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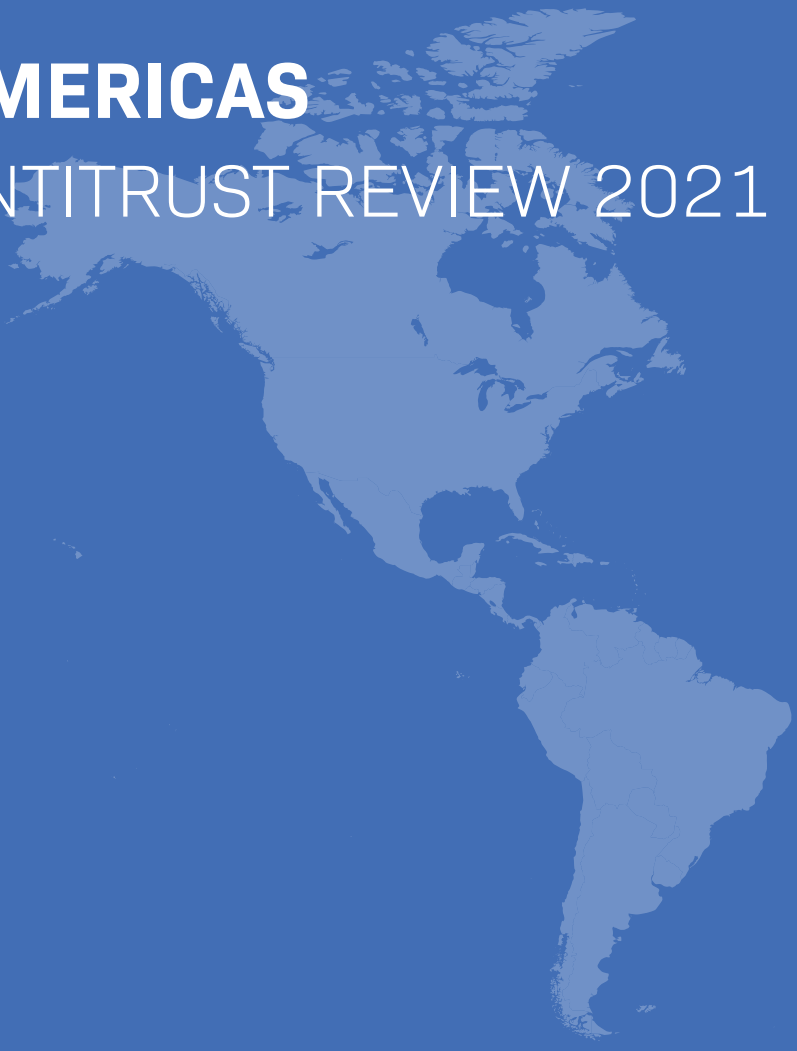

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ANTITRUST REVIEW 2021

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This article was first published in October 2020
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Published in the United Kingdom
by Global Competition Review
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL

www.globalcompetitionreview.com

To subscribe please contact subscriptions@globalcompetitionreview.com

ISBN: 978-1-83862-257-2

Printed and distributed by Encompass Print Solutions
Tel: 0844 2480 112

Preface

Global Competition Review's *Americas Antitrust Review 2021* is one of a series of regional reviews that have been conceived to deliver specialist intelligence and research to our readers – general 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, and 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 the contributors and their firms for their time and commitment to the publication.

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.

Global Competition Review
London
August 2020

United States: Technology Mergers

Megan Browdie, Jacqueline Grise, Howard Morse and Elizabeth Giordano
Cooley LLP

In summary

Covid-19 has made 2020 into a year like no other with 'stay at home' orders and working from home the new normal. Nonetheless, the tech and pharma industries continued to attract immense antitrust scrutiny, with daily reports in the media and pressure from politicians to address what some perceive to be anticompetitive mergers by digital platforms and pharmaceutical companies, even while innovation in both sectors continues at breakneck speed. In this article, we discuss some of the most noteworthy trends and developments in the high-tech and pharma sectors over the past year, with an eye towards the unique issues that are driving antitrust enforcement in the technology area.

Discussion points

- Nascent competition and killer acquisitions
- *American Express* decision applied to merger case
- Issuance of new Vertical Merger Guidelines
- Partisan divisions impacting high-tech antitrust enforcement

Referenced in this article

- Department of Justice
- Federal Trade Commission
- *Sabre/Farelogix*
- Vertical Merger Guidelines
- *Abbvie/Allergan*
- *Illumina/PacBio*
- *BMS/Celgene*
- *Roche/Spark*
- *Boston Scientific/BTG*
- *T-Mobile/Sprint*

Tech and pharma sectors are US antitrust enforcement priority

Covid-19 has made 2020 into a year like no other with 'stay at home' orders and work from home the new normal. Nonetheless, US antitrust investigations and enforcement actions march forward, with US Department of Justice (DOJ) and Federal Trade Commission (FTC) staff working hard, from home, vowing that these covid times will not impede or deter their enforcement efforts.

