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2018 ANTITRUST M&A YEAR IN REVIEW

Last year the era of significant transactions that promise to transform numerous industries in the U.S. and around the globe continued, presenting antitrust authorities with complex and novel challenges. Crowell & Moring's Antitrust Group was privileged to participate in many of those matters, and is pleased to present this 2018 M&A Year in Review, which highlights and provides insights on some significant developments and includes updates on:

- FTC and DOJ enforcement
- European Commission developments
- Telecom and Media transactions
- Health care transactions
- Vertical mergers
- China regulatory activity
- A look ahead to 2019

NOTABLE CROWELL & MORING DEALS IN 2018

AT&T's $85 Billion Acquisition of Time Warner

C&M was co-lead antitrust counsel at DOJ for AT&T in this significant media transaction. C&M also played a key role supporting the trial team that prevailed in the first vertical merger case litigated by either DOJ or FTC in over 40 years. On February 26, 2019, the decision was affirmed by the U.S. Court of Appeals for the D.C. Circuit.

United Technologies' $30 Billion Acquisition of Rockwell Collins

C&M was lead U.S. antitrust counsel for UTC in its acquisition of avionics supplier Rockwell Collins, reportedly the largest aerospace transaction in history. DOJ cleared the transaction subject to the divestiture of two small businesses.

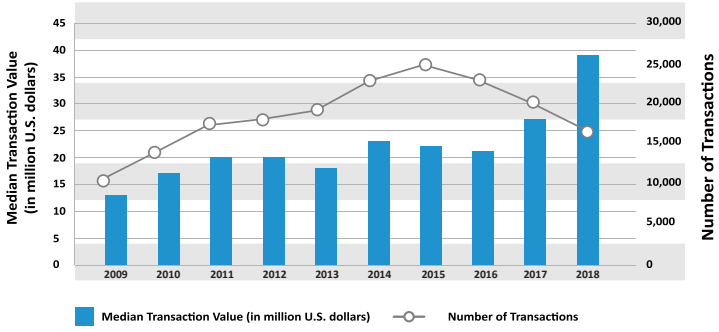
Gwinnett Hospital's Merger with Northside Hospital

C&M represented Gwinnett Health System in connection with the FTC's intense review of its merger with Northside Hospital, which ultimately cleared without the FTC requiring any remedies. The merger combines complementary services of the health systems, and will result in higher quality health care for the Atlanta-area community.

FTC & DOJ ENFORCEMENT

The Trump Administration antitrust team was finally seated and working in 2018 – five new FTC Commissioners and a largely stable DOJ front office – so now we have our first opportunity to observe changes in policy and larger trends. More so than in recent administrations, it is already evident that we can expect a degree of policy divergence between the agencies and occasional but strong differences of opinion among the FTC's five Commissioners.

GLOBAL M&A VOLUME



Source: PitchBook Data, Inc.

The result will be sometimes unpredictable agency-specific priorities, more arguably selective enforcement, variation in each agency's approach to remedies, and the inevitable degree of uncertainty that comes from lack of complete consensus and coordination. Nevertheless, as ever-larger and more complex deals are presented to the agencies, we expect to see some lengthy investigations and a willingness to litigate when necessary, increased attention to industries perceived as critical, and further efforts to

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streamline the merger review process. We also expect a robust level of agency participation in domestic and international policy fora to advance the agencies' respective agendas, but with the potential for advocacy of some divergent positions.

A few highlights bear special mention. The DOJ's sole litigated case was its failed challenge to AT&T's acquisition of Time Warner—the first effort by either U.S. agency to litigate a vertical merger to judgment in over 40 years. It also undertook deep-dive investigations of the tie ups between pharmacy benefit managers and health insurance companies that included vertical dimensions, but it did not seek to block any other merger. For its part, the FTC brought three horizontal merger challenges, winning one and seeing the others abandoned before judicial resolution. FTC staff also tried an administrative case (decision pending), and defended a favorable district court decision before the Eighth Circuit. The FTC also launched an ambitious series of hearings entitled *Competition and Consumer Protection in the 21st Century*, which will cover a variety of merger enforcement and other issues. These hearings may lead to new enforcement priorities and policy pronouncements.

Both agencies negotiated relief in many other cases without going to court, as is typical, and we also saw a continued commitment to focus enforcement resources in the telecom/internet/tech space, agriculture, and health care industries. The DOJ also announced changes to its model timing agreement and merger review process, intended to allow most merger investigations to be completed within six months, and the FTC published a model timing agreement. It does not appear, however, that the DOJ and FTC have been closely coordinating these efforts.

