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ANTITRUST TRADE AND PRACTICE

Expert Analysis

Antitrust Yearly Wrap-Up: Tech and Telecom in the Spotlight

By **Karen Hoffman Lent** And **Kenneth Schwartz**

Antitrust enforcement in numerous industries was robust in 2019. Aggressive and unexpected actions made headlines and proved that parties need to be prepared to meet any potential antitrust obstacles. The Department of Justice (DOJ) and Federal Trade Commission (FTC) were very active last year—challenging mergers, dedicating new and substantial resources to investigating anticompetitive conduct, filing amicus briefs in a bevy of private litigations and overall continuing to rethink the goals and policy of antitrust enforcement. Popular media sources reported heavily on antitrust activities, particularly around the growing size of companies in the tech and telecom industries. Here's a recap of the major events of 2019 and issues to watch for in 2020.

Merger Enforcement

T-Mobile/Sprint deal remains tied up in court. One of the mergers most talked about in 2019 was T-Mobile's proposed acquisition of Sprint, which was reviewed by DOJ and the Federal Communications Commission (FCC). Historically, the agencies' enforcement in the telecom industry has been very aggressive, including blocking AT&T Inc.'s proposed acquisition of T-Mobile in 2011. The T-Mobile/Sprint deal, which enforcers argued would combine two of the four players in the market, was expected to face intense scrutiny from the start.

In July, more than a year after the parties agreed to the deal, DOJ announced its approval subject to a substantial divestment commitment. DOJ's proposed settlement will require Sprint to divest its prepaid mobile business and certain spectrum assets to Dish Network Corporation, which DOJ believes will "enable a viable facilities-based competitor to enter the market" and deploy a high-quality 5G network. The proposed settlement will also require T-Mobile to provide Dish with robust access to its network for seven years, and T-Mobile and Sprint must provide Dish accessibility to 20,000 cell sites and hundreds of retail locations. A few months after DOJ approved the revised transaction, FCC announced its approval of the deal, finding "the transaction will help close the digital divide and advance United States leadership in 5G, the next generation of wireless connectivity."

Before DOJ and FCC issued their formal decisions, a coalition of Democratic state attorneys general sued to block the transaction in the District Court for the Southern District of New York. The challenge represents a departure from the norm—in which states rarely bring their own suits and instead follow the federal agencies' lead. During the two-week bench trial conducted by Judge Victor Marrero in December, the states argued that the merger would substantially lessen competition in the market for mobile wireless telecommunications and lead to higher prices—even taking into account the parties' substantial divestment commitment to Dish.

In contrast, the merging parties argued that the combined company would be able to better compete with rivals AT&T and Verizon. Whether the states win or lose, state attorneys general are likely to keep up their aggressive investigation and enforcement posture in 2020. As California Attorney General Xavier Becerra, recently noted, "[i]f you're consolidating, we're looking."

FTC and DOJ challenged acquisitions of nascent competitors. Historically, mergers that do not substantially increase market share or market concentration are unlikely to be challenged. However, commentators, including academics and political constituencies, have recently focused on the theory of

KAREN HOFFMAN LENT *and* KENNETH SCHWARTZ *are partners at Skadden, Arps, Slate, Meagher & Flom.* ELIZABETH KRAUS, *a law clerk at the firm, assisted in the preparation of this column.*

"killer acquisitions," i.e., where firms with large market shares purchase start-up competitors that purportedly could one day challenge those firms. In turn, both DOJ and FTC have recently sought to enjoin deals under this theory. In August, DOJ challenged Sabre Corporation's proposed acquisition of Farelogix, Inc., companies that provide booking services to airlines. DOJ alleged that the acquisition would allow Sabre to "eliminate a disruptive competitor that has introduced new technology to the travel industry and is poised to grow significantly."

In opposition, the merging parties argued that Farelogix is a small company with limited resources and scale and its technology is complementary to Sabre's which will enable Sabre to compete better with its more direct competitors. Trial is scheduled for later this month.

