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United States: economist perspective

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NOVEMBER 2021

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Overview of agencies

The Antitrust Division of the US 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. While their enforcement powers are similar, certain important differences exist. Both investigate mergers under the merger control provisions of the Clayton Act and can bring enforcement actions to block proposed transactions or unwind consummated transactions. Both also enforce monopolisation and attempted monopolisation under the Sherman Act. The FTC, however, has an additional tool – section 5 of the Federal Trade Commission Act, which declares illegal unfair or deceptive trade practices. The FTC lacks criminal enforcement powers, however, and all criminal prosecutions are handled by the DOJ.

The DOJ and FTC 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 and retail. However, they share responsibility for investigations pertaining to certain industries and allocate specific investigations in these industries. For example, both agencies are investigating Big Tech firms, with the FTC having an active competition litigation against Facebook and the DOJ having an active competition litigation against Google.

In addition to the DOJ and FTC, certain other federal agencies such as the Federal Communications Commission, the Federal Energy Regulatory Commission, the Department of Transportation, the Department of Defense, the Comptroller of the Currency and the Federal Reserve Board have varying roles in merger reviews, ranging from providing advice to the DOJ or FTC to approving transactions or parts of transactions.

Individual states also have their own competition statutes. 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 Federal Communications Commission had cleared the merger with remedies. States have sued Google separate and apart from the current DOJ litigation as well. Certain states have viewed federal enforcement as being too lax, or having the wrong focus, but with the new leadership at the DOJ and FTC seeking a more interventionalist approach to competition policy, these disagreements may diminish.

Recent developments

The United States is seeing an underlying environment in which expressed concerns about a lack of competition abound across numerous industries. Against this backdrop, the competition agencies have become more active. Substantial antitrust developments stemming from federal agency actions, state actions, and private litigation have evolved on several fronts in the United States, including:

- winds of change – antitrust enforcement as it has been practised over the past 40 years is being challenged as insufficient in addressing competition and concentration issues in the modern economy;
- revisions to FTC practices – under new leadership, the FTC is reviewing or has changed long-standing practices in areas ranging from administrative issues to analysis and remedies;
- Big Tech investigations and litigations – the federal agencies and states have active litigations with Google and Facebook pending, with investigations of other tech companies ongoing, and a likelihood of additional litigation;

- focus on 'killer acquisitions' – both the FTC and DOJ have investigated whether proposed mergers would eliminate nascent competitors, leading to the abandonment of some proposed deals;
- focus on labour issues – the federal agencies are continuing to focus on labour issues such as 'no poach' agreements and the impact of mergers on groups of workers;
- agency litigation losses – the federal agencies have lost in litigation in numerous cases over the last several years, a pattern which may continue given the more aggressive postures taken by the agencies, at least without new antitrust legislation; and
- NCAA Supreme Court ruling – in a class action case, the Supreme Court ruled that the NCAA (the governing body for amateur college athletics) cannot prevent schools from competing for student-athletes based on in-kind compensation related to educational expenses.

Winds of change

Fundamental questions about the role of antitrust are shaping antitrust policy and the application of that policy. The past 40 years of antitrust enforcement have adhered to the consumer welfare standard as well as rigorous analysis involving impacts on competition and consumers. However, concerns about concentration and corporate power have underpinned a growing neo-Brandeisian view for antitrust which seeks to expand the role of antitrust itself. Tensions between the established analytical approach to antitrust and a more expansive approach will unfold in the coming months and years within the competition agencies, in courts, and in legislation, especially given the potential for new legislation focused on Big Tech.

Capturing this atmosphere of change, President Biden issued an Executive Order on 9 July 2021, calling for a 'whole-of-government' effort to promote competition in the American economy.[1] The Executive Order indicates that a fair, open, and competitive marketplace is the cornerstone of the American economy and that competitive marketplaces support prosperity, the reinvestment in enterprises, the ability to experiment and innovate, and the availability of more choices and lower prices for consumers. The Order expresses concerns that excessive market concentration threatens economic liberties and the welfare of workers, farmers, small businesses, start-ups, and consumers.

The Executive Order states that as industries have consolidated over the past several decades, competition has weakened, leading to various problems, and that federal government inaction has contributed to these problems. The Executive Order cites to problems including non-compete agreements that restrict worker ability to switch jobs, occupational licensing requirements that limit worker mobility between states, dominant internet platforms that exclude market entrants, hospital consolidation that has resulted in higher prices and fewer choices, and telecommunication and financial services being too expensive, among other concerns. In specifically addressing internet platforms, the Executive Order states:

> *[I]t is also the policy of my Administration to enforce the antitrust laws to meet the challenges posed by new industries and technologies, including the rise of the dominant Internet platforms, especially as they stem from serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects.*

