

Do not pass go: a new card in US antitrust enforcement of the tech titans

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The issue of antitrust and big tech is nothing new. But it now appears to be reaching a tipping point in the United States where the changed attitude towards antitrust enforcement in the technology sector reflects an increasing realisation tech companies' market power and concerns over their use of that market power to hinder competition. To some, the US's largest tech companies represent the 'Four Horsemen of tech competition'. To others however, these companies remain beacons of American ingenuity and titans of the economy. Currently, there is strong public outcry for increased enforcement action, with some critics invoking a comparison between technology titans and Standard Oil.¹ Proposed solutions range from breaking up the largest tech companies to a wait-and-see approach concerning the benefit and harm to consumers. The question now is not whether antitrust and the tech titans are on a collision path, but what the fallout will be on key issues, including Big Data, online platforms, acquisition of nascent competitors, and new legislation.

1 Elizabeth Warren, *Here's how we can break up Big Tech*, Medium, 8 March 2019, <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c>; Christine Wilson, Commissioner, Federal Trade Commission, 'Why we should all play by the same antitrust rules, from Big Tech to small business', address at the American Enterprise Institute, 4 May 2019. https://www.ftc.gov/system/files/documents/public_statements/1527497/wilson_remarks_aei_5-4-19.pdf/.

Big Data

Antitrust enforcers in the United States recognise the importance of Big Data² and the potentially adverse effects of data concentration, whereby many technology companies hold or control access to vast quantities of data and are able to valorise such data. At the same time, US antitrust authorities grapple with exclusionary conduct such as refusals to deal and tying by large data-driven companies with market power. Previously, certain types of exclusionary conduct, such as refusal to deal, have not been an area of rigorous enforcement in the US because under US law proving liability for such conduct faces a high bar. An allegation of misconduct, at least with regard to Big Data, can be complicated by difficulties in defining relevant markets. Furthermore, although Big Data is valuable across sectors, companies derive different competitive advantages, based on the type of data and sector, making it difficult to develop a new universal approach to addressing competition concerns.

Accordingly, US antitrust enforcement involving Big Data is more apt to occur in the context of merger reviews. US antitrust agencies already consider data in the context of merger filings,³ and in mergers involving Big Data, they assess whether the combination of the companies could harm competition by increasing barriers to entry for new market participants. US antitrust enforcers are not likely to combat privacy issues relating to data under an antitrust regime in the near future as they have consistently declared privacy issues under the scope of the Federal Trade Commission's (FTC's) Consumer Protection Bureau rather than a competition matter.⁴

Online platforms

Much of the criticism and allegations of unfair competition in the tech sector have been levied against companies that operate online platforms due to the unique nature of these platforms and the potential antitrust issues their business models pose. As with other two-sided markets, online platforms demonstrate network effects, meaning that the more users a platform has, the more valuable it becomes. Additionally, many online platforms benefit from indirect network effects – the more users on one side of the platform, the more valuable it is to users on the other side. In other words, a platform is more profitable to advertisers or sellers the more consumers use it.

2 See De Mauro, Greco, Grimaldi (2016), 'A formal definition of big data based on its essential features', *Library Review*, Vol 65 Issue 3, pp.122–135, for a definition of Big Data.

3 See, Press release, 'FTC challenges Reed Elsevier's proposed \$4.1 billion acquisition of ChoicePoint, Inc', *Federal Trade Commission*, 16 September 2008, <https://www.ftc.gov/news-events/press-releases/2008/09/ftc-challenges-reed-elseviers-proposed-41-billion-acquisition>.

4 See, for example, Maureen K Ohlhausen and Alexander P Okuliar, 'Competition, consumer protection, and the right [approach] to privacy', 80 *Antitrust Law Journal*, 121 (2015).

In its 2018 *American Express* decision,⁵ the US Supreme Court ruled that some two-sided platforms constitute a single market, and the analysis of whether certain terms imposed on one side of the platform are anticompetitive must weigh both sides of the platform in a balancing test. The Supreme Court found that the anticompetitive harm that might result from agreements American Express had with the merchants accepting its credit cards were not anticompetitive when weighed against the competitive benefits provided to American Express credit cards users.⁶

After the *American Express* ruling, a case against online platforms could be more difficult to prove, assuming that courts analyse an online platform in the same way as a credit card network. If courts consider an online platform to be more similar to platforms where each transaction occurs separately, such as a newspaper, then after *American Express* plaintiffs would not have to prove that the anticompetitive harm to one side's users is not outweighed by the competitive benefits offered to the other users.⁷ This balancing test could make it especially difficult for plaintiffs to prove their burden against technology platforms that offer a range of free products to consumers. It has yet to be seen whether courts will adopt the *American Express* analysis in future cases against online tech platforms.

