

COMPETITION ECONOMICS HANDBOOK 2020

Published in association with:

Cornerstone Research

Copenhagen Economics

Berkeley Research Group

E.CA Economics



Competition Economics Handbook 2020

A Global Competition Review Special Report

Reproduced with permission from Law Business Research Ltd
This article was first published in November 2019
For further information please contact Natalie.Clarke@lbresearch.com

Competition Economics Handbook 2020

Insight account manager Bevan Woodhouse

Head of production Adam Myers

Deputy head of production Simon Busby

Editorial coordinator Hannah Higgins

Production editor Harry Turner

Subeditor Hilary Scott

Research editor Tom Barnes

Researcher Helen Barnes

Editor, Global Competition Review Pallavi Guniganti

Publisher Clare Bolton

To subscribe please contact

Global Competition Review

Meridian House, 34-35 Farringdon Street

London, EC4A 4HL

United Kingdom

Tel: +44 20 7908 9205

Fax: +44 20 7229 6910

subscriptions@globalcompetitionreview.com

No photocopying. CLA and other agency licensing systems do not apply.

For an authorised copy contact claire.bagnall@globalcompetitionreview.com

This publication is intended to provide general information on competition law, economics and policy. The information and opinions that it contains are not intended to provide legal advice, and should not be treated as a substitute for specific advice concerning particular situations (where appropriate, from local advisers).

© 2019 Law Business Research Limited

ISBN: 978-1-83862-221-3

Printed and distributed by Encompass Print Solutions

Tel: 0844 248 0112

Competition Economics Handbook 2020

Published in association with:

Cornerstone Research

Copenhagen Economics

Berkeley Research Group

E.CA Economics

CONTENTS

Albania.....	1	Estonia.....	43
Algeria	3	Emmi Martikainen and Anssi Kohonen	
Argentina.....	4	Copenhagen Economics	
Armenia	6	European Union	46
Australia	11	Claus Kastberg Nielsen, Adina Claiici and	
Austria	14	Federico De Michiel	
Azerbaijan	16	Copenhagen Economics	
Barbados.....	17	Fiji.....	53
Belgium	18	Finland.....	54
Bosnia and Herzegovina	20	Emmi Martikainen, Anssi Kohonen and Kalle Kantanen	
Brazil.....	21	Copenhagen Economics	
Bulgaria	24	France.....	58
Canada	26	Germany.....	60
Channel Islands.....	29	Hans W Friederiszick, Simone Kohnz and	
Colombia	30	Rainer Nitsche	
Croatia	32	E.CA Economics	
Cyprus.....	34	Greece	67
Czech Republic.....	35	Hungary.....	68
Denmark.....	36	Iceland.....	70
Henrik Ballebye Okholm and Torben Thorø Pedersen		India	71
Copenhagen Economics		Indonesia.....	72
Egypt.....	41	Ireland.....	74
El Salvador	42	Israel	76
		Italy	78
		Jamaica.....	79
		Japan.....	81
		Kenya.....	83

Korea	86	Russia	123
Latvia	87	Serbia.....	126
Emmi Martikainen and Mindaugas Cerpickis		Seychelles	128
Copenhagen Economics		Singapore	130
Lithuania	91	Slovakia	131
Mindaugas Cerpickis and Emmi Martikainen		Slovenia	133
Copenhagen Economics		South Africa	134
Luxembourg.....	94	Spain	136
Malaysia	95	Swaziland	138
Malta.....	97	Sweden.....	139
Mauritius	98	Karl Lundvall and Mattias Almqvist	
Mexico	100	Copenhagen Economics	
Montenegro	102	Switzerland	144
Netherlands	103	Tunisia	146
New Zealand.....	105	Turkey	147
North Macedonia	107	Ukraine	150
Norway	109	United Kingdom	152
Henrik Ballebye Okholm and Erik Lindén		Peter Davis, Vivek Mani, Can Celiktemur and	
Copenhagen Economics		Vikram Kumar	
Pakistan	114	Cornerstone Research	
Peru	115	United States.....	160
Philippines	117	Henry J Kahwaty and Cleve B Tyler	
Poland	118	Berkeley Research Group	
Portugal.....	120	Zambia.....	166
Romania	121	Zimbabwe	168

Global Competition Review is delighted to publish this thirteenth annual edition of the *Competition Economics Handbook*.