Applying a similar framework, FTC recently challenged Illumina, Inc.'s proposed acquisition of Pacifica Biosciences of California, Inc. FTC alleged that Illumina was seeking to "unlawfully maintain its monopoly in the U.S. market for next-generation sequencing (NGS) systems by extinguishing PacBio as a nascent competitive threat." According to FTC's complaint, PacBio only had about 2-3 percent market share. The parties shortly thereafter abandoned the transaction. DOJ's and FTC's actions here suggest that challenges to nascent competitor acquisitions may become more common in 2020. Challenges seem most likely to occur in the digital technology markets given the rapid growth of many tech giants through acquisitions and the increasing political lens on the tech sector overall.

Structural remedies remain the norm. In 2019, FTC required the largest-ever divestment in a merger enforcement action. FTC approved Bristol-Myers Squibb Company's $74 billion acquisition of fellow pharmaceutical and biologic manufacturer Celgene Corporation, but is requiring the parties to divest Celgene's oral medicine, Otezla, which treats moderate-to-severe psoriasis, to Amgen Inc. for $13.4 billion. The divestiture is noteworthy because BMS does not currently offer competing psoriasis drugs. Rather, BMS is in the process of developing a drug that would compete with Otezla. In past pharmaceutical mergers, it was more common for parties to divest the pipeline product rather than the currently marketed product. Merging parties should expect the antitrust agencies to continue rigorous adherence to structural remedies in 2020

Vertical mergers were approved despite aggressive enforcement. In 2017, DOJ challenged AT&T's proposed acquisition of Time Warner Inc. The case was a rare challenge—the first in over 20 years—to a vertical merger. Judge Richard Leon denied DOJ's challenge, and the D.C. Circuit Court of Appeals affirmed his decision.

> Several newly announced mergers have already sparked interest including Google's proposed acquisition of Fitbit, where many commentators have focused on the intersection of privacy issues and traditional antitrust analyses.

Despite this loss, challenges to vertical mergers may continue. Shortly after the Court of Appeals affirmed DOJ's unsuccessful challenge in AT&T/Time Warner, former Principal Deputy Assistant Attorney General Andrew Finch said DOJ will continue to challenge vertical mergers that may be anticompetitive and harmful to consumers. The FTC's Democratic Commissioners also voiced their view that vertical mergers should be more heavily scrutinized in separate dissents last year after FTC approved the vertical merger of Staples, Inc. and Essendant, Inc.

In that matter, FTC imposed behavioral remedies, but Commissioners Slaughter and Chopra argued that the remedies did not curb the transaction's anticompetitive effects. Commissioner Slaughter also argued that FTC should require more proof of vertical mergers' claimed efficiencies. Going forward, parties that seek to vertically integrate should be prepared to demonstrate that claimed efficiencies are merger-specific, verifiable, and do not arise from anticompetitive reductions in output or service. Parties also should anticipate an inquiry if the merger is likely to cause anticompetitive harm, such as increased price of key inputs, decreased access to key inputs or customers, barriers to market entry, coordination, or anticompetitive information sharing.

Developments In Tech Enforcement

Antitrust authorities focused on Big Tech. In a speech last year, FTC Chairman Joseph Simons said it was crucial that FTC gain a better understanding of the tech industry because "the role of technology in the economy and in our lives grows more important every day." FTC created a Technology Task Force to investigate firms' potentially anticompetitive conduct in the U.S. technology industry, including in markets for online advertising, social networking, mobile operating systems and apps, and online platforms. The Technology Task Force is reviewing industry practices, prospective mergers, and consummated mergers in the technology-related sectors of the economy.

Assistant Attorney General Makan Delrahim also spoke of the need to investigate the industry. In July, DOJ announced 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." Many states also announced they opened investigations into technology firms.

Although DOJ and FTC did not name names, news outlets reported that DOJ is investigating Google and Apple, and FTC is investigating Facebook and Amazon. Because the agencies and states are each investigating tech firms, it is possible we will see divergent results. The

agencies have not released much information about their investigations but have indicated their concerns revolve around 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), platforms favoring their own products and services at the expense of rivals, and previously mentioned "killer acquisitions." There is limited judicial precedent for many of these theories, which may ultimately inform and limit enforcement actions.

