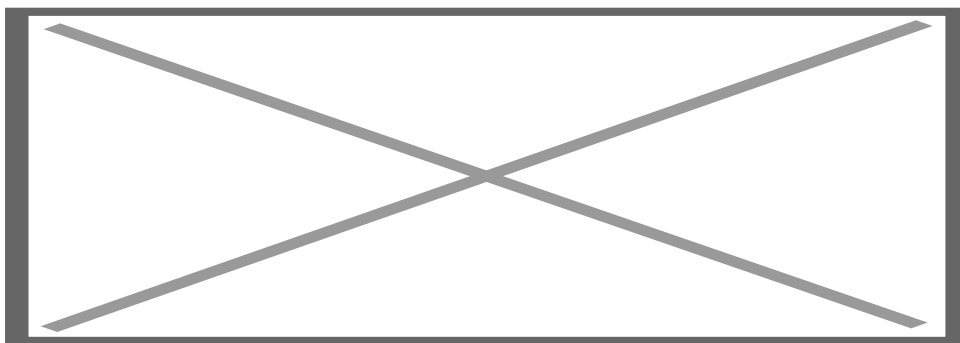


Four Takeaways from the ABA Antitrust Section's 2015 Spring Meeting

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This year's 63rd ABA Section of Antitrust Law Spring Meeting featured extensive remarks from antitrust regulators forewarning of more vigorous antitrust enforcement in 2015. The Proskauer antitrust team was on the ground and provides a report highlighting four key takeaways to help companies tailor their antitrust compliance and preparedness.

Over 2,900 antitrust attorneys, economists and policy makers met in Washington, D.C. last week for an extended, three-day discussion regarding the latest developments and forecasts in antitrust law and enforcement around the globe. This year's Spring Meeting was noteworthy for a few reasons. First, the meeting kicked off moments after the European Union publicly [announced a formal complaint](#) against Google for violating Europe's competition laws. Second, it was the first time that the meeting featured a visit from the United States Attorney General. In his remarks, Attorney General Eric Holder forewarned that the Department of Justice would be delivering [significant antitrust criminal news](#) in the next few weeks. Third, comments by panelists from the Department of Justice and the Federal Trade Commission make clear that vigorous antitrust enforcement continues to be a top priority of agencies in the United States and abroad.



The 100 most frequently used words in the titles and descriptions of the 2015 Spring Meeting's panels.

Whether global or local – and regardless of size – companies and transactions are undeniably subject to a heightened amount of antitrust scrutiny. That scrutiny includes the potential for significant penalties and remedies. Regulators are noting an uptick in aggressive and complex transactions across markets. The regulators at the Spring Meeting emphasized that they will not shy away from litigating even the most complex cases through trial. Perhaps more than ever, it is important that companies treat proactive antitrust compliance as a smart business policy. Strong antitrust compliance programs can be measured by how well – and how early in a business decision's life cycle – a company's business personnel understand that antitrust risks can arise in the most typical commercial arrangements as well as in complex deals. Consequently, antitrust advisors – both in-house and outside the company – must effectively keep up with the rapid pace at which business, product innovation and antitrust law are advancing.

1. Antitrust Enforcement Is on the Rise, and the Agencies Are Trial-ready. The FTC and the DOJ repeatedly emphasized their antitrust litigation capabilities and recent winning streak in antitrust cases across many enforcement areas. They noted wins in merger challenges, non-merger civil cases, criminal cases and appeals. Their recent litigation success stories included the DOJ's February 2015 victory in *United States v. American Express* after a seven-week trial and the FTC's [recently affirmed victory](#) in *St. Alphonsus v. St. Luke's Health System*. The government's messaging was reinforced when, on the first day of the meeting, the [Eleventh Circuit published an opinion](#) upholding an FTC decision and order in *McWane, Inc. v. FTC* that found the defendant liable for monopolization.

