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AMERICAS
ANTITRUST REVIEW 2020

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Preface

Global Competition Review's *Americas Antitrust Review 2020* is one of a series of regional reviews that have been conceived to deliver specialist intelligence and research to our readers – in-house counsel, government agencies and private practice lawyers – who must navigate the world's increasingly complex competition regimes.

Like its sister reports covering the Asia-Pacific, Europe, the Middle East and Africa, this book provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in the field.

In preparing this report, Global Competition Review has worked with leading competition lawyers and government officials. Their knowledge and experience – and above all their ability to put law and policy into context – give the report special value. We are grateful to all of the contributors and their firms for their time and commitment to the publication.

Changes from the previous edition include adding a chapter on US class action defence, focusing on the perspective of plaintiffs. Along with the new topics, contributors' roles highlight trends in competition law. For example, the Federal Trade Commission chapter was penned by Daniel Francis, associate director for digital markets – an area of particular interest globally.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws over the coming year.

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United States: Technology Mergers

Megan Browdie, Jacqueline Grise, Howard Morse and Julia Brinton*
Cooley LLP

The past year witnessed the US Federal Trade Commission (FTC) and the Department of Justice (DOJ) Antitrust Division making good on promises for vigorous merger enforcement, with a sharp focus on high-tech industries, including the pharmaceutical and technology industries. Garnering significant media attention, antitrust is now mainstream, grabbing headline-worthy statements from all corners of the US government, ranging from President Trump, presidential candidates, members of Congress, state attorneys general, the Food and Drug Association (FDA), the Federal Communications Commission and, of course, the FTC and the DOJ.

Calls for tougher antitrust enforcement have been wide-ranging, but there is a fixation on perceived lax merger enforcement, which some argue has allowed major tech and pharma companies to become too dominant. The 'hipster' brand of antitrust enforcement has raised a drumbeat that is only getting louder, with a slew of recent calls for re-examination of previously consummated mergers, breaking up big tech companies and keeping pharmaceutical prices at a competitive level through more aggressive merger enforcement against life sciences transactions.

In at least partial reaction to the political pressures, the FTC and the DOJ are laser focused on mergers of high-tech platforms and protecting nascent competition. In particular, the agencies are eyeing 'killer acquisitions' of nascent technologies. In his first major speech as chair of the FTC, Joe Simons pledged that 'one of our interests in this area will be mergers of high-tech platforms and nascent competitors'.[1] Further, Simons stated:

> *These types of transactions are particularly difficult for antitrust enforcers to deal with because the acquired firm is by definition not a full-fledged competitor, and the likely level of future competition with the acquiring firm is often not apparent . . . [b]ut the harm to competition can nonetheless be significant.*[2]

1 Federal Trade Commission, 'Prepared Remarks of Chairman Joseph Simons Georgetown Law Global Antitrust Enforcement Symposium' (Sept. 25, 2018), www.ftc.gov/system/files/documents/public_statements/1413340/simons_georgetown_lunch_address_9-25-18.pdf.

2 id.

Similarly, the DOJ has reacted to calls for increased enforcement of killer acquisitions. In a June 2019 speech, Assistant Attorney General (AAG) Makan Delrahim commented on acquisitions of nascent competitors in digital markets:

> *It is not possible to describe here each way that a[n] [acquisition of a nascent competitor] may harm competition in a digital market, but I will note the potential for mischief if the purpose and effect of an acquisition is to block potential competitors, protect a monopoly, or otherwise harm competition by reducing consumer choice, increasing prices, diminishing or slowing innovation, or reducing quality.*[3]

Fostering competition in the life sciences industry also continues as a top agenda item for the FTC. Simons has expressed that he is 'very concerned . . . with drug pricing'[4] and that the FTC 'is committed to maintaining competition in the pharmaceutical industry . . . [because] [t]he FTC firmly believes that a vibrant, competitive marketplace offers the greatest benefits to consumers'.[5]

Understanding the unique issues that drive antitrust enforcement in the technology arena – from the distinctive features of platform markets and network effects, to the importance of intellectual property and innovation competition, FDA regulations, as well as new trends such as an increased focus on 'big data' as a barrier to entry – is essential to achieving merger clearance in close cases.

