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Antitrust Scrutiny of High-Tech: What Does It Really Mean?

Advisory

By Peter J. Levitas, Sonia Kuester Pfaffenroth, Dylan S. Young

INTRODUCTION

For years the technology sector has received significant antitrust scrutiny, but that scrutiny has increased markedly in recent months. Legislators and political candidates are focusing on leading technology platforms, often demanding more aggressive enforcement and sometimes going so far as to suggest breaking up specific companies, unwinding consummated mergers and applying more stringent standards to acquisitions and business practices in technology markets. Most immediately relevant, antitrust enforcers seem to be directing additional resources into investigations in this space. A successful enforcement action against one or more of the leading digital platforms or the imposition of a new regulatory framework could lead to significant changes in the technology sector. Antitrust enforcers have expressed the view that the existing legal framework is sufficiently flexible to address dynamic technology markets, while simultaneously noting that potential enforcement efforts in this sector, as in any other, are bound by the facts presented and thus may in some instances face hurdles. Thus, while the increased interest of lawmakers may lead to more or longer investigations in the high-tech sector and may create additional emphasis on such investigations by the antitrust agencies, it remains to be seen which business strategies and proposed acquisitions in the tech sector ultimately will be the subject of enforcement actions.

AGENCY ACTIVITY

Both US federal agencies as well as state enforcers appear to be increasing their focus on competition in digital markets.

It has been widely reported that the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have approved a "clearance agreement" to divide responsibility for investigating the "big four" technology companies, with DOJ responsible for Google and Apple and the FTC responsible for Amazon and Facebook.¹ Neither agency has confirmed the reports and indeed Bruce Hoffman has told the media, "I would be skeptical and cautious about any media story indicating there is some allocation of companies. That would be atypical of the way we clear matters."²

The FTC has hosted a series of hearings on competition and consumer protection where the topic of competition in digital markets was prominent,³ and recently Commissioner Chopra argued that "[o]ver the past decade, we have watched the decentralized internet converge under a handful of corporate umbrellas," and suggested that "[w]e should all be asking whether tech convergence is choking off competition in markets where platform and content intersect."⁴

The FTC recently launched a "Technology Task Force," which is "dedicated to monitoring competition in U.S. technology markets, investigating any potential anticompetitive conduct in those markets, and taking enforcement actions when warranted."⁵ The Task Force, unlike most FTC sections, appears to have responsibility for both mergers (proposed and consummated⁶) and conduct investigations.⁷ Patricia Galvan, the head of the Task Force, has confirmed that investigations are underway.⁸ In a filing with the SEC, Facebook acknowledged that the FTC opened an antitrust investigation of the company in June 2019.⁹

Similarly, the DOJ has engaged repeatedly on this topic. A press release on July 23, 2019 confirmed that the "Justice Department [is] reviewing the practices of market-leading online platforms."¹⁰ Earlier, the DOJ held a public workshop with a high-tech focus last month,¹¹ and Assistant Attorney General Makan Delrahim recently offered his views regarding

"digital gatekeepers" and the DOJ approach to antitrust enforcement in technology markets. Delrahim promised to pursue enforcement against antitrust violations in the sector and offered the view that certain technology markets (such as search, social networks, operating systems, e-books, and online advertising) appear to have only one or two major competitors. He also analogized antitrust enforcement against digital sector participants to landmark monopolization cases such as *Standard Oil*, *AT&T* (1974), and *Microsoft*.¹² Jeffrey Wilder, the DOJ's chief economist, has recently suggested that DOJ may give closer scrutiny to incumbent platforms that attempt to acquire start-ups in adjacent markets and consider monopolization theories in the acquisition context as well as in potential standalone conduct investigations.¹³

