

ANTITRUST TRADE AND PRACTICE

Expert Analysis

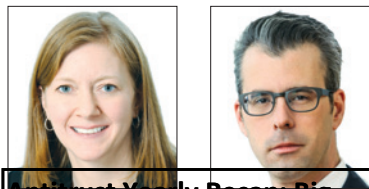
Antitrust Yearly Recap: Big Tech Takes Center Stage

Antitrust was a hot topic in 2020. Enforcement remained highly active, especially by the FTC, which filed more merger challenges than in any year since 2001. The DOJ and FTC continued to increase their focus on nascent competition, casting aside conventional practice to thwart firms' acquisitions of start-up competitors. Big Tech took center stage as lawsuits were filed, congressional hearings were held, and public debate raged over antitrust's role in addressing the rise of dynamic digital platforms. Here's a recap of the major events of 2020 and issues to watch for in 2021.

Merger Enforcement

Nascent competition challenges continue. The DOJ and FTC continued to ratchet up their focus on transactions involving nascent competition, with the FTC boasting in its 2020 fiscal year report

KAREN HOFFMAN LENT and KENNETH SCHWARTZ are partners at Skadden, Arps, Slate, Meagher & Flom. Associate SUNDIATA SIDIBE assisted in the preparation of this article.



Antitrust Yearly Recap: Big Tech Takes Center Stage
By Karen Hoffman Lent and Kenneth Schwartz

that “remarkably, six of our public merger cases this year ... involved nascent or potential competition theories.” As we discussed in our 2019 annual review, the DOJ and FTC have recently concentrated on thwarting “killer acquisitions,” i.e., where firms with large market shares purchase start-up competitors that potentially could one day challenge those firms. This is a shift from conventional practice, in which mergers that do not substantially increase market share or market concentration were unlikely to be challenged.

For example, the FTC challenged the proposed \$1.37 billion acquisition by Edgewell, a leading supplier of men's shaving equipment, of Harry's, a direct-to consumer men's and women's shaving company. The challenge came despite Harry's

having a market share of just 2.6% before the deal was attempted. The FTC argued that the acquisition “would remove a critical disruptive rival that has driven down prices,” claiming that Harry's had disrupted Edgewell and P&G's longstanding, “comfortable duopoly” in the relevant market, with annual price increases not driven by changes in costs or demand.” Edgewell abandoned the deal a week after the FTC filed its complaint.

Surprisingly, this wasn't the only razor industry deal called off after being challenged by the FTC under a nascent competition theory. The FTC also objected to Procter & Gamble's acquisition of Billie, a NY-based startup that sells women's razors and body wash. The FTC alleged that the merger would “eliminate innovative nascent competitors for wet shave razors,” causing harm to consumers. The company had announced its intention to be acquired by P&G after raising only \$35 million in venture capital in June. Ian Conner, director of the FTC's Bureau of Competition, asserted that, “as its sales

grew, Billie was likely to expand into brick-and-mortar stores, posing a serious threat to P&G. If P&G can snuff out Billie's rapid competitive growth, consumers will likely face higher prices." The two sides terminated the deal soon after the DOJ filed suit, stating jointly that while they were disappointed with the FTC's decision, "it is in both companies' best interests not to engage in a prolonged legal challenge."

The FTC also challenged Ossur's proposed acquisition of College Park, both makers of prosthetic limbs. Despite the transaction not being reportable under the Hart-Scott Rodino Act, the FTC alleged that the transaction would likely harm U.S. customers of myoelectric elbows, prosthetic devices the FTC alleges have "substantial functional advantages" over mechanical elbows. College Park is a leading supplier of myoelectric elbows in the United States and Iceland-based Ossur is developing its own myoelectric elbow. The two parties agreed to divest College Park's entire myoelectric elbow business to resolve the FTC's concerns.

The FTC in May cleared the \$63 billion acquisition of Allergan by Abbvie on a 3-2 vote and subject to divestiture of two drug treatments for exocrine pancreatic insufficiency and a third used to treat Crohn's disease and ulcerative colitis. The FTC's complaint alleged the deal would eliminate future direct competition between AbbVie and Allergan in the development and sales in the United States of IL-23 inhibitor drugs.

