Session 105 | Uncharted Territory: Antitrust Enforcement in the Technology Sector

Antitrust laws in the United States have evolved with the economy and technological change, moving from the trustbusting of Standard Oil to the last of the “Big Cases” – AT&T and Microsoft. Today the antitrust laws face a new challenge. Technology and digital platform companies such as Google, Facebook, Amazon, and Apple have achieved unprecedented power over technological markets and everyday life. The growth of these companies raises important questions, including: Is traditional antitrust analysis adequate for assessing dominant firm conduct by Big Tech firms? How should such analysis address the distinctive characteristics of platforms and digital markets and the business models of firms operating in such markets? How should Big Tech acquisitions be evaluated, including the acquisition of nascent upstarts? Can current competition laws reach—and remedy—anticompetitive conduct by Big Tech firms? And if competition laws need to be updated to address anticompetitive conduct by Big Tech firms, what legislative and/or regulatory changes are desirable? The CLE program will analyze the enforcement landscape, recent litigation against the Big Tech companies, and legislation and proposed solutions that have been advanced in the United States and in Europe.

Moderator:
Bonnie Lau, Partner Morrison & Foerster LLP

Speakers:
Mai Pham Robertson, Chief of Staff to General Counsel, Fannie Mae
Michele Lee, Head of Global Litigation, Regulatory & Employment, Pinterest
Elizabeth Wang, Executive Vice President, Compass Lexecon
Tim Wu, Professor, Columbia University & White House Special Advisor, National Economic Council
SESSION NAME:

UNCHARTED TERRITORY
Antitrust Enforcement in the Technology Sector
Agenda

- Key Antitrust Concepts
  - Horizontal Agreements
  - Monopolization
  - Vertical Restraints
  - Merger Enforcement
- The Current (Shifting) Regulatory Landscape
- Novel Theories of Harm
  - Self-Referencing
  - Killer Acquisitions
  - Big Data
- Question and Answer
Speakers

• Michele Lee
  • Head of Global Litigation, Regulatory & Employment, Pinterest
• Erica Lai
  • Corporate Counsel, Litigation at Northrop Grumman
• Sophie Yang
  • Senior Vice President, Compass Lexecon

Moderator

• Bonnie Lau
  • Partner, Morrison & Foerster LLP
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The New Normal

• Innovation, technological advancement, rise of digital platforms
• Antitrust enforcement is trying to keep pace (or catch up)
  • New policies, investigations, enforcement actions
  • New studies to analyze potential impact on competition
  • New tools to address issues presented by digital platforms
  • Unclear what the problems are and how to solve them
  • Significant political (and peer) pressure to act
• This environment creates uncertainty and risk for you because the rules of the road are unclear, evolving, and often conflicting
• Where are we now? Where are going? What should you do?
Key Antitrust Concepts
## U.S. Legal Framework

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<th>Concept</th>
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<td>Agreements</td>
<td>Agreements, combinations, or conspiracies that unreasonably restrain trade</td>
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<td>Sherman Act § 2</td>
<td>Monopolization</td>
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<td>Transactions</td>
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<td>State Laws</td>
<td>Agreements + Monopolization + Other Conduct + Transactions</td>
<td>Often track, but can be broader than, federal analogs</td>
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Analytical Framework

• **Per Se Rule**
  • Certain conduct is considered inherently anticompetitive and is therefore *per se* (automatically) illegal, regardless of circumstances or justifications
    • Price fixing
    • Bid rigging
    • Market allocation (customers/territories)
  • **Subject to criminal prosecution**

• **Rule of Reason**
  • Other conduct is assessed under the rule of reason, a more lenient standard that considers the purpose of a restraint and weighs anticompetitive effects against any procompetitive justifications
    • Vertical restraints (exclusive dealing, RPM)
    • Exclusionary conduct (refusals to deal)
Why Does Antitrust Matter?