High-tech and pharma growth industries have attracted substantial investment during the pandemic, with numerous IPOs and mergers, even while other sectors have lagged. At the same time, tech and pharma have attracted immense antitrust scrutiny, with daily reports in the media and pressure from politicians to address what some perceive to be anticompetitive mergers by digital platforms and pharmaceutical companies, even while innovation in both sectors continues at breakneck speed. Investigations of high-profile deals in the tech and pharma sectors are increasingly standard fare, with all signs pointing towards a tough enforcement environment going forward whether Joe Biden or Donald Trump wins the 2020 presidential election.

Antitrust trends and developments in the high-tech sectors are noteworthy for industry players that are contemplating deal activity or may be impacted by deals. Understanding the unique issues that drive antitrust enforcement in the technology arena – from the offensive and defensive playbooks regarding investigations of 'nascent competition' and 'killer acquisitions', to the distinctive features of 'platform' markets and 'network effects', the importance of intellectual property and innovation competition, and Food & Drug Administration regulations, as well as new trends such as an increased focus on big data as a barrier to entry – is essential to obtaining merger clearance quickly and efficiently, particularly in close cases.

Nascent competition and killer acquisitions in the high-tech arena

Nascent competition and killer acquisitions of early-stage technologies in both the pharmaceutical and technology sectors are at the centre of the antitrust spotlight.

Potential competition theories have long been used to challenge acquisitions by incumbent firms of potential competitors alleged to have constrained the incumbent's market power with the threat of disruptive new entry. But evidentiary requirements on the agencies to advance 'clear proof' rather than mere speculation regarding future competitive effects has historically limited enforcement action to negotiated divestitures in large pharmaceutical matters and led to few successful courtroom challenges based on potential competition theories of harm.

With covid-19, the world is evolving, and so are the US antitrust enforcement theories when it comes to nascent competitors. Advancing the debate, a 2018 paper published by Yale School of Management and London Business School professors, entitled 'Killer Acquisitions', made waves in the antitrust world with a number of startling – and hotly debated – conclusions, including that up to 7.5 per cent of acquisitions in the pharma sector, based on an analysis of over 10 years

of pharmaceutical industry data, are killer acquisitions (ie, acquisitions where 'incumbent firms . . . acquire innovative targets solely to discontinue the target's innovation projects and preempt future competition').[1]

The authors of that paper concluded that '[k]iller acquisitions appear to routinely avoid regulatory scrutiny by acquiring entrepreneurial ventures at transaction values below the [Hart-Scott-Rodino Act (HSR)] review thresholds.'[2] This concern was echoed in a 2019 article by a University of Chicago economist, arguing that an increase in HSR reporting thresholds from US$15 million to US$50 million in 2001 corresponded with a concomitant rise in horizontal mergers between direct competitors.[3]

The US antitrust agencies are responding to these articles with enforcement actions and exploration of new approaches to potential competition cases. For example, in December 2019, the FTC challenged Illumina's acquisition of Pacific Biosciences, asserting that the acquisition was illegal as monopolisation as well as substantially lessening competition, alleging that the merger would eliminate nascent competition in the US market for next-generation DNA sequencing systems and allow Illumina to maintain its monopoly in the market.[4]

Notably, the FTC's challenge was issued despite the parties' arguments that Pacific Biosciences was unlikely to successfully commercialise its technology and compete head to head against Illumina, given ongoing financial struggles, a history of failed product launches and the inherent limitations of its sequencing technology. The parties abandoned the proposed deal in January 2020, citing 'the lengthy regulatory approval process' and 'continued uncertainty of the ultimate outcome'.[5]

That the transaction was challenged as illegal monopolisation demonstrates an emerging approach to attack acquisitions of potential competitors in a way that potentially minimises the agencies' burden to prove a transaction is likely to 'substantially lessen competition'. DOJ and FTC officials have argued that the DC Circuit Court's standard in *United States v Microsoft* allows them to challenge an acquisition of a nascent competitor by a monopolist when '"reasonably capable of contributing significantly to the defendant's monopolist power", unless outweighed by

1 Colleen Cunningham, Florian Ederer and Song Ma, 'Killer Acquisitions', abstract (April 2019), SSRN, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3241707.

2 id. at 42.

3 Thomas G Wollmann, 'Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act', *American Economics Review: Insights* 77 (2019), available at https://pubs.aeaweb.org/doi/pdfplus/10.1257/aeri.20180137.