Technology platforms in the antitrust crosshairs

Recent political interest and scrutiny from antitrust enforcers has thrust technology platforms into the antitrust crosshairs. Expressing the DOJ's concerns in this area, Acting Deputy AAG Jeffrey Wilder focused a speech in June 2019 on acquisitions of potential competitors in platform markets:

> *We're concerned about acquisitions of nascent competitors in platform industries because these markets are prone to tipping, and with tipping comes the potential for durable market power and substantial barriers to entry. Anticompetitive conduct by firms seeking to maintain or acquire monopoly power is precisely what Section 2 is intended to address.*[6]

The FTC is also apprehensive about potential anticompetitive effects involving mergers between technology platforms, devoting enormous resources to a series of hearings on competition and consumer protection in the twenty-first century. The FTC held 14 hearings over a 10-month period

3 Assistant Attorney General Makan Delrahim, '"...And Justice for All": Antitrust Enforcement and Digital Gatekeepers' (June 11, 2019), www.justice.gov/opa/speech/file/1171341/download.

4 David McLaughlin, 'Trump FTC Pick Suggests Task Force to Monitor Drug Prices' (Feb. 14, 2018), www.bloomberg.com/news/articles/2018-02-14/trump-ftc-pick-simons-suggests-task-force-to-monitor-drug-prices.

5 'FTC Submits Statement to HHS on Its Blueprint to Lower Drug Prices' (July 17, 2018), www.ftc.gov/news-events/press-releases/2018/07/ftc-submits-statement-hhs-its-blueprint-lower-drug-prices.

for a total of 23 days of discussion on a wide array of high-tech topics. Simons' introduction to the hearings promised that the FTC would keep 'a very open mind' on these important issues, including whether 'significant adjustments to antitrust doctrine, enforcement decisions and law would be beneficial to our country'.[7]

Among the hearings, the FTC dedicated an entire day to examine the potential for collusive, exclusionary and predatory conduct in multisided technology platform industries. FTC leadership, company executives from the tech sector, and economists and lawyers specialising in this area convened in Washington, DC to debate a myriad of challenging antitrust issues relating to platform markets, including the following:

> *What are the defining characteristics of multi-sided platforms? Are any adjustments to antitrust analysis necessary to account for any special characteristics of multi-sided businesses?*
>
> *What is the relevance of network effects (direct and indirect) in multi-sided platform markets? And, are there unique procompetitive justifications for these types of conduct by firms competing in multi-sided platform markets?*
>
> *How should the courts and agencies define relevant antitrust markets and measure market power for multi-sided platform businesses?*[8]

While only time will tell the extent to which the hearings will generate change, there is mounting pressure for US authorities to be more aggressive in challenging technology platform leaders.

New market definition rules for multisided platforms

On the issue of how courts should define relevant antitrust markets and measure market power for multisided platform businesses, the Supreme Court in 2018 issued a landmark decision in *Ohio v American Express*, addressing the appropriate analysis of alleged anticompetitive effects in multisided markets, where an intermediary serves more than one distinct set of customers.[9] The Court concluded that American Express's (AMEX) contracts preventing merchants from directing customers to other credit or debit cards charging lower fees do not violate the antitrust laws.

Many industries involve two-sided or multisided markets. Traditional two-sided advertising markets include newspapers, magazines, radio and television. Innovation and the rise of the digital economy have spurred explosive growth in next-generation multisided platforms, especially in technology markets that connect consumers to products and services, such as apps that bring buyers and sellers together to facilitate a transaction, social media platforms, online booking tools, ride sharing, energy management and financial services such as credit cards.