- Criminal penalties
- Imprisonment
- Protracted investigations in multiple jurisdictions
- Massive fines
- Follow-on civil lawsuits
- Treble damages, attorneys fees and costs in lawsuits (win or lose)
- Potential for forced changes to business practices
- Business disruption
- Reputational harm
Horizontal Agreements

- **Horizontal** – agreements between competitors
  
  *Per Se Illegal – Highest Risk*

  - **Price Fixing**: Agreements or understandings to fix, alter, peg, stabilize, standardize, or regulate price
  
  - **Bid Rigging**: Agreements or understandings on any method by which bids will be determined, submitted, or awarded
  
  - **Market Allocation**: Agreements or understandings to divide markets, territories, or customers

- Unlawful agreements need not be express → they can be inferred based on circumstantial evidence (wink/nod)
  
  - Opportunity to collude followed by simultaneous behavior
  
  - Parallel conduct among competitors + additional factors
    
    - Exchanges of competitively sensitive information (CSI)
    
    - Common motive to conspire
    
    - Actions against the economic self-interest of each participant
No-Poach Agreements

• “No-poach” = agreement not to solicit/hire other company’s employees
  • Another form of competitor agreement
  • Competition in this context means competition for talent, not goods/services
  • Beware exchanges of information beyond wages – bonuses/benefits/etc.
• DOJ/FTC issued Antitrust Guidance for HR Professionals in 2016
  • Focus is on wage-fixing, no-poach agreements, and information-sharing
  • DOJ says these agreements are *per se* antitrust violations
• Punishment is up to 10 years in prison and $1M fine for individuals
• Developing area of enforcement starting in December 2020
  • Criminal corporate indictments
  • Individual executives charged with wage-fixing and non-solicit agreements
Monopolization (U.S.)

- Prohibits monopolies, attempts, and conspiracies to monopolize
- Mere possession of monopoly power is not illegal
- Requires both *monopoly power + exclusionary conduct*
  - It is not illegal to be BIG, only to be BIG and BAD *(until now?)*
  - **Monopoly power**: power to control prices or exclude competition in relevant market (high market share)
  - **Exclusionary conduct**: conduct that enhances or maintains monopoly power, foreclosing competition (e.g., refusals to deal, tying arrangements)
- Analyzed under rule of reason, which weighs competitive harm against procompetitive benefits
Vertical Restraints

• **Vertical** – agreements between firms at different levels of the distribution chain

**Rule of Reason – Lower Risk**

• Exclusive dealing arrangements
• Resale price maintenance (RPM)
• Most favored nation (MFN) clauses

• The antitrust laws recognize that vertical restraints can promote interbrand competition and yield important efficiencies
  • Encouraging downstream investment in the marketing/sale of goods
  • Preventing free-riding
  • Reducing transaction/bargaining costs
  • Promoting brand value

• However, they can also disadvantage/foreclose rivals, create barriers to entry, and harm competition

• Vertical merger guidelines
Merger Enforcement Framework

Section 7 of Clayton Act

• Prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly."

• Key question is forward-looking, and asks “whether the proposed merger is likely to create or enhance market power or facilitate its exercise.”

• Transactions that exceed certain monetary thresholds must notify the antitrust agencies through the HSR process, to allow agencies to examine likely effects of proposed merger.

• During waiting period, parties must comply with the antitrust laws, including prohibitions on gun jumping, exchanges of competitively sensitive information (CSI), and other anticompetitive conduct.

• Closing timeline increasingly uncertain given recent FTC policy changes.
The Current (Shifting) Regulatory Landscape
Current U.S. Landscape

• White House Executive Order
• Federal Trade Commission
  • New leadership – Lina Khan
  • Rescinding prior FTC and/or DOJ policies and guidance
• Department of Justice, Antitrust Division
  • New leadership – Jonathan Kanter
• State AG investigations
• Potential new federal legislation
Significant Potential Exposure

Senate Zeros in on Big Tech with Latest Antitrust Reform Bill

Amazon and Apple handed $225 million in Italian antitrust fines

Federal Trade Commission Refiles Suit Accusing Facebook Of Illegal Monopoly

Google hit with its third antitrust lawsuit since October, this time by a bipartisan coalition of states