As for the DOJ, the department lost its challenge to Sabre Corporation's proposed acquisition of Farelogix. Despite Farelogix's status as a small company with limited resources, the DOJ alleged that the deal between the two companies would allow Sabre to "eliminate a disruptive competitor that has introduced new technology to the travel industry and is poised to grow significantly." Judge Stark in the District Court for the District of Delaware disagreed, finding that under the U.S. Supreme

The FTC and 48 attorneys general filed twin lawsuits in federal district court against Facebook, alleging that the company is illegally maintaining a social networking monopoly through years of anticompetitive conduct.

Court decision in *Ohio v. American Express Co.*, Sabre and Farelogix did not compete because Sabre was a two-sided platform facilitating transactions between airlines and travel agencies, and Farelogix was not, as it provided service only to airlines. The parties terminated the transaction after the U.K.'s Competition & Markets Authority blocked it, finding that it would reduce competition in the industry. The Third Circuit subsequently vacated the district court's decision, holding that the dispute was moot when the companies abandoned the deal. The appeals court made clear, however, that it took no

position on the underlying issues in the case, stating that, "[a]s such, this order should not be construed as detracting from the persuasive force of the district court's decision, should courts and litigants find its reasoning persuasive."

Other developments in merger enforcement. In a first-of-its-kind arbitration, the DOJ challenged Novelis's planned purchase of Aleris due to its concern about increased concentration in the aluminum aluminum-body sheet market. The parties agreed to arbitrate a key dispositive issue, marking the first time that the DOJ invoked its authority under the Administrative Dispute Resolution Act of 1996 to arbitrate a merger challenge rather than litigating in federal court. The DOJ won the arbitration, forcing Novelis to divest Aleris's entire aluminum auto body sheet operations in North America in return for the DOJ dropping its challenge. Defendants also had to reimburse DOJ for its fees and costs incurred in connection with the arbitration proceedings. Assistant Attorney General Makan Delrahim noted that this case demonstrated that arbitration "has the potential to be a powerful dispute resolution tool in the right circumstances," and that he "[looked] forward to applying the learning from this case to future matters."

In June, the DOJ and FTC issued new Vertical Merger Guidelines, the first official guidance update on mergers combining companies at different levels of the supply chain

from either of the agencies since the DOJ published the Non-Horizontal Merger Guidelines in 1984. The new guidance aims to provide merging parties and their counsel with “transparency of the analytical process underlying the agencies’ enforcement decisions.” The Guidelines are consistent with agency practice and “detail the techniques and main types of evidence that the agencies typically use to predict whether vertical mergers may substantially lessen competition.” The Guidelines were issued over the objection of FTC Commissioners Rebecca Slaughter and Rohit Chopra, who criticized them for failing to adequately address the competitive harms of vertical mergers while over-emphasizing their benefits.

The DOJ and FTC implemented expedited procedures for reviewing COVID-19-related mergers during the pandemic, including promising to conduct such reviews within seven days. DOJ published business review letters announcing that it would not challenge certain mergers, including an arrangement among a group of medical supplies distributors to collaborate in providing personal protective equipment, and a proposed collaboration among pharmaceutical companies to share information about developing COVID-19 antibody treatment.

Developments in Tech Enforcement

Big Tech under fire. The most highly debated topic in antitrust

was whether antitrust policy should be doing more to promote competition in digital platform markets. The House Antitrust Subcommittee’s request in early 2020 for recommendations on the “digital platform monopoly” elicited forty responses from lawmakers, practitioners, and academics, with proposals ranging from leaving the antitrust laws relatively untouched to significant overhaul of the current regime and mandated breakup of the digital economy.

