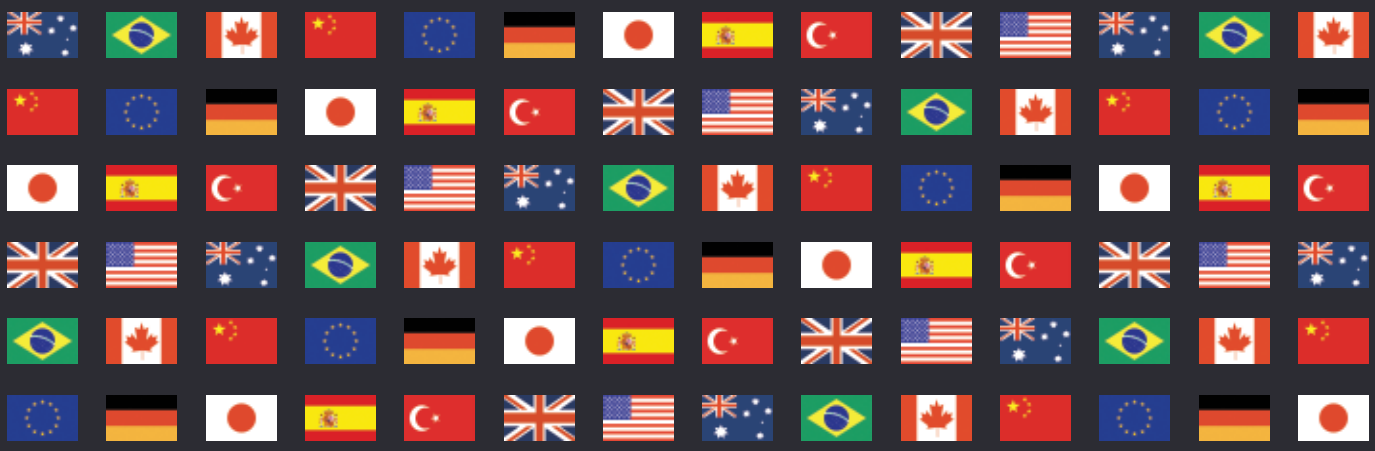
Digital Competition 2021

Contributing editors
Stephen Wisking, Kyriakos Fountoukakos and Marcel Nuys



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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the first edition of *Digital Competition*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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Getting The Deal Through

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Contents

United States

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LEGAL AND REGULATORY FRAMEWORK

Legislation

1 | What legislation governs competition in digital markets in your jurisdiction? Does the standard competition law framework apply or are there any special rules or exemptions?

There is no legislation in the United States that is specific to competition in digital markets. Instead, digital markets are governed by US standard competition laws and the applicable legal framework, including section 1 of the Sherman Act, which prohibits agreements and collusive conduct that unreasonably restrains trade; section 2 of the Sherman Act, which prohibits monopolisation, attempted monopolisation, and other exclusionary conduct by firms with market power; section 3 of the Clayton Act, which prohibits exclusionary contracts, including tying and exclusive dealing; section 7 of the Clayton Act, which prohibits mergers and acquisitions that may substantially lessen competition; and section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition, including conduct and transactions which violate section 1, section 2, and section 7, as well as invitations to collude. Most US states also have general antitrust laws governing all industries, including digital markets.

Enforcement authorities

2 | Which authorities enforce the competition law framework in your jurisdiction's digital markets?

The Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) share responsibility for enforcing US antitrust laws at the federal level. The DOJ's Technology and Financial Services Section is responsible for investigations and enforcement with respect to computer software and other high-tech markets, but current high-profile digital market enforcement matters reportedly involve staff of the Attorney General and the Antitrust Division's Assistant Attorney General as well. The FTC has a specialised unit, the Technology and Enforcement Division, which monitors and investigates potential anti-competitive conduct and transactions in digital markets. Other sectoral regulators, such as the Federal Communications Commission, also have statutory authority to review transactions and regulate certain conduct that may involve digital markets.

State Attorneys General also enforce competition laws, both federal and state. Although State Attorneys General often investigate and bring cases together with federal authorities, they have increasingly pursued their own investigations and enforcement actions, including in digital markets. In 2019, 43 State Attorneys General submitted comments to the FTC calling for greater antitrust enforcement in digital markets. Currently, New York is leading a coalition of nearly all 50 states in an antitrust investigation of Facebook, while Texas is leading a coalition of all states in an antitrust investigation of Google.

Regulatory guidelines

3 | Have the authorities in your jurisdiction issued any guidelines on the application of competition law to digital markets?

There are no competition guidelines in the US that have been issued specifically for digital markets. The DOJ and FTC investigate transactions across all industries pursuant to their Horizontal Merger Guidelines and Vertical Merger Guidelines. Other antitrust guidelines that might be potentially relevant in digital markets include the DOJ and FTC Antitrust Guidelines for Collaborations Among Competitors; Statements of Antitrust Enforcement Policy in Healthcare; Antitrust Guidelines for the Licensing of Intellectual Property; and Antitrust Guidance for Human Resource Professionals. The FTC is reportedly planning to publish one or more reports or guidance documents resulting from its 'Hearings on Competition and Consumer Protection in the Twenty-first Century', which may address digital markets.