Merger remedy policy is an area we will be watching and that may divide the agencies, especially with regard to the relative desirability of structural and behavioral remedies. Assistant Attorney General Delrahim has forcefully expressed his preference for structural remedies over "regulatory," behavioral remedies. In May 2018, DOJ announced the *Bayer/Monsanto* consent order, touted by the DOJ as the "largest negotiated merger divestiture ever." In contrast, FTC Chairman Simons has stated a concern over the failure rate of partial divestitures and Commissioner Chopra has criticized the mixed track record of divesting assets to private equity purchasers. Differences of opinion may prove to be case-specific, however. In an unusual joint venture matter, the FTC unanimously accepted an elaborate behavioral remedy that included the appointment of a private monitor. But in early 2019, the Commissioners split 3-2 in resolving the *Staples/Essendant* merger that included vertical issues, with the majority supporting a behavioral remedy decree including a monitor, and Commissioners Chopra and Slaughter dissenting, questioning the likely effectiveness of the remedy.

EU: 2018 BRINGS RECORD-BREAKING NUMBER OF MERGER FILINGS, BUT NO INCREASE IN INTERVENTION

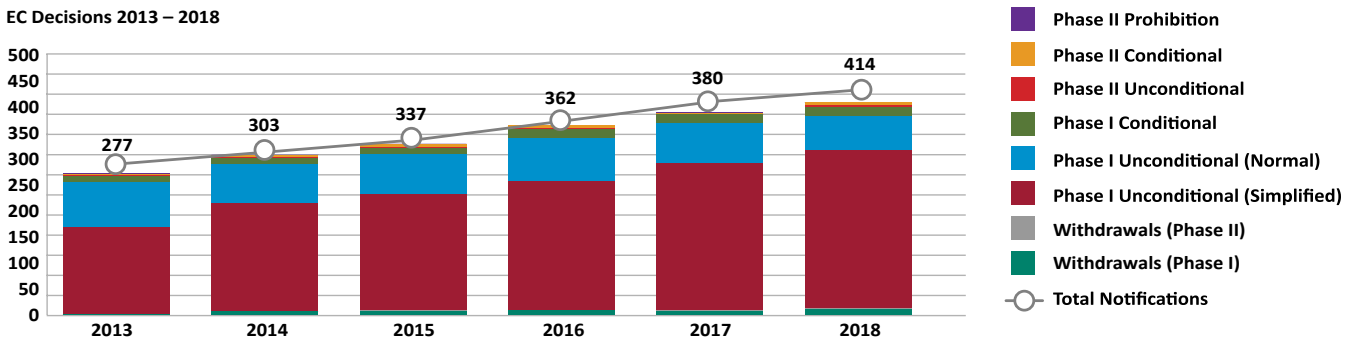
With a total of 414 notified transactions, 2018 saw the highest number of notifications to the European Commission in the history of the EU merger control regime, surpassing the previous record of 402 in 2007. In the last five years, filings have gone up by almost 50%, although the Commission was able to process 75% of filings through a simplified procedure introduced in 2014.
No transactions were blocked in 2018, although two were abandoned in Phase II (and, in early 2019, the Commission blocked two transactions that it had started to examine in 2018, *Siemens/Alstom* and *Wieland/Aurubis Rolled Products/Schwermetall*). With 23 transactions approved with remedies (17 in Phase I and 6 in Phase II), the Commission's intervention rate of 6% (27% of non-simplified notifications) was in line with previous years. Four transactions were cleared unconditionally in Phase II, showing that the opening of a Phase II investigation does not necessarily mean that the parties have to offer commitments to obtain clearance.

We observe a trend towards increasingly longer "prenotification" talks with the European Commission, indicating that merging companies are holding off on filing in hopes of resolving issues before the clock starts on Phase I. This trend runs counter to the original intent of the EU merger regulation, which aims to give companies legal certainty by setting a strict timetable.