The Executive Order contends that a 'whole-of-government' approach is necessary to deal with over-concentration, monopolisation, and unfair competition in the overall economy. In addition to the DOJ and FTC, the Executive Order cites to the enforcement and rulemaking powers of numerous agencies and government departments to promote competition. It calls on the DOJ and FTC to review

1 'Executive Order on Promoting Competition in the American Economy,' The White House, 9 July 2021, available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

the agencies' horizontal and vertical merger guidelines and their Antitrust Guidance for Human Resource Professionals, the DOJ and bank regulators to 'revitalise' bank merger oversight, and the FTC to consider various rulemakings to curtail the use of 'unfair' non-compete clauses that limit worker mobility, data collection practices that damage competition or consumer privacy, restrictions that limit third-party repair of items, agreements that limit the entry of generic drugs, unfair types of competition in major internet marketplaces, occupational licensing restrictions, and tying in real estate brokerage, among others. It also calls on the Department of Agriculture to consider numerous areas to improve competition for agricultural products, the Federal Communications Commission to consider re-imposing 'net neutrality' rules and avoid excessive concentration resulting from future spectrum auctions, and the Department of Health and Human Services to take various actions to increase competition from biosimilar drugs, among other requirements for these and other agencies and departments.

The Executive Order comes at a time when there are various legislative proposals in Congress related to antitrust issues, especially issues related to technology companies and the digital economy, including the proposed Platform Competition and Opportunities Act that would shift the burden of proof by requiring a 'dominant' platform to demonstrate that its acquisition of a smaller rival or potential rival would not harm competition,[2] the proposed American Innovation and Choice Online Act that would prevent 'dominant' online platforms from giving preferences to their own products on their own platforms,[3] and the proposed Ending Platform Monopolies Act that could force gatekeepers to divest lines of business where they can favour their own services to the disadvantage of rivals.[4] These and other legislative proposals, together with the Biden Administration's overall concerns regarding market concentration, indicate there will be substantial evolution in antitrust enforcement in the US over the next few years.

2 For a description of the proposed legislation, see House Judiciary Committee Chairman Nadler's Statement for the Markup of H.R. 3826, the Platform Competition and Opportunity Act of 2021, 23 June 2021, available at https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4619.

3 For a description of the proposed legislation, see House Judiciary Committee Chairman Nadler's Statement for the Markup of H.R. 3816, the American Innovation and Choice Online Act, 24 June 2021, available at https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4620.

4 For a description of the proposed legislation, see the statement House Antitrust Subcommittee Vice Chair Jayapal's Statement on the Ending Platform Monopolies Act (H.R. 3825), 24 June 2021, available at https://jayapal.house.gov/2021/06/24/big-tech-legislation-passes-judiciary-committee/.

Revisions to FTC practices

Numerous changes have unfolded in personnel, policy, and procedure at the FTC during 2021. While changes in FTC procedure in a typical year may be relatively insignificant and not garner much attention beyond antitrust practitioners, recent procedural changes at the FTC are more substantial and signal an increasingly aggressive stance by the FTC, in line with President Biden's Executive Order.

In February 2021, with the support of the DOJ, the FTC announced it would temporarily suspend granting early termination for merger filings.[5] Mergers meeting certain thresholds must be reported, and the parties to a transaction cannot consummate their merger until the expiry of a waiting period that usually lasts 30 days. Transactions that raise no concerns have historically been granted early termination, allowing transactions to close before the expiry of the waiting period. This practice was 'temporarily' suspended, though, as of this writing, that 'temporary' suspension has lasted over seven

5 'FTC, DOJ Temporarily Suspect Discretionary Practice of Early Termination,' Federal Trade Commission, 4 February 2021, available at https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early.

months. Two of the five FTC Commissioners objected to the suspension of granting early termination.[6] In August 2021, citing 'a tidal wave of merger filings', the FTC indicated that it was sending warning letters to merging companies about open investigations that are extending beyond the 30-day waiting period.[7]

President Biden nominated Lina Khan to serve as a Commissioner of the FTC.[8] At the time, Ms Kahn was a Columbia University law professor who has been critical of Big Tech starting when she was a law school student.[9] She was approved by the Senate and sworn in on 15 June 2021, and immediately following the Senate's approval, President Biden designated Ms Khan as Chair of the agency. Previously, Chair Khan served as counsel to the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law, where she assisted with the House's investigation into the digital economy.

After Chair Khan joined the FTC in June and President Biden's Executive Order was issued in early July, on 21 July the FTC repealed a 1995 policy statement disfavouring the use of prior approval requirements for future, related transactions as part of FTC orders resolving merger cases.[10] Under the 1995 policy, the FTC did not require parties to seek prior approval of certain future acquisitions but instead relied on its standard procedures to scrutinise subsequent transactions. With the repeal, the FTC signalled that future orders resolving merger cases may include requirements that parties notify the FTC about related transactions for up to 10 years, even if they are small.