One recent criticism of the *American Express* opinion is that technology companies that operate online platforms are both managing and participating on the platform, creating horizontal and vertical relationships. Because companies that operate online platforms collect information on customers, companies on the platform can use it to compete more effectively against sellers and steer consumers to their own products. Some have demanded that large technology companies be banned from both operating a platform and owning a participant that operates on a platform.⁸

Until recently, US antitrust enforcers have held out on launching widespread investigations into online platforms. Competition agencies from other jurisdictions, by contrast, are years into investigations.⁹ On 23 July 2019 the Antitrust Division of the United States Department of Justice (the Division) announced it would be

⁵ *Ohio v American Express Co*, 138 S Ct 2274 (2018).

⁶ See, *ibid.* at 2286-88.

⁷ See, *ibid.* at 2286.

⁸ Warren, *supra* note 1.

⁹ See, Press release, 'Bundeskartellamt prohibits Facebook from combining user data from different sources', *Bundeskartellamt*, 2 July 2017, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html, providing a summary of the restrictions the Bundeskartellamt imposed on Facebook in the agency's investigation into Facebook abuse of market power. See also, Elizabeth Schulze, 'If you want to know what a US tech crackdown may look like, check out what Europe did', CNBC 7 June 2019, <https://www.cnbc.com/2019/06/07/how-google-facebook-amazon-and-apple-faced-eu-tech-antitrust-rules.html>, discussing the European Commission's investigations into US tech companies, including the combined US\$9.5bn in antitrust fines imposed on Google since 2017.

opening an investigation into whether leading internet platforms have market power and are ‘engaging in practices that reduced competition, stifled innovation, or otherwise harmed consumers.’¹⁰ The Division’s announcement comes on the heels of reports that the FTC’s Bureau of Competition and Division will divide up the ‘Four Horsemen of tech.’¹¹ Whether investigations into these companies will be conducted as reported or whether they will take a different form, it is clear that US antitrust enforcers are ramping up.

Killer acquisitions – a closer look at smaller deals

In the US, unlike many other jurisdictions, the need for a pre-merger control filing depends on the value of the transaction.¹² Given US merger filing thresholds, acquisitions by large tech companies of their nascent competitors frequently are not reportable. Such acquisitions have been coined ‘killer acquisitions’ on the theory that large technology companies are buying up nascent competitors before they can pose a real threat to the business of these technology titans.¹³

While individual acquisitions may not pose a threat to competition, taken together, these acquisitions could produce anti-competitive effects. For example, in the field of artificial intelligence (AI), Google has acquired more than a dozen AI companies in the last decade.¹⁴ Unsurprisingly, other leading tech firms also have made multiple acquisitions in this sector.¹⁵

Additionally, the acquisition of nascent technology companies are often ‘acqui-hires’, which is where the rationale for the transaction is the acquisition of the company’s talent, and the nascent company’s product or service is abandoned.¹⁶ Although large technology companies have defended these acquisitions as a way

10 See, Press release, ‘Department reviewing the practices of market-leading online platforms, *US Department of Justice, Antitrust Division*, 23 July 2019, <https://www.justice.gov/opa/pr/justice-department-reviewing-practices-market-leading-online-platforms>.

11 Hannah Albarazi, ‘DOJ makes antitrust probe of Big Tech companies official’, *Law360*, 23 July 2019, https://www.law360.com/competition/articles/1181339/doj-makes-antitrust-probe-of-big-tech-companies-official?nl_pk=84106a0f-487f-424b-af4dba0d9ab4af92&utm_source=newsletter&utm_medium=email&utm_campaign=competition&read_more=1.

12 15 U S C section 18a (2011). Acquisitions below US\$90m are not reportable, and the thresholds can be higher depending on the value of the transaction and the size of the parties to the transaction.

13 ‘Killer Acquisitions’, *Competition Policy International*, 12 September 2018, <https://www.competitionpolicyinternational.com/killer-acquisitions>.

14 ‘The race for AI: Google, Intel, Apple in a rush to grab artificial intelligence start-ups’, *CB Insights*, 27 February 2018, <https://www.cbinsights.com/research/top-acquirers-ai-startups-ma-timeline>.