State enforcers are also focusing more on competition in digital markets. Forty-three state attorneys general recently encouraged the FTC to emphasize "non-price aspects of competition"—including impacts on privacy—as a way to increase enforcement against potentially anticompetitive acquisitions by technology platforms.¹⁴ Moreover, Attorney General William Barr also reportedly met with a group of eight bipartisan state attorneys general to discuss antitrust topics related to the tech sector.¹⁵ Multiple state attorneys general have also voiced interest in independently investigating and challenging conduct and acquisitions by major technology platforms.¹⁶ The Attorneys General for Nebraska and Louisiana gave a joint interview in which they described broad, bipartisan interest in investigating major tech companies.¹⁷ Similarly, the Attorney General for Tennessee suggested that ". . . structural change driven by the government may well be necessary" to address concerns about concentration in this space.¹⁸

European competition authorities have been even more focused on digital competition. EC Commissioner for Competition Margrethe Vestager recently suggested that dominant technology platforms are "a different beast" and thus require a different approach than other companies.¹⁹ Vestager argued that platforms leverage masses of data that smaller rivals and new entrants cannot match and thus not only competition enforcement but also regulation will be necessary for "governments to reassert control of parts of the digital world."²⁰ German competition enforcers have suggested that laws could be changed to allow for enforcement against platforms that have non-dominant power in multiple markets if other companies are nonetheless dependent upon them.²¹ Other European authorities have also advocated for a more regulatory approach; for example, the Chairman of ARCEP, the French telecommunications regulatory authority, suggested that the largest technology companies should be regulated as public utilities.²²

Most recently, the EC has taken the very unusual step of publishing a Statement of Objections to support imposing so-called "interim measures" in connection with its recently opened investigation of Broadcom. These measures will block certain exclusivity provisions, based on the preliminary finding of the EC that "Broadcom's conduct may result in the elimination or marginalisation of competitors before the end of [full] proceedings."²³ This effort to halt conduct before a final conclusion is reached in the investigation appears to be a reflection of the EC's increasingly aggressive approach in the technology sector.

Other jurisdictions around the world have also committed more resources and attention to antitrust scrutiny of large technology platform companies. For example, Australia has established a special office of the Australian Competition & Consumer Commission dedicated to policing Facebook and Google on a range of issues including competition, algorithms, "fake news," and hate speech.²⁴

CONGRESSIONAL HEARINGS AND PUBLIC STATEMENTS

There is increased Congressional interest in these issues as well. The House Judiciary Committee has announced a "top-to-bottom" antitrust investigation into digital competition issues.²⁵ A series of hearings, interviews, and depositions is scheduled to last approximately 18 months.²⁶ After the hearing was announced, Congressman David Cicilline (D-RI), Chair of the House Antitrust Subcommittee, expressed displeasure with the state of antitrust law and enforcement in the high-tech sector, offering the view that "Congress has retreated" from shaping U.S. antitrust laws, and instead "allow[ed] the laws to become more technical, less effective, and altogether less democratic in the hands of the courts."²⁷ Representative Cicilline described the state of antitrust enforcement as "a failure by everyone" and argued that "[t]here hasn't been a serious investigation in 20 years, and we want to understand why."²⁸

In addition, the Senate Judiciary Committee also announced an antitrust oversight hearing for July 23, 2019, but that was postponed until September 17, 2019.²⁹ Separately, seven Senators, led by Senator Klobuchar (D-MN), Ranking Member of the Antitrust Subcommittee, sent letters to the DOJ and FTC requesting that the agencies disclose any existing conduct investigations into Google, Apple, Facebook, and Amazon. The letters also ask the agencies to commit to issuing public statements explaining their findings and the outcome of any such investigations.³⁰

CAMPAIGN PROMISES AND LEGISLATIVE PROPOSALS

Rhetoric encouraging enforcement against digital platforms has increased across the political spectrum. President Trump previously has suggested that digital platforms are politically biased, and recently suggested that US antitrust enforcement should be more vigorous in its approach to major platform companies. He noted EC efforts in this regard and said "we should be doing what they're doing."³¹