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7 FTC Chair Joe Simons, 'Prepared Remarks of Chairman Joe Simons Hearings on Competition and Consumer Protection in the 21st Century' (Sept. 13, 2018), www.ftc.gov/system/files/documents/public_statements/1409925/opening_remarks_of_joe_simons_hearings1georgetown_sept2018_0.pdf.

8 'Competition and Consumer Protection in the 21st Century -- Hearing #3', Benton, www.benton.org/event/competition-and-consumer-protection-21st-century-hearing-3.

9 See *Ohio v Am. Express Co.*, 138 S. Ct. 2274 (2018).

Credit card issuers market their platforms to both merchants and cardholders and provide distinct services to each that facilitate a transaction between them. The Supreme Court determined that AMEX operates as a two-sided 'transaction platform', providing services simultaneously to two different groups of customers (cardholders and merchants) who depend on the platform to intermediate a transaction.

The Court reasoned that 'two-sided transaction platforms' that 'facilitate a single, simultaneous transaction' exhibit 'pronounced indirect network effects and interconnected pricing and demand', and ultimately are 'better understood as supplying only one product – transactions'.[10] Accordingly, 'evaluating both sides of a two-sided transaction platform is . . . necessary to accurately assess competition'.[11]

This market definition allowed AMEX to persuade the Court that the pro-competitive investments that it makes on the cardholder side of the market must be considered in the competitive effects analysis. If the Court had determined that there were two separate markets, AMEX's arguments about the benefits to cardholders may not have been considered.

With technology platforms drawing heavy fire from antitrust enforcers, the *American Express* decision provides additional opportunities for creative advocacy in the merger context. To be sure, the decision is not a 'free pass' to technology platforms and other types of multisided products, but it will undoubtedly increase the burden on the antitrust agencies and private plaintiffs in alleging and proving anticompetitive effects when dealing with interconnected multisided platforms. *American Express* is likely to have broader application as merging parties apply the court's reasoning to proposed transactions pending before the FTC and the DOJ.

Agencies focus on protecting nascent competition

The FTC devoted another full day of discussion during the FTC's hearings on competition and consumer protection in the twenty-first century, examining 'Acquisitions of Nascent and Potential Competitors in Digital Technology Markets', which focused on whether 'current antitrust law [is] sufficient for development of challenges to these types of acquisitions'.[12]

Throughout the hearing, industry and legal experts debated some of the most challenging questions that arise in the context of acquisitions involving nascent competitors, including the following:

What is the appropriate antitrust framework to evaluate acquisitions of potential or nascent competitors in high-technology markets?

How should the antitrust agencies evaluate whether a nascent technology is likely to develop into a competitive threat in dynamic, high-technology markets?

10 id. at 2286.

11 id. at 2287.

12 Press Release, 'FTC Announces Agenda for the Third Session of Its Hearings on Competition and Consumer Protection in the 21st Century' (Oct. 2, 2018), www.ftc.gov/news-events/press-releases/2018/10/ftc-announces-agenda-third-session-its-hearings-competition.

> *What are some pragmatic approaches that the antitrust enforcement agencies could consider for enhancing their evaluation of these types of acquisitions?*[13]

Not only is the FTC thinking hard about policy issues and the analytical framework regarding transactions involving nascent competitors, the agency is using its enforcement tools to block such transactions. In March 2018, the FTC filed a complaint to challenge CDK Global, Inc's acquisition of competitor Auto/Mate, Inc, charging that the proposed merger between two specialised software vendors violates federal antitrust laws. CDK ultimately abandoned the transaction, which was a significant 'win' for the FTC.

In the FTC's press release, the director of the Bureau of Competition stated:

> *The evidence indicated that Auto/Mate was also a threat to other incumbent DMS [dealership management system] providers, and, importantly, was poised to become an even more effective competitor in the near future. The Commission's action shows that it will block a proposed merger if a large, established firm seeks to eliminate competition from a small but significant and developing competitor that is delivering substantial competitive benefits in innovation, price, and quality.*[14]

Focus on pharma and medical devices

Pharmaceutical enforcement also remains at the top of the FTC antitrust enforcement agenda, with priorities on both current and future potential competition.

