ENFORCER HUB

USA Overview

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GCR INSIGHT

Overview of Agencies

The Department of Justice (DOJ) and Federal Trade Commission (FTC) have overlapping jurisdiction to investigate mergers and business practices that may have adverse effects on competition. The agencies have allocated responsibility between themselves for different sectors of the economy, with the DOJ focusing on industries such as chemicals, manufacturing, telecoms, banking and transportation, and the FTC focusing on industries such as healthcare, pharmaceuticals, food, retail and energy. However, they share responsibility for investigations pertaining to certain industries and allocate specific investigations in these industries. For example, both agencies are now investigating Big Tech firms. In addition to the DOJ or FTC, federal agencies such as the Federal Communications Commission (FCC) and the Federal Energy Regulatory Commission may have oversight authority for certain mergers.

In addition, each state has its own competition statute(s). While states usually work in tandem with the federal agencies, state Attorneys General may decide to take actions alone or as part of a coalition of states. Companies also may face antitrust litigation brought by private parties, sometimes as a class action (especially in price-fixing cases).

Historically, the DOJ, FTC and states have acted in concert with one another where they have overlapping responsibilities. However, in the past several years, that historical harmony has fractured to some degree. Examples include the DOJ's opposition to the FTC's Qualcomm litigation and a group of states challenging the T-Mobile/Sprint merger after the DOJ and FCC had cleared the merger with remedies.

Recent developments

Overall, the competition agencies have remained engaged and active in the United States, and private antitrust litigation has also continued. Antitrust developments stemming from federal agency actions, state actions, and private litigation have evolved on several fronts in the United States, including:

- Qualcomm reversal - the 9th Circuit Court of Appeals ruled against the FTC, overturning a federal district court, in a case in which the DOJ intervened in opposition to the FTC;
- merger litigation losses – the DOJ and FTC have lost recent merger challenges in court, and the states lost their challenge to the T-Mobile/Sprint merger;
- DOJ merger arbitration – the DOJ won a merger challenge it sought to resolve via arbitration, a procedural avenue not used previously;
- Vertical Merger Guidelines – the DOJ and FTC jointly issued updated guidelines for vertical mergers, the first such update in 35 years;
- collaborations and covid-19 – the DOJ and FTC issued a joint statement to provide safe harbours in recognition of some degree of unprecedented collaboration among competitors in response to covid-19, but also expressed concern about the potential for anticompetitive behaviour that could emerge in the midst of the pandemic; and
- Big Tech investigations – the DOJ, FTC and certain states continue to investigate the technology sector actively, with the DOJ and some states filing the first Big Tech case against Google.

Qualcomm reversal

The DOJ and FTC have concurrent authority in many areas, but once a matter has been assigned to one agency, it is very unusual for the other to become involved in the matter. The FTC's litigation against Qualcomm is a significant exception. 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 appealed. The DOJ intervened in opposition to the FTC, seeking a stay of some remedies.

The DOJ told the Appellate Court that Qualcomm's appeal had 'a likelihood of success' on the merits, criticising the analysis of the Trial Court regarding 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, the Appellate Court cited to the opposing views of the DOJ and FTC as a reason for its decision.

In August 2020, the Appellate Court reversed the District Court's decision and vacated its remedies. The Appellate Court found that while the markets were correctly defined (as "CDMA modem chips" and "LTE modem chips"), the district court erred in its competitive effects analysis:

[The district court's] analysis of Qualcomm's business practices and their anticompetitive impact looked beyond these markets to the much larger market of cellular services generally. Thus, a substantial portion of the district court's ruling considered alleged economic harms to OEMs – who are Qualcomm's customers, not its competitors—resulting in higher prices to consumers. These harms, even if real, are not 'anticompetitive' in the antitrust sense—at least not directly—because they do not involve restraints on trade or exclusionary conduct in 'the area of effective competition.'