On March 8, 2019, Senator Elizabeth Warren (D-MA) released a proposal to "break up big tech."³² The proposal would require large digital platforms to adhere to certain conduct requirements (such as non-discrimination) and would prohibit them from owning businesses that operate on their platforms.³³ Senator Warren's plan also includes unwinding some recent acquisitions by major platforms, such as Facebook's acquisition of Instagram and Amazon's acquisition of Whole Foods.³⁴ Senator Bernie Sanders (I-VT) also indicated his support for breaking large technology companies,³⁵ and other candidates for the Democratic presidential nomination, including Hawaii Congresswoman Tulsi Gabbard, New York Mayor Bill de Blasio and Andrew Yang have backed a "break up big tech" plank as well.³⁶

Senator Klobuchar has characterized previous investigations into large technology companies as inadequate³⁷ and has proposed modifying the Clayton Act to make it easier to block proposed acquisitions; deals could be blocked if they are found to "materially lessen competition,"³⁸ which is intended to be a lesser standard than the current "substantially lessen competition" standard. Senator Klobuchar's proposal would also shift the burden of proof in what her proposal designates as "mega-mergers"³⁹ to require that the parties prove that such transactions do not harm competition.⁴⁰ The proposed legislation also modifies the Clayton Act to prohibit transactions that tend to create a monopsony in a specific line of commerce.⁴¹ Recently, Senator Klobuchar has introduced another bill to authorize civil monetary penalties for Section 2 violations.⁴² The penalties could be as high as 15% of the defendant's total US revenues or 30% of their revenues in the relevant markets.⁴³

What Does This All Mean in Practice?

It remains to be seen what enforcement actions will emerge in the coming months or whether any proposal to reform the existing antitrust laws or to impose a regulatory framework on digital platforms ultimately will come to fruition. But the agencies do not embrace the view that reforms are a necessary predicate to enforcement. AAG Delrahim recently noted his view that "U.S. antitrust law is flexible enough to be applied to markets old and new."⁴⁴ FTC Commissioner Christine Wilson "emphatically reject[s] any suggestion that these [high-tech] markets are different enough to warrant different treatment."⁴⁵ And the competition authorities of the G7 released a "Common Understanding" on "Competition and the Digital Economy" on June 5, 2019 that emphasizes "[t]he flexibility and relevance of existing antitrust rules."⁴⁶

Even while the agencies increase their emphasis on competition in technology markets they remain focused on the practical requirements of bringing a successful enforcement action. FTC Chairman Joseph Simons recently emphasized, "as a law enforcement agency, [the FTC is] constrained by the parameters of our authorizing statute and the facts of the case in front of us."⁴⁷ Principal DAAG Andrew Finch made a similar point in a speech to the OECD, while noting some of the challenges associated with bringing a successful action in the high-tech sector.⁴⁸ And Enforcers have voiced reservations about drastic measures like "breaking up big tech" and utility regulation.⁴⁹

Nonetheless, the antitrust authorities do seem to be more interested in the high-tech space and particularly platform competition and are investing additional resources to assess such competition issues. This increased interest may already be leading to more investigations, and if the antitrust agencies are concerned about competition in particular markets, they may be more inclined to dig deeper and investigate longer in these market segments. Of course, additional scrutiny does not necessarily mean that new enforcement actions will materialize, but it is worth watching carefully to see whether any new challenges develop under the current framework, and whether that framework itself is shifted by lawmakers around the world.

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¹ See, e.g., Seth Fiegerman, *Google, Facebook and Apple could face US antitrust probes as regulators divide up tech territory*, CNN (Jun. 3, 2019).

² Ben Remaly, *FTC probes Facebook, but for what?*, GCR (July 25, 2019).

³ *Hearings on Competition and Consumer Protection in the 21st Century*, FTC.gov.

⁴ Rohit Chopra, [Tech Platforms, Content Creators, and Immunity](#) (Mar. 28, 2019, Prepared Remarks before American Bar Association Section of Antitrust Law Annual Spring Meeting).

