

DOJ and FTC Lock in on Big-Tech Firms, But T-Mobile/Sprint Merger Opinion Provides a Potential Compelling Antitrust Defense

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Over the past year, the United States Department of Justice (DOJ) and the Federal Trade Commission (FTC) have focused their antitrust efforts on so-called “big-tech” firms, including Google, Facebook, Amazon, and Apple. At the same time, key voices in both the FTC and DOJ have been signaling that the agencies are realizing that they must adapt their antitrust enforcement approaches to reign in big tech, as part of a larger conversation in the antitrust community about whether current antitrust laws and practices are versatile enough to deal with the ever-changing nature of digital platforms.

Meanwhile, a recent U.S. District Court decision allowing the T-Mobile/Sprint merger to proceed may provide a potential antitrust defense to the big-tech firms in the event federal regulators decide to pursue a case.

The FTC Creates New Division to Investigate Tech Competition

In February 2019, the FTC created a task force entirely dedicated to address competition issues in the technology industry. The task force has since been converted into a permanent Bureau of Competition division called the Technology Enforcement Division (TED). In July 2019, Facebook disclosed that it was being investigated by the FTC, which the FTC subsequently confirmed was part of the TED’s antitrust probe of multiple large technology firms classified as “multi-sided platforms.” Several major media outlets have reported that Amazon is also a main focus of the FTC’s ongoing investigation. In January 2020, FTC Chairman Joseph Simons revealed that the FTC was nearing a decision on whether it will bring a related enforcement action.

While the TED was continuing its investigation, the FTC’s Deputy Director, Daniel Francis, discussed the creation of the FTC’s first new enforcement division in nearly twenty years during a panel discussion on September 12, 2019, titled, “Big Tech and Antitrust: What Lies Ahead.” Mr. Francis explained that the TED was created to address the unique issues that big-tech firms present to antitrust enforcement in the United States, including the ever-evolving nature of digital platforms. Mr. Francis made clear that while the FTC is highly attuned to these issues, it will continue to pursue traditional, evidence-based cases to develop its enforcement response to digital platforms.

The DOJ Says Breaking up Tech Giants is “Perfectly on the Table”

In public comments, Makan Delrahim, the DOJ’s Assistant Attorney General for the Antitrust Division, has been even more straightforward regarding the investigation of big-tech firms. Speaking at the WSJ Tech Live conference on

October 22, 2019, Mr. Delrahim openly wondered whether the big-tech firms had “abused the market power that they had gained,” and notably, said that a breakup of the tech giants was “perfectly on the table.” The DOJ has reportedly been working on a wide-ranging antitrust investigation involving Google and Facebook, and perhaps Apple, and in late January 2020, signaled that they were expanding the probe by posting two-year term job listings for attorneys, paralegals, and statisticians to assist with a probe of “digital markets.”

The FTC and DOJ investigations are part of a wider focus on big-tech firms and the perceived lack of scrutiny they received in developing into some of the largest companies in the world. The House of Representatives’ Antitrust Subcommittee have held five public hearings with Amazon, Apple, Google, and Facebook over the last year, and some current and former Democratic presidential nominees, particularly Elizabeth Warren, have been highly critical of the tech firms’ alleged abuses of power, including the sharing of private information for profit. Earlier this month, news outlets reported that DOJ Attorney General William Barr is personally taking control of the DOJ investigation, with the expectation that Attorney General Barr will be more aggressive in mounting an antitrust challenge against one or more of the tech companies.

“Complex and Dynamic” Market Defense

While the big-tech firms remain under immense pressure from federal regulators, a recent opinion may provide a new defense to these probes.

On February 11, 2020, U.S. District Judge Victor Marrero declined to block a proposed merger between T-Mobile and Sprint, the third- and fourth-largest wireless carriers, respectively, in the United States. After the DOJ and the Federal Communications Commission approved the merger plan last year, the deal was challenged by thirteen states and the District of Columbia—a lawsuit that Mr. Delrahim of the DOJ pointed to in his February 6, 2020 remarks about “third parties” undercutting decisions made by federal enforcement agencies. In Judge Marrero’s opinion approving the proposed merger, he explained that the wireless industry was a “complex and dynamic market” with goods that “can shift quickly from year to year.”^[1] In support of his opinion that the deal was not anticompetitive, Judge Marrero found that in complex and dynamic markets, “pricing strategies tend to be less transparent,” with anticompetitive behaviors “likely more risky, impractical, or unrealistic.”^[2]

Big-tech firms would be wise to study this decision because of the close parallels between the wireless and big-tech industries. Each of the big-tech firms is a unique, digital platform that together clearly form a “complex and dynamic” market that is constantly changing, perhaps even more so than the wireless industry. If federal antitrust regulators decide to bring an enforcement action against one or more of the big-tech firms, a “complex and dynamic” market defense now has precedent, and may prove even more persuasive coming from big-tech firms.

^[1] *New York v. Deutsche Telekom AG*, No. 19 CIV. 5434 (VM), 2020 WL 635499, at *45, *49 (S.D.N.Y. Feb. 11, 2020).

^[2] *Id.* at *48.

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Authors

[Martin Geagan](#)

[Brandon Annette](#)

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