partnering with business
to keep you ahead of the curve
The Crowell & Moring LLP Antitrust Practice Group offers unparalleled client service by investing in understanding your business, the industries in which you operate, your company’s culture and risk tolerances. Our clients range from the largest multinational companies in the world, where we partner with sophisticated in-house legal departments, to technology start-up companies where we deal directly with the business team. We recognize that every client relationship must be highly customized and supported by a knowledgeable team of skilled practitioners and our group commits to every client to be highly responsive.

We know that when you are seeking antitrust advice, you cannot afford a delay in obtaining practical guidance to get in the way of your business. There are many antitrust practice groups in firms of every size, but none rivals Crowell & Moring in the quality and speed of response, or in understanding the role of antitrust counsel in the progress of business. It is these qualities that set us apart, and explain why our client relationships are so enduring.
Our attorneys have a broad range of experience at the Department of Justice (DOJ), the Federal Trade Commission (FTC), and the European Commission (EC). This experience has carried over to our private practice, where we appear before those same agencies as well as other regulatory agencies involved in competition policy. We also have a national and international complex civil litigation practice in federal and state courts at both the trial and appellate levels. Additionally, we work closely with our clients to reduce antitrust risk by conducting thousands of on-site and on-line antitrust training sessions and by establishing effective compliance and audit programs.

As a world-class and worldwide antitrust law practice, we cover the full range of substantive antitrust and trade regulation issues:

- Criminal grand jury investigations and trials
- Defense of civil litigation, trial and investigations
- Pursuit of damages in recovery actions
- Full-service merger and acquisition representation
- Counseling on ways to manage antitrust risks, including conducting audits and sophisticated compliance training
Defense of Criminal Antitrust Claims

There is no event event more chilling to an executive than receiving a grand jury subpoena, informing you that your company is under criminal investigation in the U.S., or being the target of a dawn raid by European officials. From grand jury investigations and amnesty applications to extradition proceedings and litigation, our criminal defense team—headed by former DOJ prosecutors—has the experience to guide you through all phases of criminal proceedings. We have defended companies against government allegations of price fixing, bid rigging, market allocation, customer allocation, and related issues of fraud and corruption. Our representations often involve dealing with foreign authorities, including those in Europe, Canada, and Asia. Among the group’s client representations, we have been instrumental in the following matters:

- Assisting an individual in obtaining a judgment of acquittal in a criminal bid-rigging trial
- Persuading senior DOJ officials to overrule the staff recommendation to indict our corporate client for price fixing, despite evidence from a competitor with amnesty
- Negotiating an amnesty agreement with DOJ whereby the client company and its employees avoided any criminal charges associated with an alleged price-fixing conspiracy
- Representing various companies and their employees in navigating international cartel investigations in the U.S., Europe, and elsewhere

Defense of Civil Litigation and Investigations

Antitrust litigation can be overwhelming for many firms, but not for Crowell & Moring. We are experienced trial and appellate lawyers with a track record of success across the spectrum of civil cases. Recently, we have:

- Negotiated favorable settlements for a Fortune 100 client in multiple price-fixing class actions
- Achieved dismissal (or denial of class certification) in numerous class actions alleging monopolization and unfair competition claims in state and federal courts
- Engineered dismissal of 4,000 individual retailer cases against a pharmaceuticals client in multidistrict litigation alleging Section 1 and Robinson-Patman Act claims
- Won summary dismissal of a follow-on (to government investigation) class action Section 1 case seeking $4 billion
- Obtained a favorable verdict after a three-week trial on conspiracy and monopolization charges
- Obtained summary judgment on the eve of trial on state law antitrust claims
- Successfully represented a key player in the first Internet monopolization case
We craft our strategy step by step with our clients, developing realistic budgets, clear milestones, and pragmatic approaches to achieve the most cost-effective results. The only surprise we think clients should have in litigation is winning the hard cases no one thought could be won.