For example, the FTC's July 2018 order required Amneal Pharmaceuticals to divest 10 generic products to complete its US$1.45 billion acquisition of Impax.[15] While Amneal and Impax were current competitors in four of the markets, six of the 10 divestitures were for markets in which the FTC alleged Amneal or Impax was already marketing a product and the other was one of a limited number of suppliers capable of entering.[16]

In April 2019, the FTC continued its streak in medical devices with a consent order requiring Fresenius Medical Care to agree to a divestiture of NxStage's bloodline tubing sets to complete Fresenius's US$2 billion acquisition of NxStage. The FTC alleged that the merger would have been three to two in the bloodline tubing sets market where the combined entity would hold 82 per cent of the market.[17]

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13 id.

14 Press Release, 'FTC Challenges CDK Global, Inc.'s Proposed Acquisition of Competitor Auto/Mate, Inc.' (Mar. 20, 2018), www.ftc.gov/news-events/press-releases/2018/03/ftc-challenges-cdk-global-incs-proposed-acquisition-competitor.

15 *In re Amneal Holdings, LLC*, No. C-4650 (FTC July 10, 2018).

16 Markus H. Meier, Bradley S. Albert and Kara Monahan, 'Overview of FTC Actions in Pharmaceutical Products and Distribution' (June 2019), www.ftc.gov/system/files/attachments/competition-policy-guidance/overview_pharma_june_2019.pdf.

17 *In re Fresenius Medical Care AG & CO. KGaA*, No. C-4671 (FTC Apr. 9, 2019); *In re Fresenius Medical Care AG & CO. KGaA*, No. C-4671 (FTC Feb. 9, 2019).

In another pending proposed merger between Roche and Spark Therapeutics, the FTC issued a second request in June 2019. At issue is a potential concern in haemophilia gene therapy. There is strong speculation that the FTC is focusing on whether this is a killer acquisition whereby Roche is 'buying . . . to squash the competition' and because of '"how close . . . the drug" [is] to finishing development'.[18]

FTC's more aggressive stance on divestitures in pharma deals

In 2018, then acting director of the FTC Bureau of Competition, Bruce Hoffman, announced that the agency will no longer accept divestitures of pipeline drugs in certain pharmaceutical mergers because divestitures of pipeline products were not working well for certain pharmaceutical products. By way of background, the agency conducted an internal study that showed that the rate of failure was 'startlingly high' for divestitures of certain complex pipeline pharmaceutical products.[19]

Announcing the FTC's tougher position on divestitures in pharma deals, Hoffman stated: 'our view is that when you're looking at remedies, you're remedying an anticompetitive transaction . . . and the risk of failure belongs on the parties, not on the public'.[20] Accordingly, in situations in which the parties to the transaction own both a successfully marketed pharmaceutical product and a pre-marketed product that is a would-be competitor, the FTC will push for a divestiture of the currently marketed product.

In an ongoing matter, the FTC issued a second request to Bristol-Myers-Squibb Company and Celgene Corporation in March 2019 that honed in on the drug market for treating psoriasis as a result of the proposed US$74 billion merger.[21] While the merger remains subject to review, Bristol-Myers-Squibb has publicly offered to divest Celgene's marketed product, Otezla, in an attempt to achieve FTC clearance, instead of divesting the pre-marketed psoriasis product under development.[22] This move is consistent with the FTC's stance that divestiture of pipelines assets is not sufficient to resolve competition issues in complex pharmaceutical transactions.[23]

18 Max Fillion, 'Comment: In Roche-Spark merger, FTC could be looking at hemophillia gene therapy overlaps', MLex (June 12, 2019), www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1100175&siteid=191.

19 Charles McConnell, 'Hoffman: FTC won't accept pipeline divestitures in certain mergers', *GCR* (Feb. 5, 2018), https://globalcompetitionreview.com/article/usa/1153346/hoffman-ftc-wont-accept-pipeline-divestitures-in-certain-mergers.