Also in July 2021, the FTC rescinded a 2015 policy statement on the use of section 5 of the FTC Act.[11] The 2015 Statement of Enforcement Principles addressed using section 5 on a stand-alone basis, including describing the FTC's goal of promoting consumer welfare, using a rule of reason analysis framework, and disfavouring the use of section 5 on its own if the Sherman or Clayton Acts are sufficient to address the competitive harm or practice.

No alternative statement providing guidance on how the FTC would enforce section 5 going forward was provided, leading to a heightened degree of uncertainty in the business community. FTC Chair Khan issued a statement regarding the rescission, that stated in part:

> *The Commission's inability, after a century of commanding this statutory authority, to deliver clear Section 5 principles suggests that the time is right for the Commission to rethink its approach and to recommit to its mandate to police unfair methods of competition even if they are outside the ambit of the Sherman or Clayton Acts. The task will require careful and serious work, but it is one that our enabling statute expected and required.*[12]

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6 See, 'Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson, Regarding the Commission's Indefinite Suspension of Early Termination,' Federal Trade Commission, 4 February 2021, available at https://www.ftc.gov/system/files/documents/public_statements/1587047/phillipswilsonetstatement.pdf.

7 Vedova, Holly, 'Adjusting Merger Review to Deal with the Surge in Merger Filings,' Federal Trade Commission, 3 August 2021, available at https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings.

8 'Lina M. Khan Sworn in as Chair of the FTC,' Federal Trade Commission, 15 June 2021, available at https://www.ftc.gov/news-events/press-releases/2021/06/lina-m-khan-sworn-chair-ftc.

9 Khan, Lina M. (2017), 'Amazon's Antitrust Paradox,' The Yale Law Journal, 126 (3): 710-805.

10 'FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers,' Federal Trade Commission, 21 July 2021, available at https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter.

11 'FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act,' Federal Trade Commission, 1 July 2021, available at https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under.

12 Statement of Chair Lina M Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act, Federal Trade Commission, 1 July 2021, available at https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf.

These developments indicate that Chair Khan, who was joined in the statement by two of the other four Commissioners, may seek to expand how the FTC uses this statutory provision, and therefore the business community may not have clarity in this regard for some time, increasing uncertainty and risk.

In September 2021, the FTC under its new leadership rescinded the Vertical Merger Guidelines.[13] In June 2020, the DOJ and FTC had released joint Vertical Merger Guidelines, the first statement from the two agencies on how they analyse vertical mergers. This represented the first major policy guidance on vertical mergers since the DOJ 1984 Non-Horizontal Merger Guidelines. The FTC's statement contains striking language which shows a break with prior practice. The statement reads, in part, that the former guidelines 'include unsound economic theories that are unsupported by the law or market realities' and that the withdrawal is in 'order to prevent industry or judicial reliance on a flawed approach.'[14] There now is no official FTC guidance on how it evaluates vertical mergers. As of this writing, the Vertical Merger Guidelines remain in effect at the DOJ.[15]

In July 2021, the FTC updated its Rule of Practice to change the way it issues rules, and it earlier established a Rulemaking Group in its office of the General Counsel to assist with rulemaking.[16] The FTC has rulemaking authority, but this authority has been little used for many years, especially in the competition area. Recently, however, Commissioners have expressed increasing interest in using rulemaking power in areas related to data privacy, non-compete provisions in employment contracts, and other areas. How the FTC chooses to use its rulemaking authority is an additional area of uncertainty facing the business community.

Finally, the FTC is also considering new ways to analyse individual cases, even for industries in which it has long been active. For example, in an August 2021 letter to the White House, FTC Chair Khan stated that she would 'ask that we identify additional legal theories to challenge retail fuel station mergers where dominant players are buying up family-run businesses.'[17] In an area where the FTC has engaged in numerous merger investigations over the years, it is unclear what new legal theories might be available that the FTC has not considered previously. Furthermore, any new legal theory pursued by the FTC would be constrained by case law and precedent, at least in the absence of new legislation. However, firms facing new legal theories underlying FTC challenges to mergers might change course (eg, abandon or not consider certain mergers), even if any such new theory might not ultimately prevail in court.

Overall, the FTC is pursuing the most substantive changes in its approach in many decades, which is likely to lead to many more investigations and challenges. The change in posture is underpinned by different viewpoints held by agency leadership regarding the role of antitrust enforcement. As a result, we can expect to see a somewhat different set of cases and theories of harm being pursued than antitrust practitioners have observed since about 1980. However, the FTC does not operate in a vacuum, and its actions going forward will be influenced by events and actions taken in other branches of the government such as judicial decisions and by potential new legislation.

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13 'Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary,' Federal Trade Commission, 15 September 2021, available at https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines.

14 'Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary,' Federal Trade Commission, 15 September 2021, available at https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines.

