetitive conduct."[405] However, the court viewed claims that Apple changed its algorithm in order to prevent third-party developers from detecting changes in heart rate as sufficient to allege "'associated conduct' that makes product design changes cognizable under antitrust law."[406]

US Airways wins $1, then trebled, in suit against Sabre. On May 19, 2022, after a three-week retrial, a Manhattan jury returned a verdict in favor of US Airways on its Section 1 and 2 claims, awarding $1 in damages.[407] The case was retried after the Second Circuit overturned district court orders on two key points. First, the Second Circuit held that a market limited to Sabre's travel agents was properly pled on the basis of allegations that there were no viable substitutes and that travel agents were locked into Sabre.[408] Second, the Second Circuit held the district court had improperly instructed the jury to decide for itself whether the platform was one-sided or two-sided, contrary to the requirement of *Amex* that both sides of the platform be considered together.[409] In the retrial, the jury found that Sabre had unlawfully maintained monopoly power in the Sabre travel agent market and unlawfully restrained trade using "full content" provisions in its airline contracts.[410] US Airways has moved for attorneys' fees covering the 11-year litigation.[411]

Exclusive dealing case based on loyalty discounts survives motion to dismiss. In *In re Surescripts Antitrust Litigation*, a federal district court denied a motion to dismiss claims that the defendants were charging supracompetitive prices through illegal monopolization of the e-prescribing market, a two-sided market between doctors and pharmacies, through a loyalty pricing program.[412] The court found that claims that the net benefits of the program incentivized doctors and pharmacies to stay within the defendants' exclusive network were sufficient to allege a violation of Section 2.[413] The court further noted the alleged effect of "clawback" provisions of Surescripts' loyalty scheme, under which loyal doctors or pharmacies who switched to a competitor network would have to pay Surescripts' higher, non-loyalty price and the difference in rates for all transactions.[414]

Antitrust Litigation in the Pharmaceutical Industry

Generics Pricing Antitrust Litigation

As part of the *Generics Pricing Antitrust Litigation*, in May 2022, the Eastern District of Pennsylvania dismissed claims against some of the largest wholesalers in the country.[415] The putative Indirect Reseller class (IRPs) alleged that these wholesalers were part of a vertical conspiracy to encourage and facilitate contemporaneous price increases between the defendant manufacturers. However, the court found that IRPs had failed to allege an explicit agreement between manufacturers and wholesalers or sufficient plus factors to make a conspiracy plausible. While IRPs alleged the wholesalers passed along pricing information, the court found this was normal in their role as middlemen. IRPs have since filed an amended complaint that again includes the wholesalers, and the revised motions to dismiss are pending.

Reverse Payment Cases

Endo prevails in jury trial against reverse payment allegations. After a three-week trial in July, a jury in the Northern District of Illinois returned a verdict in favor of Endo Pharmaceuticals over allegations by private plaintiffs that unlawfully entered into a $112 million patent infringement settlement with Impax Laboratories to delay a generic version of Endo's Opana ER painkiller. The jury agreed that Endo had market power and had engaged in a reverse payment transaction, but it determined that the transaction was not unreasonably anticompetitive. Endo argued during and after the trial that the settlement was procompetitive because it "enabled Impax to come to market with its generic version of Opana ER years earlier than otherwise would have been permitted."[416] This is only the second jury verdict in reverse payment cases since *Actavis*, along with *Nexium* in 2014. Both were for the defendants.

Mixed results for plaintiffs alleging reverse payment settlements. Plaintiffs bringing claims concerning reverse payment settlements faced mixed results in 2022.

- In the *Bystolic* case, the Southern District of New York dismissed claims that Forest Laboratories had delayed entry of a generic version of the Bystolic beta blocker through reverse payments.[417] The court held that the plaintiffs failed to adequately allege that the payments were unexplained and not legitimate business deals.

- In the *Colcrys* case, the plaintiffs alleged that Takeda entered into reverse payment agreements under which Par would enter and price in line with Takeda and Amneal while Watson would enter 180 days later.[418] The court found insufficient allegations to support a single overarching conspiracy, but it did find enough plus factors (such as Takeda entering into the agreements at the same time and the fact that the Watson agreement mentioned the deals with other manufacturers) to support separate bilateral conspiracies.

- In the *Seroquel* case, the plaintiffs alleged AstraZeneca entered patent lawsuit settlements with Handa, Par, and Accord to delay introduction of generics for its schizophrenia drug Seroquel XR.[419] The court found that the plaintiffs had failed to allege with sufficient particularity that the agreement with Accord was "large" and "unjustified" relative to the expected value of the patent suit.[420] The plaintiffs also did not present evidence that AstraZeneca's patent was invalid, making any harm speculative, especially considering that four later filers lost their invalidity cases.

Other Significant Cases

Mylan wins appeal in EpiPen rebating case.[421] In July, the 10th Circuit affirmed summary judgment in *In re EpiPen*, finding that Mylan's competitor, Sanofi, failed to show that a reasonable jury could find that Mylan's rebating caused harm to consumers.[422] Sanofi alleged that Mylan exorbitantly raised the price of EpiPen and then cut deals with insurers, PBMs, and others that provided rebates when they agreed to give preference to EpiPen or not to cover Sanofi's Auvi-Q alternative. The 10th Circuit held that Sanofi could not "present a triable issue of monopolization without offering any evidence of actual or threatened consumer harm." The court held that,

because Mylan's exclusive rebate agreements brought about lower prices for epinephrine auto-injectors than if Mylan and Sanofi "used preferred or co-preferred rebate agreements," Sanofi had to show (and had not shown) that Mylan's agreements were likely to foreclose Auvi-Q such that Mylan could later raise prices.