Civil Actions

FTC's Qualcomm challenge continues. In our 2018 annual review, we wrote that FTC and Qualcomm Inc. had headed to court to litigate FTC's claims that Qualcomm violated Section 2 of the Sherman Act by refusing to license its standard essential patents to competing chipmakers. In May, Judge Lucy Koh of the District Court for the Northern District of California issued an opinion in which she sided with FTC and held that Qualcomm unlawfully used its monopoly power to harm competition. Koh held that Qualcomm must deal with its rivals on fair, reasonable and nondiscriminatory terms and relied in part on the U.S. Supreme Court's decision in *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, which has rarely been relied upon. The decision lies at the outer bounds of antitrust law—the notion that dealing with a competitor years ago obligates a company to continue dealing is unprecedented.

The case, which was controversial from the start, remains so. Shortly after Judge Koh's order was published, FTC Commissioner Christine Wilson criticized the action in a column published by the Wall Street Journal. Separately, DOJ intervened in the case and supported Qualcomm in its motion to stay Koh's decision pending review by the U.S. Court of Appeals for the Ninth Circuit. The motion to stay was denied, but the case remains pending in the Ninth Circuit.

App purchasers have standing to sue. Early last year, the Supreme Court heard oral arguments in *Apple Inc. v. Pepper* on the standing question: Do iPhone users who purchase apps from Apple's electronic retail store have standing to sue Apple under Section 2 of the Sherman Act for alleged monopolization of the electronic app marketplace? In May, the court answered "yes" in its 5-4 opinion. The case has returned to the District Court for the Northern District of California, where the plaintiffs' monopolization claim will be heard.

FTC applied the Supreme Court's Actavis opinion. In 2013, the Supreme Court held in *FTC v. Actavis* that reverse-payment settlements, in which a patent holder pays a generic-drug maker to delay its entry into the market, were potentially anticompetitive and should be analyzed under Section 1 of the Sherman Act's rule of reason. In 2017, FTC filed suit against Impax Laboratories, LLC and Endo Pharmaceuticals Inc., alleging that the companies' reverse-payment settlement unlawfully eliminated competition. An administrative law judge dismissed the case, but on appeal to the Commission in 2019, FTC reversed and held that Impax received a "large and unjustified payment" which indicated "the parties may not merely be settling valid claims, but may actually be entering an unlawful agreement to maintain and to share the brand's monopoly profits." Impax appealed the Commission's decision to the Fifth Circuit, where the case is pending.

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Criminal Penalties

No industry is beyond reproach. Several companies and their employees were penalized for conspiring to fix prices last year. Fines and prison sentences were imposed for conduct in various industries, including freight-forwarding services, insulation contracts, canned and pouch tuna, global foreign currency exchanges, commercial flooring products and services, and customized promotional products. Individuals were required to pay fines ranging from $28,000 to $4.5 million and faced up to 10 years in prison. Although companies and individuals demonstrated increased sophistication in attempting to hide their illegal communications, with some going so far as to use encrypted messaging applications, their efforts did not help them escape liability. A key takeaway is that no product is too niche and no market is too small to evade antitrust enforcement for criminal activity.

Projections for 2020

We expect antitrust enforcement to be as active as ever this year. The Trump administration continues to thoroughly investigate and challenge transactions and conduct issues. State attorneys general have proved themselves willing and able to independently challenge large mergers and behavioral issues. Several newly announced mergers have already sparked interest and potentially elicit novel theories, including Google's proposed acquisition of Fitbit, where many commentators have focused on the intersection of privacy issues and traditional antitrust analyses. In addition, the 2020 presidential election will place antitrust and Big Tech in the spotlight as almost every presidential candidate has vehemently argued for greater antitrust enforcement. In sum, antitrust enforcement has grown more aggressive in recent years, and it is unlikely that 2020 will be any different.

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