15 'Justice Department Issues Statement on the Vertical Merger Guidelines' Department of Justice, 15 September 2021, available at https://www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines.

16 'FTC Votes to Update Rulemaking Procedures, Sets Stage for Stronger Deterrence of Corporate Misconduct,' Federal Trade Commission, 1 July 2021, available at https://www.ftc.gov/news-events/press-releases/2021/07/ftc-votes-update-rulemaking-procedures-sets-stage-stronger.

17 Letter to The Honorable Brian Deese, Direct, National Economic Council, 25 August 2021, available at https://www.whitehouse.gov/wp-content/uploads/2021/08/Letter-to-Director-Deese-National-Economic-Council.pdf.

Big Tech litigations and investigations

As described above, 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.[18]

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. The FTC created a Technology Enforcement Division in 2019, which has improved its ability to investigate technology-related issued and signalled its focus on assessing potentially anticompetitive behaviour at Big Tech firms.[19] In addition, state attorneys general are conducting their own investigations into the competitive implications of Big Tech business practices. These investigations have led to a flurry of cases.

Following a DOJ investigation of Google related to both search and search advertising that lasted more than a year,[20] the DOJ (and 11 states) 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.[21] The DOJ's case is in discovery at the time of writing.[22] In addition, recent reports indicate that the DOJ may file a second suit against Google regarding its digital advertising practices and the manipulation of online auctions.[23]

Three separate cases have been brought by groups of states against Google. The first state-led suit (Texas et al. v Google) was filed by 16 states and Puerto Rico on 16 December 2020 alleging anticompetitive conduct regarding display advertising on third-party websites.[24] The following day, 35 states, Puerto Rico, Guam, and Washington, DC filed a case (Colorado et al. v Google) alleging monopoly maintenance regarding search and search advertising.[25] Finally, on 7 July 2021, 36 states and Washington, DC filed a case (Utah et al. v Google) focused on Google Play Store.[26]

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18 Though the DOJ and FTC can challenge monopolistic practices, the FTC has a broader toolkit available to it given that it can take action using the FTC Act section 5's prohibition of unfair methods of competition.

19 See Federal Trade Commission – Inside the Bureau of Competition, Technology Enforcement Division, available at https://www.ftc.gov/about-ftc/bureaus-offices/bureau-competition/inside-bureau-competition/technology-enforcement-division.

20 The FTC had previously investigated Google's business practices regarding search and related topics but declined to take action. 'Statement of the Federal Trade Commission Regarding Google's Search Practices,' In the Matter of Google Inc., FTC File Number 111-0163, 3 January 2013, available at https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf.

21 'Justice Department Sues Monopolist Google for Violating Antitrust Laws: Department Files Complaint Against Google to Restore Competition in Search and Advertising Markets,' Department of Justice, 20 October 2020, available at https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws.

22 Koenig, Bryan, 'DOJ Using 'Hammer' for 'Scapel' Google Discovery: Judge,' Law360, 31 August 2021, available at https://www.law360.com/articles/1417832/doj-using-hammer-for-scalpel-google-discovery-judge.

23 Kang, Cecilia, 'Justice Dept. Is Said to Accelerate Good Advertising Inquiry,' The New York Times, 1 September 2021, available at https://www.nytimes.com/2021/09/01/technology/google-antitrust-advertising-doj.html.

24 The State of Texas, et al. v Google LLC, U.S. District Court for the Eastern District of Texas, No. 4:20cv957, Complaint, 16 December 2020.

25 The State of Colorado, et al. v Google LLC, U.S. District Court for the District of Columbia, No. 1:20cv03715, Complaint, 17 December 2020.

26 The State of Utah, et al. v Google LLC, No. 3:21-cv-05227, Complaint, 7 July 2020.

The FTC brought a monopoly maintenance case in 2020 against Facebook seeking the divestitures of Instagram and WhatsApp,[27] a case resulting from an investigation involving the FTC and 46 states, the District of Columbia, and Guam.[28] The FTC's lawsuit against Facebook alleges that its prior acquisitions, including Instagram and WhatsApp, harmed competition by removing nascent competitors from the market that otherwise could have challenged Facebook's position. The FTC also alleges more broadly that Facebook 'enforce[ed] a series of anticompetitive conditional dealing policies that pulled the rug out from under firms perceived as competitive threats.'[29]

Given the confirmation of Big Tech critic Lena Khan to lead the FTC and the nomination of Big Tech critic Jonathan Kanter to lead the DOJ, the federal competition agencies are anticipated to continue pressing on multiple fronts against Big Tech. In addition, states have demonstrated a willingness to strike out on their own in recent years, especially in cases involving Big Tech where the spotlight is brightest. Big Tech can expect intense scrutiny over the next several years.