With economics at the centre of competition law, this handbook identifies the issues that antitrust economists are tackling today. The book's comprehensive format provides contact details for competition agencies' economists in over 70 jurisdictions. A Q&A format illustrates how the advisers are organised and their input into the regulation and enforcement process.

Much of the information has been provided by the agencies themselves and we are, as ever, grateful for all their cooperation.

The *Competition Economics Handbook 2020* is one of five special reports included in a *Global Competition Review* subscription each year, alongside four issues of the magazine, a survey on a four-year rotation (*Corporate Counsel* published in January 2019 and *40 Under 40*, to be published in January 2020) and two signature surveys, *Rating Enforcement* and *The GCR 100*.

We would like to thank all those who have worked on the research and production of this publication.

The information listed is correct as of October 2019.

Global Competition Review

London

October 2019

Overview

Henry J Kahwaty and Cleve B Tyler

Berkeley Research Group

Antitrust developments stemming from federal agency actions, state actions and private litigation have continued on several fronts in the United States, including:

- the Department of Justice (DOJ) and Federal Trade Commission (FTC) actively investigating the technology sector, including Big Tech;
- the DOJ being active in intervening in other litigations, including in the FTC litigation against Qualcomm;
- an increased focus on labour issues;
- the DOJ has brought a merger challenge that may be resolved via binding arbitration; and
- a coalition of states suing to block the merger of Sprint and T-Mobile, even though the parties have settled with the DOJ and the sector regulator (the Federal Communications Commission (FCC)).

Big Tech investigations

Broad concerns have been expressed regarding increasing concentration, margins and lack of entry across a range of technology-related industries, and whether antitrust enforcement to date has played a sufficient role in these industries. Particular criticism has focused on Big Tech. At least partly in response to these expressed concerns, the FTC and DOJ have become markedly more proactive in this sector.

The DOJ announced in July 2019 that it was conducting a review of ‘whether and how market-leading online platforms have achieved market power’ and whether they have ‘reduced competition, stifled innovation, or otherwise harmed consumers’. The FTC announced in February 2019 the establishment of a task force ‘dedicated to monitoring competition in US technology markets’, including investigating potential anticompetitive behaviour and taking enforcement action. The agencies reportedly have divided up responsibilities for the four firms receiving the most scrutiny, with the DOJ taking Google and Apple, and the FTC taking Facebook and Amazon. Furthermore, states’ Attorneys General are conducting their own investigations into the competitive implications of Big Tech business practices.

The FTC recently completed a slate of 14 Hearings on Competition and Consumer Protection in the 21st

Century, including several topics related to technology markets and online platforms, such as ‘Privacy, Big Data, and Competition’, ‘Algorithms, Artificial Intelligence, and Predictive Analytics’ and ‘Data Security’. The impact of these hearings will depend to a large extent on how the information accumulated is evaluated and internalised at the FTC. In its investigations, the FTC can consider the use of FTC Act Section 5’s prohibition of unfair methods of competition, which provides a more flexible legal framework for addressing potential concerns than the Sherman Act’s proscriptions against monopolisation and attempted monopolisation. Also, the FTC potentially could seek the unwinding of previous mergers, such as Facebook’s acquisitions of Instagram and WhatsApp.

Relatedly, the FTC levied a US\$5 billion fine against Facebook in July 2019 for violating consumer privacy – in particular, for violating a prior FTC order from 2012 by ‘deceiving users about their ability to control the privacy of their personal information’.

Department of Justice amicus programme

The DOJ has placed renewed emphasis on its amicus programme, which involves exercising its discretion to make filings in antitrust cases in which the DOJ is not a party. The DOJ’s intervention in such cases has expanded substantially in the past two years and it is now common for private litigants to make submissions to the DOJ regarding such litigation. The programme is designed to promote the proper application and development of antitrust law, and it may temper litigant claims for fear of seeing an opposition brief filed by the United States.

The DOJ and FTC have concurrent authority in many areas and it is very unusual for one to oppose the other. An unusual example where this did happen is in the FTC’s litigation against Qualcomm. The FTC brought a case against Qualcomm in January 2017. Qualcomm is a seller of baseband chips used to connect cellular phones to networks and a leading developer of wireless communications technology. The FTC challenged Qualcomm’s practice of selling modem chips for cellular phones or tablets only to buyers that also have a licence to Qualcomm’s

portfolio of standard-essential patents, a practice the FTC alleged to be a means of maintaining Qualcomm's monopoly over baseband processors.