4 Complaint, *In the Matter of Illumina, Inc. and Pacific Biosciences of Cal., Inc.*, Comm'n File No. 1910035, (FTC 17 Dec 2019), available at www.ftc.gov/system/files/documents/cases/d9387_illumina_pacbio_administrative_part_3_complaint_public.pdf.

5 Joint Press Release, Illumina and Pacific Biosciences Announce Termination of Merger Agreement (2 Jan 2020), available at www.sec.gov/Archives/edgar/data/1110803/000111080320000005/exhibit991.htm.

procompetitive justifications'.[6] The agencies are looking to monopolisation as an additional tool in their arsenal for acquisitions by dominant firms, though it is far from clear that will lower the burden of proof.

The agencies are also assessing the impact of transactions that did not require an HSR filing, particularly with respect to acquisitions of nascent competitors in both technology and pharma markets. The FTC issued Special Orders to five technology firms in February 2020, requiring them to provide information related to acquisitions consummated over the past 10 years that were not HSR reportable. These orders were issued under section 6(b) of the Federal Trade Commission Act, which authorises the FTC to conduct industry studies that do not have a specific law enforcement purpose, though they can lead to enforcement actions depending on what is uncovered. One of the FTC's stated goals in issuing these orders is to determine whether 'additional transactions should be subject to pre-merger notification requirements'.[7] Although the Special Orders are focused on the technology sector, two FTC commissioners called for the FTC to expand the analysis to non-reportable deals in the healthcare industry.[8]

The agencies also continue to investigate acquisitions that are below HSR reporting thresholds when they learn about them, both before and after consummation. For example, in April 2020, Össur Hf and College Park Industries, Inc agreed to divest College Park's myoelectric elbow business to settle FTC allegations that Össur's proposed acquisition of College Park, which was not reportable under HSR, would eliminate potential competition in the myoelectric elbow market.[9] The FTC's complaint alleged that Össur was developing its own myoelectric elbow, and absent the proposed acquisition, it would likely compete with the dominant supplier of myoelectric elbows, College Park.[10]

6 Prepared Statement of the Federal Trade Commission Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, 'Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms', at 5 (24 Sep 2019), available at www.judiciary.senate.gov/imo/media/doc/Hoffman%20Testimony2.pdf (quoting *United States v Microsoft*, 253 F.3d at 59, 79).

7 Press Release, FTC, FTC to Examine Past Acquisitions by Large Technology Companies (11 Feb 2020), available at www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

8 Statement of Commissioner Christine S Wilson, Joined by Commissioner Rohit Chopra Concerning Non-Reportable Hart-Scott-Rodino Act Filing 6(b) Orders (11 Feb 2020), available at www.ftc.gov/system/files/documents/reports/6b-orders-file-special-reports-technology-platform-companies/statement_by_commissioners_wilson_and_chopra_re_hsr_6b_0.pdf.

9 Press Release, FTC, FTC Imposes Conditions on Össur Hf's Acquisition of College Park Industries, Inc. (7 April 2020), *In the Matter of Össur Hf. and College Park Industries*, Comm'n File No. 1910177 (28 May 2020), available at www.ftc.gov/news-events/press-releases/2020/04/ftc-imposes-conditions-ossur-hfs-acquisition-college-park.

10 Complaint, *In the Matter of Össur Hf. and College Park Industries*, Comm'n File No. 1910177 (FTC 7 Apr 2020), available at www.ftc.gov/system/files/documents/cases/191_0177_ossur_college_park_complaint.pdf.

Sabre/Farelogix marks first application of American Express to a merger case

2020 also saw the first application of the Supreme Court's 2018 landmark decision in *Ohio v American Express* to a merger case involving section 7 of the Clayton Act.

In *American Express*, which involved a challenge to conduct as an illegal agreement in restraint of trade, the Supreme Court held that when assessing anticompetitive effects in a two-sided market – such as credit card networks that sell their products to both consumers and merchants – courts must consider the effects on both sides of the market, and a price increase on one side of a platform does not mean there is an anticompetitive effect without evidence of increased overall costs for consumers, taking into account effects on both sides of the platform.[11]

The implications of the *American Express* decision in the merger context has been subject to widespread debate, with some arguing the Supreme Court's reasoning should extend beyond the 'transaction platforms' at issue there to other two-sided markets, even if the transactions are not simultaneous, such as advertisers and subscribers to a television network. Others argue that the Clayton Act makes illegal mergers that lessen competition in 'any line of commerce' in 'any section of the country', and so in analysing mergers, the court can focus on only one side or a two-sided market. At a minimum, it seems that antitrust authorities must consider the interrelationships in two-sided markets, recognising, for example, that an increase in newspaper prices that will lead to a reduction in subscribers will in turn reduce advertising revenue as advertisers will reach fewer readers, and thus may not be profitable, even if the authorities only focus on the impact on subscribers.

