THE MERGER CONTROL REVIEW

NINTH EDITION

Editor
Ilene Knable Gotts

THE LAWREVIEWS

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This article was first published in August 2018
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Chapter 5

US MERGER CONTROL IN THE HIGH-TECHNOLOGY SECTOR

C Scott Hataway, Michael S Wise, Noah B Pinegar and Sabin Chung[1]

I INTRODUCTION

Merger enforcement has been undergoing a shift in the United States as the Trump administration made new appointments at both the Federal Trade Commission (FTC) and the Department of Justice (DOJ). This shift has particular significance for mergers in the high-technology sector, where developing theories related to innovation competition and big data continue to dominate the discussion. As of the date of this publication, the implications of a changing of the guard at both agencies are not entirely clear, but based on public statements so far, we anticipate several changes and potential global divergence for high-tech merger enforcement.

II NEW LEADERSHIP AT THE DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION SUGGESTS MARGINALLY DOVISH ENFORCEMENT

Assistant Attorney General Makan Delrahim was confirmed in late September 2017. Since his appointment, Delrahim has given a number of speeches regarding his views on patent enforcement, several of which are particularly favourable to technology companies. For example, according to a recent speech, it is Delrahim's view that patent hold-up 'is fundamentally not an antitrust problem, and therefore antitrust law should not be used as a tool to police FRAND commitments that patent-holders make to standard setting organizations'.[2] He went on to state that 'because a key feature of patent rights is the right to exclude, standard setting organisations and courts should have a very high burden before they adopt rules that severely restrict that right'. In the merger review context, these strong positions in favour of intellectual property protection might suggest a departure from prior standards. Among other things, Delrahim's comments seem inconsistent with the DOJ's approach to Google's acquisition of ITA Software in 2011, where the DOJ required Google to license the acquired software on FRAND terms to its competitors.[3]

At the same time, Delrahim has not suggested that large technology companies should be immune from antitrust scrutiny. For example, he recently noted that the DOJ should

1 C Scott Hataway is a partner, Michael S Wise is of counsel, and Noah B Pinegar and Sabin Chung are associates at Paul Hastings LLP.

2 Makan Delrahim, The 'New Madison' Approach to Antitrust and Intellectual Property Law (March 16, 2018).

3 See *United States v. Google Inc.*, Case No. 1:11-cv-00688, Competitive Impact Statement (D.D.C. Apr. 8, 2011).

'encourage fresh thinking on how our legal tools apply to new digital platforms'.[4] This at least suggests openness to new theories of harm from high-technology mergers, though Delrahim has consistently stated that any enforcement must be 'evidence-based.' Overall, we consider Delrahim's positions and the DOJ's likely enforcement efforts to be marginally favourable to high-technology mergers, particularly in comparison to other global enforcement agencies.

At the FTC, in a rather unique series of events, the five Commissioners who were serving at the end of the last administration either stepped down or announced plans to do so, leaving President Trump with the ability to appoint a completely new Commission since his inauguration in early 2017. Inevitably, this complete turnover in FTC leadership will have implications for merger reviews.

The new Commission's approach to high technology will not be clear for some time, but the new Commissioners seem open to a more active role for the agency. The new chair of the FTC, Joe Simons, stated during his confirmation process that increased enforcement is needed, noting that the Commission may have 'been too permissive in dealing with mergers and acquisitions, resulting in harm to consumer welfare via increased prices, limited consumer choice, and harm to workers'.[5]

Other new commissioners expressed similar views on the need for increased vigilance, particularly for high-technology sectors. Christine Wilson, for example, noted that it may make sense to have another look at prior enforcement decisions related to high-technology companies. However, as Rohit Chopra noted during his confirmation hearing, high-technology competition is challenging, and it is an area where agencies should be humble as they continue to learn the dynamics. Overall, we expect the Commission's enforcement efforts to shift marginally in favour of high-technology consolidation, rejecting some of the more extreme enforcement positions of sister agencies in Europe while presenting a relatively more aggressive stance than Delrahim's DOJ.