Advisory reports

4 | Have any advisory reports been prepared in your jurisdiction on competition law issues in digital markets?

No advisory reports have been prepared by any US federal or state government enforcer to date, but reports have been published by the staff of a US House of Representatives subcommittee and another by an academic institution. In October 2020, the majority staff of the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law issued a report entitled Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, which recommended vast proposals to restore competition in digital markets and to strengthen antitrust law and enforcement generally. The Subcommittee majority staff's report is critical of antitrust enforcement in digital markets to date, and its recommendations would arguably represent that most significant changes to merger and non-merger antitrust law in over a century. And previously, the George J Stigler Center at the University of Chicago formed a Committee on Digital Platforms that released a final report and policy brief on digital platforms in September 2019 written by a committee of academics, policymakers and experts. The academic report expresses concerns that current antitrust law and enforcement has failed to address competition concerns raised by digital platforms and recommends legislative and enforcement changes to address these concerns. For example, the academic report states that antitrust agencies, economists and courts evaluating digital platform mergers lack the necessary tools to analyse non-price dimensions of competition; that antitrust enforcement should be more aggressive; and that a regulatory digital authority should be created to complement the work of the DOJ and FTC in merger enforcement. In addition, the comments submitted by 43 Attorneys General to the FTC in 2019 recommend greater consideration of non-price effects and network effects when assessing digital market mergers and note that section 2 of the Sherman Act can be a strong tool for policing monopolists' acquisitions of nascent and potential competitors.

Advance compliance guidance

5 Can companies active in digital markets ask the competition authority for advance guidance on competition law compliance before entering into an agreement or determining a pricing strategy?

All firms, including those active in digital markets, concerned about the antitrust implications of proposed business activities may request a statement of the federal antitrust agencies' enforcement intentions under either the DOJ's business review letter procedure or the FTC's advisory opinion process, which can take several months to complete. Business review letter or advisory opinion applicants must submit all relevant background information, copies of all operative documents, detailed descriptions of collateral understandings and additional information and documents that the DOJ or FTC may request in order to review the proposed conduct. Although a business review letter or advisory opinion expresses the DOJ's and FTC's current enforcement intentions as of the date of the letter, the agencies remain free to bring an enforcement action if the facts change or the actual conduct proves to be anticompetitive. FTC advisory opinion letters specifically note that the Commission is not bound by the advisory opinions issued by staff.

Regulatory climate and enforcement practice

6 How would you describe government policy and the competition authorities' general regulatory and enforcement approach towards digital companies in your jurisdiction?

The US antitrust agencies would dispute the premise that their enforcement approach varies across sectors or changes over time. But it is clear from speeches and other public reports that the largest firms active in digital markets are currently a specific focus of ongoing investigations at both agencies and among the state antitrust enforcers. For the past few years, antitrust enforcement in the US has been criticised as being too lax in digital markets, in both mergers and conduct matters. For example, critics claim that certain acquisitions by large technology firms of potential competitors should have been blocked, but were permitted; that the legal burden of proving anticompetitive effects is too high; and that current antitrust laws are insufficient to address competition concerns in digital markets. Over approximately the past three years, federal and state antitrust enforcers have significantly increased their scrutiny of digital markets. Congress is conducting investigations of the largest technology firms, and legislators have proposed a variety of new laws to increase antitrust enforcement broadly and specifically in digital markets. Still, antitrust enforcers have brought relatively few enforcement actions in digital markets and have not, as yet, brought cases against the largest technology firms, though reports indicate that such litigation may be imminent. The proposed legislation also remains pending.

HORIZONTAL AGREEMENTS

Special rules and exemptions

7 Do any special rules or exemptions apply to the assessment of anti-competitive agreements between competitors in digital markets in your jurisdiction?

There are no formal antitrust rules or exemptions regarding agreements between competitors specific to digital markets in the US. Note that some activities of digital businesses may fall within the jurisdiction of sectoral regulators such as the Federal Communications Commission or Department of Transportation.

Access to online platforms

8 How has the competition authority in your jurisdiction addressed horizontal restrictions on access to online platforms?

To date, the US federal competition agencies have not specifically addressed agreements among competitors to not use particular online platforms, or agreements in which suppliers restrict particular platforms from hosting rival products or services.

Under the general antitrust framework, an explicit agreement among competitors to refuse to deal with particular rivals can be illegal per se, absent of a plausible justification. The agencies often regard a concerted refusal to deal targeting particular customers or suppliers, or an agreement to deal with them only on certain terms, as unlawful if it appears to be a means to implement a cartel agreement. For example, in 2012, the DOJ alleged that Apple orchestrated an agreement among six book publishers not to supply a rival e-book platform (Amazon) except at higher prices. The courts ruled the arrangements illegal per se (*United States v Apple Inc*, 791 F.3d 290 (2d Cir. 2015)). Agencies and courts are far less likely to characterise exclusivity and vertical non-compete agreements as per se unlawful refusals to deal, but instead consider their potential anticompetitive and pro-competitive effects under the more comprehensive 'rule of reason'.