15 *Ibid.*

16 Anant Raut, ‘On nascent competition in merger analysis’, *FTC*, 27 January 2019, https://www.ftc.gov/system/files/documents/public_comments/2019/01/ftc-2018-0088-d-0017-163741.pdf.

to acquire talent, the possible benefits of an ‘acqui-hire’ may be outweighed by the potential harm to competition because services and products of the start-up never reach the market.¹⁷

Transactions that do not necessarily raise price may still stymy competition, and the FTC has challenged such acquisitions claiming an effect on innovation markets.¹⁸ Indeed such a theory was posited in the 2010 *Horizontal Merger Guidelines* and in the 2014 challenge of the proposed acquisition of EagleView Technology by Verisk Analytics.

The FTC and Division have the authority to investigate mergers that do not meet the filing thresholds of the Hart-Scott-Rodino Act merger clearance process, but they have rarely done so. However, US antitrust agencies are already moving to address these killer acquisitions. In the announcement for its Technology Task Force, the FTC stated that part of its focus would be the review of acquisitions that fall below the merger filing thresholds and could raise competitive concerns. Assistant Attorney General Makan Delrahim also stated that the acquisition of nascent competitors could be anticompetitive for various reasons and may raise the Division’s ‘suspicions’.¹⁹

New legislation or brushing off the toolbox?

The question of whether new tools are needed for US antitrust against tech companies has received much attention on the political scene. Many Democratic presidential candidates for the 2020 election have demanded more intensive antitrust scrutiny of large US tech companies with some candidates even calling for the breakup of the largest tech firms, including Google.²⁰

Others, including current and former agency officials and practitioners, argue that current antitrust approaches have served the interest of US consumers and that existing tools are more than capable of evaluating potential antitrust issues raised by technology companies.²¹ Even with the Division taking a more active stance toward investigations and enforcement involving technology companies, the agency believes it does not need to add more tools to its current enforcement toolkit. In

¹⁷ *Ibid.*

¹⁸ Terrell McSweeney, Commissioner, *Federal Trade Commission*, ‘Understanding innovation and its role in US merger review’, Remarks at the 18th International Conference on Competition Berlin, 16 March 2017, https://www.ftc.gov/system/files/documents/public_statements/1176893/berlin_international_conference_on_competition_final.pdf.

¹⁹ Makan Delrahim, Assistant Attorney General, US Department of Justice, Antitrust Division, ‘...*And Justice for All: Antitrust enforcement and digital gatekeepers*’, 11 June 2019, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-new-frontiers>.

²⁰ See, Warren, *supra* note 1.

²¹ See, Delrahim, *supra* note 19.

summer 2019, Assistant Attorney General Delrahim outlined conduct in the tech field that the Division potentially could find anticompetitive using its current enforcement tools, such as leveraging network effects, coordinated behaviour between market players, exclusive tying arrangements, and the acquisition of early stage companies.²²

It is yet unclear whether US legislators will enact any new antitrust legislation specific to technology companies, but they also are increasing their scrutiny of the sector. In June 2019, the US Congress opened a bipartisan probe into competition in digital markets, which already has included hearings with testimony from representatives of the largest US technology companies and follow up requests for additional information.²³ House Antitrust Subcommittee Chairman David Cicilline also announced his subcommittee would consider whether existing antitrust laws are sufficient to tackle ‘abusive conduct’ by online platforms or whether new legislation is necessary.²⁴

Although many are pushing for new laws, the existing legal framework may prove adequate as US antitrust agencies step up enforcement actions against the technology sector. US antitrust agencies already have statutory authority to pursue enforcement actions against many potentially anticompetitive practices in the technology sector, and, absent significant changes in the political environment, no proposed antitrust legislation appears likely to be adopted in the near future.

Conclusion: do not pass go

US antitrust enforcers have long taken a laissez-faire approach to enforcement against technology companies, citing a reluctance to hamper innovation with excessive enforcement. However, 2019 is becoming the year in which the antitrust agencies are increasing their focus on the technology sector. In a six-month period, the FTC announced its Technology Task Force and the Division announced an investigation into online platforms. The new investigations into technology companies may take years, if precedent investigations are any indicator. Based on statements from the agencies, the key issues in these investigations are likely to be the acquisition of nascent competitors, whether online platforms have market power and whether they are taking action to stifle competition. Although the US agencies may be late to the table compared to other jurisdictions, the impact of any actions taken could transform the technology sector in the United States as we know it.

²² *Ibid.*

²³ Kate Cox, ‘Justice Department launches antitrust probe into Big Tech’, *ArsTechnica*, 24 July 2019, <https://arstechnica.com/tech-policy/2019/07/justice-department-launches-antitrust-probe-into-big-tech/>.

²⁴ *Ibid.*

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