In terms of substance, a few cases are noteworthy. Together with the 2017 *Dow/DuPont* decision, the 2018 decision in *Bayer/Monsanto* shows an increased focus on the effects of mergers on innovation. In *Apple/Shazam*, cleared unconditionally in Phase II, the Commission investigated a novel theory of harm based on the use of data, namely the concern that Shazam controlled a unique dataset of consumers' music preferences, which might have allowed Apple to tip the market for digital music streaming services in its favor. While the investigation did not result in a challenge, the Commission's analysis may provide a blueprint for the assessment of future cases involving unique datasets. *Daimler/BMW car sharing JV* stands out due to the novelty of the remedies: API (application programming interface) access was granted to third-party aggregator platforms for mobility solutions and access to Daimler's integrator app was granted to other car sharing providers. The Commission's unconditional phase II clearance of *T-Mobile Netherlands/Tele 2 Netherlands* undermines the perception that under Commissioner Vestager the Commission is no longer prepared to allow four-to-three mergers in mobile telephony markets. On 6 February 2019, it was announced that the Commission had vetoed the merger between the two largest European manufacturers of trains, Siemens and Alstom, resisting pressure from the French and German governments to help create a "European champion" able to take on State-backed foreign rivals, such as China's CRRC, the world's biggest train maker.

After hitting Facebook with a record fine of €110m in 2017 for providing misleading information in relation to its acquisition of WhatsApp, the Commission continued to get tough on procedural infringements in 2018 by imposing a €125m fine on Altice for "gun jumping" in its acquisition of PT Portugal. Several other investigations into procedural infringements are ongoing.

EU MERGER CONTROL



TELECOM AND MEDIA

In an era marked by an explosion of new video content and a rapid evolution in the way viewers are consuming it, several companies pursued major transactions in 2018 to better position themselves to compete in a world where tech giants like Netflix, Google, Facebook, and Amazon are making enormous investments based on new business models. As consumers increasingly abandon traditional linear television in favor of consuming more content online, and on mobile devices in particular, industry participants are undertaking major transactions to position themselves for the future.

In June 2018, AT&T and Time Warner completed their $85 billion transaction combining AT&T's distribution platforms with Time Warner's portfolio of content. The companies explained that the combination would enable innovative content delivery and advertising platforms, which would help the combined firm compete with online giants that both own and distribute content like Netflix, Amazon, and Hulu. DOJ declined to clear the deal with behavioral remedies–despite having done so in prior similar deals like *Comcast/NBCUniversal*–and instead sued to block a vertical merger for the first time in over 40 years. DOJ argued that the combined firm would have increased bargaining leverage allowing it to charge rival distributors more for Time Warner's popular content, which in turn would lead to higher prices for consumers.

After a three week bench trial, Judge Richard J. Leon denied the government's request for an injunction and approved the merger without conditions. The decision noted the recent changes to the media landscape, including the "rise and innovation of over-the-top, vertically integrated video content services," "declining [traditional pay TV] subscriptions," and the "shift toward targeted, digital advertising." The Court acknowledged that vertical mergers produce efficiencies, including the $350 million per year in lower prices that DOJ's expert "conceded" AT&T customers would receive, and the elimination of bargaining friction that would allow AT&T "to deliver content to its customers in more innovative ways." While DOJ relied on a bargaining model to show a predicted net price increase to rivals' customers, the Court found that DOJ failed to present "real world objective evidence" supporting the necessary inputs to that model, and that its result was contradicted by witness testimony and empirical evidence offered by the parties' expert showing that similar vertical integration of content producers and distributors did not result in higher prices. On February 26, 2019, the decision was affirmed by the U.S. Court of Appeals for the D.C. Circuit, holding that the government failed to meet its burden to prove that anticompetitive price effects would offset the conceded procompetitive benefits.

The year also brought major horizontal telecom and media deals. Among content providers, Disney continues to pursue its horizontal acquisition of most of 21st Century Fox's assets, including its cable networks and film and televisions studios. Disney's Bob Iger explained that the "acquisition reflects a changing media landscape increasingly defined by transformative technology and evolving consumer expectations," and would "allow us to greatly accelerate our direct-to-consumer strategy… our highest priority." DOJ approved the deal conditioned upon Disney selling Fox's regional sports networks. The transaction continues to be reviewed by Brazilian authorities.

In another horizontal deal, Sinclair Broadcasting sought to acquire Tribune Media in a $3.9 billion deal that would have created a broadcaster with 215 stations reaching 73% of U.S. households. Notwithstanding industry changes, merger opponents argued that broadcast television remains relevant, especially for local news coverage. The deal ultimately collapsed after the FCC said it would refer the deal to an administrative law judge because the parties' proposed divestiture plan "would allow Sinclair to control those stations in practice, even if not in name, in violation of the law."