Government civil litigation typically flows from investigations into industry or company practices. Not every investigation, however, ends with the government bringing legal action. Crowell & Moring’s antitrust lawyers have successfully defended numerous clients in civil antitrust investigations by the FTC Antitrust Division, state attorneys general and the EC. By utilizing experience gained working inside the agencies and in private practice, we have successfully assisted clients to close:

- An FTC investigation of a pharmaceutical client involving alleged predatory disparagement of generic competitors and exclusionary contracts with managed care companies and pharmacy benefit managers
- An EC investigation of an airline joint venture’s claimed potential abuse of a dominant position
- An FTC investigation of an industrial client’s exclusive supply contract
- A state attorney general’s investigation of allegedly exclusionary marketing practices

Obtaining Wins on Appeal

Our team of appellate lawyers are called on to preserve trial victories or reverse trial court losses on appeal. As just a sample of our appellate work, we have:

- Obtained affirmance by the Supreme Court of dismissal of price-fixing claims against a transportation industry client
- Obtained reversal in California Supreme Court of unfavorable result on motion to strike under California’s Strategic Lawsuits Against Public Participation statute
- Successfully defended on appeal summary judgment against attempted monopolization and boycott charges for an HMO and hospital system
- Obtained reversal of unfavorable verdicts and protected favorable verdicts on appeal of predatory pricing and common law fraud claims against an airline client
- Obtained affirmance of summary judgment of antitrust and RICO claims brought against a utility client
- Obtained affirmance of dismissal of monopolization claims against a hospital client
While companies historically have focused their legal efforts on avoiding or defending antitrust matters, corporate legal departments have increasingly come to realize that there are substantial sums to recover when they are victimized by antitrust violations. Antitrust recovery actions are a way for companies to gain revenue if they have been harmed—typically through overcharges associated with collusion among the company’s suppliers. Corporate legal departments can ill afford to allow these opportunities to pass, yet are often faced with the difficult choice of managing a case internally—with scarce resources—or joining a class action that will not fully and fairly reflect a large purchaser’s overcharges.

Crowell & Moring provides companies with a more sophisticated recovery action alternative.

Whether as part of a group of plaintiffs or on an individual basis, corporate clients must balance their relationships with the suppliers with their obligation to their shareholders to recover damages. We craft an approach that demonstrates resolve and commitment to results, while at the same time maintaining the relationships with the other side. Recovery actions are not only about knowing how to win a case. They are also about knowing how to use litigation or arbitration to resolve outstanding liability, while maintaining supplier-customer relationships going forward.

Crowell & Moring's antitrust recovery practice provides a superior alternative to class actions for several reasons. First, we are frequently able to achieve recoveries for clients that far exceed those of a class settlement. Second, we have the experience and sophistication to pursue business settlements for clients that are often ignored by class counsel or are inappropriate to class settlements. Third, we pursue global solutions for our clients, whereas class actions often only look at solutions in the United States. With offices in London and Brussels and relationships around the world, Crowell & Moring has experience litigating before U.S. and foreign courts and arbitration panels.
Crowell & Moring has represented dozens of Fortune 500 companies in recovery actions, and has recovered hundreds of millions of dollars for our clients through these efforts. While past results may not be representative of the results to be expected in any individual case, we have achieved the following successes:

• Obtained for a group of 51 copper purchasers settlements 10 times the amounts the companies would have recovered had they remained members of the class

• Obtained for a consortium of mining companies multimillion dollar settlements with defendants involved in price fixing of explosives. These settlements far exceeded the recovery of similarly situated plaintiffs who took part in the class action against the manufacturers.

We are currently representing groups of plaintiffs in price-fixing overcharge recoveries in several areas, including:

• The electrical and mechanical carbon products industry, where the DOJ and EC each has found cartel behavior

• The dynamic random access memory (DRAM) computer chip industry where the DOJ has obtained guilty pleas

A key component of these recovery efforts is our ability to offer innovative fee and risk sharing arrangements. We have pursued successful recovery efforts through standard fees, fixed fees, success fee arrangements and contingent fee arrangements. These matters require innovative thinking on the part of our in-house counsel clients, who are seeking to enhance the value of corporate legal departments in new ways. We have demonstrated that we are prepared to partner with our clients, taking our own substantial risks while sharing in the rewards that we are able to obtain for the client.
Crowell & Moring is the “go to” antitrust practice for companies looking to successfully close their most important strategic acquisitions, a reputation we have earned through a track record of consistent success. Examples of recent representations by our group include:

