

## Antitrust Enforcement in 2021 and Beyond: Insights from the ABA's Antitrust Spring Meeting

April 1, 2021

On March 23-26, 2021, the American Bar Association's Section of Antitrust Law held its annual Spring Meeting virtually. This annual event—which brings together government enforcers, policymakers, and antitrust practitioners on antitrust and consumer protection issues—was more relevant than ever at a time of a change in presidential administration in the United States, as well as vigorous enforcement agendas for both U.S. federal and state attorneys general and non-U.S. competition authorities.

Panelists from government and the private sector discussed a range of topics, including general enforcement agendas, sector-specific enforcement priorities, and the remedial authority of the U.S. Federal Trade Commission (“FTC”). Remarks from the Spring Meeting underscore the point that this coming year will be another high-profile one for antitrust, featuring developments in the highly-publicized lawsuits against major technology firms, the priorities of a new presidential administration, and continued interest in pursuing enforcement actions and reforming the antitrust laws for enforcers and policymakers across the political spectrum.

Below are a few key takeaways from the Spring Meeting's discussions.

### Competition authorities remain committed to vigorous antitrust enforcement under both conventional and new antitrust theories.

All signs from the Spring Meeting pointed toward continued vigorous enforcement at the federal level, as well as by state attorneys general and non-U.S. competition authorities. While the Biden administration has yet to announce certain key nominations—including nominations for the leadership of the Department of Justice, Antitrust Division (“DOJ”) and the permanent Chair of the FTC—President Biden has already nominated Lina Khan, known for her aggressive stance toward major technology companies, as an FTC Commissioner.

- **FTC's Aggressive Posture.** Acting FTC Chair Rebecca Kelly Slaughter called for aggressive antitrust enforcement for both merger and conduct matters, and for the FTC to act boldly, even if it means pursuing cases that present novel issues or litigating rather than accepting proposed remedies that do not fully address the agency's concerns. With respect to mergers, she said that the FTC was considering several avenues to advance its enforcement interests, including “bright-line” rules to ensure that mergers that pose stark competition issues “don't make it out of the board room.” She also defended the FTC's authority to seek restitution in light of the *AMG Capital Management v. FTC* pending before the Supreme Court, in which the high court is considering whether Section 13(b) of the FTC Act authorizes the agency to seek restitution.<sup>1</sup> She remarked that, regardless of the Court's decision in *AMG*, the FTC is prepared to “dust off tools” it has not used in a long time, including its authority to issue civil fines or pursue additional administrative actions, and to take full advantage of the agency's remedial authority. The possibility of an unfavorable ruling for the FTC in *AMG* was cited as one reason for the agency's March 25, 2021

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<sup>1</sup> *AMG Capital Management v. FTC*, No. 19-508 (S. Ct. argued Jan. 13, 2021).

announcement that it is creating a new rulemaking group within its Office of the General Counsel “to strengthen existing rules and to undertake new rulemakings.”<sup>2</sup>

- **Continued Focus on Technology Firms.** The FTC, DOJ, and state attorneys general (“state AGs”) all expressed their intention to continue prosecuting their litigations against major technology firms, including Google and Facebook, as indicative of their commitment to vigorous antitrust enforcement in the digital platform space and to multi-agency cooperation in appropriate circumstances. Elizabeth Brady, Chief of Multistate Antitrust Enforcement in the Florida AG’s office suggested potential divergences from the federal government on strategy, with reference to the *T-Mobile/Sprint* litigation, where a coalition of states sought to block the merger after the DOJ cleared the transaction pursuant to a consent decree. European Competition (“EC”) Commissioner Margrethe Vestager and Australian Competition and Consumer Commission (“ACCC”) Commissioner Sarah Court likewise remarked that the digital markets were an enforcement priority for the EC and ACCC, respectively.
- **Other Industries of Interest.** Beyond the investigations and litigations concerning technology firms, DOJ officials in particular identified labor markets and the healthcare and pharmaceutical industries as enforcement priorities. With respect to labor markets, DOJ officials discussed their commitment to criminal prosecutions of firms that unlawfully agree to fix or suppress wages. With respect to healthcare, DOJ officials discussed their focus on transactions involving healthcare facilities, especially where transactions have the potential to harm a community’s healthcare assets or the quality of patient care—a particular focus in light of the COVID-19 pandemic. Consistent with these stated priorities, state, federal, and international antitrust enforcers recently formed a working group to reevaluate approaches to pharmaceutical industry mergers, as discussed in our [March 17, 2021 client memorandum](#).
- **Nascent Competition Remains a Priority.** Discussions during the Spring Meeting also suggested that the competition authorities remain focused on issues of nascent or potential competition both in the United States and abroad, as discussed in greater length in our [January 19, 2021 client memorandum](#).
- **Continued Focus on Vertical Mergers.** Last year, the DOJ and FTC issued new Vertical Merger Guidelines, which were revised for the first time in 26 years, as discussed in further detail in our [July 1, 2020 client memorandum](#). At the Spring Meeting, mergers involving firms at different stages of the supply chain remained a hot topic. Consistent with that continued focus, on March 30, 2021, the FTC filed a lawsuit challenging a vertical merger in the healthcare industry— Illumina’s proposed acquisition of Grail—alleging that this transaction would harm competition because Illumina could raise the costs of Grail’s rivals and impede their ability to compete.

## Potentially Enhanced Focus on Post-Consummation Merger Challenges

Several commentators at the Spring Meeting discussed the possibility of an uptick in post-consummation challenges to mergers, particularly in light of a recent decision by the Fourth Circuit to uphold a rare divestiture ordered by a district judge following a private party’s challenge to the transaction. In *Stevens & Sons v. Jeld-Wen*, a private plaintiff—who was both a downstream competitor to and purchaser of components from the defendant, Jeld-Wen—successfully challenged the combination of Jeld-Wen and its competitor, CMI, in the “doorskin” industry even though DOJ declined to challenge the merger after an

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<sup>2</sup> Press Release, Federal Trade Commission, *FTC Acting Chairwoman Slaughter Announces New Rulemaking Group* (March 25, 2021), <https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group> (accessed March 30, 2021).

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HSR Act notification, and the plaintiff itself told the DOJ that it did not oppose the transaction at the time of DOJ's initial merger review in 2012.<sup>3</sup> In discussing this case during the Spring Meeting, Colorado Attorney General Philip Weiser said it suggests firms should be on notice that mergers may be challenged after closing, especially if there is evidence that they actually led to a reduction in competition.

In the coming months, we will continue to brief our clients on the future of antitrust enforcement in the Biden administration and beyond. Please do not hesitate to contact us if you would like to discuss any of these developments.

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If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your usual Davis Polk contact.

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<sup>3</sup> *Steves & Sons, Inc. v. Jeld-Wen, Inc.*, 988 F.3d 690 (4th Cir. 2021).