

THE MERGER  
CONTROL  
REVIEW

EIGHTH EDITION

Editor  
Ilene Knable Gotts

THE LAWREVIEWS

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The Merger Control Review

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# US MERGER CONTROL IN THE HIGH-TECHNOLOGY SECTOR

*Thomas P Brown and Michael S Wise*<sup>1</sup>

## I INTRODUCTION

2017 began with the inauguration of Donald Trump as the 45th President of the United States. During his campaign, President Trump gave only limited insight into how his administration would tackle antitrust issues generally. Since the election, antitrust enforcement in the high-technology sector has been limited, with few cases reaching decision points that would shed light on future enforcement priorities. The uncertainty is compounded by the fact that key leaders for both the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) are either awaiting confirmation or yet to be identified.

Although the DOJ and FTC will likely continue to pursue cases involving technology, the framework for analysing these cases will be developed after new leadership at both agencies is installed. In the meantime, we can expect to see continued grappling with concepts like innovation markets and future competition. In addition, one of the most interesting emerging issues in high-technology mergers is the impact of algorithmic pricing models and other automated systems that may change how we traditionally analyse factors such as incentives for coordination. Whether a new President will inspire new approaches to this and other developing areas remains to be seen.

## II IMPACT OF TRUMP ADMINISTRATION ON MERGER REVIEW

During his presidential campaign, Donald Trump provided little insight into his approach to antitrust issues. His only real statements on the subject, criticism of large mergers in the media technology space such as *AT&T/TimeWarner* and *NBC/Comcast*, suggested that his administration might be more interventionist than previous Republican administrations. However, more recent developments, including the appointment of Former FTC Commissioner Joshua Wright to head the antitrust transition team, suggest that the Trump Administration will follow the generally less interventionist path of most recent Republican administrations.

The uncertainty about antitrust enforcement under the Trump Administration is compounded by key vacancies at both the DOJ and the FTC. The Senate is still in the process of confirming President Trump's nomination to the Assistant Attorney General to head the Antitrust Division, Makan Delrahim. At the FTC, only two of the five commissioner

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<sup>1</sup> Thomas P Brown is a partner and Michael S Wise is a senior associate at Paul Hastings LLP.

positions are currently filled. Moreover, Commissioner Terrell McSweeney's term expires this year, meaning that Trump may be responsible for appointing at least four of the five FTC commissioners during his first year in office.

Makan Delrahim brings some familiarity with high-technology issues to the DOJ. As a lawyer, he has experience practising in the intersection of antitrust and intellectual property issues, and he also served in the late 1990s on the Senate Judiciary Committee staff handling issues relating to e-commerce and emerging technologies. In the confirmation process, Delrahim responded to various questions involving high-technology markets, noting that he saw existing antitrust laws as sufficient to address competition issues in these emerging areas and that they have proven 'effective and adaptable to various types of anticompetitive conduct even as industries have evolved and technology has created new markets'.<sup>2</sup> He pledged, if confirmed, to investigate matters in the high-technology sector 'as I would in any industry'.

In addition, Delrahim has expressed interest in innovation through his commitment to a proper balance between antitrust policy and intellectual property law. Delrahim is a registered patent attorney, and noted during his confirmation hearing that he 'feel[s] strongly that an intellectual property owner's rights need to be respected and protected'.<sup>3</sup> He added that the DOJ should 'strive to eliminate as much as possible the unnecessary uncertainties for innovators and creators in their ability to exploit their intellectual property rights, as those uncertainties can also reduce incentives for innovation'.<sup>4</sup>

At the FTC, Maureen Ohlhausen, a Republican appointee, is currently serving as the acting chair of the Commission. The only other currently serving commissioner is Terrell McSweeney, a Democratic appointee whose term expires in September 2017. Because the FTC requires a majority vote to file a complaint or accept a remedy in a merger case, current enforcement actions would require both commissioners to agree to move forward.

### **III COULD ALGORITHMS FACTOR IN MERGER ENFORCEMENT ANALYSIS**

An emerging area of potential interest for merger enforcement is the impact of automated systems and algorithms to monitor or enforce coordinated behaviour. EU Competition Commissioner Margrethe Vestager recently commented on the need for antitrust enforcers to be vigilant anticompetitive use of algorithms.<sup>5</sup> She highlighted the possibility that cartels will use algorithms in online markets to detect whether cartel members are 'cheating' by lowering prices. She also suggested that dominant firms could use algorithms to exclude competing products from search hit lists.