Dems Call For Criminal Inquiry Into Google-Facebook Ad Deal
High-Profile Litigation

• Federal and state enforcement
  • DOJ v. Google
  • FTC v. Facebook
• Private civil lawsuits
  • Epic Games v. Apple
Global Enforcement

• 140+ jurisdictions with competition law enforcement regimes
• European Union
  • Google: $9B in fines in the last few years (Shopping/Android/Ad Intermediation)
  • Apple: investigation of platform abuse vs. app developers (Spotify complaint)
• China State Administration for Market Regulation (SAMR)
  • Draft antitrust guidelines aimed at regulating internet-based monopolies, recent fines on large e-commerce companies
• Japan FTC
  • October 2021 opened probe against Apple and Google on smart devices
• Korea FTC
  • September 2021 fined Google $177M for abuse of market dominance in Android operating system market
  • Amended Monopoly Regulation and Fair Trade Act (MRFTA) to cover “killer acquisitions”
Novel Theories of Harm
Self-Referencing

- Potential monopolization or abuse of dominance where:
  - Platform has a **dual role** as both a distributor of products/services and a competitor to firms offering products/services on the platform
  - Platform has a **dominant** position
  - Platform exploits its market power to **exclude rivals**, benefitting itself, strengthening its market position, and harming competition

- Recent enforcement examples
  - Google Shopping (EU)
  - Amazon Marketplace + Spotify complaint vs. Apple (EU)
  - *Texas et al. v. Google* (E.D. Tex.)
Killer Acquisitions

- Acquisition of nascent competitor (e.g., innovator or disruptive firm) to eliminate threat of future competition
- U.S. antitrust enforcers are actively pursuing cases
  - *Sabre/Farelogix* (DOJ, UK CMA airline booking)
- Regulators are highly focused on identifying so-called “killer” acquisitions in digital markets
  - Sept 2021 FTC staff presented report on nearly a decade of unreported acquisitions by large tech cos, analyzing terms, scope, structure, and purpose of exempted transactions
- Difficult to identify/challenge these transactions using traditional antitrust tools → enforcers are getting creative
  - France: Proposal to require tech platform to report all deals
  - United States: Section 2 of the Sherman Act (monopolization)
Big Data

• The possession of large quantities of data (volume, velocity, variety, value) as a potential harm to competition
• Data is abundant and can yield significant consumer benefits such as improved (often zero-price) services
• Data-driven network effects can lead to market tipping and winner-take-all outcomes
  • Data as a barrier to entry to other firms
  • Exploitation of data to harm competition (less privacy)
• Enforcers continue to grapple with key questions:
  • Is Big Data in itself a competition problem?
  • How to evaluate harm to competition (non-price effects)?
  • Can antitrust law address issues presented by Big Data?
No Poach

• DOJ pursuing criminal charges for no poach agreements
  • E.g., US v. Surgical Care Affiliates

• Private plaintiffs pursuing per se treatment in all contexts

• Case law – no clear standard has developed for civil litigation
  • Rule of reason?
  • Quick look?
  • Per se?

• That some courts have approved per se treatment at pleadings stage does not resolve the question
  • In re Railway Industry Employee No-Poach Antitrust MDL (W.D. Pa. June 20, 2019)
  • Butler v. Jimmy John’s Franchise (S.D. Ill. July 31, 2018)
Aggressive Merger Enforcement

• Administration has set an aggressive tone
  • “The Department of Justice is conducting a careful review of the Horizontal Merger Guidelines and the Vertical Merger Guidelines to ensure they are appropriately skeptical of harmful mergers.”
    – Richard Powers, Acting Asst. Atty General of DOJ Antitrust Division

• Heightened interest in specific sectors, including tech and digital platforms

• Increased attention on issues such as data, labor, ESG

• Effects
  • No decline in M&A (yet)
  • Deal timelines extending
  • Agency uncertainty (warning letters)
Questions?