Algorithms

9 Has the competition authority in your jurisdiction considered the application of competition law to the use of algorithms, in particular to algorithmic pricing?

The US antitrust agencies have not addressed algorithmic pricing in any guidance documents, but in the only matter to date touching on such conduct, the DOJ has criminally indicted and entered into guilty plea agreements with two individuals and a corporate entity for conspiring to fix the prices of posters sold online. According to the charges, the co-conspirators agreed, among other things, to adopt specific pricing algorithms to coordinate the price of certain posters sold in the US through Amazon Marketplace. One of the defendants also allegedly 'instructed' his firm's algorithm-based software to set the prices of these posters in compliance with the price-fixing agreement. Theinvestigation of price fixing in the online wall decor industry is ongoing. The agencies have not brought a case involving or otherwise addressed the question of whether there can be an agreement where two algorithms coordinate pricing with no human input.

Data collection and sharing

10 Has the competition authority in your jurisdiction considered the application of competition law to 'hub and spoke' information exchanges or data collection in the context of digital markets?

To date, the federal competition agencies have not specifically addressed information exchanges or data collection in the context of digital markets.

Under the general antitrust framework discussed in the DOJ and FTC Antitrust Guidelines for Collaboration Among Competitors, information sharing among competitors may be reasonably necessary for some pro-competitive collaborations or pro-competitive in itself, particularly where managed by a third party that is not an actual or potential competitor. However, information exchanges raise competitive concerns if the information exchanged:

- is competitively sensitive, such as that relating to price, output, costs, or strategic planning;
- concerns current operations or future plans; or
- is not sufficiently aggregated and anonymised.

For example, in 2018–2019, the DOJ brought claims against 12 television broadcasters for sharing data from which each could infer the other's current unsold advertising inventory and its anticipated value, allowing them to resist advertisers' efforts to create competition in negotiations. Similarly, in 2017, the DOJ brought claims against video programming distributor DIRECTV alleging it had been involved in exchanges of forward-looking strategic information with certain competitors to coordinate negotiations for video programming.

Agencies have not directly addressed situations where a platform operator collects information from market participants in order to compete against them. However, some commentators have urged agencies to consider, as part of ongoing investigations into large digital platforms, whether platform operators have used their access to customer or competitor data to gain an unfair competitive advantage or otherwise harm competition.

Other issues

11 | Have any other key issues emerged in your jurisdiction in relation to the application of competition law to horizontal agreements in digital markets?

As the DOJ's e-books case against Apple illustrates, agencies have shown increasing concern that some vertical restraints common in digital settings, such as MFNs or other contract provisions referencing rivals, can facilitate horizontal coordination.

Potential antitrust concerns related to horizontal and vertical intellectual property licensing practices, such as through standard-setting organisations, have produced increasing study and debate within the agencies. Most recently, the DOJ has shifted enforcement focus in this area from the unilateral behaviour of patent owners to the collective action of the members of standards development organisations, recently taking the unusual step of issuing a supplement to a 2015 business review letter evaluating the patent policy of the Institute for Electrical and Electronics Engineers.

VERTICAL AGREEMENTS

Special rules and exemptions

12 | Do any special rules or exemptions apply to the assessment of anti-competitive agreements between undertakings active at different levels of the supply chain in digital markets in your jurisdiction?

There are no special rules or exemptions under US antitrust law for analysing vertical agreements in digital markets. Vertical agreements are subject to potential challenge under sections 1 and 2 of the Sherman Act, section 3 of the Clayton Act and section 5 of the Federal Trade Commission Act, as well as state antitrust law. Vertical agreements are almost always evaluated under the antitrust rule of reason, under which courts evaluate evidence of both pro-competitive and anti-competitive effects of the restriction. The analysis differs depending on whether the conduct restricts solely intra-brand conduct, as with resale price maintenance and exclusive sales territories, or instead restricts inter-brand competition, as with exclusive dealing and related practices.

Vertical intra-brand restrictions on distributors and retailers, both price and non-price, have rarely been challenged by the federal agencies and today are almost always lawful because they can generate efficiencies that reduce costs or promote inter-brand competition (see *Leegin Creative Leather Products Inc v PSKS Inc*, 551 US 87 (2007) and Cont'l TV v GTE Sylvania, 433 US 36 (1977)). While most states largely follow federal law on vertical intra-brand non-price agreements, some states continue to treat minimum resale price maintenance as per se illegal.

Inter-brand, exclusionary vertical agreements that affect competitors are more likely to be challenged, but only if the government can demonstrate actual or likely competitive harm, taking into account any pro-competitive benefits. An agreement restricting inter-brand competition, such as exclusive dealing, most favoured nation provisions, conditional pricing practices, and related distribution restraints, are deemed unlikely to harm competition, however, unless the party imposing the restriction possesses significant market power (see *United States v Microsoft Corp*, 253 F.3d 34, 64 (2001)). The analysis can also be affected by whether the conduct arises in a multisided platform, in which case the Supreme Court has held that the government must prove net harm across multiple sides of the platform.