Even as the DOJ, FTC and state attorneys general pursue ongoing (or future) cases against Big Tech firms, among others, these agencies have all experienced recent losses in court, especially in dynamic industries (described more below). Few, if any, industries are more dynamic than Big Tech. Any competition litigation against Big Tech companies will likely be difficult and complex, as was the DOJ's case against Microsoft more than 20 years ago.

The September 2021 district court decision following a bench trial in Epic Games, Inc. v Apple might provide something of a preview into challenges that the agencies face. That case challenged the legality of the 30 per cent commission Apple charges developers for app sales (including sales that occur within apps, in 'in-game' sales), specifically with regard to Epic's blockbuster video game Fortnite. The Court found that while Apple is not a 'monopolist in the submarket for mobile gaming transactions' its 'conduct in enforcing anti-steering restrictions is anticompetitive.'[30] So, Apple 'won' the case, at least mostly. However, the ruling with regard to anti-steering restrictions suggests that future decisions in Big Tech cases might involve outcomes with partial wins rather than outright victories or losses for the agencies.

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27 The FTC's initial complaint had been dismissed for failing to plead sufficient facts to establish the elements of a Sherman Act section 2 claim, including an allegation of market power. See Federal Trade Commission v Facebook Inc., U.S. District Court for the District of Columbia, No. 1:20-cv-03590-JEB, Memorandum Opinion, 28 June 2021. However, the Court provided leave for the FTC to file an amended complaint. The FTC voted 3-2 to file an amended complaint. See Federal Trade Commission v Facebook Inc., 1:20-cv-03590-JEB, U.S. District Court for the District of Columbia, First Amended Complaint for Injunctive and Other Equitable Relief, 19 August 2021, available at https://www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf.

28 The FTC's Press Release describes its case against Facebook and the participation of states in the investigation. See, 'FTC Sues Facebook for Illegal Monopolization,' Federal Trade Commission, 9 December 2020, available at https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization. The states are not co-plaintiffs with the FTC in this litigation. Instead, 46 states, the District of Columbia, and the territory of Guam filed a parallel monopolisation litigation against Facebook. See The State of New York, et al. v Facebook, Inc., U.S. District Court for the District of Columbia, No. 1:20cv03589, Complaint, 9 December 2020, available at https://ag.ny.gov/sites/default/files/state_of_new_york_et_al._v._facebook_inc._-_filed_public_complaint_12.11.2020.pdf. The District Court dismissed the states' Complaint, finding that the states had waited too long to challenge Facebook's acquisitions of Instagram and WhatsApp. The states are appealing the dismissal of their suit.

29 Federal Trade Commission v Facebook Inc., U.S. District Court for the District of Columbia, No. 1:20-cv-03590-JEB, First Amended Complaint for Injunctive and Other Equitable Relief, 19 August 2021, paragraph 8, available at https://www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf.

30 Epic Games Inc., v Apple Inc., U.S. District Court for the Northern District of California, No. 4:20cv05640, Rule 52 Order After Trial on the Merits, 10 September 2021, available at https://cand.uscourts.gov/wp-content/uploads/cases-of-interest/epic-games-v-apple/Epic-v.-Apple-20-cv-05640-YGR-Dkt-812-Order.pdf.

Focus on 'killer acquisitions'

The DOJ and FTC have shown an increased willingness in the past few years to pursue certain types of cases which embrace certain theories of harm not typically pursued in earlier merger cases. For example, the DOJ pursued a rare challenge to a vertical merger in seeking to block the merger between AT&T and Time Warner – though a district court declined to enjoin the merger in 2018.[31] In April 2020, the FTC filed an administrative complaint regarding a partial ownership stake that Altria Group took in Juul Labs, with the allegation that Altria took an ownership position in exchange for not competing with Juul Labs in selling e-cigarettes.[32] At the time of writing, no decision has been reached in this case.

The agencies have been paying closer attention and shown a willingness to challenge so-called 'killer acquisitions' in which an incumbent firm purchases a small, but growing competitor that is perceived to be a future threat, or a nascent competitor. The term 'killer acquisition' appears to have been coined based on a paper studying mergers and subsequent product development (or lack thereof) in the pharmaceutical industry.[33] The FTC's challenge of Facebook's past acquisition of WhatsApp and Instagram fits this general theory, though for consummated mergers.

Two transactions abandoned early in 2021 also were challenged by the agencies based on nascent competitor theories. The DOJ challenged Visa, Inc's proposed $5.3 billion merger with Plaid in November 2020 based on a theory that Plaid is a nascent competitor in online debit transactions. The parties abandoned the deal in January 2021. The DOJ alleged that the merger would have 'eliminate[d] this competitive threat to [Visa's] online business before Plaid had a chance to succeed.'[34] In December 2020, the FTC challenged Proctor & Gamble's merger with Billie, Inc, a provider of women's shaving supplies, using a nascent competitor theory. The FTC described Billie as 'an important and growing head-to-head competitor' which had plans to move from a direct-to-consumer company to one that was available in brick-and-mortar stores also.[35] Proctor & Gamble and Billie also abandoned their deal in January 2021.[36]

These challenges based on a nascent competitor theory were brought under prior agency management. Even so, these nascent competitor theories are expected to continue to be a point of emphasis at the agencies.