Qualcomm applies its OEM-level licensing policy equally with respect to all competitors in the modem chip markets and declines to enforce its patents against these rivals even though they practice Qualcomm's patents (royalty-free). Instead, Qualcomm provides these rivals indemnifications through the use of 'CDMA ASIC Agreements'… Thus, while Qualcomm's policy toward OEMs is 'no license, no chips,' its policy toward rival chipmakers could be characterized as 'no license, no problem'.

The decision cited repeatedly to the Supreme Court's decision in Amex characterising the anti-steering practices considered in that case as "procompetitive and innovative". In Qualcomm, the Appellate Court echoed themes from Amex in summarising that, "[a]nticompetitive behavior is illegal under federal antitrust law. Hypercompetitive behaviour is not." The Court found that Qualcomm is under no duty to license rival chip providers, that if Qualcomm breached any duty to license its standard essential patents on FRAND terms that this is an issue for contract and patent law, not antitrust law, and that its practices were not anticompetitive.

The Supreme Court (in Amex) and the Appellate Court (in Qualcomm) both found that the respective plaintiffs failed to demonstrate anticompetitive effects. These decisions underscore the challenges inherent in demonstrating anticompetitive effects in dynamic and complex industries, especially when the defendant can point to plausible business justifications for its conduct.

Agency Merger Litigation Losses

The FTC, DOJ and states all lost merger cases in 2020. Given that mergers are not often litigated, the temporaneous proximity of losses by three different government plaintiffs is striking.

In January 2020, the FTC lost its first merger case since 2015 in its challenge to Evonik/PeroxyChem, providers of hydrogen peroxide. The merging parties had proposed a divestiture within days of the FTC seeking injunctive relief in district court, but the FTC continued to seek an injunction. The FTC's market definition was found to have fundamental deficiencies. In denying the FTC's bid for an injunction, the district court criticised the FTC for ignoring demand-side substitution when defining product markets and instead for using supply-side substitution without having sufficient evidence that suppliers "swing" from one product to another.

The judge pointed to the FTC's approach previously used in Sysco in suggesting that the agency should have defined product markets by customer type rather than lumping different product types in the same product market. The Court also found the FTC's product and geographic markets to be 'disconnected'. However, even with properly defined markets, the outcome might not have been different because the Court indicated that the parties were not close competitors, and in evaluating evidence of the potential for increased prices, stated "[l]acking a smoking gun, the FTC fires away with a few squirt guns…"

A group of states suffered a loss in their challenge to T-Mobile/Sprint in February 2020. T-Mobile agreed in April 2018 to acquire Sprint in a transaction valued at over US$26 billion. T-Mobile and Sprint had been 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 agencies.

The DOJ, FCC, and many states investigated the most recent T-Mobile/Sprint merger proposal and the parties reached agreements on divestitures and other remedies with the DOJ, FCC and five states. Fifteen other states and the District of Columbia, however, sued to block the transaction in federal court and viewed the proposed remedies as insufficient. 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).

In ruling against the states, the court emphasised the dynamic aspects of the industry, the prognosis for competition from maverick T-Mobile, and gave credence to the ability of Dish Network to enter the market with the divested assets.

Despite the strength of the Plaintiff States' prima facie case, which might well suffice to warrant injunction of mergers in more traditional industries, a variety of considerations raised at trial have persuaded the Court that a presumption of anticompetitive effects would be misleading in this particularly dynamic and rapidly changing industry. T-Mobile has redefined itself over the past decade as a maverick that has spurred the two largest players in the industry to make numerous pro-consumer changes. The Proposed Merger would allow the merged company to continue T-Mobile's undeniable successful business strategy for the foreseeable future.

The DOJ lost its challenge to Farelogix/Sabre Corporation following a bench trial in January and February 2020. The court found the DOJ's positions persuasive that Farelogix was enjoying success, the merging companies compete, Sabre saw Farelogix as a threat, and Sabre stood to lose revenue to Farelogix. The court also underscored a "surprising lack of credibility" on the part of the merging parties' witnesses. Yet, the court ruled against the DOJ because it bore the burden of proof to show that the transaction would harm competition in a relevant product and geographic market. The DOJ's case relied extensively on expert evidence, and the Court found this evidence to be unpersuasive. The court specifically pointed out that Sabre operated a two-sided platform with airlines on one side and travel agencies on the other, while Farelogix served only airlines. Citing to the 2018 Supreme Court decision in Amex, the court indicated that a two-sided platform could only compete in transactions with another two-sided platform, which Farelogix did not have.