Appropriate application of the *American Express* decision in the merger context was argued in the DOJ's challenge to Sabre's acquisition of Farelogix.[12] Sabre operates a global distribution system, which is a transaction platform that connects travel agencies to travel suppliers such as airlines. Farelogix offers an alternative booking services solution, Open Connect, which allows airlines to connect directly to travel agencies. The DOJ argued the acquisition marked 'a dominant firm's attempt to eliminate a disruptive competitor', which would likely lead to higher prices and reduced innovation.[13]

In April 2020, the district court ruled against the DOJ, interpreting *American Express* as standing for the proposition that only 'other two-sided platforms can compete with a two-sided platform for transactions'.[14] The court reasoned that the 'preponderance of the evidence' showed that the parties viewed each other as competitors, and that Sabre's motivations for the acquisition 'include dealing with an entity Sabre views as a competitor and threat and transforming [new distribution capability] technology from a risk to an opportunity for innovation and integration'.[15]

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11 *Ohio v American Express*, 138 S. Ct. 2274 (2018).

12 Complaint, *United States v Sabre Corp.*, Case 1:19-cv-01548-UNA (D. Del. 20 Aug 2019), available at www.justice.gov/opa/press-release/file/1196816/download.

13 id. at 1.

14 *United States v Sabre Corp.*, 2020 WL 1855433, *34 (D. Del. 7 Apr 2020) (citing *Ohio v American Express Co.*, 138 S. Ct. 2274, 2287 (2018)).

15 id. at *15, *28.

However, the court held that Sabre and Farelogix cannot compete as a matter of law pursuant to *American Express*, because Sabre, as a two-sided platform, and Farelogix, as not a two-sided platform, cannot compete against each other.[16]

The court's ruling was in stark contrast to a decision of the UK Competition and Markets Authority (CMA) issued two days later, which blocked the transaction due to the potential for reduced innovation and higher prices for customers booking flights through travel agencies.[17] The companies abandoned the transaction after that decision was issued, though Sabre said that it would continue to appeal the CMA decision.[18]

In response to the DOJ's urging, the Third Circuit has now vacated the decision, though in its decision the three-judge panel noted that the vacatur, which was based on 'mootness' of the controversy and not the merits, 'should not be construed as detracting from the persuasive force of the district court's decision, should courts and litigants find its reasoning persuasive'.[19]

DOJ and FTC issue updated vertical merger guidelines

The DOJ and FTC together issued new Vertical Merger Guidelines in June 2020 (Guidelines), replacing long-outdated Non-Horizontal Guidelines issued by the DOJ, without concurrence from the FTC, in 1984.[20]

The Guidelines spell out the analytical framework the agencies use to evaluate transactions between companies that are not current or potential future competitors – 'vertical' transactions, between upstream manufacturers and downstream manufacturers, distributors or retailers, focusing primarily on the risk of foreclosing competitors.

The Guidelines are, at least in part, a reaction to the DOJ's failed 2018 challenge to AT&T's US$85 billion acquisition of Time Warner, the then owner of CNN, HBO and Warner Brothers, which was the first litigated challenge to a vertical transaction in nearly 40 years. After a six-week trial, the US District Court for the District of Columbia found that the DOJ failed to show the acquisition was likely to lessen competition, marking the DOJ's first loss in a merger challenge since 2004.[21] The DC Circuit Court affirmed the District Court's decision, noting that the DOJ's vertical merger guidelines had not been updated since 1984, but declined to provide clarity on the proper legal standards for evaluating vertical mergers.[22]

16 id. at *34.

17 CMA, 'Anticipated acquisition by Sabre Corporation of Farelogix Inc.: Final report' (9 Apr 2020), available at https://assets.publishing.service.gov.uk/media/5e8f17e4d3bf7f4120cb1881/Final_Report_-_Sabre_Farelogix.pdf.

18 *Sabre Corporation v Competition and Markets Authority*, Competition Appeal Tribunal (30 Apr 2020), available at www.catribunal.org.uk/cases/134541220-sabre-corporation.

19 Order granting motion to vacate the district court's decision and order granting judgment to defendants, *U.S. v. Sabre Corp.*, No.20-1767 (3d Cir. 20 Jul 2020).

20 US Department of Justice and Federal Trade Commission, Vertical Merger Guidelines, 30 June 2020 (Guidelines), available at www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

21 *United States v AT&T Inc.*, 310 F. Supp. 3d 161 (D.D.C. 12 June 2018).