In July, CEOs of Alphabet, Amazon, Apple, and Facebook, four of

Radical changes to antitrust law and enforcement are unlikely because, despite some of his campaign rhetoric, President Biden has historically held a moderate stance on antitrust issues, especially in relation to some of his Democratic counterparts on the campaign trail.

the country’s five most valuable companies, testified in front of the House Antitrust Subcommittee on a number of antitrust-related matters. And in October, the House Antitrust Subcommittee released a report outlining the results of a 16-month investigation “into the state of competition in the digital economy, especially the challenges presented by the dominance of Apple, Amazon, Google, and Facebook and their business practices.” The report walked through a series of recommendations for how best

to tackle the antitrust challenges presented by the rise of big tech, including the recommendation that any big tech merger involving dominant companies be “presumed anticompetitive.”

While disagreement exists as to the particulars, efforts to modernize the antitrust laws have bipartisan support in Congress, with legislative proposals floated earlier in the year by Senators Klobuchar, Warren, and others, and proposals currently being prepared by subcommittee Chairman David Cicilline and Republican Ken Buck. Cicilline claims that changes in merger and monopolization sections of the antitrust laws would correct enforcement where the courts got it wrong.

But antitrust authorities are not waiting on the legislative process. The DOJ sued Google in what is being called the most significant antitrust lawsuit since the Justice Department’s Microsoft suit in the 1990s. Google is accused of unlawfully maintaining monopolies through anticompetitive practices in the search and search advertising markets. The Justice Department claims that Google has “foreclosed competition for internet search” through exclusionary agreements that deny competitors the possibility of reaching the scale necessary to compete. Google’s chief legal officer called the lawsuit “deeply flawed,” claiming it will “artificially prop up lower-quality search alternatives, raise phone prices, and make it harder for people to get the search services they want to use.”

Google has since been hit with two additional lawsuits, one by a coalition of more than 30 states with similar claims as the DOJ lawsuit, and another by a smaller group of states that is focused on Google's control over digital advertising, apart from its search-advertising operations. Additional private actions have been filed against Google as well.

Google was not the only big tech company in the crosshairs. The FTC and 48 attorneys general filed twin lawsuits in federal district court against Facebook, alleging that the company is illegally maintaining a social networking monopoly through years of anticompetitive conduct. The complaint alleges that Facebook has engaged in a systematic strategy to eliminate threats to its monopoly, including its 2012 acquisition of nascent competitor Instagram and 2014 acquisition of WhatsApp, along with the placement of anticompetitive conditions on software developers. The FTC is seeking a permanent injunction in federal court that includes divestiture of Instagram and WhatsApp and requires Facebook to seek prior approval for future mergers and acquisitions. As with Google, a number of private actions were filed following the FTC lawsuits.

Other Civil Actions

Qualcomm wins appeal. In our 2019 annual review, we wrote that Judge Lucy Koh of the District Court for the Northern District of California's had sided with the FTC

in its claims that Qualcomm had violated Section 2 of the Sherman Act by refusing to license its standard essential patents to competing chipmakers. We highlighted the controversial nature of the ruling, which was publicly criticized by FTC Commissioner Christine Wilson and even objected to by the DOJ, contending that the District Court ruling could undermine Qualcomm's position in technologies such as 5G that are essential for national security.

In August, a three-judge Ninth Circuit panel reversed Koh's decision, concluding that Qualcomm had no duty, under Section 2 or otherwise, to license its competitors. In addition, it ruled that Qualcomm's "no license, no chips" policy of refusing to supply chips to handset makers that had not licensed its patents did not constitute an illegal surcharge. The court agreed with Qualcomm's arguments that it had achieved its market position lawfully by developing and investing in breakthrough technologies, reasoning that, "[a]nticompetitive behavior is illegal under federal antitrust law. Hypercompetitive behavior is not." The Ninth Circuit rejected the FTC's request, without comment, to reconsider the cases en banc.

T-Mobile finally acquires Sprint. In February, a District Court for the Southern District of New York denied an injunction requested by a coalition of Democratic state attorneys to block T-Mobile's acquisition of Sprint. As we discussed in last year's review, the challenge

represented a departure from the norm, in which states rarely bring their own suits and instead follow the federal agencies' lead. The court's decision marked the final hurdle for an acquisition that was announced by the parties in April 2018 and saw the DOJ approve the deal over a year later, subject to a substantial divestment commitment to DISH. The parties subsequently completed the acquisition, combining the previously third and fourth-largest U.S. wireless carriers, after Verizon and AT&T.