Merger litigation has occurred in the United States more frequently since about 2015, however, merger litigation is still relatively rare. The vast majority of proposed mergers are not investigated and those subject to investigation overwhelmingly are resolved without a trial. Despite greater frequency and heightened focus on litigation by the agencies and states, government plaintiffs registered three losses in court in the first few months of 2020. These rebukes raise the stakes for any government agency considering the next litigation, such as potential actions against Big Tech, discussed further below.

DOJ merger arbitration win

In March 2020, an arbitrator sided with the DOJ regarding market definition for a proposed merger using a novel process for resolving a DOJ challenge. In early September 2019, the DOJ challenged the proposed acquisition of Aleris by Novelis. In its complaint filed in federal court, the DOJ alleged this transaction would harm competition in the North American market for rolled aluminium autobody sheet. In conjunction with its complaint, the DOJ issued a press release stating that the parties had agreed to use binding arbitration if certain conditions were met. The arbitration would address the issue of product market definition, which the DOJ described as being "dispositive". This was the first time the DOJ had sought arbitration to resolve an antitrust matter.

Merger litigations can take more than a year to resolve. For example, the DOJ's challenge to AT&T/Time Warner occurred in November 2017, but the final appellate ruling was not handed down 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 can reduce dispute costs and resolve issues 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 also tends to result in quicker resolution.

The DOJ expressed satisfaction with the arbitration process as both resource-saving and benefiting from the use of an experienced antitrust practitioner as the arbitrator. Unlike other countries that have specialist competition tribunals, the DOJ brings its cases in the federal court system, which hears a broad array of disputes. Utilising an experienced antitrust practitioner as an arbitrator would move the DOJ in the direction of agencies that litigate before specialist tribunals. However, this procedural innovation may not have a sizable impact if used only infrequently.

Vertical Merger Guidelines

In June 2020, the DOJ and FTC jointly issued updated Vertical Merger Guidelines, the first update to US vertical merger guidance since 1984. As opposed to presenting new ways of analysing vertical mergers, the guidelines instead set forth general practices the agencies have followed for years. Written guidelines are helpful for the business community because of increased transparency and enhanced understanding of agency practices. However, the new guidelines maintain a large degree of flexibility for the agencies, sacrificing the transparency and certainty they otherwise might have provided.

Certain features of the new Vertical Merger Guidelines are worth underscoring. First, there are no explicit safe harbour market shares, which is different from approaches taken elsewhere. The European Commission, for example, uses a 30 per cent market share safe harbour, Japan uses 35 per cent and Canada uses the same screening thresholds for horizontal and vertical mergers with screens that vary by the type of adverse competitive effect. The adopted guidelines also differ from the DOJ/FTC draft vertical guidelines, which included a 20 per cent safe harbour. Second, the Vertical Merger Guidelines outline concerns regarding foreclosure (with heavy emphasis on raising-rivals' costs strategies), access to competitively sensitive information, and the potential for coordination. The guidelines explicitly include an example related to a diagonal merger. Finally, the guidelines explicitly recognise the elimination of double-marginalisation not as an offsetting efficiency but as an inherent benefit from the merger itself.

Collaborations and covid-19

In March 2020, the DOJ and FTC together issued a Joint Antitrust Statement Regarding COVID-19 (COVID-19 Statement). The COVID-19 Statement does not change in any fundamental manner how antitrust violations are perceived by the agencies, but instead is intended to "make clear to the public that there are many ways firms, including competitors, can engage in procompetitive collaboration that does not violate the antitrust laws". To provide additional certainty and visibility, specific market share-based safe harbours were identified.

