Active Times for Antitrust

Antitrust in the United States

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Antitrust attracted significant popular and political attention in 2019: State and federal enforcers launched investigations into "Big Tech" platforms; some enforcers and 2020 Democratic presidential candidates expressed increasingly aggressive visions for enforcement; and a federal judge subjected a US Department of Justice merger settlement to unprecedented scrutiny.

Big Tech Investigations and State Attorney General Involvement

Major technology platforms such as Google, Facebook, Apple and Amazon are facing ongoing antitrust investigations at both the federal and state levels. The DOJ is leading the investigations into Google and Apple, while the Federal Trade Commission scrutinizes Facebook (which it previously fined $5 billion for consumer protection violations related to data privacy) and Amazon. In addition to these investigations, the FTC has ramped up its focus on the technology sector by establishing a dedicated Technology Enforcement Division.

The federal agencies are not alone: the US House of Representatives' Antitrust Subcommittee is investigating the same four companies in parallel, with Democratic committee chair David Cicilline hiring vocal critics of big tech (including Lina Khan, author of a prominent academic article calling for antitrust enforcement against Amazon) to assist with the investigation. On the US Senate side, Republican Sen. Josh Hawley, who launched an investigation of Google while Missouri Attorney General, is among the loudest voices calling for investigation. State attorneys general hailing from both political parties have launched probes of their own, with Texas' Republican AG Ken Paxton and New York's Democratic AG Letitia James leading the way for dozens of states.

The state-level investigations are understood to focus primarily on the tech platforms' advertising businesses, while federal investigations appear to be reviewing both conduct and certain prior transactions (such as Facebook's acquisitions of Instagram and WhatsApp).

The state tech investigations are part of a broader trend toward more antitrust enforcement, which is perhaps best exemplified by the unprecedented challenge to the proposed T-Mobile and Sprint merger. There, 14 states brought a case, which went to trial in December 2019, to block the merger despite DOJ and FCC approval of the deal.

Aggressive Proposals From Democratic Enforcers and Presidential Candidates

Antitrust has taken center stage in the political arena, with Democrats leading a charge for stronger enforcement. Democratic 2020 presidential candidates in particular have outlined tough stances on merger enforcement and even called for the breakup of large companies. Elizabeth Warren is rumored to be considering a proposal that would bar companies with $40 billion in annual revenue from engaging in M&A.

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While Warren and other candidates' proposals are far from becoming law, they are not alone in calling for more enforcement. The two minority Democratic FTC commissioners have authored a number of sharp dissents calling for more aggressive enforcement in actions, and the majority Republican commissioners agreed to more modest measures.

As an example, when a Republican majority required divestiture of a psoriasis treatment drug to approve the merger of pharmaceutical giants Bristol-Meyers Squibb and Celgene, both Democrats dissented. Commissioner Rebecca Kelly Slaughter lamented high drug prices and called for a broader framework that would go beyond assessing product overlaps to "consider whether any pharmaceutical merger is likely to exacerbate anticompetitive conduct by the merged firm or to hinder innovation." Commissioner Rohit Chopra likewise advocated a broad-ranging approach that would consider whether a merger will "facilitate a capital structure that magnifies incentives to engage in anticompetitive conduct or abuse of intellectual property" or "deter formation of biotechnology firms that fuel much of the industry's innovation."[1]

Increased Scrutiny of DOJ Settlements

Pursuant to a 1974 statute known as the Tunney Act, DOJ antitrust consent decrees must be filed in federal court and determined to be in the public interest by a judge following a 60-day public comment period. Historically, Tunney Act procedures have been a formality, and merger parties have routinely closed their transactions while the judicial determination is pending, with DOJ's blessing. But at least one federal judge has recently sought to reinvigorate the review process.

In October 2018, the DOJ reached a divestiture settlement with CVS and Aetna to approve their $69 billion merger. District of Columbia District Court Judge Richard Leon harshly criticized the parties and the DOJ for allowing the transaction to close before his public interest determination and questioned the adequacy of the settlement. Judge Leon held evidentiary hearings with live testimony from witnesses opposed to the transaction, a step never before taken in a Tunney Act review of a merger settlement. The witnesses were allowed to testify to a wide range of concerns, over DOJ's objection that the Tunney Act authorized the court to evaluate only the adequacy of the consent decree to remedy the specific harms DOJ had alleged.

Ultimately, Judge Leon found the decree to be in the public interest and approved it without alterations—though not until nearly a year after the consent decree was filed. It remains to be seen whether other judges will follow Judge Leon's lead or require material changes to

[1] *See* FTC Requires Bristol-Myers Squibb Company and Celgene Corporation to Divest Psoriasis Drug Otezla as a Condition of Acquisition (November 2019), available here.

settlements negotiated by the DOJ and merging parties, but if they do, the shift could significantly delay closing of DOJ-reviewed mergers with settlements.