20 id.

21 Jenna Ebersole and Flavia Fortes, 'Comment: Bristol-Myers, Celgene argue psoriasis drug overlap not a concern, but FTC will review range of factors', MLex (May 9, 2019), www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1090007&siteid=191&rdir=1.

22 'Bristol-Myers Squibb Provides Update on Pending Merger with Celgene', Bloomberg (June 24, 2019), www.bloomberglaw.com/document/PTLNUCMEQTXD.

23 Bruce Hoffman, Acting Director, Bureau of Competition, Fed. Trade Comm'n, Remarks at GCR Live 7th Annual Antitrust Law Leaders Forum, 'It Only Takes Two to Tango: Reflections on Six Months at the FTC' (Feb. 2, 2018), www.ftc.gov/system/files/documents/public_statements/1318363/hoffman_gcr_live_feb_2018_final.pdf.

No deal too small in high-tech industries

Perhaps more so than any other industry, the government pays attention to high-tech deals that fall below the Hart-Scott-Rodino Act (the HSR Act) reporting thresholds. This frequently occurs in the tech sector, either because the transaction value is under the HSR 'size-of-transaction test' or because the to-be-acquired firm does not meet the requisite 'size-of-person' threshold.

Case in point, in September 2017, Ottobock HealthCare GmbH announced the acquisition of Freedom Innovations LLC from a private equity sponsor called Health Innovation Partner. At the time of the merger, Ottobock and Freedom were both manufacturers of prosthetic knees. The transaction did not meet the HSR thresholds and was consummated without undergoing prior antitrust review. After receiving a complaint from a large customer, the FTC opened and investigation and eventually challenged the deal in court.

In May 2019, FTC Chief Administrative Law Judge (ALJ) D Michael Chappell sided with the FTC, concluding the already consummated transaction would substantially lessen competition in the microprocessor prosthetic knees (MPK) market.[24] The ALJ found that Ottobock and Freedom were 'direct competitors' and that competition in the MPK market 'has enabled clinic customers to negotiate lower prices and has spurred MPK innovation'.[25]

As a result, the ALJ's order requires Ottobock to unwind the transaction and sell the Freedom assets and business to an FTC-approved purchaser.[26] At the 25 July 2019 hearing on appeal to the FTC commissioners, Ottobock and the FTC staff debated whether the proposed divestiture of Freedom's MPK business would 'restore competition in the only product market the [C]ommission had challenged'.[27] As the parties await the commissioners' final decision, this matter reinforces the that the FTC (and the DOJ) will litigate to unwind transactions raising competition concerns, even if non-reportable under the HSR Act and if consummated.

Vertical merger enforcement in technology arena

In a highly anticipated decision, the DC Circuit unanimously affirmed the district court's refusal to enjoin the merger between AT&T and Time Warner in February 2019. The case was the first litigated vertical merger challenge in over 40 years.[28] Although the loss was certainly a blow to the DOJ, both the DOJ and the FTC have made clear that they will continue to bring challenges to vertical mergers, and have committed to update the vertical merger guidelines to provide additional guidance on the appropriate analytical framework.

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24 *In re Otto Bock Healthcare North America, Inc.*, Initial Decision, at 1 (FTC May 6, 2019), www.ftc.gov/system/files/documents/cases/docket_9378_initial_decision_public_5-7-19.pdf.

25 id. at 2.

26 id. at 239.

27 Ben Remaly, 'FTC commissioners question Ottobock's divestiture defence', *GCR* (July 26, 2019), https://globalcompetitionreview.com/article/usa/1195604/ftc-commissioners-question-ottobock%E2%80%99s-divestiture-defence.

28 Jake Walter-Warner and William F. Cavanaugh, Jr., 'The Last Time DOJ Sued to Block a Vertical Merger was Over Forty Years Ago . . . And It Lost;, Patterson Belknap (Jan. 8, 2018), www.pbwt.com/antitrust-update-blog/the-last-time-doj-sued-to-block-a-vertical-merger-was-over-forty-years-ago-and-it-lost.