In the telecom arena, T-Mobile and Sprint announced a $146 billion deal that would combine the third and fourth largest U.S. wireless carriers. The parties claim the transaction will allow the U.S. to win the global race to deploy a 5G wireless network and allow them to better compete with AT&T and Verizon. Opponents have expressed concern with this "four-to-three" merger that eliminates a maverick firm. While regulators rejected a merger between the same companies in 2014, and the deal remains pending, the DOJ and FCC have not rejected the deal out of hand.

HEALTH CARE

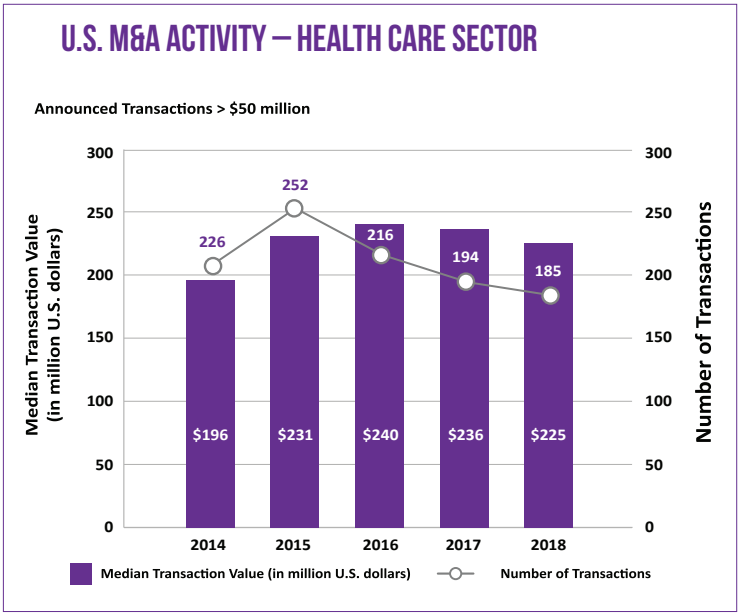
After a string of high-profile FTC and DOJ court challenges to health care mergers last year, the largest mergers announced in 2018 did not result in any new court battles.

The health care provider space continued its brisk pace of transactions. Seven hospital merger deals involved sellers with net revenues of $1 billion or more although most of these mergers notably involved systems with different geographic footprints. In one large merger—the combination of Beth Israel, Lahey, and other providers—the FTC did not bring a challenge against a 3-2 merger, calling it a "close call" in an unusual closing statement, and instead deferring to the Massachusetts Attorney General's negotiated remedy of price caps and other behavioral remedies as a condition of deal clearance.

The Commission was also busy with physician mergers, seeking to convince the Eighth Circuit to affirm a preliminary injunction against a prominent hospital system's acquisition of a significant physician group. The lower court found it to be a merger to monopoly in general surgery and near-monopoly in three other service markets. That case is one to watch as the power buyer defense was front and center.

The Antitrust Division settled a notable case brought against Atrium Health in North Carolina. DOJ alleged that Atrium used its market power to prohibit insurers from steering members away from Atrium, depriving consumers of lower-priced and higher quality health care options. Although it wasn't a merger case, deal lawyers were paying careful attention – if Atrium had prevailed it would have undermined the FTC's competitive effects theories in its merger cases. The DOJ settlement ends that threat to the FTC's recent win streak in litigated hospital merger challenges.

In the insurer space, the DOJ's attention was on largely vertical mergers, particularly *Cigna/Express Scripts* and *CVS/Aetna*. The *Cigna/Express Scripts* deal cleared DOJ review without enforcement action. In the *CVS/Aetna* deal, the DOJ's settlement with the merging parties required them to resolve a horizontal overlap in individual Medicare Part D prescription drug plans, explaining that the vertical aspects did not warrant challenge. The horizontal aspects of the deal were notable for two reasons. First, this was the first time the DOJ charged a violation in the merger of Medicare Part D prescription drug plans after having investigated several other transactions involving Part D overlaps. Second, the deal was also notable for requiring a pre-approved buyer for the divestiture assets and a monitoring trustee, demonstrating the Antitrust Division's risk aversion when it comes to remedies affecting the Medicare population.