31 Department of Justice – U.S. v AT&T Inc., DirecTV Group Holdings, LLC., and Time Warner Inc., available at https://www.justice.gov/atr/case/us-v-att-inc-directv-group-holdings-llc-and-time-warner-inc.

32 Federal Trade Commission – Atria Group/JUUL Labs, In the Matter of, available at https://www.ftc.gov/enforcement/cases-proceedings/191-0075/altria-groupjuul-labs-matter.

33 See Cunningham, Colleen, Florian Ederer, and Song Ma (2021), 'Killer Acquisitions,' Journal of Political Economy, 129 (3): 649-702.

34 'Visa and Plaid Abandon Merger After Antitrust Division's Suit to Block,' Department of Justice, 12 January 2021, available at https://www.justice.gov/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block.

35 In the Matter of Proctor & Gamble Company and Billie, Inc., Before the Federal Trade Commission, Complaint, Public Version, 8 December 2020, available at https://www.ftc.gov/system/files/documents/cases/d09400_administrative_part_3_complaintpublic600214.pdf.

36 'Statement of Ian Conner, Director of the FTC's Bureau of Competition, Regarding the Announcement that The Procter & Gamble Company has Abandoned Its Proposed Acquisition of Billie, Inc.,' Federal Trade Commission, 5 January 2021, available at https://www.ftc.gov/news-events/press-releases/2021/01/statement-ian-conner-director-ftcs-bureau-competition-regarding.

Focus on labour markets

In October 2016, the DOJ and FTC released a policy statement and guidance on antitrust issues in labour markets.[37] It noted that wage-fixing and agreements not to compete for employees are illegal in most instances.[38] Though these matters had been dealt with as civil antitrust violations previously, the DOJ stated that it intended to prosecute criminally individuals and companies that engage in naked wage-fixing or enter into no-poaching agreements.

The first criminal labour-related cases were filed in late 2020 and early 2021. In December 2020, a grand jury returned an indictment against a former owner of a therapist staffing company charging him with participating in a conspiracy to fix prices by lowering the rates paid to physical therapists and physical therapist assistants providing in-home care in the Dallas-Fort Worth metropolitan area and elsewhere in northern Texas.[39] In January 2021, an indictment was issued against Surgical Care Affiliates for agreeing with two other companies not to solicit each other's senior-level employees.[40] The DOJ has now, therefore, commenced criminal prosecutions of both wage fixing conspiracies and no-poach agreements.

In addition to criminal prosecutions and civil litigation in this area, merger investigations at both the FTC and DOJ now routinely consider whether mergers under investigation will likely have effects in labour markets.

37 'Antitrust Guidance for Human Resource Professionals,' Department of Justice and Federal Trade Commission, October 2016, available at https://www.justice.gov/atr/file/903511/download.

38 An exception is a joint venture, where the parties need to agree on certain restrictions to facilitate the formation and operation of the JV.

39 United States of America v Neeraj Jindal, U.S. District Court for the Eastern District of Texas, No. 4:20cr00358, Indictment, 9 December 2020, available at https://www.justice.gov/opa/press-release/file/1373911/download.

40 United States of America v Surgical Care Affiliates, LLC and SCAI Holdings, LLC, U.S. District Court for the Northern District of Texas, No. 3:21cr011, Superseding Indictment, 8 July 2021 (supersedes Indictment filed 5 January 2021), available at https://www.justice.gov/atr/case-document/file/1411111/download.

Agency litigation losses

Despite indications of more aggressive enforcement, many agency challenges will end up in court where decisions are guided by law and precedent. DOJ or FTC litigations that use novel theories, for example, still must pass muster under existing jurisprudence. In the absence of changes in legislation, litigations that depart from law and precedent may see the agency lose its case in court.

In recent years, the FTC increasingly had sought monetary relief such as restitution and disgorgement of ill-gotten gains against defendants in both competition and consumer protection cases. It achieved $732.2 million in monetary relief in 49 cases during fiscal year 2019,[41] and $796.9 million from 63 cases during fiscal year 2020.[42] However, on 22 April 2021, the Supreme Court ruled in a unanimous decision in AMG Capital Management, LLC that the FTC does not have the authority under section 13(b) of the FTC Act to seek monetary relief such as restitution or disgorgement, and instead is limited to seeking permanent injunction.[43] Though the FTC can still seek monetary penalties under sections

41 Federal Trade Commission, Congressional Budget Justification, Fiscal Year 2021, 10 February 2020, p. 5, available at https://www.ftc.gov/system/files/documents/reports/fy-2021-congressional-budget-justification/fy_2021_cbj_final.pdf.