⁵ Press Release, Fed. Trade Comm'n, [FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets](#) (Feb. 26, 2019).

⁶ Press Release, Fed. Trade Comm'n, [FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets](#) (Feb. 26, 2019). Although challenges to consummated mergers are within the purview of both agencies, such challenges are relatively rare and historically have occurred more frequently in non-reportable transactions or in cases in which complaints came post-clearance. In 2017, the FTC and DOJ each challenged consummated mergers, at least one of which was a reportable transaction. *See* Michael Bernstein, et al, [2017 U.S. Merger Enforcement Year in Review](#)(Feb. 28, 2018).

⁷ Press Release, Fed. Trade Comm'n, [FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets](#) (Feb. 26, 2019); [Bureau of Competition Organization Chart](#) (May 22, 2019).

⁸ Leah Nylen, [FTC's tech task force beginning investigations, official says](#), Mlex (Jun. 18, 2019); Joshua Sisco, [FTC's tech task force focused on probes of conduct, closed mergers](#), Mlex (May 22, 2019), Press Release, Fed. Trade Comm'n, [FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets](#) (Feb. 26, 2019).

⁹ Facebook, Inc., Current Report, Form 8-K (July 24, 2019) ("The online technology industry and our company have received increased regulatory scrutiny in the past quarter. In June 2019, we were informed by the FTC that it had opened an antitrust investigation of our company. In addition, in July 2019, the Department of Justice announced that it will begin an antitrust review of market-leading online platforms.").

¹⁰ Press Release, Dep't of Justice, [Justice Department Reviewing the Practices of Market-Leading Online Platforms](#) (July 23, 2019).

¹¹ [Public Workshop on Competition in Television and Digital Advertising](#), DOJ.gov.

¹² Ass. Att'y Gen. Makan Delrahim, "[...And Justice for All](#)": Antitrust Enforcement and Digital Gatekeepers (Jun. 11, 2019, Remarks for the Antitrust New Frontiers Conference).

¹³ Acting Deputy Assistant Attorney General Jeffrey M. Wilder Delivers [Remarks at the Hal White Antitrust Conference](#) (Jun. 10, 2019).

¹⁴ [Federal Trade Commission Hearings on Competition and Consumer Protection in the 21st Century Public Comments of 43 State Attorneys General](#) (Jun. 11, 2019).

¹⁵ [U.S. attorney general, state officials discuss big tech firms' effect on competition](#), Reuters (July 25, 2019).

¹⁶ *See e.g., id.*

¹⁷ Leah Nylen, [State AGs committed to investigating Big Tech companies like Google, Facebook](#), Mlex (Jun. 12, 2019).

¹⁸ Leah Nylen, [State AGs committed to investigating Big Tech companies like Google, Facebook](#), Mlex (Jun. 12, 2019).

¹⁹ Margrethe Vestager, [Competition and the Digital Economy](#) (OECD/G7 Conference, Paris; Jun. 3, 2019); Charley Connor, [Vestager: Governments must take back control of the digital world](#), GCR (Jun. 3, 2019).

²⁰ Margrethe Vestager, [Competition and the Digital Economy](#) (OECD/G7 Conference, Paris; Jun. 3, 2019); Charley Connor, [Vestager: Governments must take back control of the digital world](#), GCR (Jun. 3, 2019).

²¹ Matthew Newman and Arezki Yaiche, [Digital platforms' cross-market power could prompt German law change](#), Mundt says, Mlex (July 12, 2019).

²² Lewis Crofts, ['Big Tech' task force could improve online competition, French regulator says](#), Mlex (Jun. 14, 2019). Andreas Mundt, President of German Federal Cartel Office, has argued for a more staged approach to digital enforcement. "If we find competition law cannot do {it}, we should add some regulation. Only if we have done that, then it might be time to break up these companies." Simon Zekaria, [Google, Facebook shouldn't face breakup until all else fails, says Germany's Mundt](#), Mlex (Jun. 17, 2019).