Vertical agreements that facilitate horizontal collusion among firms at any level of the supply chain may be subject to harsher treatment and may even be found per se unlawful under either section 1 of the Sherman Act or section 5 of the FTC Act.

Online sales bans

13 | How has the competition authority in your jurisdiction addressed absolute bans on online sales in digital markets?

The US antitrust agencies have not brought an enforcement action involving an absolute ban on online sales. Such a ban would likely be seen as a vertical non-price intra-brand restraint and, unless imposed by a dominant firm, is unlikely to be viewed as anticompetitive under current federal antitrust law. However, if, for example, the ban was horizontal and imposed pursuant to an agreement among competing suppliers or retailers to eliminate competition from the online channel, it could be challenged as a collective refusal to deal (also known as a group boycott) or, depending on the evidence, as per se illegal horizontal price fixing.

Resale price maintenance

14 | How has the competition authority in your jurisdiction addressed online resale price maintenance?

The US federal antitrust authorities have not brought cases addressing resale price maintenance in digital markets, but any such action would be based on the standard framework. Under federal law, as articulated by the US Supreme Court in the 2007 *Leegin* decision, resale price maintenance is typically evaluated as a vertical agreement pursuant to the rule of reason standard (*Leegin Creative Leather Products Inc v PSKS Inc*, 551 US. 87 (2007)). An agreement is lawful under the rule of reason if it does not unreasonably harm competition taking into account any pro-competitive benefits.

After the Supreme Court's decision in *Leegin*, some states passed statutes to mandate per se unlawful treatment for resale price maintenance, while other state courts have held that resale price maintenance agreements remain per se unlawful under existing court precedent. While the federal antitrust authorities have not pursued enforcement for resale price maintenance in recent decades, state enforcers and private parties could pursue enforcement actions in those states where resale price maintenance remains per se unlawful.

Geoblocking and territorial restrictions

15 | How has the competition authority in your jurisdiction addressed geoblocking and other territorial restrictions?

US antitrust authorities have not specifically addressed geoblocking and cross-border restrictions involving digital markets, but any such conduct would be based on the standard framework for analysing vertical distribution practices and is highly unlikely to pose any significant antitrust concerns under current federal law if limited to restricting

intra-brand competition. Moreover, a firm's unilateral decision regarding whether to sell a product or provide access in a particular territory or country is unlikely to raise concerns under US antitrust law.

Platform bans

16 How has the competition authority in your jurisdiction addressed supplier-imposed restrictions on distributors' use of online platforms or marketplaces and restrictions on online platform operators themselves?

To date, US antitrust enforcers have not directed their attention to selective distribution systems. As with other vertical restrictions, a supplier restriction on a distributor's resale strategy, including any restrictions on reselling products through online platforms or marketplaces, will be evaluated under the rule of reason under the same framework that applies to territorial restrictions. Such agreements are unlikely to violate the antitrust laws unless the seller has market power and the restriction harms inter-brand competition taking efficiencies such as the elimination of free-riding into account, or facilitates horizontal collusion or price-fixing at any level in the vertical supply chain.

Targeted online advertising

17 How has the competition authority in your jurisdiction addressed restrictions on using or bidding for a manufacturer's brand name for the purposes of targeted online advertising?

To date, US agencies have brought one enforcement action relating to restrictions on using or bidding on branded keywords. In 2016, the FTC challenged 1-800 CONTACTS for including terms in trademark litigation settlement agreements with competitors that restricted the parties from bidding on each other's trademarks as keywords to trigger online search advertising. In *In the Matter of 1-800 Contacts, Inc*, FTC Dkt. No. 9372 (Aug. 8, 2016), the FTC did not challenge the legitimacy of the underlying infringement claims but argued that the settlement agreements nevertheless created an unreasonable restraint on competition in violation of section 5 of the Federal Trade Commission Act (using section 1 Sherman Act standards). The case was tried before an administrative law judge who ruled in favour of the FTC complaint counsel and the Commission affirmed the decision over the dissent of one Commissioner. Appeal of the case is pending before the Second Circuit United States Court of Appeals.

Most-favoured-nation clauses

18 How has the competition authority in your jurisdiction addressed most-favoured-nation clauses?

While antitrust enforcers have challenged most favoured nation clauses (MFNs) in a variety of markets, enforcement actions against digital platform operators which employ MFNs have been more limited in the United States than in Europe. In April 2012, the DOJ filed an antitrust lawsuit against Apple challenging its supply agreements with e-book publishers, which included MFNs. A federal appellate court ruled that while Apple's contracts with publishers to distribute eBooks were vertical, Apple stood at the centre of a hub-and-spoke conspiracy among publishers to raise the price of e-books, supporting a per se violation of section 1 of the Sherman Act (see *United States v Apple Inc*, 791 F.3d 290 (2d Cir. 2015)). Courts have been less willing to uphold antitrust claims against platform MFNs that are not based on evidence of a horizontal conspiracy. In *Ohio v American Express Co*, the Department of Justice and several state Attorneys General challenged anti-steering provisions in American Express retailer agreements which prevented retailers from expressing a preference or using incentives to steer consumers towards a competing card that might offer a lower cost per transaction. Ultimately the Supreme Court ruled in 2018 that the government had not met its initial burden of proof because it failed to show that the anti-steering provisions harmed competition in the two-sided market for the transactional platform (138 S. Ct. 2274 (2018)).