Supreme Court to hear NCAA case. At the end of 2020, the Supreme Court granted certiorari in *NCAA v. Alston*, to review the Ninth Circuit's decision in March holding that the NCAA cannot place restrictions on the education-related benefits available to student-athletes.

Criminal Enforcement

DOJ's first criminal wage-fixing prosecution. In December, the DOJ announced its first-ever criminal wage-fixing prosecution, making good on a number of statements it has made since 2016 broadcasting its intention to prosecute "naked" no-poach and wage-fixing agreements. The agency accused Neeraj Jindal, the Texas-based owner of a staffing company for physical therapy, of violating Section 1 of the Sherman Act by conspiring with others to pay lower rates to certain physical therapists and their assistants in the Dallas-Fort Worth area. Because staffing companies operate exclusively in labor markets and

secure profits according to their pay rates, the DOJ may view them as having a significant incentive to fix wages and therefore subject them to continued scrutiny moving forward.

Generic pharmaceuticals. The DOJ continued its investigation into the generic pharmaceutical industry, going after companies and individuals suspected of manipulating generic drug prices for profit. This included Sandoz, which entered into a deferred prosecution agreement with the DOJ under which it agreed to pay \$195 million in criminal penalties, the largest criminal penalty in history for a domestic antitrust violation.

Hector Armando Kellum, a former senior executive of Sandoz, pled guilty to conspiring to fix prices, rig bids, and allocate customers for generic drugs. Facing the possibility of 10 years in prison and a fine exceeding \$1 million, Kellum agreed to cooperate with the DOJ pharmaceutical investigation that has seen seven companies and four executives charged, three of which have pleaded guilty.

'Big Chicken' investigation. The DOJ has also taken aim at the broiler chicken industry, indicting 10 executives on charges that they conspired using phone, email, and text messages to fix prices and rig bids for broiler chicken products from 2012 to early 2019. Tyson Chicken, Sanderson Farms and Pilgrim's Pride, three of the country's top broiler chicken companies where many of these executives are

employed, are cooperating with the ongoing investigation.

Former CEO jailed. Chris Lischewski, the former president and CEO of Bumble Bee Foods, was sentenced to 40 months in jail and a \$100,000 criminal fine for his leadership role in an antitrust conspiracy where he exchanged pricing information and ordered subordinates to collect pricing information from canned tuna competitors. In November, a California federal judge denied an impassioned release bid from Lischewski, who claimed the pandemic had made his prison conditions "significantly worse than usual."

Projections for 2021

Antitrust enforcement is only expected to increase under the incoming Biden Administration. In particular, the DOJ antitrust division filed significantly fewer criminal cases under the Trump Administration than were filed when Biden was Vice President.

The debate over whether antitrust policy should be doing more to promote competition in digital platform markets will continue, and aforementioned legislative proposals may become law. The magnitude of legislative change to the antitrust laws may in large part depend on the upcoming run-off Senate elections in Georgia; extensive changes are less likely if Republicans maintain Senate control.

While the focus will remain on big tech, any legislation passed will likely affect other industries

as well. Special attention may be given to the pharmaceutical and health industries, especially as the COVID-19 pandemic has revealed market concentration issues which led to shortages of vital medical supplies such as ventilators and personal protective equipment. The agricultural sector may also see increased scrutiny under Biden, who called for this directly during his campaign in order to "help family farms and other small and medium-sized farms thrive."

Overall, radical changes to antitrust law and enforcement are unlikely because, despite some of his campaign rhetoric, President Biden has historically held a moderate stance on antitrust issues, especially in relation to some of his Democratic counterparts on the campaign trail. U.S. checks and balances may also temper transformation of the existing antitrust regime, as sweeping changes in enforcement may be met with resistance from federal judges.