- ²³ Press Release, European Comm'n, [Antitrust: Commission opens investigation into Broadcom](#) and sends Statement of Objections seeking to impose interim measures in TV and modem chipsets markets (Jun. 26, 2019).
- ²⁴ Byron Kaye, Tom Westbrook, [Australia to 'lift veil' on Facebook, Google algorithms to protect privacy](#), Reuters (July 25, 2019).
- ²⁵ Brian Fung, [House Judiciary Committee launches 'top-to-bottom' antitrust probe of big tech](#), CNN (Jun. 3, 2019). This decision by the Democratic-controlled House has been criticized by at least one Republican Senator. See Matt Bernardini, [GOP Sen. Blasts House Antitrust Probes Into Tech Giants](#), Law360 (Jun. 5, 2019).
- ²⁶ Press Release, H. Jud. Comm., [House Judiciary Committee Launches Bipartisan Investigation](#) into Competition in Digital Markets (Jun. 3, 2019); Brian Fung, [House Judiciary Committee launches 'top-to-bottom' antitrust probe of big tech](#), CNN (Jun. 3, 2019). The first hearing highlighted bipartisan concerns about the extent to which on-line platforms are dictating advertising rates and focused in particular on the impact that on-line advertising is having on news organizations. Cecilia Kang, [House Opens Tech Antitrust Inquiry With Look at Threat to News Media](#), N.Y. Times, Jun. 11, 2019.
- ²⁷ Press Release, Rep. David Cicilline, [Cicilline Delivers Keynote Address at American Antitrust Institute's 20th Annual Policy Conference](#) (Jun. 20, 2019).
- ²⁸ Claude Marx, [Cicilline says previous failures necessitate strong congressional action on antitrust](#), Mlex (Jun. 20, 2019).
- ²⁹ [Oversight of the Enforcement of the Antitrust Laws](#), Judiciary.Senate.Gov (last visiting July 24, 2019); [US Senate announces antitrust oversight hearing July 23](#), Mlex (Jun. 12, 2019).
- ³⁰ Press Release, Sen. Amy Klobuchar, [Klobuchar Leads Letters Pressing Federal Trade Commission](#), Justice Department on Antitrust Investigations into Large Tech Companies (Jun. 21, 2019).
- ³¹ Brett Samuels, [Trump: Big tech companies 'discriminate against me'](#), The Hill (Jun. 10, 2019).
- ³² Elizabeth Warren, [Here's how we can break up Big Tech](#), Medium (Mar. 8, 2019); Astead W. Herndon, [Elizabeth Warren Proposes Breaking Up Tech Giants Like Amazon and Facebook](#), N.Y. Times, Mar. 8, 2019.
- ³³ Elizabeth Warren, [Here's how we can break up Big Tech](#), Medium (Mar. 8, 2019). Smaller platforms would only be bound by the conduct regulations.
- ³⁴ Elizabeth Warren, [Here's how we can break up Big Tech](#), Medium (Mar. 8, 2019); Astead W. Herndon, [Elizabeth Warren Proposes Breaking Up Tech Giants Like Amazon and Facebook](#), N.Y. Times, Mar. 8, 2019.
- ³⁵ Max Fillion, [Six US presidential candidates back breaking up Big Tech companies; others disagree, fail to commit](#), Mlex (Jun. 21, 2019); see generally, "Should tech giants like Facebook, Amazon, and Google be broken up?", [Meet the Candidates](#), N.Y. Times (Jun. 24, 2019).
- ³⁶ Max Fillion, [Six US presidential candidates back breaking up Big Tech companies; others disagree, fail to commit](#), Mlex (Jun. 21, 2019); see generally, "Should tech giants like Facebook, Amazon, and Google be broken up?", [Meet the Candidates](#), N.Y. Times (Jun. 24, 2019); @TulsiGabbard (Mar. 12, 2019; 3:14 PM).
- ³⁷ Eric Johnson, [Sen. Amy Klobuchar, 2020 presidential candidate, explains how she would regulate Big Tech if she wins](#), Vox (Mar. 16, 2019).
- ³⁸ S. 307, [Consolidation Prevention and Competition Promotion Act of 2019](#); Press Release, Sen. Amy Klobuchar, [Klobuchar Introduces Legislation to Modernize Antitrust Enforcement and Promote Competition](#) (Feb. 1, 2019); see also Eric Johnson, [Sen. Amy Klobuchar, 2020 presidential candidate, explains how she would regulate Big Tech if she wins](#), Vox (Mar. 16, 2019).
- ³⁹ Senator Klobuchar's bill would shift the burden in transactions where *either* (1) the acquiring person would hold \$5 billion in the target's voting securities and assets, *or* (2) either party has assets, net annual sales, or market capitalization greater than \$100 billion and the acquiring person would hold \$50 million in the target's voting securities and assets. S. 307, [Consolidation Prevention and Competition Promotion Act of 2019](#).