Commissioner Ohlhausen followed Vestager's comments in May 2017 addressing the use of algorithms to automate pricing decisions.<sup>6</sup> While she described some concerns over algorithms as 'a bit alarmist,' she acknowledged the need for 'changes in how the enforcement agencies investigate some forms of problematic conduct.' She described, for example, the

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2 Makan Delrahim, Responses to Questions for the Record (May 10, 2017) at 34, available at [www.judiciary.senate.gov/imo/media/doc/Delrahim%20Responses%20to%20QFRs.pdf](http://www.judiciary.senate.gov/imo/media/doc/Delrahim%20Responses%20to%20QFRs.pdf).

3 Id. at 25.

4 Id.

5 Margrethe Vestager, Algorithms and Competition (16 March 2017).

6 Maureen K Ohlhausen, 'Should We Fear The Things That Go Beep In the Night? Some Initial Thoughts on the Intersection of Antitrust Law and Algorithmic Pricing' (23 May 2017).

possibility that algorithms could be used to enforce collusion or to have a single algorithm used for industry-wide pricing. In both cases, Commissioner Ohlhausen argued that traditional means of antitrust analysis is sufficient to address these issues.

A potentially more interesting question arises in the context of merger enforcement when algorithms are in play. Suppose, for example, that some of the participants in an industry employ technology to monitor competitor pricing. If a firm that employs this technology seeks to combine with one that does not, does this make the industry overall more subject to coordinated conduct? Alternatively, do firms that lack this type of monitoring technology pose less of a competitive check on the merging parties' pricing post-closing? Such questions are a logical next step from the concerns raised by Vestager and Ohlhausen, and in an age where more and more business is conducted in an economic environment, we can expect that these issues will begin to appear in high-technology mergers.

#### **IV MULTI-SIDED MARKETS AND HIGH-TECHNOLOGY**

An evolving area of interest in merger review is how the FTC and DOJ are likely to view competition issues raised in high-technology mergers implicating multi-sided platforms. Unlike traditional markets, multi-sided markets tend to involve businesses that generate revenue by providing a platform on which customers and sellers can interact with each other, rather than by providing a product or service directly. The most common example in past analysis has been the newspaper industry, which generates a large portion of its revenue from selling advertisement space rather than by selling newspapers. Today, we are witnessing more and more examples in the high-technology space, particularly when it comes to online sales solutions or social media platforms.

In a 2016 speech, Commissioner Ohlhausen addressed the FTC's recent high-technology merger enforcement in *Zillow/Trulia*.<sup>7</sup> There, Commissioner Ohlhausen detailed the importance of the FTC's analysis of both sides of the two-sided platform for the parties, both of which operated web portals for buying and selling homes. Among other things, multi-sided platforms raise issues in antitrust analysis because they may require consideration of multiple relevant markets and they also present the potential that competition concerns on one side of the platform may be offset or outweighed by procompetitive benefits on the other side of the platform. In *Zillow/Trulia*, Commissioner Ohlhausen noted that the FTC had independently analysed each side of the platform using a traditional approach. Because the FTC found sufficient competition on both sides, it did not need to consider balancing between the sides or other issues novel to a multi-sided platform.

#### **V CONCLUSION**

The inauguration of President Trump is one of a series of significant political events to play on both sides of the Atlantic. Those events have created uncertainty about the stability of a host of institutions that have defined the global order since the end of World War II. But uncertainty is not the same thing as change. Antitrust law, particularly as it relates to high technology industries, is no different.

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<sup>7</sup> Maureen K Olhausen, 'Antitrust Tales in the Tech Sector: Goldilocks and the Three Mergers and Into the Muir Woods' (26 January 2016).

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Mr Brown previously served as vice-president, senior counsel at Visa USA Inc. There he was responsible for managing the aftermath of the settlement in *In re Visa Check/MasterMoney Antitrust Litigation*, including the dozens of consumer class actions that were filed following the settlement. He was also deeply involved in the company's transformation from a coop to a shareholder-owned company.

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Michael Wise is a senior associate in Paul Hastings' Washington, DC office. Mr Wise focuses his practice on antitrust and competition issues arising in the United States and abroad. His recent representations include contested transactions in the telecommunications, transportation, broadcast television and healthcare sectors. In several matters, he has successfully coordinated multi-jurisdictional merger control filings and reviews for companies with global footprints.

In addition, Mr Wise has handled complex litigation matters arising under the Sherman Act and state unfair competition laws. His experience includes managing international investigations into anticompetitive practices. He also counsels clients on competition compliance issues, including developing internal compliance protocols and assisting with compliance training and auditing functions.