22 *United States v AT&T Inc.*, 2019 WL 921544 (D.C. Cir. 26 Feb 2019).

The new Guidelines lay out the agencies' approach to defining relevant markets in analysing vertical mergers. They articulate a number of potential harms that may stem from vertical mergers, including raising rivals' costs, creating the need for two-level entry, facilitating the access to competitively sensitive information of rivals in upstream or downstream markets, and facilitating the likelihood of collusion or coordinated interaction.[23] They explain, for example, that a vertical merger may 'diminish competition by allowing the merged firm to profitably use its control of [a] related product to weaken or remove the competitive constraint from one or more of its actual or potential rivals in the relevant market' and 'increase the vertically integrated firm's incentive or ability to raise its rivals' costs by increasing the price or lowering the quality of the related product'.

The Guidelines also explicitly recognise the elimination of double marginalisation as a potential pro-competitive benefit of vertical mergers, given that it may enable the merged firm to set lower downstream prices to the benefit of consumers.[24]

The Guidelines have been touted by the agencies as providing predictability and clarity, while affirming the agencies' commitment to enforcement and willingness to challenge such transactions. Such transparency is valuable as the agencies increasingly scrutinise vertical mergers, including those by online platforms that are not competitors, and review consummated deals in high-tech markets.

The Guidelines, however, do not address remedies. Such discussion would have been welcomed, given differences between the agencies in recent years as to how they approach remedies. The Trump DOJ has expressed scepticism of 'behavioural' or non-structural remedies that have been more often accepted by the FTC. The DOJ's refusal to accept behavioural remedies in *AT&T/Time Warner*, similar to those accepted to resolve concerns with the *Comcast/NBC Universal* merger, is one reason that matter was litigated and explains the DOJ's loss, in part, as the parties unilaterally accepted a remedy by agreeing to binding arbitration with customers.

Now that the Guidelines have been issued, the agencies will be looking for transactions to serve as test cases. If past history is any indication, however, the number of vertical merger challenges is likely to remain small relative to horizontal merger challenges among direct competitors.

Recent partisan divisions impacting antitrust enforcement in high-tech industries

Political divisions, which some believe have become more extreme across the US in recent years, appear to be influencing antitrust enforcement at both the DOJ and FTC.

At the DOJ, recent congressional testimony has accused the DOJ of opening merger and non-merger investigations for political reasons rather than on sound antitrust theories, directing issuance of burdensome second requests, over the objection of career staff, to mergers posing few competitive risks, and there have been long-standing rumours reported of White House direction

23 Guidelines § 4.

24 id. § 6.

to challenge the *AT&T/Time Warner* merger, though the Trump administration has denied all allegations.[25] Senior Trump administration antitrust officials have countered the accusations,[26] but the partisan divide remains.

Meanwhile, at the FTC, the Democrats issued dissents to the issuance of the Vertical Merger Guidelines, casting doubt on their persuasive power in court. The Democrats are also issuing dissents that call for changes to the analytical framework currently used for pharmaceutical mergers, with Commissioner Rebecca Slaughter calling for more focus on innovation competition and Commissioner Rohit Chopra calling for a more extensive overhaul of the agency's approach to merger investigations.

In *AbbVie/Allergan*, the FTC cleared AbbVie's US$63 billion acquisition of Allergan, with the three Republican commissioners voting in favour and two Democrats dissenting. The majority required divestitures to two buyers: (i) Allergan's assets related to exocrine pancreatic insufficiency (EPI) drugs Zenpep and Viokace to Nestlé and (ii) the transfer of Allergan's rights and assets related to brazikumab to AstraZeneca.

Slaughter said she was 'concerned about the Commission's approach to pharmaceutical mergers', arguing that 'in light of AbbVie's public representations about its plans to curtail Allergan's ongoing research programs, [she] cannot share the majority's confidence that the innovation effects of this merger are competitively benign'.[27] Chopra went further, questioning the Commission's history of requiring divestitures in overlapping products, attacking it as 'narrow, flawed, and ineffective', 'miss[ing] the big picture, [and] allowing pharmaceutical companies to further exploit their dominance'.[28]

Regarding the divestiture buyers, Chopra expressed concern about Nestlé's ability to replace lost competition for EPI drugs, referring to it as 'the maker of KitKats and Tidy Cats', and questioned AstraZeneca's commitment to aggressively market the brazikumab assets, referring to the structure of the divestiture as a 'windfall' to the company.[29]

25 See, eg, S Weber Waller, 'The Political Misuse of Antitrust: Doing the Right Thing for the Wrong Reason', Competition Policy International (16 Jul 2020), available at www.competitionpolicyinternational.com/the-political-misuse-of-antitrust-doing-the-right-thing-for-the-wrong-reason/; Testimony of John W. Elias, US House Committee on the Judiciary (24 Jun 2020), available at https://judiciary.house.gov/uploadedfiles/elias_written_testimony_hjc.pdf?utm_campaign=4024-519&utm_source=newsletter&utm_medium=email&stream=top.