⁴⁰ S. 307, [Consolidation Prevention and Competition Promotion Act of 2019](#); Press Release, Sen. Amy Klobuchar, [Klobuchar Introduces Legislation to Modernize Antitrust Enforcement and Promote Competition](#) (Feb. 1, 2019).

⁴¹ S. 307, [Consolidation Prevention and Competition Promotion Act of 2019](#); Press Release, Sen. Amy Klobuchar, [Klobuchar Introduces Legislation to Modernize Antitrust Enforcement and Promote Competition](#) (Feb. 1, 2019).

⁴² Press Release, Sen. Amy Klobuchar, [Klobuchar Introduces Legislation to Crack Down on Monopolies that Violate Antitrust Law](#) (Aug. 2, 2019). The bill would also mandate the FTC and DOJ issue joint guidelines for when to exercise penalty authority. *Id.*

⁴³ *Id.*

⁴⁴ Makan Delrahim, "[...And Justice for All](#)": Antitrust Enforcement and Digital Gatekeepers (Jun. 11, 2019, Remarks for the Antitrust New Frontiers Conference).

⁴⁵ Christine Wilson, [All \(Industries\) in the Same Boat](#): Staying the Course on the High Seas of High Tech (Mar 28, 2019, Address at CCIA Conference on Competition, Data, and Innovation in the Digital Economy).

⁴⁶ Common Understanding of G7 Competition Authorities on "[Competition and the Digital Economy](#)" Paris, 5th June, 2019. "The G7 competition authorities are: Autorità Garante della Concorrenza e del Mercato (Italy), Autorité de la Concurrence (France), Bundeskartellamt (Germany), Competition Bureau (Canada), Competition and Markets Authority (United Kingdom), Department of Justice (United States of America), Directorate General for Competition (European Commission), Federal Trade Commission (United States of America) and Japan Fair Trade Commission (Japan)." *Id.*

⁴⁷ [Statement of Chairman Joseph J. Simons, Commissioner Noah Joshua Phillips, and Commissioner Christine S. Wilson](#) Concerning the Proposed Acquisition of Essendant, Inc. by Staples, Inc. FTC File No. 181-0180 (Jan. 28, 2019).

⁴⁸ Khushita Vasant, [DoJ official highlights challenges assessing big tech acquisitions of nascent competitors](#), PARR (Jun. 6, 2019).

⁴⁹ Principal Deputy Assistant Attorney General [Andrew Finch Delivers Keynote Address at Capitol Forum's Fifth Annual Tech, Media & Telecom Competition Conference](#) (Dec. 14, 2018), ("I am skeptical of the drastic calls for breaking up firms or turning tech platforms into regulated utilities" and "is it {not} clear that breaking up big platforms would necessarily resolve the concerns people are voicing.").