Multisided digital markets

19 How has the competition authority in your jurisdiction addressed vertical restraints imposed in multisided digital markets? How have potential efficiency arguments been addressed?

Despite the recent attention to multisided digital markets, US antitrust enforcement against vertical restrictions involving digital platforms is not new and courts and enforcement agencies have largely applied standard antitrust principles in evaluating these restraints. In 1998, the DOJ filed antitrust claims against Microsoft alleging, among other things, that the company had used restrictive vertical agreements with original equipment manufacturers and internet service providers to unlawfully maintain a monopoly in PC operating systems. The Court of Appeals affirmed a lower court ruling finding in that these vertical arrangements contributed to Microsoft's maintenance of monopoly power and for the most part lacked any efficiency justifications (see ***United States v Microsoft Corp***, 253 F.3d 34, 64 (2001)).However, noting platform-related efficiencies and indirect network effects associated with the Windows operating system, the court declined to rely on per se analysis in connection with the government's allegation that Microsoft had unlawfully tied its Windows operating system to its internet browser. The court reversed and remanded that portion of the district court's decision for further analysis under a full rule of reason so those efficiencies could be considered. The court did not apply any special or different legal rules in the case.

More recently, in a case brought by the DOJ and several states against American Express, the US Supreme Court expressly considered the issue of indirect network effects that characterises some multisided platforms. The Court held that for a transactional platform characterised by strong indirect network effects, a plaintiff is required to show, as part of its initial burden of production under the rule of reason, that a restraint on one side of the platform harms competition in the market for the platform itself (138S. Ct. 2274, 2286 (2018)). Harm to competition or users on one side of the platform is not sufficient. The Court appeared to limit its holding, however, to multisided platforms with strong indirect network effects that only compete with other similar platforms. It distinguished platforms like newspapers, which face competition from other single-sided business models on either side of the platform.

This decision has been controversial and its ultimate impact on the antitrust analysis of vertical restraints involving multisided digital platforms remains uncertain. However, a recent FTC case against an electronic medical records platform suggests that while American Express may have clarified the evidence required for a plaintiff to meet its initial burden of production in a rule of reason case involving multisided platforms, it has not otherwise altered the Microsoft framework of analysis (***FTC v Surescripts, LLC***, 424 F. Supp. 3d 92 (DDC 2020)).

Other issues

20 Have any other key issues emerged in your jurisdiction in relation to the application of competition law to vertical agreements in digital markets?

Various US federal and state antitrust authorities are investigating a range of conduct involving large digital platforms, including several types of vertical agreements, such as contract provisions and technological restrictions which affect access to mobile app stores, arrangements

involving sales of third-party products on retail platforms and tying or bundling various aspects of online digital advertising. Although it is expected that any cases brought as a result of these investigations would rely on established antitrust laws and framework, it is possible that enforcers will seek to extend existing principles in novel ways to address purported harms in digital markets, especially with respect to digital platforms with high market shares. In addition, the legal landscape in the US may be reshaped by several private antitrust cases that have been filed on similar issues, including high-profile complaints by the publisher of the popular video game Fortnite challenging both Apple and Google app store restrictions, and by the US Congress, which is considering potential legislative changes in this area.

UNILATERAL ANTICOMPETITIVE CONDUCT

Establishing market power

21 What are the relevant criteria for establishing market power in digital markets in your jurisdiction? Is there any concept of 'abuse of economic dependence' where a company's market power does not amount to a dominant position?

The establishment of an unlawful monopolisation claim under section 2 of the Sherman Act requires, as a threshold showing, proof of monopoly power, which is defined as the power to control prices or exclude competition. Monopoly power, and the lesser element of market power, can be demonstrated through a durable dominant market share in a properly defined relevant market, typically at least 50 per cent although most courts require a 70 per cent or higher share. However, other criteria may also indicate monopoly power, such as direct evidence of an ability profitably to raise price or exclude competitors, evidence of high profits and margins, and direct evidence of anticompetitive effects.

US law does not recognise an antitrust violation based on 'abuse of economic dependence.' However, section 2 of the Sherman Act provides for claims of attempted monopolisation where monopoly power is not established but there is proof of a 'dangerous probability' that a firm acting with specific intent will gain monopoly power as a result of exclusionary conduct.

Abuse of market power

22 To what extent are companies with market power in digital markets subject to the rules preventing abuse of that power in your jurisdiction?