42 Federal Trade Commission, Congressional Budget Justification, Fiscal Year 2022, 28 May 2021, p. 7, available at https://www.ftc.gov/system/files/documents/reports/fy-2022-congressional-budget-justification/fy22cbj.pdf.

43 AMG Capital Management, LLC, et al. v Federal Trade Commission, Supreme Court of the United States, No. 19-508, 593 U.S. __, 141 S. Ct. 1341, Slip Opinion, 22 April 2021, available at https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf.

5 and 19 of the FTC Act in certain circumstances,[44] this ruling reduces the FTC's overall ability to seek monetary penalties.

The experiences of the agencies in merger litigations demonstrate the importance of judicial review of merger challenges. 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. The FTC lost its challenge in Evonik/PeroxyChem (providers of hydrogen peroxide),[45] a group of states lost their challenge to T-Mobile/Sprint,[46] and the DOJ lost its challenge to Farelogix/Sabre Corporation.[47]

Also, in 2018 the Supreme Court ruled against certain States in American Express, a case in which the Court found that anti-steering rules utilised by American Express to prevent merchants from directing consumers to alternative credit cards do not violate antitrust law. That decision has important implications for the analysis of cases involving multi-sided platforms.[48] These rebukes raise the stakes for any government agency considering the next litigation, such as the pending or future potential actions against Big Tech, discussed above.[49]

One area of evolution is at the intersection of antitrust and intellectual property, with the FTC experiencing certain setbacks in court. These setbacks caution future agency decision-makers to carefully assess economic theories and the applicability of precedent. For example, the FTC had challenged Qualcomm's practice of selling modem chips 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 won at the district court level, but subsequently, and in a rare move, the DOJ intervened in opposition to the FTC.[50] In August 2020, the Ninth

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44 Specifically, the FTC must hold an administrative hearing and subsequently issue a cease-and-desist order. The section 5 process must be brought within three years of the alleged violation and monetary relief must be sought within one year of the cease-and-desist order. In addition, monetary relief would only apply when a 'reasonable man would have known under the circumstances' that the illegal conduct was 'dishonest or fraudulent.' AMG Capital Management, LLC, et al. v Federal Trade Commission, Supreme Court of the United States, No. 19-508, 593 U.S. __, 141 S. Ct. 1341, Slip Opinion, 22 April 2021, citing 15 U.S.C. §57b(a)(2).

45 Federal Trade Commission v Rag-Stiftung et al., U.S. District Court for the District of Columbia, No. 19-2337, Memorandum Opinion, 24 January 2020.

46 State of New York, et al. v Deutsche Telekom AG, et al., U.S. District Court for the Southern District of New York, No. 19 Civ. 5434 (VM), Decision and Order, 11 February 2020.

47 United States of America v Sabre Corp. et al., U.S. District Court for the District of Delaware, No. 19-1548-LPS, Opinion, Redacted Public Version, 8 April 2020.

48 The Court described the two-sided platform developed by American Express as a 'transaction' platform competing to sell credit card transactions. Any analysis of only one side of this platform would be incomplete due to bi-directional 'indirect network effects.' Ohio v Am. Express Co., 138 S. Ct. 2274 (2018).

49 Given the current focus on labour market issues at the agencies, Aya Healthcare Services, Inc v AMN Healthcare, Inc (9 F.4th 1102, 1105 (9th Cir. 2021)) is another recent notable case. It involved private litigation between two healthcare staffing agencies that place travel nurses on temporary assignments. Aya Healthcare had contracted with AMN Healthcare to provide staffing when AMN Healthcare had insufficient staff to meet customer needs, and its contract included a restriction preventing Aya Healthcare from soliciting AMN Healthcare employees. Aya Healthcare challenged this restriction, and the DOJ participated as an amicus, arguing that the restriction was a naked restraint that was a per se violation. Both the District and Ninth Circuit courts disagreed, finding the restriction an ancillary restraint subject to a rule of reason analysis. This case highlights the difficulty the agencies may face when pursuing new types of cases.

50 Federal Trade Commission v Qualcomm Incorporated, United States Court of Appeals for the Ninth Circuit, No. 19-16122, United States' Statement of Interest Concerning Qualcomm's Motion for Partial Stay of Injunction Pending Appeal, 16 July 2019.