III US PREFERENCE FOR STRUCTURAL REMEDIES SHOULD INCREASE BOTH POTENTIAL RISKS AND REWARDS IN HIGH-TECH MERGERS

At both agencies, there have been indications that the recent trend toward behavioural remedies may be reversed. This perhaps disproportionately impacts high-technology deals where the antitrust issues often include vertical elements and other considerations more suited to behavioural rather than structural relief.

In late 2017, Delrahim stated a strong preference for structural remedies, noting that behavioural remedies were 'fundamentally regulatory, imposing ongoing government oversight on what should preferably be a free market'.[6] He forecast that the number of long-term behavioural consent decrees would likely give way to structural remedies in contested cases. During a spring 2018 speech, Delrahim went further, stating that 'we have a duty to ensure that the risk of a failed remedy – and thus harm to consumers – falls on

4 Makan Delrahim, Don't Stop Believin': Antitrust Enforcement in the Digital Era (April 19, 2018).

5 Joseph Simons, Prepared Statement to Congress (Jan. 31, 2018), available at https://dlbjbjzgnk95t.cloudfront.net/1010000/1010064/simons.pdf.

6 Department of Justice, Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Fall Forum, https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar (Nov. 16, 2017).

the parties to the unlawful transaction, not on the American consumer and taxpayer'. The sentiment suggests a predisposed scepticism to complicated behavioural fixes where the DOJ sees anticompetitive harm.

The new FTC leadership made its own announcements suggesting a tightening of merger remedies. FTC Bureau of Competition Acting Director Bruce Hoffman backed the DOJ's move on vertical deals, setting forth the preferred approach:

> *If we have a valid theory of harm, we start by looking at structural remedies for most vertical mergers. If that can't be achieved without sacrificing the efficiencies that motivate the merger, then we can look at conduct remedies. If those won't work – or will be too difficult and problematic for us to be confident that they will work without an excessive commitment of FTC resources where we are effectively turned into a regulator – then there should be no surprise if we seek to block the merger.*[7]

More broadly, new FTC Chairman Joe Simons, in his responses to the Senate Commerce Committee Questionnaire, called out 'significant concerns' that the US agencies have 'been too lax' in merger enforcement. Simons noted that the FTC's merger remedies have failed at a 30 per cent rate and said that is 'too high and needs to be lowered substantially, or, ideally, zeroed out altogether'.[8]

At their core, behavioural remedies represent a compromise in the 'all or nothing' US adversarial process. The parties agree to agency oversight and commercial restrictions, while the agencies allow consummation of a transaction that might otherwise yield significant anticompetitive effects. Without the behavioural option, high-technology companies face a higher stakes game in US merger control. Overall, we anticipate a relatively lax enforcement environment, but with an increase in all-or-nothing litigation positions by the federal agencies.

IV ANTITRUST AND BIG DATA – GROWING DIVERGENCE BETWEEN US AND EU APPROACHES

Antitrust treatment of data continues to drive uncertainty in the merger review context. It is often challenging to assess whether the combination of data between two merging parties may create or enhance market power. Among other things, agencies must consider – How valuable or predictive is the data? Does the data have unique attributes? Would there be substitutes? How costly would it be for other firms to access or duplicate the data? Does the data create some type of unique strategic advantage that then could be exploited in an exclusionary way? Given the complexity of the analysis, it is perhaps not surprising to see an opening divergence between the US agencies and other enforcers on these issues.

i The US approach

The standard approach to big data issues by the US agencies has focused on a case-by-case analysis on whether the data has unique attributes that cannot be replicated by other

7 D. Bruce Hoffman, Vertical Merger Enforcement at the FTC (Jan. 10, 2018), available at https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf.

8 See *supra* note 4.

competitors[9] or whether the combination of data would pose any theory of harm to consumer privacy.[10] For example in 2013, the DOJ successfully challenged the *Bazaarvoice/Powerreviews* merger, in which the Antitrust Division alleged that the companies competed with data that was unique and could not be replicated.[11] On the other hand, the FTC recently cleared unconditionally Amazon's acquisition of Whole Foods, seeing no reason to think that Whole Foods' data could not be readily replicated by other companies.[12]