- SBC Communications $16 billion acquisition of AT&T, in obtaining clearances from the DOJ, the Federal Communications Commission (FCC), state attorneys general, state utility commissions, and the U.K. Office of Fair Trading
- SBC Communications and Cingular Wireless, in obtaining DOJ, FCC and international clearances of Cingular’s $41 billion acquisition of AT&T Wireless, the largest all-cash transaction in U.S. history
- United Technologies, in its $3 billion acquisition of Kidde plc
- Pratt & Whitney Aircraft, in obtaining FTC and Department of Defense clearance of its $700 million acquisition of the Rocketdyne liquid space propulsion business unit from Boeing
- UTC Fire & Security, in obtaining FTC clearance of its $400 million acquisition of Lenel Systems International
- E.I. DuPont de Nemours, in obtaining FTC clearance of its $4.4 billion divestiture of the Invista fibers business to Koch Industries
- E.I. DuPont de Nemours, in obtaining antitrust clearance of its $64 million acquisition of Verdia, Inc.
- E.I. DuPont de Nemours, in obtaining antitrust clearance of its $408 million acquisition of ChemFirst, Inc.
- Nortel Networks, in its $448 million acquisition of PEC Solutions Inc.
- Alcoa Inc., in obtaining FTC and EC clearance of its $657 million acquisition of Fairchild Fasteners
- Northwest Airlines, in obtaining antitrust clearance of its joint venture with Continental Airlines
- Clean Harbors, Inc., in obtaining DOJ approval of its $301.3 million acquisition of the Chemical Services Division of Safety Kleen Corporation
• Lexis-Nexis, a member of Reed Elsevier Group plc, in obtaining antitrust clearance of its $775 million acquisition of Seisint, Inc.

• Lexis-Nexis, a member of Reed Elsevier Group plc, in obtaining antitrust clearance of its acquisition of Applied Discovery

• Harcourt Achieve, a member of Reed Elsevier Group plc, in obtaining DOJ clearance of its acquisition of Saxon Publishers, Inc.

• Lexis-Nexis, a member of Reed Elsevier Group plc, in obtaining FTC approval of its acquisition of Dolan Media Group

• Reed Elsevier Group plc, in obtaining DOJ and U.K. approval of its $4.45 billion acquisition of Harcourt General, Inc.

Our strategy is to utilize our knowledge of the industry and our client’s position to make judgments about which transactions are likely to attract more in-depth investigations, and to prepare our clients to manage the process, rather than be managed by it. Where appropriate, we will perform “advance” second request document sweeps, and position the company to comply rapidly, yet fully, with any demands for documents and information, so as not to delay transactions. We have deep experience working with a wide range of economic experts and, where necessary, to litigate a government challenge.
As antitrust counselors, we work with you to achieve practical results while minimizing antitrust risks arising from day-to-day activities. Whether the issue involves distribution of your products, pricing policies, intellectual property licensing conditions, or trade association activities, our deep team of advisors has the knowledge and experience to guide you through the antitrust analysis, as well as related legal issues. While our counseling practice is comprehensive, we find that we are frequently called on to counsel in the following areas:

**Distributors, Dealers and E-Commerce**

We regularly advise on the full range of distribution law issues, helping manufacturers “go to market” in an antitrust-efficient manner. We have created and enforced multilayer distribution agreements, Minimum Resale Price and Minimum Advertised Price Policies, and e-commerce agreements. We have counseled extensively on the Robinson-Patman Act. When the need arises, Crowell & Moring attorneys will also defend clients against claims by terminated dealers, whether in judicial or arbitration forums.

We work closely with our IP and International groups to support the integrity of clients’ authorized distribution channels. Thus, as part of our distribution practice, we assist clients in managing global distribution issues, including defending borders from counterfeit and grey market imports, whether through contract, border protection measures, or the enforcement of IP rights. As part of a comprehensive approach, our U.S. and European colleagues work together to ensure compliance with European Union (EU) distribution requirements, and with our trade consulting affiliate, C&M International, to achieve trade policy changes that will strengthen the respect for IP rights globally.