The COVID-19 Statement explicitly recognises that collaborative behaviour may be required to address the spread of the disease. For example, independent healthcare facilities might seek to work together to serve communities, and businesses might seek to combine production, distribution, or service networks to facilitate producing and distributing products they have not traditionally supplied. The COVID-19 Statement also reminds the business community that they can seek staff advisory opinions (FTC) or business review letters (DOJ) regarding agency views on the compatibility of specific conduct with federal antitrust law.

While anticompetitive conduct, including collusion, may emerge in a variety of economic settings, the disruption of covid-19 along with the corresponding economic downturn has created an environment that is particularly turbulent and unpredictable. The COVID-19 Statement warns that firms might pursue anticompetitive or collusive behaviour in such an environment or might seek to prey on vulnerable populations. The agencies emphasise that they will be vigilant in seeking out and prosecuting such behaviour, including criminal behaviour resulting from cartels.

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 has been sufficiently assertive. Such criticism has focused on Big Tech. At least partly in response to these concerns, the FTC and DOJ have become markedly more proactive in this sector.

In 2019, the FTC 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 not be known until the FTC initiates enforcement actions or issues closing statements explaining why it declined to take certain actions.

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 have divided up responsibilities for the four firms receiving the most scrutiny, with the DOJ investigating Google and Apple, and the FTC investigating Facebook and Amazon. Some states' Attorneys General are conducting their own investigations into the competitive implications of Big Tech business practices. Furthermore, in July 2020, Congress questioned the CEOs of the four most prominent Big Tech companies at a widely watched House of Representatives Subcommittee on Antitrust hearing. The subsequent majority report describes how once "scrappy, underdog startups" are now the "kinds of monopolies we last saw in the era of oil barons and railroad tycoons." The report recommends both structural and behavioural remedies, strengthening the antitrust laws, and reinvigorating antitrust enforcement.

Following a DOJ investigation of Google related to both search and search advertising that lasted more than a year, the DOJ filed suit against Google in October 2020 alleging that agreements that specify Google as the default search engine on mobile devices and computers collectively are exclusionary, and thus anticompetitive. The FTC's investigation of Facebook includes whether its prior acquisitions, including Instagram and WhatsApp, harmed competition by removing nascent competitors from the market that otherwise could have challenged Facebook's position.

Even as the DOJ, FTC and state Attorneys General may want to pursue further or challenge conduct by Google, Facebook, Amazon, Apple or other tech firms – or feel pressure to do so – these agencies have all experienced recent losses in court, especially in dynamic industries. Few, if any, industries are more dynamic than Big Tech. Competition litigation against Big Tech companies requires a major undertaking (such as the DOJ's case against Microsoft 20 years ago) and likely would be complex. What remains to be seen is not only the underlying strength of the cases the agencies may bring, but also whether the agencies' recent litigation losses are signs of ongoing problems at the agencies or instead will provide lessons learned that will assist the agencies in litigation against Big Tech.

Following the election of 2020 in the United States, the incoming Biden Administration means new leadership at the DOJ and eventually the FTC. This may change the agencies' focus in various ways, including regarding the direction taken by the Big Tech investigations. Perhaps ironically, even as general concerns have been raised about market power within Big Tech, during the pandemic consumers have gravitated to Big Tech products and services even more than before for at-home activities such as shopping, search and entertainment. Ongoing and fluid trends such as these may affect competition, market power, consumer perceptions (and pressure in Congress), or consumer privacy and data concerns – all of which may impact the courses of the DOJ, FTC and state Big Tech investigations and any resulting litigations in the coming year.

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Henry J Kahwaty is a managing director with 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.

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Cleve B Tyler is a managing director with 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 and antitrust. Dr Tyler has evaluated both horizontal and vertical competition issues and analysed market definition, competitive effects, and measured impacts using such tools as regression analysis and economic modelling. His work spans many industries, including waste collection and disposal, pharmaceuticals, medical devices, biotechnology, semiconductors, cable modems, high-speed data services, electricity generation and distribution, enterprise software, online search advertising, video games, insurance, healthcare, avionics, automobiles and automobile components, home appliances, and food and beverages.

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

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