US antitrust principles do not readily lend themselves to addressing at least some big data concerns. For example, under the US antitrust laws a merger is not actionable simply because the merged firm would hurt its competitors or limit access to data by its rivals, especially when better data by the merged firm would yield better services, better quality, and better products for consumers.[13] Nor in most cases would a company's refusal to share its self-developed data give rise to a viable antitrust theory. Instead, the FTC and DOJ tend to reject data divestitures that would lower incentives for companies to invest in innovation or encourage free-riding on competing investments.[14] In addition, the DOJ and FTC both carefully warn against conflating antitrust and privacy when it comes to big data.[15]

ii The European approach

The EC appears to be taking a more active stance in regulating big data. According to EC Commissioner Margrethe Vestager, if data can be an asset and act as a barrier to entry,

9 Federal Trade Commission, Dun & Bradstreet Corporation's acquisition of Quality Educational Data (QED), https://www.ftc.gov/enforcement/cases-proceedings/091-0081/dun-bradstreet-corporation-matter (Sep. 10, 2010) (The Commission challenged the acquisition that the combination gave Dun & Bradstreet more than 90 per cent of the market for K-12 educational marketing data).

10 Federal Trade Commission, Federal Trade Commission Closes Google/DoubleClick investigation, https://www.ftc.gov/news-events/press-releases/2007/12/federal-trade-commission-closes-google doubleclick-investigation (Dec. 20, 2007) (FTC looked at that question of whether privacy is in fact a non-price form of competition that is taking place, but found that the facts really did not support it); Federal Trade Commission, FTC Notifies Facebook, WhatsApp of Privay Obligations in Light of Propose Acquisition, https://www.ftc.gov/news-events/press-releases/2014/04/ftc-notifies-facebook-whatsapp-privacy-obligations-light-proposed (Apr. 10, 2014) (FTC found no competition problem but issued a letter to the two companies noting that WhatsApp has made clear privacy promises to consumers and will continue the current privacy practices after any acquisitions.).

11 *United States v. Bazaarvoice, Inc.*, Case No. 13-cv-00133-WHO, Memorandum Opinion (Jan. 8, 2014), available at https://www.justice.gov/atr/case-document/file/488846/download.

12 Federal Trade Commission, Statement of Federal Trade Commission's Acting Director of the Bureau of Competition on the Agency's Review of Amazon.com, Inc.'s Acquisition of Whole Foods Market Inc., https://www.ftc.gov/news-events/press-releases/2017/08/statement-federal-trade-commissions-acting-director-bureau (Aug. 23, 2017).

13 *Global Competition Review*, FTC skeptical of common ownership and data theories, says Hoffman, https://globalcompetitionreview.com/article/usa/1168931/ftc-sceptical-of-common-ownership-and-data-theories-says-hoffman (May 3, 2018).

14 United States Department of Justice, Deputy Assistant Attorney General Barry Nigro Delivers Remarks at The Capitol Forum and CQ's Fourth Annual Tech, Media & Telecom Competition Conference, https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-remarks-capitol-forum-and-cqs (Dec. 13, 2017).

15 *Global Competition Review*, US FTC official warns against conflating antitrust and privacy, https://globalcompetitionreview.com/article/1169134/us-ftc-official-warns-against-conflating-antitrust-and-privacy (May 4, 2018).

especially in the areas where the data is extremely valuable, enforcement may be necessary.[16] The current focus for European antitrust regulators is whether companies holding big data can exclude new competitors from markets if they control exclusive information that is instrumental to competition and difficult to replicate.

While the EC has not found serious data related concerns so far,[17] it has been scrutinizing potential antitrust issues with big data more closely under Vestager over the recent years, resulting in protracted investigations in some cases. Following this lead, regulators in Italy, France, and Germany are also digging into the big data issue. For example, Bundeskartellamt, the German Federal Cartel Office, is currently conducting an investigation into Facebook, and has just released its preliminary assessment that Facebook's collection and use of data from third-party sources violates competition law.[18]

In addition, Europe is now considering overhauling its merger rules to review deals where valuable data is involved even if the data owner's revenues do not meet the merger control thresholds.[19] European regulators want to ensure during their merger review that business rivals are not prevented from competing because they lack access to proprietary information. In cases where data is found to be unique or essential, European regulators have considered that big data could qualify as an essential facility and that the failure to share it with a competitor could therefore be an abusive practice[20] – an approach that US regulators have rejected.