**Intellectual Property**

We regularly team with our IP group to counsel at the increasingly important intersection of antitrust and intellectual property, regularly advising clients on the antitrust aspects of patent pooling and licensing. We also have conducted many workshops on the interface of IP and antitrust law through the U.S. and EU. We act as antitrust counsel for the nation’s largest patent pool administrator, and have filed an amicus brief in the Supreme Court on behalf of the Intellectual Property Owners Association on post-Kodak aftermarket issues. We advise on the antitrust implications of licensing agreements and work with our IP litigators to determine whether those claiming infringement of their patents have engaged in conduct that violates the antitrust laws.
Compliance, Training and Audits

Both in the United States and Europe, we provide comprehensive antitrust compliance counseling to our clients to reduce the risk of government investigations and litigation. We are currently conducting audits of U.S. distribution policies and of trade association activities across Europe. We also present in-house seminars on antitrust compliance, prepare corporate compliance guidelines, and conduct compliance reviews in which we evaluate a client’s antitrust policies and practices.

We also provide web-based training tailored for individual clients on a variety of competition-related topics. Available training modules include:

- Current Antitrust Developments for Senior Executives
- Antitrust Basic Training
- Hart-Scott-Rodino Compliance
- Seven Days in the Life of a Grand Jury Investigation
- Tying, Bundling and Loyalty Discounts
- Antitrust and IP for Patent Lawyers
- Joint Ventures, Teaming Agreements and Other Competitor Collaborations
- Aftermarket Issues and Antitrust
- The Robinson-Patman Act: Price Discrimination Primer
- Gun Jumping vs. Integration Planning
- Trade Associations
- Antitrust Issues for Purchasing Departments
- Antitrust Issues for Human Resource Departments
- What Commercial Lawyers Should Know to Spot Antitrust Issues
- False Advertising
- The Evils of E-mail
Trade associations bring together competitors, and therefore require antitrust advisors who can provide real-time counsel on how competitors can engage in lawful, industry-advancing conduct without crossing the line into illegal behavior. We act as antitrust counsel for several major industry associations on the entire range of legal issues, including: membership requirements and restrictions; voluntary self-regulation through accreditation programs; information exchange programs, statistical surveys, and standard setting. When the need arises, we assist associations in responding to antitrust investigations, and provide regular training and counseling to avoid even the appearance of anticompetitive agreements among their members. Our work includes serving as counsel at association meetings, where we are called on to provide advice during discussions that raise competitively-sensitive issues.

We also offer a full range of association support services including maintaining board/corporate books and organized records for the association; recording the official minutes of board and member meetings; handling member communications including meetings, seminars, and other event notices; coordinating membership recruitment efforts, and contract administration, including the internal record-keeping of member documents, contracts, and other association agreements with third parties.

Health Care Antitrust Practice

Crowell & Moring offers clients one of the nation’s leading health care antitrust practices, featuring attorneys who draw on years of client representation as well as extensive leadership background in government health care antitrust law enforcement and in the antitrust and health law bar. Understanding the industry is key to effective antitrust representation in the health field. Our health care antitrust team combines exceptional antitrust capability with deep knowledge of many of the country’s outstanding health care organizations. We handle a full range of antitrust litigation, transactional and counseling matters for health care clients, for-profit and not-for profit, taking pride in providing practical, insightful and, when necessary, forceful representation.

Our work includes defense against provider network exclusion and boycott class action claims; representing health insurers, hospitals, and managed care companies in mergers and acquisitions, including the Hart-Scott-Rodino pre-merger notification process; structuring joint ventures among health care providers and payors; defending pharmaceutical companies against monopolization, restraint of trade, and price discrimination charges; providing antitrust counsel to health care clients with sensitivity to the complex interplay of the market and regulation in health care; helping clients protect themselves from the anticompetitive practices of others; and responding to DOJ, FTC and state antitrust investigations and complaints.
E-Discovery expertise is by no means limited to antitrust litigation and Hart-Scott-Rodino second request work, however, the document intensive nature of antitrust practice requires that our antitrust team be at the cutting edge of E-Discovery technology. We have truly “been there” as shown by the example of our ability to, in just 90 days, collect review and produce hundreds of millions of pages in connection with SBC Communications’ $16 billion acquisition of AT&T.