US antitrust law does not use the terminology 'abuse of dominance.' Companies in digital markets are subject to the same general standards prohibiting the exercise of monopoly power to unlawfully exclude competition as firms in other industries, as established in the body of case law interpreting section 2 of the Sherman Act. In addition to evidence of monopoly power, enforcers must prove that the monopolist wilfully obtained or maintained its monopoly power through exclusionary or anticompetitive conduct. Examples of exclusionary conduct may include predatory (below-cost) pricing, refusal to deal, exclusive dealing, and tying arrangements. Importantly, exclusionary conduct by a monopolist is not per se unlawful. Instead, courts may consider the conduct's competitive effects relative to consumer welfare, whether the conduct makes economic sense in the absence of its exclusionary impact, or whether the conduct harmed rivals through efficiency-based competition.

The DOJ's 2001 monopolisation case against Microsoft is instructive in the context of digital markets. The court found that Microsoft unlawfully maintained its monopoly position in PC operating systems through various exclusionary practices, including technical integration of Microsoft's browser into Windows; contracts with manufacturers and other parties which effectively excluded competing browsers; threatening to cut off customers who did not exclusively support Microsoft's browser; and subverting competing technologies that threatened Microsoft's operating system (*United States v Microsoft Corp*, 253 F.3d 34, 64 (2001)).

Data access

23 How has the competition authority in your jurisdiction addressed concerns surrounding access to data held by companies with market power in digital markets?

Although US enforcement agencies have not recently brought a case involving access to data in digital markets, one private case currently pending before a federal district court will address such claims. In that case, a competing professional social networking platform alleged that Linkedin violated antitrust law by blocking access to the competitor's scraping of public profiles for use in its own product, which LinkedIn justified as necessary to protect its users' privacy concerns. The claim is that Linkedin's data is an 'essential facility' under the antitrust laws, such that granting competitors access to the data may be required under certain circumstances. Public reports suggest that federal and state enforcers are considering whether requiring access to, or portability of, data maintained by social media and other large digital platforms may be necessary to remedy alleged anticompetitive conduct.

Data collection

24 How has the competition authority in your jurisdiction addressed concerns surrounding the collection of data by companies with market power in digital markets?

US competition authorities treat data as an asset and practices relating to the collection and use of data may be relevant in the analysis of entry barriers or competitive effects in either a conduct or merger investigation. However, data collection practices that generate consumer privacy issues are typically addressed by authorities that enforce privacy or other consumer protection laws.

Leveraging market power

25 Has the competition authority in your jurisdiction adopted any decisions involving theories of harm relating to leveraging market power in digital markets, such as through tying, bundling or self-preferencing?

The US Supreme Court has ruled that section 2 of the Sherman Act does not recognise as unlawful generalised theories of monopoly leveraging or the use of monopoly power in one market to gain a competitive advantage in a second market unless that advantage rises to the level of threatened monopolisation (*Verizon v Trinko*, 540 US 398 (2004)). However, certain types of agreements or unilateral conduct have been condemned as allowing a monopolist to unlawfully exclude competition in an adjacent market. For example, tying under US law involves an agreement to sell one product in which the firm has market power only on the condition that the buyer also purchases a different product. Although the Supreme Court has yet to overrule its previous decisions which treated tying as per se unlawful, the trend in the courts has increasingly been to treat tying, even by a monopolist, as subject to more complete analysis under the rule of reason, which allows courts to evaluate pro-competitive benefits (for example, lower prices to consumers) along with any anticompetitive harm. US courts are particularly sceptical of claims of anticompetitivebundling which lack the coercive element of tying claims, because of their potential to result in consumer benefits. In a recent example from 2019, the FTC alleged that a dominant online medical prescription platform maintained a monopoly by using tactics such as loyalty arrangements which effectively imposed exclusivity to prevent

customers from doing business through rival platforms. Although there are no recent US enforcement decisions regarding self-preferencing in digital markets, public reports indicate that related theories may be pursued in active investigations involving digital markets.

Other theories of harm

26 What other types of conduct have been found to amount to abuse of market power in digital markets in your jurisdiction?

None to date, but in February 2020, the FTC announced a study in which it ordered Google, Amazon, Apple, Facebook and Microsoft to provide information regarding acquisitions consummated from 2010 to 2019. In addition to evaluating these firms' acquisition activity relative to merger reporting requirements, the FTC may consider whether a series of acquisitions over time that are not independently unlawful may violate sections 1 or 2 of the Sherman Act when undertaken by a firm with market power to exclude actual or potential competitors.

MERGER CONTROL

Merger control framework

27 How is the merger control framework applied to digital markets in your jurisdiction?

There currently are no special rules or thresholds applicable to digital markets in the US merger control framework. The same rules and thresholds apply as in any merger or acquisition in any industry, although recent press reports suggest that the federal agencies may consider a lower notification threshold for acquisitions by large digital platforms as part of the move to greater scrutiny of digital markets. As with other mergers, the FTC or DOJ investigate and decide whether to challenge a merger in a digital market, and have jurisdiction to do so regardless of whether the transaction meets the notification threshold or whether it is already consummated. Along with the federal agencies, state Attorneys General – either independently or with the federal agencies – may investigate and bring a lawsuit to enforce state or federal antitrust laws applicable to digital mergers.