In *AT&T/Time Warner*, the DOJ argued that the merger violated the antitrust laws because the combined entity would be able to charge distribution competitors a higher price for its content due to increased bargaining leverage. The DC Circuit affirmed the district court's factual findings, holding that the DOJ did not satisfy its burden to show that the combined entity would have increased bargaining leverage to charge higher prices for its content. Central to the appellate court's holding was the district court's 'fact-specific conclusion based on real-world evidence that . . . the post-merger cost of a long-term blackout would not sufficiently change to enable [the combined entity] to secure higher affiliate fees'.[29]

Notwithstanding the appellate loss, the DOJ has committed to continue to scrutinise vertical mergers. Indeed, Principal Deputy AAG Andrew Finch predicted that it would not take another 40 years before the DOJ brings its next vertical merger case.[30] Likewise, Simons warned that its recent string of decisions not to challenge vertical mergers should not be interpreted expansively.[31] That said, during the pendency of the *AT&T* appeal, the antitrust agencies cleared several vertical mergers.[32]

Looking forward, shortly after the *AT&T* decision, the DOJ announced its intention to collaborate with the FTC to issue updated non-horizontal merger guidelines.[33] While the agencies have not announced a definitive timeline, Simmons tempered expectations of a quick resolution due to the complexities of vertical merger analysis and the need for a long-lasting bipartisan solution.[34]

Vertical merger remedies

New leadership under the Trump administration has indicated increased scepticism of behavioural remedies in vertical mergers. AAG Delrahim stated, 'antitrust is law enforcement, it's not regulation. . . . [B]ehavioral remedies often fail to [let the competitive process play out].'[35] In keeping with this rhetoric, in May 2018, the DOJ granted approval for Bayer's US$62.5 billion acquisition of

29 *United States v AT&T, Inc.*, 916 F.3d 1029, 1036 (D.C. Cir. 2019).

30 Shylah Alfonso, David Chiappetta, Jon Jacobs and Nick Hesterberg, 'Highlights from 2019 ABA Antitrust Spring Meeting: Part 1', *Law360* (Apr. 1, 2019), https://www.law360.com/trials/articles/1121806/highlights-from-2019-aba-antitrust-spring-meeting-part-1.

31 Matthew Perlman, 'FTC, DOJ May Team Up on Vertical Merger Guidelines', *Law360* (Mar. 29, 2019), www.law360.com/articles/1144678/ftc-doj-may-team-up-on-vertical-merger-guidelines.

32 *In re Sycamore Partners II, L.P.*, No. C-4667 (FTC Jan. 28, 2019); Complaint, *United States of America v CVS Health Corporation*, No. 1:18-cv-0340 (D.D.C. Oct. 10, 2018); Closing Statement, 'Statement of the Department of Justice Antitrust Division on the Closing of its Investigation of the Cigna – Express Scripts Merger' (Sept. 17, 2018), www.justice.gov/atr/closing-statement; *In re Fresenius Medical Care AF &CO. KGaA*, No. C-4671 (FTC Feb. 9, 2019).

33 David McLaughlin, 'DOJ to Issue Vertical Merger Framework This Year, Delrahim Says', Bloomberg (Apr. 3, 2019), https://news.bloomberglaw.com/mergers-and-antitrust/doj-to-issue-vertical-merger-framework-this-year-delrahim-says.

34 Matthew Perlman, 'FTC, DOJ May Team Up on Vertical Merger Guidelines', *Law360* (Mar. 29, 2019), https://www.law360.com/articles/1144678/ftc-doj-may-team-up-on-vertical-merger-guidelines.

35 Assistant Attorney General Makan Delrahim, Keynote Address at the American Bar Association's Antitrust Fall Forum (Nov. 16, 2017), www.justice.gov/opa/speech/file/1012086/download.