But effective use of E-Discovery technology goes beyond just responding to requests for documents. We offer an innovative E-Discovery audit, designed to assess the readiness of each company’s technology systems and electronic document practices to respond to E-Discovery requests. Based on the audit results, we can offer specific solutions to reduce the potential for loss of electronic documents (and the accompanying sanctions that could result), advice on updated document retention practices, and develop protocols for document preservation, collection, review and production, which can sharply reduce the overall burdens of complying with E-Discovery requests. We work extensively with E-Discovery vendors, and operate at the cutting edge of technology in this rapidly evolving field.
Advertising and Consumer Protection

As part of our antitrust/trade regulation practice, and in conjunction with the Crowell & Morning’s broader product risk management practice, our counseling efforts in consumer protection range from guidance on product labels and packaging to advertising claims to disclaimers. We also regularly counsel on warranties and limitations of liability as well as the full range of distribution issues such as Internet marketing and privacy issues. Our lawyers have extensive experience representing clients before all of the relevant agencies in this area, including the FTC, the Consumer Product Safety Commission, the National Highway Traffic Safety Commission, as well as international authorities. Our approach here is to help our clients build valuable relationships with the agencies rather than adopting a “run and hide” strategy. This maximizes the chance of avoiding adverse agency action.

More broadly, our substantial litigation and regulatory experience positions us to help our clients navigate the full range of legal issues facing manufacturers, distributors and sellers of consumer products on a global basis. We often assist our clients with designing processes to minimize litigation risk at all stages of a product’s life from cradle to grave. Our multidisciplinary team allows us to take a comprehensive risk management approach to our clients’ issues in this arena.

European Competition Law Practice

Based in Brussels and London, our experienced competition attorneys work closely with our Antitrust Group in Washington and have substantial expertise in advising clients in a wide range of sectors, including aviation, consumer goods, a wide range of chemical products, pharmaceuticals, seeds, technology and telecommunications, as well as more traditional manufacturing businesses.

We regularly work on a variety of European and global transactions, cartel investigations and complex litigation. Our attorneys have acted in many high-profile EC merger control cases, representing parties during Phase I and Phase II proceedings, as well as the successful negotiation of complex commitments and their subsequent management.

Our Brussels Office has extensive experience in representing clients in Article 81 and 82 EC investigations either on behalf of defendants or complainants, and in providing counseling advice on a wide range of antitrust issues, including intellectual property rights, joint ventures, distribution agreements and leniency applications. In addition, our lawyers are expert in establishing and developing effective antitrust compliance programs, notably working with clients to ensure that their staff are made aware of relevant EC and U.S. antitrust rules.
We have represented a number of companies before the EC Courts on antitrust, intellectual property and other matters. We have also acted for clients in significant antitrust-related proceedings before national courts and arbitral tribunals.

A representative sample of the competition work done by our European offices includes:

• Obtaining EC clearance for transactions representing a wide range of industries that include the automobile industry, crop protection products, industrial components, Internet, mobile telephony services, pharmaceuticals and seeds
• Representing a leading international company in a complex double merger that resulted in one of the first referrals from EU Member State competition authorities to the EC and successfully obtaining conditional clearance of the transaction
• Coordinating multijurisdictional merger and regulatory filings around the world for European, Japanese and U.S. companies
• Representing clients in national merger control proceedings and cartel investigations
• Representing clients in several EC cartel investigations in the chemical industry
• Representing clients before the EC courts in relation to EC antitrust decisions
• Representing clients in national courts and before arbitral tribunals in complex antitrust matters
• Carrying out comprehensive European antitrust audits for a major multinational company
• Regular advice to trade associations on devising antitrust compliant activities
• Drafting and modifying European cooperation, licensing and distribution agreements