Prohibited mergers

28 Has the competition authority prohibited any mergers in digital markets in your jurisdiction?

There are few cases in which US antitrust enforcers have challenged mergers in digital markets. For example, in January 2014, the DOJ succeeded in its lawsuit challenging Bazaarvoice's consummated acquisition of PowerReviews. The DOJ sued to unwind the merger, alleging it was likely to substantially lessen competition for product rating and review platforms, which combined software and services to enable manufacturers and retailers to collect, organise and display consumer-generated product reviews and ratings online.

In June 2017, the FTC filed a complaint challenging the proposed merger of DraftKings and FanDuel, the two largest online providers of paid daily fantasy sports betting. The FTC alleged that paid daily fantasy sports was a separate market from other fantasy sports; that paid daily fantasy sports could be evaluated either as an online platform market or as a cluster market; and that the merger would create a firm with by far the largest share of the market. The parties subsequently abandoned the transaction.

In March 2018, the FTC filed a complaint challenging CDK Global Inc's acquisition of nascent competitor Auto/Mate, Inc, alleging that the merger between these two automotive dealer management software vendors was anticompetitive. The parties subsequently abandoned the transaction.

In August 2019, the DOJ filed a complaint challenging Sabre Corporation's acquisition of Farelogix, alleging that the two firms competed head to head to provide software-enabled booking services for airline tickets to traditional and online travel agencies, and arguing that the merger would eliminate competition that had benefited airlines and consumers. A district court denied the DOJ's request for an injunction, but the DOJ successfully petitioned to have the decision vacated on appeal after the parties abandoned the transaction.

And while the agencies investigated and cleared the *Zillow/Trulia*, *Google/DoubleClick*, *Facebook/Instagram* and *Facebook/WhatsApp* transactions, some of these consummated transactions may be under renewed scrutiny as part of ongoing federal and state investigations.

Market definition

29 How has the competition authority in your jurisdiction addressed the issue of market definition in the context of digital markets?

The antitrust agencies have generally followed their guidance on product and geographic market definition as laid out in the Horizontal Merger Guidelines, which define markets as narrowly as needed to accurately reflect competition between substitute products and services. The agencies use a variety of qualitative and, where available, quantitative evidence to inform market definition under the framework of the hypothetical monopolist test. For example, in its review of the *CDK Global/Auto/Mate* merger, the FTC defined the relevant product market narrowly as the sale of automotive dealer management software for franchise dealers, excluding similar products for used car dealers because those similar products did not provide OEM certification necessary for franchise dealerships. Geographic markets have often been defined as, or no broader than, the United States, such as in *Sabre/Farelogix* and *DraftKings/FanDuel* on the basis of the hypothetical monopolist test or ordinary course of business evidence.

'Killer' acquisitions

30 How has the competition authority in your jurisdiction addressed concerns surrounding 'killer' acquisitions in digital markets?

The US antitrust enforcement agencies have always been concerned about the reduction of innovation and potential competition, but they have been increasingly focused on the impact of 'killer' acquisitions in digital markets, with mixed success. FTC Chair Joe Simons has stated that the FTC is very focused on 'mergers of high-tech platforms and nascent competitors,' explaining that because the acquired firm is by definition not a full-fledged competitor, the likely level of future competition is not often apparent, '[b]ut the harm to competition can nonetheless be significant.' In 2018, the FTC sued to enjoin the CDK Global/Auto/Mate merger, arguing that Auto/Mate, although it had a relatively small market share, was an 'innovative, disruptive challenger' which offered low pricing, favourable contract terms, free upgrades, training, and high-quality customer service. The transaction was subsequently abandoned.

DOJ Assistant Attorney General Delrahim has commented that there is '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, or diminishing or slowing innovation, or reducing quality.' In 2019, the DOJ unsuccessfully challenged the Sabre/Farelogix merger, alleging that Farelogix was an innovative technology company that had injected much-needed competition and innovation into the stagnant booking services markets. A district court, however, denied the DOJ's request to enjoin the merger, although this decision was later vacated by an appeals court after the parties abandoned the merger. In November

2020, the DOJ also sued to block Visa's proposed acquisition of Plaid, a financial technology firm developing a substitute for Visa's online debit services, alleging the transaction "would eliminate a nascent competitive threat[.]"

FTC Chairman Simons has indicated that the agency may require big tech firms to notify it of transactions that do not meet the current thresholds for notification under the HSR Act, in order to better detect potentially unlawful transactions.

Substantive assessment

31 What factors does the competition authority in your jurisdiction consider in its substantive assessment of mergers in digital markets?