Indeed, various panelists from the DOJ proclaimed that they had another strong year. And they presented some statistics to back up their claims. The DOJ successfully obtained remedies or caused the parties to abandon potentially anticompetitive transactions in at least 20 cases last year. The DOJ's criminal enforcement division also had a record year, securing over \$1.3 billion in criminal fines. And over 40 individuals were charged with crimes, primarily in the auto parts, polyurethane foam, ocean shipping and financial services sectors.

The DOJ also highlighted that enforcement activity is on the rise, in part because of an increasing number of merger transactions that raise potentially complex and problematic issues. The DOJ panelists noted that they are seeing an increasing amount of aggressive transactions. They have identified a need to "push back" against what they perceive as overreaching by companies interpreting the Horizontal Merger Guidelines. David Gelfand, Deputy Assistant Attorney General for Litigation at the DOJ, noted that merger filings have increased by over 10% compared to the prior year, and that second requests similarly have increased. Both trends are expected to continue through 2015, and the DOJ has invested significantly in its in-house roster of antitrust litigators and testifying expert economists in preparation for additional enforcement actions going to trial.

Criminal antitrust enforcement is also here to stay. And DOJ panelists made clear that this includes domestic cartels – not just international ones. Brent Snyder, a Deputy Assistant Attorney General for Criminal Enforcement in the DOJ's Antitrust Division,

forewarned that criminal domestic investigations will be announced in the next year. The message was echoed by Mr. Holder during his remarks on the last day of the meeting.

The DOJ also is increasingly determined to pursue structural remedies, and is looking to support that effort with evidence that such remedies are in the best interests of consumers and competition. In fact, the DOJ announced a new program to analyze empirically the success of divestitures and other remedies obtained by the DOJ in prior merger challenges. The DOJ reported initial results from its analysis of low-cost carrier access to capacity-constrained airports. That was one of the concerns driving the remedies that the DOJ obtained in the American Airlines-US Airways merger last year. The DOJ reported that the passenger capacity of these airports had expanded since the remedies were obtained, which the DOJ attributed to more frequent flights and the use of larger equipment by airlines. The DOJ and the FTC repeatedly noted their shared preference for divestiture and structural remedies in merger cases.

In non-merger civil cases, the DOJ is focused more than ever on seeking disgorgement "in appropriate cases" where defendants have profited from their alleged misconduct. In determining which remedies to seek, the DOJ will weigh whether the defendant company implemented a meaningful compliance program. The DOJ noted that it was likely to seek a court-ordered monitor of a company's business where a company did not appear to take any steps to adopt an antitrust compliance program. It also would potentially seek such a monitor if a company demonstrated a risk of recidivism – i.e., by keeping key employees who were involved in the underlying misconduct in a position that is price-oriented. Similarly, companies should not expect the DOJ to give credence to a defense asserting that its senior employees went "rogue." One DOJ panelist described a true rogue employee in an antitrust case akin to Bigfoot – "often rumored but seldom seen."

Consequently, the need for smart and defensible antitrust compliance efforts is ever more important. The FTC and the DOJ – emboldened by recent victories in the courts – are more than ever prepared and well-equipped to challenge mergers and non-merger conduct that they believe is anti-competitive or harmful to consumers. As a Deputy Assistant Director at the FTC noted during one of the panels, the FTC's investigations into non-merger conduct typically are triggered by complaints from competitors, customers or suppliers. That means companies are not often aware that they are being investigated

until it is too late. A strong antitrust compliance program and the early involvement of antitrust advisors are valuable investments that can help defend the company's business decisions and deals if they are ever challenged.

2. Agencies Remain Committed To Protecting Pro-Competitive Innovation. The intersection of technological and product innovation was at the forefront of the antitrust discussion regarding various sectors of the economy. The much-anticipated outcome of government agency inquiries into the AT&T-DirecTV merger is slotted to be one of the key antitrust developments in 2015. Other important developments in antitrust this year will relate to standards-essential patents and the impact of regulation on "disruptors" that compete with a regulated incumbent.