26 See Letter from Makan Delrahim to Jerrold Nadler, Chairman, and Jim Jordan, Ranking Member, Committee on the Judiciary, US House of Representatives (1 July 2020), available at www.politico.com/f/?id=00000173-0d14-dd78-a9ff-7fb6e2a70000.

27 Dissenting Statement of Commissioner Rebecca Kelly Slaughter, *In the Matter of AbbVie, Inc./Allergan plc*, Comm'n File No. 191-0169, 1-2 (FTC 5 May 2020), available at www.ftc.gov/system/files/documents/public_statements/1574577/191_0169_dissenting_statement_of_commissioner_rebecca_kelly_slaughter_in_the_matter_of_abbvie_and_0.pdf.

28 Dissenting Statement of Commissioner Rohit Chopra, *In the Matter of AbbVie, Inc./Allergan plc*, Comm'n File No. 1910169, 2 (FTC 5 May 2020), available at www.ftc.gov/system/files/documents/public_statements/1574583/1910169_dissenting_statement_of_commissioner_rohit_chopra_in_the_matter_of_abbvie-allergan_redacted.pdf.

29 Dissenting Statement of Commissioner Rohit Chopra, footnote 28 at 3, 13.

The majority responded, expressing concern that Chopra's dissent reflected 'disregard for facts and law'.[30] The statement went on to defend the divestitures, both based on identity of buyer and in structure, as well as the FTC's divestiture process, and argued that history demonstrated the success of pharmaceutical remedies such as the ones proposed (ie, 'remedies [that] entailed the divestiture of an on-market pharmaceuticals produced by a contract manufacturer and did not require transferring manufacturing capability').[31]

Similarly, in *BMS/Celgene*, the Democrats dissented, with Chopra 'skeptical that the status quo approach will uncover the range of potential harms to American patients' and Slaughter 'concerned that [the FTC's] analytical approach is too narrow' insofar as it focused on overlaps between the parties.[32] Slaughter advocated that 'the Commission should more broadly consider whether any pharmaceutical merger is likely to exacerbate anticompetitive conduct by the merged firm or to hinder innovation'.[33]

Republican Commissioners Christine Wilson and Noah Phillips issued statements in response. Wilson agreed 'that pharmaceutical price levels in the United States today are cause for concern', but argued that the 'causes . . . fall outside the jurisdiction and legal authority of the [FTC]'.[34] She defended the Commission's track record in pursuing enforcement actions 'within its limited authority as a competition agency', pointing to merger enforcement as well as pharmaceutical conduct enforcement efforts, and other advocacy.[35] Phillips took a harsher tone, criticising the dissents for failing to identify theories of harm missed by the FTC and seeming to conflate the goals of antitrust enforcement with other potential harms posed by mergers.[36]

30 Statement of Chairman Joseph J Simons, Commissioner Noah Joshua Phillips and Commissioner Christine S. Wilson, *In the Matter of AbbVie, Inc./Allergan plc*, Comm'n File No. 1910169, 2 (FTC 5 May 2020), available at www.ftc.gov/system/files/documents/public_statements/1574619/abbvie-allergan_majority_statement_5-5-20.pdf.

31 id. at 2, 8.

32 Dissenting Statement of Commissioner Rohit Chopra, *In the Matter of Bristol-Myers Squibb/Celgene*, Comm'n File No. 1910061, 1 (FTC 15 Nov 2019), available at www.ftc.gov/system/files/documents/public_statements/1554293/dissenting_statement_of_commissioner_chopra_in_the_matter_of_bristol-myers-celgene_1910061.pdf; Dissenting Statement of Commissioner Rebecca Kelly Slaughter, *In the Matter of Bristol-Myers Squibb/Celgene*, Comm'n File No. 1910061, 1 (FTC 15 Nov 2019), www.ftc.gov/system/files/documents/public_statements/1554283/17_-_final_rks_bms-celgene_statement.pdf.

33 Dissenting Statement of Commissioner Rebecca Kelly Slaughter, footnote 32 at 1.

34 Statement of Commissioner Christine S Wilson, *In the Matter of Bristol-Myers Squibb/Celgene*, Comm'n File No. 1910061, 2 (FTC 15 Nov 2019), available at www.ftc.gov/system/files/documents/public_statements/1554278/bms-celgene_-_wilson_statement.pdf.

35 id.

