

Antitrust Enforcement Centers On Technology Industry

By **Kenneth Schwartz, Ingrid Vandenborre, Michael Frese and Michael Sheerin** (January 30, 2020, 3:07 PM EST)

Antitrust enforcers in the United States and European Union remained active in 2019, and recent developments at the U.S. Department of Justice, Federal Trade Commission, state attorneys general offices and EU agencies signal even greater levels of activity in 2020.[1] The common theme is increased attention to high-tech industries and digital markets, which are expected to face heightened scrutiny.

United States

Focus on the Technology Industry

The DOJ and the FTC pursued active enforcement agendas in 2019. Grabbing the most headlines was the agencies' shared emphasis on alleged anti-competitive conduct in the technology industry. The FTC announced its Technology Task Force in February 2019 to "monitor competition and investigate potential anticompetitive conduct in markets in which digital technology is an important dimension of competition." This mandate includes scrutiny of allegedly anti-competitive practices and merger activity within technology-related industries, and the FTC has stated that multiple investigations are underway.

For its part, the DOJ announced in July 2019 that it is investigating "whether and how market-leading online platforms have achieved market power and are engaging in practices that have reduced competition, stifled innovation, or otherwise harmed consumers." Similar to the FTC, the DOJ has stated that it is investigating conduct and merger activity, and media reports have suggested that its investigations are similarly wide-ranging.

While the exact scope of these investigations is not known, leaders at both agencies have indicated that they are specifically looking at the use of big data to exclude competitors, the leveraging of two-sided platforms (e.g., leveraging significant membership base to extract higher payments from advertisers) and "killer acquisitions" (in which a large company acquires a smaller competitor to stifle innovation or eliminate competition) — issues that historically have not been the basis for enforcement actions.

With respect to merger reviews, both agencies are focused on prospective and consummated transactions. Companies considering acquisitions in technology-related sectors in 2020 face greater risk of prolonged investigations and, possibly, enforcement actions based on novel theories that would not have been anticipated in the past.

State Attorneys General Are Increasingly Active

State AGs also significantly increased their enforcement activity in 2019. For



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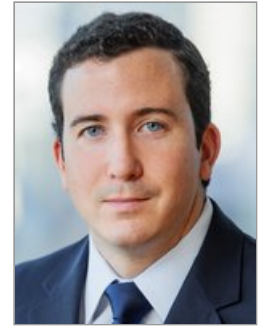


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many years, state AGs generally were content to follow the lead of the DOJ or FTC when it came to merger reviews, but nine states and the District of Columbia broke that mold in June 2019 when they filed suit to block T-Mobile's proposed acquisition of Sprint, despite the DOJ's decision to clear the deal subject to a divestiture. Eight more states joined that lawsuit (although four states have now withdrawn). A two-week bench trial was held in December 2019.



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The suit raises complex issues related to the interplay of federal and state antitrust enforcement authority. The outcome carries significant implications for the T-Mobile/Sprint merger and potentially could embolden individual states to more actively police mergers on their own, regardless of the outcome of DOJ or FTC review.

Increased activity by state AGs is not limited to mergers, as many states have announced that they are opening their own investigations into technology firms that could mirror the DOJ and FTC investigations. Both agencies have signaled that they are coordinating to some degree with state AGs as they conduct these parallel investigations, indicating that the possibility of federal and state antitrust enforcers working together, when possible, still exists.

Expect Continued Vigorous Enforcement

Although we have yet to see results of recent antitrust investigations, DOJ and FTC leaders have suggested that those will come as soon as 2020. In addition, companies should be cognizant of the heightened risk of independent — and perhaps divergent — state AG investigations. Finally, both Democratic and Republican candidates in the 2020 elections have stated that vigorous antitrust enforcement is a key part of their agendas. Given that all signs point to continued vigorous enforcement, companies should have a firm grasp of the possible antitrust risks associated with their business decisions and have a strong game plan to avoid any antitrust pitfalls.

European Union

On Nov. 27, 2019, the EU Parliament approved the new composition of the European Commission, the EU's executive arm, for a five-year term. Margrethe Vestager will serve a second term as the commissioner in charge of the competition department. In a rare dual role for a commissioner, she also will coordinate the EC's digital agenda, which involves working on the Digital Services Act and a European approach to artificial intelligence. Digital markets are a priority area for the competition department, but Brussels will not monopolize the debate, as regulators in EU member states are expected to remain prevalent. Companies can expect to face novel theories of harm and speedier interventions from regulators.

Digital Markets

In April 2019, an expert panel appointed by Vestager issued a report on competition policy for the digital era, the findings of which will influence the EC's enforcement activities. The report's key conclusions include a number of novel approaches, indicating, for example, that the EC may:

- View a company's access to data as a reflection of its market power;
- Define market power more broadly than the traditional market definition;
- Prohibit potentially anti-competitive conduct absent a showing of pro-competitiveness; and
- Assess acquisitions of fast-growing startups to be part of an anti-competitive strategy to make up for the acquirer's own user defections.

Additionally, the EC is concerned about companies regulating their own platforms if those platforms are used by other businesses. Given these developments, increased enforcement intervention is likely; however, as no sweeping legislative changes are expected, it remains to be seen whether the EU courts will support these novel approaches.

Assertive Local Authorities

Companies doing business in the EU also may face member state authorities that have their own agendas. Some of the highest-profile cases of 2019 originated in the member states, including investigations into use of personal data, online advertisement practices, digital payment methods and e-commerce/logistics activities. It is uncertain whether all these investigations will result in enforcement decisions but they demonstrate that national competition authorities are willing to take on global players and business practices, even if the EC is conducting parallel investigations.

In the area of merger control, expect increased intervention by national regulators as well, most notably in the U.K., where deals in the digital industry receive intense scrutiny. The German Legislature is working on revisions to the German competition law with a particular focus on digital markets and platforms, allowing for early intervention against digital platform companies leveraging their market power.

Interim Measures

For the first time in almost two decades, the EC imposed interim measures in an ongoing investigation. The decision is appealed, but Vestager has indicated that she will use interim measures again if necessary. This desire for swift intervention, especially in tipping markets, is echoed by national authorities. In the U.K., a 2019 expert report has called for increased use of interim measures, and the Belgian, Dutch and Luxembourg competition authorities have expressed the need for an ex ante intervention mechanism against gatekeepers to online ecosystems, e.g., dominant companies that control a platform.

Expect Intrusive Enforcement Actions

We predict vigorous antitrust enforcement across the EU in 2020, notably in the digital space. Authorities in many EU capitals may feel the need to deliver on their promises, as well as the competitive pressures from fellow authorities. The EC may demonstrate less patience for long-running investigations and open-ended remedies, and an increased desire to fix perceived issues quickly and comprehensively.

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[1] For more information on antitrust developments, see <https://www.skadden.com/insights/publications/2020/01/2020-insights/2020-insights?intIaContactId=NF9bMnQMmNub7m9tomantw%3d%3d>.