Seventh Circuit rejects patent thicket and reverse payment claims in Humira case. In August 2022, the Seventh Circuit affirmed the Northern District of Illinois's dismissal of antitrust claims brought against AbbVie and biosimilar Humira manufacturers by indirect purchasers of Humira. First, the court held that AbbVie obtaining and asserting 132 patents was not inherently monopolistic and that the plaintiffs' patent-thicket theory was barred under *Noerr-Pennington* because the plaintiffs did not allege AbbVie used the *process* of litigation to monopolize the Humira market. Second, the court concluded that AbbVie's patent settlements with biosimilar Humira manufacturers—which the plaintiffs alleged were exchanges of early entry in the EU for delayed entry in the United States—were not unlawful reverse payments under *Actavis*. The court reasoned that because the deals were separate settlements under distinct patent regimes and not a part of one global settlement, the different entry dates could not be treated as reverse payments.

Allegations of foreclosure of active ingredient can proceed. In October 2022, the District of New Jersey, in a transcript opinion, held that Dr. Reddy's case against Amarin could proceed past the motion to dismiss stage.[423] Dr. Reddy's alleges that, after winning the patent litigation against Amarin regarding Vascepa, Amarin entered (explicit or *de facto*) exclusive agreements with the only manufacturers of the active pharmaceutical ingredient, allegedly delaying Dr. Reddy's launch by 10 months. The court rejected Amarin's argument that these agreements were reasonable steps to ensure supply for its product, finding a jury could instead conclude Amarin was merely acting to foreclose inputs and succeeding in doing so.

Civil Litigation in the United Kingdom

Opt-out class action allowed to proceed. In May, the Court of Appeal dismissed an appeal in *Le Patourel v. BT* by BT Group against the Competition Appeal Tribunal's (CAT's) decision to certify collective proceedings on an opt-out basis.[424] The case concerns alleged overcharges for standalone residential landline telephone services for a class of two million individuals. The court rejected BT's challenge to an opt-out class, finding that Parliament intended to leave the choice of opt-in or opt-out to the CAT based on the facts of each individual case.

In November, an application for a collective claim of £900 million ($1.095 billion) against Amazon was filed at the UK Competition Appeal Tribunal.[425] The application is being brought by consumer rights advocate Julie Hunter on behalf of over 50 million UK consumers. It argues that Amazon abuses its position as the dominant online marketplace by using a self-favoring algorithm to ensure that the Buy Box always features goods sold directly by Amazon itself, or by third-party retailers who pay significant storage and delivery fees to it. That offer, the application argues, is the only one considered and chosen by most users, who wrongly assume it is the best deal.[426] This application comes at the same time as the CMA's investigation into Amazon's business practices,[427] and Amazon reached a settlement with the European Commission concerning its Buy Box.[428]

Pass-on defense falters in forex case. In March, the Court of Appeal ruled in *Allianz Global Investors GMBH and others v. Barclays Bank plc and others* that the defendant banks' argument that the plaintiffs had partly mitigated their losses by passing them through to individual investors should be struck.[429] The banks contended that the investors, not the investment funds, had the proper claim for damages because the investors redeemed or withdrew at a price impacted by alleged manipulation of forex rates. This defense was accepted at lower levels, but the Court of Appeals rejected it, finding that the investment funds' losses were not avoided by the investors redeeming at a lower level; rather, the lower redemption rate was determined by the contract between the fund and the investors.

Follow-on claim against smart card chip manufacturers time barred. In *Germalto Holding BV and others v. Infineon Technologies AG and others*,[430] a €480 million ($480.9 million) follow-on claim against smart card chip manufacturers based on an infringement of EU competition law was found to be time-barred by the UK Court of Appeal. Gemalto's claim was filed in 2019 and was grounded in a 2014 EC decision fining the smart chip card manufacturers €138 million ($138.4 million) for coordinating prices and exchanging competitively sensitive information between 2003 and 2005. Generally, for causes of action arising before March 9, 2017, the limitation period is six years from when the cause of action accrued or, where conduct is concealed as is often the case with cartels, from when

the plaintiffs reasonably could have discovered the relevant facts. Here, Gemalto had received EC information requests and knew of a statement of objections from press releases, meaning that it should have been aware of the basis for a claim well before the final EC decision was released.

First RPM-based collective action filed. In March 2022, the plaintiffs filed a proposed class action against instrument manufacturer Fender on behalf of consumers who purchased guitars and accessories from its UK resellers during a six-year period. The claim was based on a CMA finding from January 2020 that Fender unlawfully required one of its main UK resellers to comply with minimum prices for products sold online. This is the first collective action related to resale price maintenance in the UK. It is currently awaiting certification.[431]

Conclusion

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

Endnotes

To view the complete listing of endnotes for this report, please visit https://www.wsgr.com/email/Antitrust-Report/2022/Antitrust-Report-2022-Endnotes.pdf**.**

About Wilson Sonsini's Antitrust Practice

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

Based in New York City, Washington, D.C., San Francisco, Silicon Valley, 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.

WILSON SONSINI

650 Page Mill Road, Palo Alto, California 94304-1050 | Phone 650-493-9300 | Fax 650-493-6811 | www.wsgr.com

Wilson Sonsini has 19 offices in technology and business hubs worldwide. For more information, visit wsgr.com/offices.