Monsanto, conditioned on certain divestitures.[36] The divestiture package was the 'largest negotiated merger divestiture' – comprising businesses and assets worth approximately US$9 billion – and addressed both horizontal and vertical concerns.[37]

The FTC, however, has continued to approve mergers subject to behavioural remedies in vertical transactions. For example, in *Staples v Essendant*,[38] the Commission's January 2019 consent decree required Staples to establish a firewall separating Staples' business-to-business sales operations from Essendant's wholesale business.[39] Staples is the largest vertically integrated reseller of office products in the United States, while Essendant is the largest US wholesale distributor of office products. The FTC alleged that Staples competed with Essendant-sourced independent dealers and resellers in selling office supplies and was concerned that, as a result of the merger, Staples would gain access to sensitive information on these reseller customers and could use that information to raise its prices in bidding against resellers for an end customer's business. The FTC's firewall limits access to sensitive customer information to certain Staples employees to address this concern.

Likewise, in *Northrop Grumman v Orbital*,[40] the FTC required behavioural commitments for Northrop Grumman, a missile systems provider, to complete its proposed US$7.8 billion acquisition of Orbital, a missile component supplier, in June 2018.[41] The FTC was concerned that the combined firm would refuse to sell certain critical Orbital products to Northrop's competitors and Northrop would gain access to confidential information of its competitors through Orbital's relationships with those competitors. The FTC required Northrop to agree to non-discrimination provisions, implementation of a firewall and the appointment of a compliance officer to complete the acquisition.

Looking forward, it remains to be seen whether the DOJ and the FTC will be aligned in how they consider the use of behavioural remedies, or whether the DOJ will take a stronger stance against their use with the FTC remaining more amenable.

36 Proposed Final Judgment, *United States v Bayer AG and Monsanto Co.*, No. 1:18-cv-01241 (D.D.C., May 29, 2018).

37 Press Release, 'Justice Department Secures Largest Negotiated Merger Divestiture Ever to Preserve Competition Threatened by Bayer's Acquisition of Monsanto' (May 29, 2018), www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened.

38 *In re Sycamore Partners II, L.P.*, No. C-4667 (FTC Jan. 28, 2019).

39 Press Release, 'FTC Imposes Conditions on Staples' Acquisition of Office Supply Wholesaler Essendant Inc'. (Jan. 28, 2019), www.ftc.gov/news-events/press-releases/2019/01/ftc-imposes-conditions-staples-acquisition-office-supply. The Commission vote to accept the settlement was three to two, with the two Democrat commissioners dissenting on the grounds that the consent did not go far enough to allay competitive harm. id.

40 *In re Northrop Grumman Corp. v Orbital ATK, Inc.*, No. C-4652 (FTC June 5, 2018).

41 Press Release, 'FTC Approves Modified Final Order Imposing Conditions on Northrop Grumman's Acquisition of Solid Rocket Motor Supplier Orbital ATK, Inc.' (Dec. 4, 2018), www.ftc.gov/news-events/press-releases/2018/12/ftc-approves-modified-final-order-imposing-conditions-northrop.

Non-merger investigations stem from merger investigations

Another emerging trend is the antitrust agencies identifying conduct that leads to non-merger investigations and enforcement actions based on a merger review. And, beyond agency investigations, many have led to follow-on litigation.

For example, in late 2018, the DOJ settled with six broadcast companies to resolve allegations the companies exchanged 'pacing' and other information in select markets in violation of section 1 of the Sherman Act.[42] AAG Delrahim alleged that the information exchange 'disrupt[ed] the normal competitive process', 'lessened competition', and 'harmed . . . local businesses and the consumers they serve'.[43] AAG Delrahim explained that the Division discovered the alleged anticompetitive information sharing during its investigation into the since-abandoned proposed acquisition of Tribune Media Company by Sinclair Broadcasting Group.[44] Follow-on litigation has been consolidated in the Northern District of Illinois.