36 Statement of Commissioner Noah Joshua Phillips, *In the Matter of Bristol-Myers Squibb/Celgene*, Comm'n File No. 1910061 (FTC 15 Nov 2019), available at www.ftc.gov/system/files/documents/public_statements/1554288/bms-celgene_phillips_statement_final_1115.pdf.

Other FTC decisions have been less contentious; for example, clearing Boston Scientific's acquisition of BTG, requiring divestiture of certain assets.[37] Similarly, the FTC commissioners voted unanimously to close an investigation into Roche's US$4.8 billion acquisition of gene therapy start-up Spark Therapeutics after a 10-month investigation. The FTC staff had examined whether Roche would have the incentive to delay or discontinue Spark's developmental gene therapy for haemophilia A, given Roche's haemophilia A monoclonal antibody. The Commission concluded that Roche would have the 'incentive to accelerate, rather than decelerate the development for Spark's gene therapy in order to compete for gene therapy patients', given the presence of other potential competitors that would likely come to market prior to Spark's therapy.[38]

The Democrats' dissents do appear to be pushing the FTC staff to investigate pharmaceutical mergers more closely than in the past. Staff have recently been reluctant to grant early termination of the HSR waiting period even when transactions do not raise serious substantive issues. The dissents have also impacted the scrutiny applied to proposed buyers of assets to be divested, extending investigations for months even after parties have announced they are undertaking divestitures to address FTC concerns. For example, in the *AbbVie/Allergan* transaction announced in June 2019, the parties announced in January 2020 that they had signed definitive agreements to divest assets related to EPI drugs Zenpep and Viokace and brazikumab. The FTC did not announce a consent decree covering the same products and buyers until May 2020, five months later.

State AGs increasing enforcement in the technology sector

There has also been increasing activism on behalf of state attorneys general (AGs) to address a perceived gap in enforcement by the federal antitrust agencies in the technology sector.

In the most high-profile recent example of *T-Mobile/Sprint*, the DOJ approved the merger in July 2019 on the condition that T-Mobile divest certain assets, including Sprint's prepaid wireless business. Fourteen state AGs, however, filed a lawsuit challenging the merger, alleging that the divestiture package was not sufficient to alleviate competitive concerns. In February 2020, the district court refused to enjoin the merger, concluding that 'despite the strength of [the] states' prima facie case . . . a presumption of anticompetitive effects would be misleading in this particularly dynamic and rapidly changing industry'.[39]

37 Press Release, FTC, FTC Requires Divestitures and Imposes Conditions on Boston Scientific Corp.'s Acquisition of BTG plc (7 Aug 2019), available at www.ftc.gov/news-events/press-releases/2019/08/ftc-requires-divestitures-imposes-conditions-boston-scientific.

38 Press Release, FTC, Federal Trade Commission Closes Investigation of Roche Holding AG's Proposed Acquisition of Spark Therapeutics, Inc. (16 Dec 2019), available at www.ftc.gov/news-events/press-releases/2019/12/federal-trade-commission-closes-investigation-roche-holding-ags.

39 *New York v Deutsche Telekom AG*, 439 F.Supp.3d 179, *248 (S.D.N.Y. 11 Feb 2020).

The DOJ lauded the district court's decision and expressed concern about state enforcement against national mergers, warning that 'should a minority group of states, or even one, be able to undo the nationwide relief secured by the federal government, it would wreak havoc on parties' ability to merge, on the government's ability to settle cases, and cause real uncertainty in the market for pro-competitive mergers and acquisitions'.[40]

40 Assistant Attorney General Makan Delrahim Delivers Remarks at Media Institute Luncheon, '"Getting Better": Progress and Remaining Challenges in Merger Review' (5 Feb 2020), available at www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-media-institute-luncheon.

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Megan Browdie is a partner in Cooley's antitrust and competition practice group, resident in the firm's Washington, DC, office.

Ms Browdie advises clients on antitrust issues, including with respect to mergers and acquisitions, compliance with the Hart-Scott-Rodino Act, licensing of intellectual property and distribution. She has experience in matters before the Department of Justice, the Federal Trade Commission and state attorneys general, as well as in federal court. Ms Browdie has worked with clients in a number of industries, including automotive, consumer goods, computer hardware and software, financial services, oil and gas, pharmaceuticals and medical devices, publishing and telecommunications.

Ms Browdie serves as an editor for the American Bar Association's (ABA) Section of Antitrust Law's preeminent publication, *Antitrust Law Developments*. She is a frequent speaker, presenting on several panels, including 'Deal or No Deal? Lessons from Recent Merger Decisions', 'Antitrust Enforcement in the Time of COVID-19: What You Need to Know' and 'Recent Developments' for the ABA's Health Care and Pharmaceuticals Committee.