In October, the FTC's Premerger Notification Office issued new guidance clarifying that certain not-for-profit hospital mergers, which may not have been reported under the Hart-Scott-Rodino Act due to a technical interpretation of change-of-control provisions, were, in fact, subject to HSR reporting requirements. In December, the Trump administration issued a report on health care competition. Among other things, the report stated that some health care markets may be too concentrated and recommended continued active federal antitrust enforcement and state policy changes regarding Certificate of Need and Certificate of Public Advantage laws.

SPOTLIGHT ON VERTICAL MERGERS

Noteworthy policy changes regarding vertical merger enforcement; DOJ AAG Delrahim expressly disavowed the 1984 vertical merger guidelines and announced plans to issue revised guidelines in 2019. The DOJ also withdrew its 2011 remedies guide, which had endorsed the use of behavioral remedies in vertical mergers. The FTC included discussion of the need for new vertical merger guidelines in its hearings on *Competition and Consumer Protection in the 21st Century*.

The DOJ and FTC were presented with a series of high profile vertical mergers in 2018, in industries ranging from telecommunications to health care. Perhaps more so than in any other area of antitrust merger enforcement, these deals exposed potential—and actual—differences of opinion between the DOJ and FTC, and within the FTC.

The most notable vertical merger development was the DOJ's unsuccessful effort to block the *AT&T/Time Warner* transaction. DOJ's decision to litigate that case stands in contrast to the results in two other vertical mergers the DOJ reviewed last year. After a careful investigation, the DOJ took no issue with the vertical aspects of the *CVS/Aetna* deal, ultimately clearing the merger with only a small divestiture required in an area of horizontal overlap. The $67 billion *Cigna/Express Scripts* merger cleared without any conditions after just six months—a relatively short investigation by recent DOJ standards. DOJ's settlement of the *Bayer/Monsanto* deal also purported to resolve vertical competition concerns.

Surely aware of the spotlight on vertical merger enforcement given DOJ's challenge to *AT&T/Time Warner*, the FTC issued a rare closing statement in March 2018, explaining why it closed its investigation of Essilor's acquisition of Luxottica without requiring any remedy. Essilor is a leading designer and manufacturer of ophthalmic lenses, while Luxottica is a leading manufacturer and

distributor of optical frames and the largest U.S. retailer of eyeglasses. The closing statement took pains to explain that over the course of a year-long investigation staff "extensively investigated every plausible theory and used aggressive assumptions to assess the likelihood of competitive harm," even noting the millions of documents the agency collected and the 100 market participants interviewed by staff.

In June 2018, the FTC cleared Northrop Grumman's acquisition of Orbital ATK, subject to behavioral remedies. Northrop is one of the few prime contractors for Department of Defense missile systems, while Orbital is the leading U.S. producer of solid rocket motors (SRMs) used in missile systems. The consent order prohibited the merged firm from discriminating against Northrop's missile-system competitors in the supply of Orbital's SRMs, and imposed information firewalls to protect SRM and missile-system competitors' competitively sensitive information from being shared improperly within the merged firm. Likely recognizing the potential public perception of a divergence of policy with the DOJ with regard to behavioral remedies, the FTC stated that it "typically disfavors behavioral remedies and will accept them only in rare cases based on special characteristics of an industry or particular transaction."

Finally, just as 2019 began, stark differences of opinion about the treatment of vertical mergers surfaced when the FTC voted 3-2 to clear Staples' acquisition of office-supply wholesaler Essendant, subject to behavioral relief in the form of an information firewall. The two dissenting Commissioners issued lengthy statements arguing that the FTC should have challenged the transaction. In response, Commissioner Wilson issued a strongly worded concurring statement, accusing the dissenters of favoring a challenge "based on nothing more than a hunch that Staples 'may' or 'might' be able to harm rivals" while she preferred "to base my analysis on the evidence we have gathered and the law as it exists today[.]" Expect this division on vertical merger enforcement to continue at the FTC.

CHINA REGULATORY ACTIVITY

In 2018, China implemented its most significant institutional reform since enacting the Anti-Monopoly Law in 2008, combining three antitrust agencies into one agency called the State Administration for Market Regulation (SAMR). SAMR's Anti-Monopoly Bureau is responsible for merger review and other antitrust matters. There is some hope that this reform will lead to a more efficient, transparent, and consistent approach to merger control.

2018 also saw the eruption of a trade war between the U.S. and China, accompanied by rumors that China consequently put on hold its review of significant transactions involving U.S. parties. SAMR's review of the *Qualcomm/NXPI* transaction drew notable attention, as the investigation remained pending almost two years after signing, leading Qualcomm to eventually abandon the transaction.