iii Effects of divergence on cross-border deals

Given the divergence between US and EC treatment of big data issues, large high-technology transactions face increased uncertainty during the clearance process. While the DOJ and FTC are likely to give significant weight to the pro-competitive efficiencies of data aggregation, the EC seems equally more likely to engage in prolonged fact-finding as to the preclusive impact of the aggregation on would-be competitors. Successful cross-border mergers must not only account for the increased time and complexity of developing economic theories in this area, they must also present coherent, pro-competitive narratives that respect the enforcement priorities in all relevant jurisdictions. Over time, we expect all jurisdictions to follow the EC, albeit at varying pace, toward a heightened sensitivity to the impact of data on durable market structures.

16 *Wall Street Journal*, EU Asks, Does Control of 'Big Data' Kill Competition?, https://www.wsj.com/articles/eu-competition-chief-tracks-how-companies-use-big-data-1514889000 (Jan. 2, 2018).

17 The European Commission previously cleared Facebook's acquisition of WhatsApp and Google's acquisition of DoubleClick. While the European Commission cleared the Facebook transaction in 2014, three years later Facebook was fined €110 million for providing misleading information during the merger investigation about its ability to establish reliable automated matching between Facebook and WhatsApp user accounts.

18 Reuters, Facebook's hidden data haul troubles German cartel regulator, https://www.reuters.com/article/us-facebook-privacy-germany/facebooks-hidden-data-haul-troubles-german-cartel-regulator-idUSKBN1HU108 (Apr. 17, 2018).

19 European Commission, Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control, http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html (from Oct. 7, 2016 to Jan. 13, 2017).

20 See e.g., Joint Study of French and German Antitrust Authorities (2016), http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf;jsessionid=0D702D369EA11A51984A7B91489F2CA9.1_cid387?__blob=publicationFile&v=2.

V SO-CALLED 'INNOVATION MARKETS' WILL CONTINUE TO CREATE UNCERTAINTY IN HIGH-TECH TRANSACTIONS

Treatment of 'innovation markets' continues to be a developing area of antitrust law, with particular relevance in pharmaceuticals, medical devices, life sciences, and other technology-driven industries. The enforcement trends in this area highlight the significant disruption that innovation enforcement may have on traditional paradigms.

The evolving treatment of innovation competition is evident from the US and EC treatments of *Dow/DuPont* in 2017. While the deal was reviewed on both sides of the Atlantic, the EC took a leading role in addressing purported innovation competition concerns. The EC ultimately cleared the transaction with significant remedies, including the divestiture of DuPont's entire global research and development organisation.

In its decision, the EC concluded that divestiture of DuPont's research and development capabilities was necessary to remedy a generalised harm to innovation competition in herbicides, fungicides and insecticides. The primary evidence relied on by the Commission was a planned reduction in the total R&D spend of the merged entity, a common synergy in which the merging parties expect to create the same output with fewer resources. Despite its vague reference to product categories, the EC did not explicitly connect elimination of redundant R&D expenses to any specific harm to consumers. Rather the elimination of innovation, or more specifically R&D expense, was taken as the harm itself.

The EC's decision is arguably inconsistent with the US Horizontal Merger Guidelines. The Guidelines refer to a unilateral theory of harm in innovation competition based on changed incentives: 'curtailment of innovation could take the form of reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products'. The Guidelines leave some ambiguity where they read: 'The Agencies therefore also consider whether a merger will diminish innovation competition by combining two of a very small number of firms with the strongest capabilities to successfully innovate in a specific direction.' While the US approach seems to clearly require a tether between R&D expenditures and existing product market concentration, the EC seems to have instead accepted innovation itself as a separate product that can be subject to structural concentration.

Though the EC's more aggressive stance could simply reflect a reasonable difference of opinion, we continue to think that the difference in treatment primarily flows from the US adversarial system. As we noted with respect to the FTC's challenge to potential competition in *Steris*,[21] the burden of proof in the United States falls squarely on the plaintiff to demonstrate by at least a preponderance of evidence the harm alleged in the complaint. Consider by contrast the explanation of Paul Csiszar, director of basic industries at DG Comp, who admitted in relation to *Dow/Dupont* that 'often we cannot rely on good economic evidence' because it is 'much more difficult to model [long term innovation] in a robust way'.[22] It seems likely that US enforcers would approach such a sweeping innovation divestiture with considerably more reticence given the ultimate leverage that the federal judiciary plays in the process.