Ms Browdie has been recognised by *Super Lawyers*, Legal Media Group's *Expert Guides* as a 'Rising Star' in antitrust, *Who's Who Legal* as a 'Future Leader', and as one of the ABA's 'Top 40 Young Lawyers'.

Jacqueline Grise
Cooley LLP

Jacqueline Grise is a partner in Cooley's antitrust and competition practice group, resident in the firm's Washington, DC, office.

Ms Grise's practice focuses on the defence of corporate clients in connection with domestic and international mergers and acquisitions, as well as antitrust counselling and other non-merger matters. She regularly represents clients before the Federal Trade Commission, the Department of Justice and foreign antitrust enforcement agencies. Ms Grise has extensive experience counselling clients through the Hart-Scott-Rodino Act merger review process, including advocating before the agencies, responding to second requests and coordinating antitrust defence strategies in countries around the world.

Her clients span a broad range of industries, including an array of high-tech industries; digital health and e-health; healthcare and pharmaceuticals; consumer and food products; computer and data storage; music recording and publishing; book and magazine publishing; industrial equipment; automotive parts; retail, including internet sales and distribution; and aerospace and defence.

Ms Grise was ranked as among the top 40 antitrust lawyers worldwide under the age of 40 by *Global Competition Review* (May 2008). She is also recognised as a leading practitioner by *Chambers USA*, Euromoney's *Guide to the World's Leading Competition & Antitrust Lawyers* and *Washington DC Super Lawyers*' Top 50 Women.

Ms Grise is a vice chair of the American Bar Association Antitrust Section's Health Care and Pharmaceuticals Committee.

Howard Morse
Cooley LLP

Howard Morse is a partner in and former chair of Cooley LLP's antitrust and competition practice group, resident in the firm's Washington, DC, office.

Mr Morse represents businesses before the Department of Justice, the Federal Trade Commission (FTC) and state attorneys general in investigations involving mergers, acquisitions and joint ventures, as well as alleged monopolisation, restraints of trade, unfair and deceptive practices and in antitrust litigation. Mr Morse has been at the forefront of applying antitrust law to the high-tech sector and the intersection of antitrust and intellectual property law.

His clients include companies in the pharmaceutical, biotech and medical device industries, as well as in the telecommunications, computer, social media, 3D printing and other tech industries.

Mr Morse served for 10 years at the FTC, where he was assistant director of the Bureau of Competition and led more than 50 merger and Hart-Scott-Rodino Act enforcement actions. He received the FTC's Award for Superior Service for 'furthering the Commission's Merger Enforcement Program' and for 'advancing the antitrust mission of the Federal Trade Commission in innovation markets and high technology industries'. Mr Morse has been recognised as a leading antitrust lawyer by *Best Lawyers in America*, *Chambers USA*, Euromoney's *Expert Guides: Competition and Antitrust*, *Super Lawyers* and *Who's Who Legal: Competition*.

Mr Morse has served on the American Bar Association Antitrust Section Council and has chaired the Section's Computer Industry, Exemptions and Immunities, Federal Civil Enforcement and Intellectual Property Committees.

Elizabeth Giordano
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Elizabeth Giordano is an associate in Cooley's antitrust and competition practice group, resident in the firm's Washington, DC, office. Elizabeth's work encompasses a variety of civil and criminal antitrust matters, including litigation, government investigations and mergers and acquisitions. Elizabeth has represented a diverse set of clients in the high-tech manufacturing, software, pharmaceutical, life sciences, gaming, internet and media industries.

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.

Cooley has more than 1,000 lawyers across 16 offices in the United States, Asia and Europe.

Cooley's antitrust and competition team is recognised as one of the top-tier practices in the area of antitrust by *Global Competition Review*, *Chambers USA* and *The Legal 500*. Providing a full range of counselling, agency representation, litigation and arbitration services, we handle all aspects of antitrust and competition matters for companies, from emerging companies to Fortune 500 corporations, in virtually every sector of the economy, including computer hardware, software, e-commerce, social media, pharmaceuticals, medical devices, biotech, clean tech, telecommunications, aerospace, automotive, defence, oilfield services, industrial manufacturing, consumer products and financial services. We provide expert, practical and timely representation that enables our clients to manage antitrust risk while accomplishing their business objectives.

Our antitrust and competition team comprises 40 lawyers in major business and technology centres in the United States, the United Kingdom, Brussels and China, a former assistant director of the Federal Trade Commission (FTC) Bureau of Competition and a former acting associate attorney general of the Department of Justice (DOJ) responsible for overseeing the Antitrust Division, as well as former FTC and DOJ staff attorneys.

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ISBN 978-1-83862-257-2