In another example, in February 2019, the DOJ announced an agreement with Learfield IMG College settling the Division's allegations the company had engaged in unlawful agreements not to compete for multimedia rights (MMR) contracts for universities' athletic programmes.[45] According to the complaint, prior to their merger, IMG and Learfield each handled MMR contracts for university sports programmes and entered into agreements not to compete – at times forming joint ventures at universities as an alleged guise for legitimate business arrangements – in violation of section 1 of the Sherman Act.[46] The alleged coordination took several forms, ranging from bidding for contracts as a joint venture, using the joint venture to co-opt smaller competitors and requesting that one party withdraw its bid.

Apparently, the Division learned of this conduct during the course of the DOJ's 15-month review and clearance of the *IMG/Learfield* merger in late 2017.[47] The proposed settlement prohibits, among other things, agreements not to bid or submit joint bids between Learfield IMG College and any of its MMR competitors. Officials in the Antitrust Division then referred the conduct to criminal prosecutors.

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42 Press Release, 'Justice Department Requires Six Broadcast Television Companies to Terminate and Refrain from Unlawful Sharing of Competitively Sensitive Information' (Nov. 13, 2018), www.justice.gov/opa/pr/justice-department-requires-six-broadcast-television-companies-terminate-and-refrain-unlawful.

43 id.

44 Juan Arteaga, Oliver Antoine, Holly Melton, 'Antitrust Risks Beyond the Deal: When Merger Investigations Lead to Civil/Criminal Antitrust Charges and Costly Follow-On Litigation', Crowell Moring (Jan. 14, 2019), https://www.crowell.com/NewsEvents/AlertsNewsletters/all/Antitrust-Risks-Beyond-the-Deal-When-Merger-Investigations-Lead-to-Civil-Criminal-Antitrust-Charges-and-Costly-Follow-On-Litigation/pdf.

45 Press Release, 'Justice Department Requires College Multimedia Rights Provider to Refrain from Unlawful Agreements Not to Compete' (Feb. 14, 2019), www.justice.gov/opa/pr/justice-department-requires-college-multimedia-rights-provider-refrain-unlawful-agreements.

46 Complaint, *United States v Learfield Communications, LLC, IMG College, LLC, and A-L Tier I LLC*, No. 1:19-cv-00389 (D.D.C., Feb. 14, 2019).

47 J. Sisco and L. Nylen, 'IMG-Learfield civil settlement started as criminal big-rigging probe', MLex (Feb. 15, 2019), www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1066522&siteid=191&rdir=1.

While these recent actions are grabbing headlines, they are far from the first to result from a merger investigation. For example, employees of rail equipment suppliers Knorr-Bremse AG and Wabtec Corporation filed a suit in federal court in April 2018 over alleged no-poach agreements between the two competitor companies following the DOJ's investigation one month prior into similar conduct, which was discovered while the DOJ was investigating the merger between Faiveley Transport, a former rail equipment supplier competitor, and Wabtec.[48] Likewise, the DOJ's ongoing investigation into an alleged price-fixing conspiracy among tuna companies StarKist, Chicken of the Sea and Bumble Bee, which has resulted in criminal allegations against the companies and executives, stemmed from the now abandoned 2015 merger between Bumble Bee and Chicken of the Sea.[49]

These investigations are cautionary tales for companies considering an antitrust-sensitive merger.

* *The authors gratefully acknowledge the significant contributions of Rubin Waranch to this publication.*

48 Press Release, 'Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees' (Apr. 3, 2018), www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete.

49 Stephanie Ritenbaugh, 'Attorney: Max fine in DOJ's price-fixing case could be "life or death" for Starkist', *Pittsburgh Post-Gazette* (Apr. 15, 2019), www.post-gazette.com/news/crime-courts/2019/04/15/StarKist-Tuna-Pittsburgh-Maximum-fine-DOJ-price-fixing-case-restitution-plea-agreement/stories/201904150023.

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Cooley's attorneys solve legal issues for entrepreneurs, investors, financial institutions and established companies. Clients partner with Cooley on transformative deals, complex IP and regulatory matters, and bet-the-company litigation, often where innovation meets the law.

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