

DOJ CHALLENGES VISA'S ACQUISITION OF PLAID – A STATEMENT ON FINTECH, MONOPOLIZATION, AND NASCENT COMPETITION

On November 5, 2020, the Antitrust Division of the Department of Justice (the "DOJ") filed a complaint to block Visa's proposed acquisition of Plaid. At a time of increased antitrust scrutiny for tech companies, this lawsuit illustrates the DOJ's interest in financial technology—fintech, protection of nascent competition and maintenance of monopoly claims, and stresses the importance of innovation.

The lawsuit comes as DOJ officials indicated that they are "leaning in" to shine a light on financial and technological markets, including their combination in the form of fintech.¹ Recognizing that the lines between different financial technology and banking services have blurred, this year the DOJ unveiled its plan to reorganize its civil sections and create a new Financial Services, Fintech, and Banking section, which is now responsible for overseeing the Visa / Plaid investigation.²

In its complaint, the DOJ claims that Visa is a monopolist in the market for online debit transactions with a durable market share of approximately 70%, and it is trying to acquire Plaid, a fintech company, to protect its market position.³ The DOJ alleges violations of both Section 2 of the Sherman Act, which prohibits monopolization, and Section 7 of the Clayton Act, which prohibits transactions that may substantially lessen competition.

Visa is one of only a handful of companies that run the systems that transmit messages between the different entities involved in the execution of online debit transactions, including a consumer's bank. Plaid currently does not compete with Visa in the market for online debit transactions—rather, its technology underpins many popular fintech offerings, including Venmo, Betterment, and Acorns. Plaid's

¹ Deputy Assistant Attorney General Michael Murray, "The Muscular Role for Antitrust in Fintech, Financial Markets, and Banking: The Antitrust Division's Decision to Lean In," Remarks at University of Michigan Law School (Oct. 14, 2020), <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-michael-murray-delivers-remarks-university-michigan-law>.

² *Id.*

³ Complaint, United States v. Visa Inc., Case No. 3:20-cv-07810 (N.D. Cal. Nov. 5, 2020), <https://www.justice.gov/opa/press-release/file/1334726/download>.

technology allows fintech apps to connect with consumers' financial accounts once consumers grant permission.

According to the DOJ, Plaid is "uniquely positioned" to offer a pay-by-bank debit service that could pose a threat to Visa's position in online debit transactions. Pay-by-bank debit services involve the use of online bank account credentials—rather than a consumer's debit card credentials—to provide the needed consumer information to facilitate a payment with a merchant, utilizing a low-cost alternative to a debit network. Plaid is developing an online pay-by-bank debit service and has connections with thousands of fintech apps, millions of consumer financial accounts, and over 11,000 financial institutions. This network provides Plaid a competitive advantage in overcoming high barriers to entry.

While this is a merger case, the Visa / Plaid complaint provides insight into how the antitrust agency may approach monopolization cases in the technology segment. The complaint paints Plaid as a "disruptive competitor" and alleges that the competitive harm caused by the acquisition includes harm to innovation. Furthermore, Visa is portrayed as a monopolist that has long tried to maintain its market share through various conduct—including entering into long-term agreements with large financial institutions that prevent rivals from growing market share. These arguments echo the allegations regarding restrictive agreements at the heart of the DOJ's antitrust complaint against Google.⁴ The DOJ's characterization of Visa is supported by many quotes from the company's own documents evidencing Visa's concerns about Plaid as a competitive threat. The complaint even features a hand-drawn illustration from a Visa executive describing Plaid as an island volcano whose capabilities are merely "the tip showing above the water."⁵

The lawsuit against Visa and Plaid is notable as it not only confirms the DOJ's interest in fintech enforcement, but also shows an evolution in Section 2 enforcement. The complaint, which comes on the heels of the case against Google, is very much about monopolization and cites key Section 2 cases, including *Microsoft*. It remains to be seen whether this is a new trend in DOJ antitrust enforcement.

⁴ Complaint, United States v. Google, Inc., Case No. 1:20-cv-03010 (D.D.C. Oct. 20, 2020), <https://www.justice.gov/opa/press-release/file/1328941/download>.

⁵ Complaint at ¶ 9, Visa, *supra* note 3.

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