The FTC's case has been controversial. One of the three FTC commissioners at the time the case was authorised issued a dissent to the filing of the lawsuit claiming, among other things, it would undermine intellectual property rights and harm innovation. The DOJ had sought to intervene with regard to remedies, but its request was denied. The FTC won at trial, the court imposed remedies and Qualcomm has appealed.

The DOJ has intervened to support Qualcomm's appeal, seeking a stay of some of the remedies imposed. The DOJ also told the Appellate Court that Qualcomm's appeal 'has a likelihood of success' with regard to liability, criticising the analysis of the Trial Court with regard to both liability and remedies. Its filing included affidavits from senior officials at the Departments of Defense and Energy attesting to harm to innovation and to these Departments arising from the Trial Court's remedies. In staying the remedies during the appeal process, the Appellate Court cited to the opposing views of the DOJ and FTC as a reason for its decision – demonstrating the impact a DOJ intervention can have.

Labour issues

The focus on labour-related issues has grown in recent years. The DOJ, FTC and states have investigated and settled 'no-poach' cases whereby entities agree not to solicit each other's employees and there has been private no-poach litigation as well. Cases have involved a wide variety of occupations, including doctors working in academic medical centres, railway workers, fast food restaurant staff and movie studio animators, directors, software engineers and visual effects artists. The DOJ recently submitted amicus briefs indicating its view that no-poach agreements among horizontal competitors are per se illegal unless they are ancillary to a separate legitimate transaction or collaboration.

Another recent DOJ amicus filing in a different litigation explained that the per se rule would not apply in the case of a franchise agreement. A requirement that prevents one franchise location from poaching the employees of another location of the same franchise could be ancillary to the establishment of the franchise's business and enable the overall organisation to compete with other organisations. In this example, the DOJ stated that a no-poach agreement should be considered under a rule of reason analysis. In addition, non-compete agreements are undergoing closer scrutiny at the state level, as several states have

imposed restrictions on the enforcement of such agreements.

DOJ Merger Challenge Arbitration

In early September 2019, the DOJ challenged the proposed acquisition of Aleris by Novelis. In its complaint filed in US District Court, the DOJ alleged this transaction would harm competition in the North American market for aluminium autobody sheet, which is rolled aluminium sheet used in automotive applications. In conjunction with its complaint, the DOJ issued a press release stating that the parties had agreed to use binding arbitration if certain conditions are met. The arbitration would address the issue of product market definition, which was described by DOJ as being 'dispositive' and would represent the first time the DOJ has used arbitration to resolve an antitrust matter.

Merger litigations and appeals can take more than a year to resolve. For example, the DOJ's challenge to the *AT&T/Time Warner* merger occurred in November 2017, but the final appellate ruling was not until February 2019. In addition, litigation is costly for both the merging parties and the government. The use of binding arbitration is a procedural innovation that is expected to reduce litigation costs and to resolve the case more rapidly. Instead of fully litigating all the issues implicated by a merger analysis, the use of arbitration to resolve one 'dispositive' issue narrows the focus of the dispute, which lowers the cost of litigation and allows for more rapid adjudication. In addition, the use of binding arbitration limits appeal opportunities, which tends to result in quicker resolution.

State action to Block Sprint/T-Mobile

T-Mobile (majority owned by Deutsche Telekom) agreed in April 2018 to acquire Sprint (majority owned by Softbank) in a transaction valued at over US\$26 billion. T-Mobile and Sprint are the third and fourth largest cellular carriers in the country. They had attempted to merge in 2014, but that transaction was called off due to opposition from the DOJ and other regulators. The DOJ, FCC and many states investigated the current merger proposal and the parties were able to reach agreements on divestitures and other remedies with the DOJ, FCC and five states to resolve their concerns.

Fifteen other states and the District of Columbia, however, have sued to block the transaction in federal court and also view the remedies as insufficient. The merits of the transaction will be litigated in federal court and the transaction could be blocked, even though it is national in scope and was approved by

national authorities. States often analyse transactions, but this is the first time a collection of states has tried to block a national transaction approved by the DOJ or FTC, as opposed to seeking remedies to resolve competitive effects specific to particular states (eg, in local markets).