Board Takeaways

These developments all show that antitrust enforcement un the US is alive and well. Importantly, historical practices cannot be counted on, given the new enforcers (State AGs) coming into play and the changes to once-rote procedures (consent decree approvals). While the focus on tech enforcement is rightly attracting headlines, boards in all industries should be aware of these changes, too.

Antitrust in Europe

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Following on 2019 as another active year for antitrust enforcement in Europe, all signs point to continued vigorous enforcement in 2020.

A New Commission

The new European Commission, headed by President Ursula von der Leyen, took office on December 1, 2019. Competition Commissioner Margrethe Vestager (having been nominated for a second consecutive term on September 10, 2019) not only resumed her role as Competition Commissioner, but President von der Leyen also appointed Ms. Vestager one of her three Executive Vice Presidents, in which capacity Ms. Vestager will now also be responsible for helping make "Europe Fit for a Digital Age" (as described below). Ms. Vestager will serve in both positions for the Commission's five-year term.

Notwithstanding Ms. Vestager's reputation as a tough enforcer of EU competition law after her first five years in office, President von der Leyen has said she expects Ms. Vestager to further strengthen the Commission's enforcement efforts over the next five years. Her mission letter to Ms. Vestager noted that this should include the Directorate General for Competition improving case detection, speeding up investigations and facilitating cooperation with and between other (European National and non-European) competition authorities.

Boards should also expect continued tough enforcement of European abuse of dominance rules, including, when necessary, the use of interim measures to prevent imminent harm.

President von der Leyen also encouraged Ms. Vestager to actively use sector inquiries into new and emerging markets that are shaping European economies and society. She asked that Ms. Vestager develop tools and policies to better tackle the distortive effects of foreign state ownership and subsidies in the EU internal market. She stressed the importance of a level playing field that provides businesses with the incentive to invest, innovate and grow and noted that EU state aid rules should support such a level playing field where market failures have created distortions.

In her role as Executive Vice President, Ms. Vestager will set the strategic direction of and chair the Commissioners' Group on a Europe Fit for the Digital Age. As President von der Leyen outlined, this role will include:

— Developing and implementing a long-term strategy for Europe's industrial future that maximizes investment in research and development.

— Working on a new SME strategy focused on supporting small businesses, entrepreneurs and startups by reducing regulatory burdens and enabling them to make the most of digitization.

— Coordinating the European approach to artificial intelligence, including its human and ethical implications.

— Coordinating a European strategy on data, including examining how Europe can use and share non-personalized big data to develop new technologies and business models that create wealth for European societies and businesses.

— Coordinating the work on upgrading liability and safety rules for digital platforms, services and products as part of a new Digital Services Act.

— Coordinating the work on digital taxation.

Ms. Vestager will be supported as Competition Commissioner by the Directorate General for Competition and new Director General Olivier Guersent. While Mr. Guersent started his career at the Commission in 1992 as part of DG Competition's Merger Task Force, he has served in a variety of roles at the Commission since then, including most recently as Director General of the Directorate on Financial Stability, Financial Services, and the Capital Markets Union. Cecilio Madero Villarejo is now Deputy Director General for Mergers, Kris Dekeyser Deputy Director General for Antitrust, and Carles Esteva Mosso Deputy Director General for State Aid. The Commission's Secretariat General will support Ms. Vestager in her role as coordinator of the digital portfolio.

Merger Control

The Commission's efforts to strengthen competition enforcement will likely mean an extension of the recent trend toward longer and more document-heavy pre-notification "investigations" in merger control cases generally, more in-depth (Phase II) merger reviews, and more blocked mergers. In 2019, high-profile mergers prohibited by the Commission included the *Wieland/Aurubis/Schwermetall*, *Siemens/Alstom*, and *Tata Steel/Thyssen Krupp* transactions.

It will also mean continued aggressive enforcement of the Commission's gun-jumping rules (similar to its investigation of, and €28 million fine imposed on, Canon in June 2019 for partially implementing its acquisition of Toshiba Medical Systems without merger control approval) and stiff sanctions on parties that fail to provide accurate and complete information as part of the merger control process (just as the Commission fined General Electric €52 million for providing incorrect information during the Commission's investigation of its takeover of LM Wind in April 2019).

Cartels

With respect to cartel enforcement, boards should continue to expect vigorous activity on the Commission's part. Until recently, the Commission has enjoyed a full pipeline of cartel cases generated by successive immunity and leniency applications, in particular in the automotive and financial sectors.