Circuit reversed the District Court's decision and vacated its remedies.[51] The Appellate Court found that Qualcomm is under no duty to license rival chip providers, and 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.[52]

In another example, the FTC lost at the Second Circuit in 1-800-Contacts, a case involving trademarks.[53] The FTC had challenged certain trademark settlement agreements entered into by 1-800-Contacts that restricted terms upon which the parties could bid in auctions conducted by online search engines (eg, Google). An administrative law judge (ALJ) had determined the agreements to be anticompetitive using a rule of reason analysis framework. The FTC upheld the ALJ's ruling, but instead applied a 'inherently suspect' standard. On 11 June 2021, the Second Circuit overturned the FTC on appeal finding that the FTC should have used the rule-of-reason framework and that the FTC incorrectly concluded that the agreements constituted unfair competition under section 5 of the FTC Act. The Court stated that, '[w]hile trademark agreements limit competitors from competing as effectively as they otherwise might, we owe significant deference to arm's length use agreements negotiated by parties to those agreements.'[54]

One notable exception to these IP-related court losses is the FTC's win in Impax Laboratories v FTC, the agency's first appellate win in a reverse payment settlement case since the Supreme Court's 2013 Actavis ruling.[55] Reverse payment settlement litigation involves challenges to patent settlements in the pharmaceutical industry which may include a payment from the branded manufacturer to the generic entrant to delay generic entry into the market. The ruling in April 2021 by the Fifth Circuit involved a determination of whether the FTC 'committed any legal errors and whether substantial evidence supported its factual findings.'[56] In following the guidance provided by Actavis, the Appellate Court found that '[t]his large and unjustified payment generated anticompetitive effects.'[57] In particular, in rejecting a primary argument by the petitioner the Court found that '[w]e disagree that Actavis requires that Commission to assess the likely outcome of the patent case in order to find anticompetitive effects.'[58]

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51 Federal Trade Commission v Qualcomm Incorporated, United States Court of Appeals for the Ninth Circuit, No. 19-16122, Opinion, 11 August 2020.

52 Federal Trade Commission v Qualcomm Incorporated, United States Court of Appeals for the Ninth Circuit, No. 19-16122, Opinion, 11 August 2020, p. 56. ('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). . . . Thus, while Qualcomm's policy toward OEMs is 'no license, no chips,' its policy toward rival chipmakers could be characterised as 'no license, no problem'.').

53 1-800 Contacts, Inc. v Federal Trade Commission, United States Court of Appeals for the Second Circuit, Case No. 18-3848, Opinion, 11 June 2021.

54 1-800 Contacts, Inc. v Federal Trade Commission, United States Court of Appeals for the Second Circuit, Case No. 18-3848, Opinion, 11 June 2021.

55 FTC v Actavis, Inc.,133 S. Ct. 2223(2013).

56 Impax Labs., Inc. v Federal Trade Commission, United States Court of Appeals for the Fifth Circuit, No. 19-60394, Opinion, 13 April 2021, p. 2

57 Impax Labs., Inc. v Federal Trade Commission, United States Court of Appeals for the Fifth Circuit, No. 19-60394, Opinion, 13 April 2021, p. 15.

58 Impax Labs., Inc. v Federal Trade Commission, United States Court of Appeals for the Fifth Circuit, No. 19-60394, Opinion, 13 April 2021, p. 15.

NCAA Supreme Court ruling

College and university sports are designed to be 'amateur' athletic competitions. These competitions generate various benefits for schools. To maintain amateur status, the NCAA issues and enforces rules or horizontal restraints that limit or restrict how schools may compensate student-athletes. The NCAA litigation was brought as a class action by current and former student-athletes to challenge the various rules on compensation imposed by the NCAA. The District Court found that the NCAA had monopsony power in athletic services for sport-specific markets and held that restrictions related to compensation were necessary to maintain amateur status and therefore preserve the popularity of college sports. However, it enjoined NCAA rules limiting the education-related benefits that schools may provide. The decision was upheld on appeal to the Ninth Circuit, and the NCAA appealed to the Supreme Court, which unanimously upheld the District Court decision.[59]

The case involves admitted horizontal price fixing in a market where the NCAA had monopoly (monopsony) control; the basic facts were not in dispute. The question at issue was the legality of restrictions designed to maintain amateurism. Following the ruling, student-athletes, even in high-profile sports such as basketball and American football, are limited to receiving scholarships and coverage for expenses such as books, room and board, scientific equipment, study abroad, graduate school scholarships, and travel. The District Court expanded the areas of compensation available to student-athletes, but other forms of compensation – including the payment of salaries – were not before the Court. Even so, Justice Kavanaugh issued a concurring opinion stating that 'Price-fixing labor is price-fixing labor,' which he described as a 'textbook antitrust problem'. He concluded:

> *Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different.*

There has also been action on the legislative front to weaken NCAA rules, with several states passing laws that allow student-athletes to make product endorsements and otherwise monetise their names and images.

59 National Collegiate Athletic Association v Alston et al., Supreme Court of the United States, No. 20-512, 594 U.S. ____ (2021), Slip Opinion, 21 June 2021, available at https://www.supremecourt.gov/opinions/20pdf/20-512_gfbh.pdf.

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