21 See Scott Hataway and Michael Wise, US Merger Control in the High-Technology Sector, *The Merger Control Review* (Seventh Edition) (Aug. 2016), available at https://www.paulhastings.com/docs/default-source/PDFs/us-merger-control-in-the-high-technology-sector.pdf.

22 *Global Competition Review*, Dow/Dupont remedy, https://globalcompetitionreview.com/article/1147851/dg-comp-official-defends-dow-dupont-remedy (Sept. 29, 2017).

Rather than attacking concentration of innovation generally, it seems more likely that the United States will continue to make incremental changes within the framework of existing guidelines and precedent. For example, the FTC Bureau of Competition Director Bruce Hoffman recently announced that the FTC will no longer accept divestitures of pipeline products in inhalant and injectable drugs when the alleged anticompetitive harm involves potential competition with an existing product.[23] Explaining the decision, Hoffman said that the failure rate of divestitures of these pipeline products is 'startlingly high' and contrasted them with the FTC's 'overall "pretty good" rate of merger remedies succeeding'. Instead, the FTC will require the acquiring party's existing inhalant or injectable product to be divested, leaving the combined firm with the task of bringing the corresponding pipeline product to market. The agency's exercise of its leverage in this categorical fashion is a notable shift, and an attempt to reconcile existing enforcement tools with innovation concerns.

Hoffman added a familiar refrain: 'the risk of failure belongs on the parties, not on the public.' This sentiment signals a further tightening of merger remedies at the FTC that is likely to disproportionately affect high-technology deals given the rate of change and difficulty in predicting competitive effects.

CONCLUSION

It is the nature of high technology to be rapidly evolving. Big data and innovation market issues, among others, will only become more important as our economy continues to expand in these areas. The FTC and DOJ will continue to face the daunting challenge of balancing traditional modes of enforcement with modified approaches that are intended to better promote innovation, and in doing so, they will continue to face political pressures and pressures from other regulators, such as the EC, who have their own views on how antitrust law should apply in these sectors. While sweeping changes are rare in US antitrust enforcement, a series of incremental developments from new leadership at the FTC and DOJ on big data, innovation and other high-technology issues could well have significant impacts on mergers across a broad swathe of the economy.

23 D. Bruce Hoffman, It Only Takes Two to Tango: Reflections on Six Months at the FTC (Feb. 2, 2018), available at https://www.ftc.gov/system/files/documents/public_statements/1318363/hoffman_gcr_live_feb_2018_final.pdf.

Appendix 1

ABOUT THE AUTHORS

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Scott Hataway is global chair of the antitrust and competition practice at Paul Hastings. His work spans the field of competition law, including company-side cartel defence; district court and appellate litigation; and strategic advocacy in relation to various business combinations under antitrust scrutiny. In addition to court appearances, he has appeared before the US Department of Justice, US Federal Trade Commission, the European Commission, China's Ministry of Commerce, the Korean Fair Trade Commission, and the Japan Fair Trade Commission.

As a former trial attorney with the US Department of Justice's Antitrust Division, Mr Hataway combines pragmatism with an extensive knowledge of agency practice and procedure. He has successfully led strategic merger review cases in a wide range of industries, including consumer electronics, telecommunications, national defence, information technology, energy infrastructure, primary metal production, broadcast communications, and transportation, among others. He has also represented clients in criminal and civil non-merger investigations, including grand jury investigations into alleged collusion in the shipping industry, the transportation industry, and the electronics industry; federal inquiries into unlawful licensing practices in the music industry; actions by state attorneys general into alleged tying and standard setting violations in the communications industry; and federal investigation into alleged monopolisation in the pharmaceuticals industry.

Complementing his work with federal agencies, Mr Hataway also represents clients involved in various competition-related disputes in state and federal court, including alleged Sherman Act violations, trademark infringement, copyright infringement, trade secret misappropriation and other unfair business practices.

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Michael Wise is of counsel 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 civil and criminal litigation matters arising under the Sherman Act and state unfair competition laws. His experience includes

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ISBN 978-1-912228-46-1