While there are signs that the continued growth in private damages actions in Europe may have dampened the appetite for potential immunity applicants to come forward and limited the number of immunity applications received by the Commission, the Commission has instead focused on and brought investigations in areas outside the conventional "seller" cartel context. It has several ongoing cases aimed at potential coordination between buyers on industrial pricing benchmarks and on the development of clean emission technology for cars. Indeed, in November 2019, the Commission opened an investigation into a possible purchasing cartel among two larger French retailers Casino and Intermarche.

Abuse of Dominance

Boards should also expect continued tough enforcement of European abuse of dominance rules, including, when necessary, the use of interim measures to prevent imminent harm. 2019 saw a range of abuse investigations initiated and concluded. In June 2019, the Commission issued a Statement of Objections against Broadcom alleging its abuse of a dominant position in the markets for "systems on a chip" for TV set-top boxes and modems. Fearing imminent "irreparable harm to competition," the Commission then took the unusual step of imposing interim measures on Broadcom in October 2019, forcing Broadcom to cease applying

provisions that the Commission views as anticompetitive in contracts with six of Broadcom's main customers.

The Commission also opened an investigation in July 2019 into Amazon's potential misuse of sensitive data from independent retailers that sell on its marketplace. Also in 2019, the Commission fined Qualcomm €242 million for abusing its alleged dominance in 3G baseband chipsets by engaging in predatory pricing with a view to forcing its competitor, Icera, out of the market, and it fined Google €1.49 billion for the misuse of its alleged dominant position in the market for the brokering of online search adverts.

Impact on Antitrust Enforcement

With a strong and experienced team behind Ms. Vestager and a clear mandate from President von der Leyen, boards of directors should fully expect a further strengthening of effective antitrust enforcement by the European Commission in the years to come. This will be true particularly in new and developing markets, and in markets where the Commissioner's role as Competition Commissioner overlaps with her position as the head of the Commission's digital portfolio.

Antitrust in China

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In 2019, the Chinese antitrust authority prioritized institutional integration, legislation and enforcement in the high-tech, public utilities, automotive, pharmaceutical, construction materials and consumer goods industries. Antitrust litigation in China continued to be active and increasingly involved complicated legal issues, such as standard essential patents and ability to arbitrate antitrust disputes.

Increasingly Important Role of Local Agencies

In January 2019, State Administration for Market Regulation (SAMR) granted a general authorization to its provincial branches (i.e., provincial AMRs) to carry out behavioral investigations in their own provinces, without the need to seek individual authorization from SAMR prior to commencing a new case. This step is believed to be designed to ease staff shortage at central-level SAMR. The 16 out of 17 behavioral investigations closed and published in 2019 were carried out by provincial AMRs.

The central-level SAMR, apart from handling merger review and high-profile behavioral investigations, has been focusing on unifying enforcement standards, coordinating and supervising provincial AMRs and training investigative forces.

New Implementation Rules and Guidance to Unify Antitrust Enforcement

SAMR issued a series of new implementation rules, including three interim implementation rules on antitrust investigations of restrictive agreements, abuse of dominance, and abuse of administrative power, as well as rules and guidelines that cover subjects such as handling of complaints, whistleblower rewards and competition compliance programs. These rules unified and provided more clarification on antitrust enforcement proceedings in China.

SAMR specifically clarified that antitrust fines for restrictive agreements and abuse of dominance (i.e., 1-10% of revenues in the preceding year) should be calculated based on the total revenues of the company infringing the law, instead of the revenues generated from the sales of the relevant products related to the infringement. SAMR also clarified that illegal gains should be confiscated whenever possible. Noting that in previous cases antitrust fines were sometimes calculated based on revenues of the relevant products

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and that confiscation of illegal gains did not often occur, we expect this new guidance to increase the antitrust monetary liability for offending companies.

In addition, SAMR has been accelerating the work to amend China's 11-year-old Anti-Monopoly Law (AML). Proposed amendments to the AML were published for public comment on January 2, 2020. Of special note, the proposed amendments address the possible criminalization of antitrust violations and possible involvement of the public security authority in antitrust investigations.

Targeted Behaviors and Industrial Sectors in Behavioral Investigations

Antitrust investigations focused on three types of anti-competitive behaviors in 2019, including cartel (eight cases), abuse of dominance (five cases) and resale price maintenance (four cases). For example, Shanghai AMR penalized the Chinese subsidiary of an US chemical company, Eastman Chemical, for engaging in exclusive dealing through multiple commercial arrangements (including minimum purchase requirements, take-or-pay clauses, most-favored-nation clauses, and other rebates) that aimed to lock in a significant portion (more than 75%) of customers' demand.