The DOJ's and FTC's substantive assessment of mergers in digital markets, as in other industries, focuses on price and non-price effects. In particular, the agencies assess whether a merger is likely to lead to higher priced or lower quality products and services for consumers than might exist 'but for' the merger. The agencies also have typically, and increasingly, focused on whether a merger might lessen or eliminate innovation competition. In the proposed merger between CDK Global and Auto/Mate, the FTC explained that Auto/Mate was an 'innovative, disruptive challenger' which was poised to become an even more effective competitor. In the proposed *DraftKings/FanDuel* merger, the FTC's complaint alleged that the merger would 'likely lead to reduced product quality, including contest size and platform features and reduced innovation, including the development of new contest types and contests for additional sports.'

The agencies have also examined the role of data when conducting merger reviews in digital markets. For example, in the *Nielsen/Arbitron* merger, the FTC alleged that the parties were the firms best positioned to develop a national syndicated cross-platform audience measurement service because they maintained the large amount of data needed to provide such a service, and, accordingly, their merger would eliminate future competition to provide those measurement services. On the other hand, the *Microsoft/LinkedIn* merger was cleared quickly despite both companies having large sets of user data, where neither sold those data nor made them available to third parties.

Although some proponents of more vigorous antitrust enforcement are calling for antitrust agencies to consider non-competition concerns in merger reviews, the agencies have, to date, maintained their focus on competition-related concerns. The FTC has, however, been more actively assessing whether mergers might result in competitive harm in labour markets.

Finally, there is no clear standard for the time frame in which the agencies analyse the potential anticompetitive effects of a merger. Indeed, one criticism often lodged by merging parties is that the agencies require that they show entry and efficiencies are likely to occur in the near term (generally in two to three years) and discount such mitigating factors in later years, but the agencies essentially treat near- and long-term anticompetitive effects equally in assessing harm from a merger.

Remedies

32 How has the competition authority in your jurisdiction approached the design of remedies in mergers in digital markets?

Historically, the US agencies have preferred structural remedies, including in technology markets. The current head of the DOJ Antitrust Division emphasised that preference. Shortly after taking his position at the DOJ, he stated that '[t]he Division has a strong preference for structural remedies over behavioural ones,' explaining that behavioural remedies are 'inherently regulatory,' the DOJ is not equipped to be an ongoing regulator of remedies, and behavioural decrees are 'merely temporary fixes for an ongoing problem.' In September 2020, the DOJ issued a revised Merger Remedy Manual, which states that 'conduct remedies' are inappropriate except in very narrow circumstances.

This strong and growing preference for structural over behavioural remedies can be seen in the disparate ways the DOJ approached the *Comcast/NBCUniversal* and *AT&T/Time Warner* vertical mergers. In 2011, the DOJ accepted behavioural remedies to resolve its concerns about the *Comcast/NBCUniversal* merger. But in 2017, the DOJ sued to block the *AT&T/Time Warner* merger rather than accept behavioural remedies similar to those accepted in *Comcast/NBCUniversal*, although that challenge was unsuccessful.

To the extent that the agencies accept behavioural remedies, those are typically used to supplement structural relief in a horizontal merger or to remedy a vertical merger. For example, to resolve concerns that Google's acquisition of ITA might threaten downstream rivals' access to ITA's software, which those rivals used as an input, the DOJ's 2011 settlement with the merging parties required them to commit that they would continue to license and improve ITA's software, honour the terms of existing agreements, negotiate extensions of existing agreements on the same terms as then-currently existed, and negotiate new agreements on a fair, reasonable , and non-discriminatory basis, among other requirements.

UPDATE AND TRENDS

Recent developments and future prospects

33 What are the current key trends, legislative and policy initiatives, recent case law developments and future prospects for the enforcement of competition law in digital markets in your jurisdiction?

There is a clear trend towards increased antitrust scrutiny of digital markets by federal and state antitrust enforcers and the US Congress. In July 2019, the DOJ announced it was reviewing the practices of market-leading online platforms and in October 2020 filed suit against Google. The FTC formed a Technology Enforcement Division in 2019 that is actively conducting investigations and the agency is reportedly on the verge of bringing a suit against Facebook. State Attorneys General of all or nearly all 50 states have had active investigations of Google and of Facebook, and investigations of other technology firms have recently been initiated. Eleven states joined the DOJ in its suit against Google, while other states indicated that they may pursue other claims against Google, and still others are reportedly considering a suit with or without the FTC against Facebook. In Congress, both the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law and the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights have held antitrust hearings on digital markets. And in October 2020, the majority staff of the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law issued a digital markets report recommending numerous proposals to restore competition in digital markets and to strengthen antitrust law and enforcement generally. Legislators have proposed legislation aimed at strengthening antitrust enforcement. Developments among litigated cases before courts are mixed. In 2020, the DOJ lost its effort to block Sabre's acqui-sition of an allegedly nascent competitor, Farelogix, but the DOJ later had the decision vacated on appeal after the parties abandoned their transaction. In 2019, the Supreme Court ruled against Apple, finding that iPhone owners had standing to sue Apple for federal antitrust violations regarding the App Store. Individual companies are increasingly filing private litigation against some of the largest technology firms as well.

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