In more and more industries, innovation competition is perceived to be as important as price competition. That trend is prevalent in the area of IP rights protection. For example, a repeated source of discussion at the meeting was the Department of Justice's recently-issued Business Review Letter regarding standards-essential patents, about which Proskauer's antitrust team [previously wrote](#). Notably, DOJ attorneys commented that many people had been reading too much into the guidance and that the DOJ's view on IP rights would continue to be fact-specific. Consequently, antitrust-based disputes between patent-holders and technology companies that rely on standards-essential patents are expected to dot the 2015 landscape of this important antitrust issue.

In addition, content can be expected to be a big issue in media mergers. Recent deals appear to reflect perceived innovation-driven changes in the marketplace. The last ten years have been marked by an increasingly rapid pace of innovation throughout the distribution chain of media content. This dynamic has been paralleled by shifts in consumer behavior driven by innovation in hardware and software technologies. These two forces will result in courts and antitrust enforcers increasingly grappling with market definition issues. As one FTC Commissioner remarked, the FTC will continue making fact-specific inquiries in merger reviews and in conduct investigations where innovation raises novel market definition and competition questions. In so doing, the FTC will consider the relevant context in which innovation decisions are made, the markets at issue, and the parties' motivation to innovate. Therefore, a company that parallels its investments in innovation with early and ongoing investments in antitrust compliance will enhance the defensibility of novel market definition theories and pro-competitive business decisions.

On the flip side of the innovation issue, companies need to be mindful of the antitrust and consumer protection risks created by their own innovation. For example, companies

with relatively larger market shares should be mindful that enforcers, competitors and new market entrants may allege that certain types of innovation are predatory or exclusionary. Although the appropriate legal lens for evaluating such claims remains unsettled across jurisdictions, such challenges can be expected in 2015. In addition, companies that develop products that interface with the Internet should ensure that their privacy policies and training are being proactively updated to reflect innovation in the market and developments in the law.

3. Health Care Will Continue To Be a Focus of Antitrust Enforcement. Such a forecast seems intuitive given that 17% of the country's GDP is spent on health care, including 12% related to pharmaceutical drugs. Accordingly, FTC Commissioner Julie Brill emphasized that the FTC would continue to actively pursue enforcement actions and file amicus briefs in the health care sector. As hospitals and other health care enterprises continue to consider mergers and deals in reaction to the Affordable Care Act, they should be prepared to demonstrate to antitrust enforcement regulators and to courts that a health care deal will deliver pro-competitive justifications such as improvements in patient outcomes. Because such mergers affect local markets, health care services companies also should expect to receive antitrust scrutiny from state attorneys general.

An Assistant Director in the FTC's Mergers IV group reiterated that, when it comes to hospital or physician group mergers, the FTC typically will define narrow markets by specialty, looking for instances where a combined physician group would have a market share in excess of 30%. Elinor Hoffman, Deputy Chief of the Antitrust Bureau of the New York Attorney General's office, concurred, but also raised the possibility that they might define a "cluster market," consisting of multiple specialties if a physician group appeared sufficiently large and diverse that many insurers would feel the need to include them within their plans. Therefore, health care deals and business decisions will benefit increasingly from early antitrust compliance efforts that can create a defensible record of pro-competitive motivations and expected outcomes.

4. Vertical Commercial Arrangements Can Present Unexpected Antitrust Risks.

One of the implicit themes highlighted throughout the Spring Meeting was the heightened attention to the antitrust risks of vertical commercial arrangements. For example, some panelists noted that [Judge Garaufis's opinion](#) in *United States v. American Express* was in large part based on the non-discrimination provisions and success thereof in allowing the defendants to charge supracompetitive prices.

In addition, most-favored nation clauses will continue to be a focus of DOJ's antitrust efforts. In the opinion of one DOJ Deputy Assistant Attorney General, certain types of MFN clauses naturally affect competition, affect consumers, and are difficult to justify as pro-competitive. Other types or terms of vertical commercial arrangements that will draw increased antitrust scrutiny from regulators include exclusive dealing contracts, market share discounts and retail preference agreements. Although DOJ panelists reinforced the agency's great interest in the area of conditional pricing, the DOJ is not expected to issue any formal guidance on the topic. Consequently, companies will benefit from implementing and overseeing antitrust compliance efforts when negotiating and inking deals with suppliers and customers.

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