The public utilities, automotive, pharmaceutical, construction materials and consumer goods industries attracted the most attention of the antitrust authority in 2019. Among them, construction materials was probably the sector receiving the most intensive antitrust scrutiny, with four price-fixing cartels and one abuse of dominance case closed by provincial AMRs.

Merger Control Review Timeline and Revival of "Hold-Separate" Remedy

SAMR reviewed and closed 433 merger cases from January to December 29, 2019, of which 428 transactions were unconditionally approved, five were approved with conditions, and none were prohibited. About 78% of the approved merger cases were reviewed under the simplified procedure, most of which were cleared within 30 days after the formal review was started. The review timeline for cases not subject to the simplified procedure was, however, less predictable and varied significantly, which may increasingly be the case if the AML's recently proposed "stop the review clock" mechanism is adopted. The average review time for the five conditionally approved cases was almost 400 days after filing.

In reviewing complex merger cases, SAMR has continued to be receptive to behavioral remedies and unconventional remedies. All of the five conditional clearances in 2019 involved behavioral remedies, and three of them (*Cargotec/TTS Group*, *II-VI/Finisar*, and *Royal DSM/Garden Bio-Chem*) revived the "long-term hold-separate" remedy. The long-term hold-separate remedy has been one of China's most controversial antitrust enforcement practices as it prevents the transacting parties from realizing the expected efficiencies and synergies of the transaction and intrudes into the parties' daily business operations due to the expansive oversight authorities granted to the monitoring trustee. Such remedy was imposed in four cases during 2011 and 2013, one in 2017, as well as the three in 2019.

Another unconventional remedy imposed in 2019 was restriction on supply to downstream competitors. In *Novelis/Aleris*, SAMR, in addition to requiring a divestiture, also prohibited the parties from supplying in China an upstream input cold-rolled sheets to any downstream aluminum automotive body sheet competitor for 10 years. It is unclear what specific antitrust issue this supply restriction remedy was intended to address as supply continuity to downstream competitors post-transaction would normally be viewed as pro-competitive.

Judicial Developments

The Supreme People's Court (SPC), China's highest court, handed down several important rulings in 2019 on interesting antitrust issues:

— ***Legal test for Retail Price Maintenance (RPM)***. In *Hainan Yutai v. Hainan Price Bureau*, the SPC, for the first time, acknowledged different legal tests previously applied by China's antitrust authority and Chinese courts. In short, the SPC confirmed that the Chinese antitrust authority can continue to presume the existence of anticompetitive effect from an RPM agreement unless rebutted by the company (though it still remains to be seen how a company can successfully rebut the illegality presumption), whereas a plaintiff in a civil antitrust litigation will need to prove the anticompetitive effect of an RPM agreement to prevail.

— ***Ability to arbitrate antitrust disputes***. In *Hohhot Huili v. Shell*, the SPC ruled that the arbitration clause in a distribution agreement does not exclude the court from reviewing the antitrust disputes between the parties of the agreement. Nevertheless, the ruling did not view antitrust issues as matters that cannot be arbitrated.

— ***Litigations involving Standard Essential Patents (SEPs)***. The latest judgment on the FRAND royalty rate in China was handed down by a Nanjing court in *Huawei v. Conversant*, which took the "top-down" approach instead of the comparable licensing method. As shown in this case, Chinese technology companies that were sued related to SEPs overseas increasingly choose to file parallel lawsuits in China. Other recent examples include *Huawei v. InterDigital* and *Xiaomi v. Sisvel*.

Impact of the Geopolitical Environment

While there was no prohibition decision or significant delay that resulted from the US-China trade tension in the vast majority of merger cases involving US companies in 2019, there have been consistently strong and widespread complaints from local stakeholders, particularly in the high-tech sector, which have in several cases complicated the review process and led to unconventional remedies that were not intended to address transaction specific antitrust issues. With regard to behavior investigations, we did not see any strong sign showing that US companies were particularly targeted or subject to much more severe antitrust penalty.

China Antitrust: A New Decade With a New Law

Antitrust enforcement in China continued to be in the spotlight in 2019, particularly given the geopolitical tensions. In light of the newly proposed amendments to the AML, which are still being discussed but indicate, to some extent, the direction of China's antitrust development, continued imposition of unconventional merger remedies, more unpredictable merger review timetables, highlighted behavioral investigations and increased penalties for non-compliance (including failure to notify, non-compliance with remedies, and non-cooperation with antitrust investigations) appear to be on the horizon for 2020.