On the other hand, China did clear several international transactions, including *UTC/Rockwell Collins*, putting some of these rumors to rest. SAMR also investigated and imposed conditional clearances on five mergers involving non-Chinese companies. The review time for these transactions averaged 373 days.

2018 further confirmed that China remains one of the most important merger control enforcers in the world and is often the final one remaining in the critical path to the clearance of global mergers.

LOOKING FORWARD TO 2019 DEVELOPMENTS

Antitrust merger enforcement will remain active in 2019, although as we noted at the outset, we expect there to be greater uncertainty and some likely surprises. Many of the specific issues discussed above, however, should continue to be at the forefront of key developments in the coming year.

- **U.S. Agency Enforcement** – The DOJ and FTC will continue to investigate horizontal and vertical deals and take targeted enforcement action that may reveal a degree of differing priorities. We will be watching to see whether, and if so how, the FTC's hearings result in new policy statements or priorities regarding increased enforcement or increased focus on particular issues, such as monopsony concerns, or particular industries, especially in technology-focused sectors.

- **Vertical Mergers** – Regardless of the D.C. Circuit's decision in *U.S. vs. AT&T*, we expect both agencies will continue to closely scrutinize vertical mergers and challenge them when they have strong evidence of consumer harm. The increased incidence of vertical integration, the already expressed intention of the DOJ to revisit its 1984 Guidelines, and the FTC's interest in the subject at its 21st Century Hearings, all suggest that we can expect to see a continued spotlight on vertical mergers.

- **Health Care** – Health care consolidation will continue, and the FTC, DOJ, and state AGs will continue to be attentive to deals in this sector. In 2019, we'll see the Eighth Circuit's decision in the *Sanford Health/Mid Dakota Clinic* merger, and perhaps a decision in the Washington AG's challenge to CHI Franciscan's affiliation with two physician groups.

Although the near-term prospects for any significant reform seem slim, these efforts are likely to continue as part of the broader debate about the effectiveness of U.S. antitrust policy as we approach the 2020 presidential election cycle. We will be monitoring the legislation and will provide updates to our clients on any significant developments.

- **Telecom** – In 2019, the mobile phone industry might see its largest shake-up in years if the DOJ and FCC decide not to challenge the *Sprint/T-Mobile* merger—or not. This year should also bring more M&A activity in the media and entertainment industries as the business models associated with video programming and distribution continue to evolve.

- **U.S. Merger Review Process** – Worth watching will be whether DOJ's effort to clear most mergers within six months starts to show results, and whether merging parties agree to work with the agencies under their new stringent model timing agreements.

- **Outside the U.S.** – The EC and some member state authorities are on the cutting edge of "Big Data" issues, and have already taken action against certain tech companies' conduct. Whether that results in merger enforcement action will be a key issue in 2019. In China, key issues to watch are how the newly consolidated agency, SAMR, functions and whether there continues seemingly to be trade-dispute hangover into antitrust clearances.

- **Legislation** – Finally, legislation reform efforts are underway in both the U.S. House and Senate that could broaden the reach of the merger provisions of the Clayton Act. Although the near-term prospects for any significant reform seem slim, these efforts are likely to continue as part of the broader debate about the effectiveness of U.S. antitrust policy as we approach the 2020 presidential election cycle. We will be monitoring the legislation and will provide updates to our clients on any significant developments.

OVERVIEW OF OUR ANTITRUST M&A PRACTICE

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Crowell & Moring offers a full-service antitrust practice with substantial depth in each of the major specialty areas. We help clients navigate the antitrust enforcement agencies and secure clearance of their mergers, acquisitions, and joint ventures; represent corporations and executives in antitrust investigations and trials; handle civil antitrust investigations; defend civil litigation brought by the government or private litigants; counsel and train our clients on an ongoing basis; and, uniquely, offer recovery services, pursuing negotiation and litigation to recover overcharges when our major corporate clients have themselves been injured by antitrust misconduct. Our capabilities span not only the U.S. but also the international antitrust regulatory and litigation challenges that our clients must navigate.

Our M&A practice has successfully handled the antitrust clearance of some of the largest and most complex mergers and acquisitions in recent history. We pride ourselves on guiding our clients through the successful review of their most important strategic transactions in the U.S., European Union, and around the world. It is not uncommon for our firm to handle several major merger reviews each year, while working closely with the antitrust agencies in many other cases to resolve matters without lengthy investigations.

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