Henry J Kahwaty
Berkeley Research Group

Henry J Kahwaty is a managing director at Berkeley Research Group's Washington, DC office and co-head of BRG's antitrust and competition policy practice. His areas of expertise include microeconomics, industrial organisation, antitrust economics and econometrics. He has completed antitrust reviews of mergers and horizontal and vertical contractual arrangements, and studies of monopolisation and abuse of dominance in the context of government investigations and private litigation. His merger work includes studies in metals, solid and hazardous waste, industrial products, avionics and pharmaceuticals. He has analysed competition issues in industries including mining, luxury goods, banking, chemicals and gem diamonds. He has completed studies of vertical restraints and vertical integration, and the impact of such vertical relationships on competition. His work also includes analysis of merger efficiencies, price-fixing allegations, class certification and competition damages.

Dr Kahwaty has presented analyses to the US Department of Justice, the Federal Trade Commission, the Directorate-General for Competition of the European Commission, the Canadian Competition Bureau, the Competition Tribunal of Canada and other agencies. He has prepared studies for the Competition Authority in Ireland. He started his career as an economist with the US Department of Justice, where he specialised in market power analysis for merger and monopolisation cases with a focus on the computer software, banking, manufacturing and defence industries. He spent 15 years as an economist, principal and director with LECG in both Washington, DC and London. He received his PhD in economics from the University of Pennsylvania in 1991.



Cleve B Tyler

Berkeley Research Group

Cleve B Tyler is a managing director at Berkeley Research Group. For more than 20 years, he has applied economic analyses to competition, intellectual property and damages issues in matters before federal and state courts, administrative law judges and regulatory commissions, and in merger investigations. Dr Tyler has testified at deposition and trial in federal court and at arbitration. He has developed or analysed damages models in a range of industries pertaining to various allegations including intellectual property infringement, antitrust, breach of contract and fraud. Dr Tyler's competition work includes evaluation of market definition and competitive effects using regression analysis and economic modelling. He has evaluated horizontal and vertical competition issues in many industries including waste collection and disposal, pharmaceuticals, electricity, insurance,

avionics, medical devices, video games, paid search advertising, automobile components, home appliances, software, and food and beverages.

Dr Tyler holds a PhD in economics from Clemson University specialising in industrial organisation, finance, and the economics of the public sector. He is an adjunct professor of economics at Johns Hopkins University's applied economics programme, teaching graduate-level courses in industrial organisation and microeconomics for nearly a decade. He taught economics at Clemson University, has published papers and made presentations on competition and damages issues, and is the managing editor of *BRG Review*. Dr Tyler is a member of the American Economic Association and American Bar Association.



Berkeley Research Group

1800 M Street NW, second floor
Washington, DC 20036
United States
Tel: +1 202 480 2700
Fax: +1 202 419 1844

Henry J Kahwaty
hkahwaty@thinkbrg.com

Cleve B Tyler
ctyler@thinkbrg.com

www.thinkbrg.com

Berkeley Research Group, LLC is a leading global strategic advisory and expert consulting firm that provides independent advice, data analytics, authoritative studies, expert testimony, investigations, and regulatory and dispute consulting to Fortune 500 corporations, financial institutions, government agencies, major law firms, and regulatory bodies around the world.

BRG experts and consultants combine intellectual rigour with practical, real-world experience and an in-depth understanding of industries and markets. Their expertise spans economics and finance, data analytics and statistics, and public policy in many of the major sectors of our economy, including healthcare, banking, information technology, energy, construction and real estate.

BRG is headquartered in Emeryville, California, with offices across the United States and in Asia, Australia, Canada, Hong Kong, Latin America and the United Kingdom.

BRG provides to counsel, corporations and governments throughout the world independent and objective testimony in matters involving antitrust litigation, mergers and acquisitions, and agency competition reviews. BRG experts combine a deep understanding of actual market behaviour with relevant economic and statistical theory, principles of finance and accounting and sound empirical research. They have provided testimony and made presentations concerning antitrust issues in courts and in meetings and hearings before the Federal Trade Commission, the US Department of Justice, the European Commission, other competition agencies and tribunals, and sector-specific regulators.

