



# The Antitrust Review of the Americas 2019

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**GCR** |  
GLOBAL COMPETITION REVIEW

# United States: Technology Mergers

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## High-tech and pharma mergers: ‘vigorous’ enforcement likely to continue under Trump administration

High-tech antitrust enforcement is at the top of the Trump administration antitrust enforcement agenda, including challenges to mergers affecting technology platforms and the pharma and life sciences industries.

Statements by senior leadership at both the US Department of Justice (DOJ) and US Federal Trade Commission (FTC) promise vigorous enforcement in tech and pharma industries, and recent actions against transactions, including non-reportable deals, prove they are serious. The agencies have also signalled an increased scepticism of behavioural remedies.

Two key court decisions will also influence merger review going forward. The DOJ’s loss in its effort to block the *AT&T/Time Warner* merger and pending appeal will likely impact not only ‘vertical’ mergers but also horizontal tech mergers given the court’s focus on the dynamic competitive landscape. And the Supreme Court’s decision in *Ohio v American Express*,<sup>1</sup> while not a merger case, warrants attention given that its teaching regarding two-sided markets may well impact merger analysis.

In the current enforcement environment, understanding the unique issues that drive enforcement in the technology arena – from the importance of intellectual property and innovation competition, to network effects and Food and Drug Administration regulations – is critical to achieving merger clearance in close cases.

## ‘Our mantra is vigorous enforcement’: DOJ and FTC management heed calls for enforcement in high-tech and pharma

New leadership is now at the helm of both the DOJ and FTC, with Makan Delrahim confirmed as Assistant Attorney General for the Antitrust Division in September 2017 and Joe Simons confirmed as chairman of the FTC in April 2018. Delrahim’s deputies are also all in place and Trump has now filled all vacancies on the FTC, so both agencies are at full strength.<sup>2</sup>

During Delrahim’s and Simons’s confirmation hearings, lawmakers questioned their intention to enforce the antitrust laws to combat perceived increasing concentration, both generally, and in high-tech and pharma specifically. Republican Senator Ted Cruz of Texas, for example, asked Simons about the growing market power of large tech companies during his confirmation hearing.<sup>3</sup>

The FTC and DOJ appear to be responding to the calls for vigorous enforcement. In April 2018, Delrahim gave a speech focused on antitrust enforcement in the digital era addressing concerns that:

*Antitrust laws are ill-equipped to address competition issues that have arisen in the digital platform economy, and that as a result of the antitrust laws’ supposed lack of adaptability more generally, there have been harmful increases in industry concentration, along with a variety of other social ills.*<sup>4</sup>

He argued that, to the contrary, the antitrust laws are well-equipped to deal with ‘evolving business models’ and said that the government stands ready to use those tools.<sup>5</sup> Delrahim pledged enforcement:

*If there is clear evidence of harm to competition in digital platforms, enforcers must take vigorous action and seek remedies that protect American consumers, so that free markets or consumers don’t instead bear the risk of failure.*<sup>6</sup>

Likewise, Simons promised during his confirmation hearing that he would investigate whether merger enforcement is ‘too lax.’<sup>7</sup> In June 2018, he announced that the FTC will hold public hearings beginning in September 2018 and continuing into 2019, covering topics ranging from ‘communication, information and media technology networks’ and ‘markets featuring “platform” businesses’, to ‘[t]he intersection between privacy, big data, and competition’ and ‘evaluating the competitive effects of corporate acquisitions and mergers’. The hearings are also expected to address ‘the role of intellectual property and competition policy in promoting innovation’, a topic of great importance to tech and pharma industries.<sup>8</sup> In a meeting with the press announcing the hearings, Simons said that the FTC’s ‘mantra is vigorous enforcement.’<sup>9</sup>

## Pharmaceuticals and medical devices remain key focus for enforcers

The FTC’s pro-enforcement cadence is particularly pronounced in the pharmaceutical and medical device industries.

Since being elected, Trump has been outspoken, complaining about drug prices.<sup>10</sup> Trump’s FTC appointees have also voiced concern about drug prices. Simons, for instance, stated during his confirmation hearing that he is ‘very concerned’ about price increases for prescription drugs and said he would look into creating a task force to assess whether anticompetitive conduct is leading to higher prices. Simons said pharmaceutical companies should anticipate that the FTC will continue to bring enforcement actions where it believes a transaction is anticompetitive, especially if there is concern about resulting high drug prices.<sup>11</sup>

Recent enforcement actions have targeted mergers involving medical devices, which seem to attract less rhetoric, but just as much enforcement as pharmaceutical mergers.

In November 2017, the FTC entered a consent order with Abbott Laboratories and Alere settling charges that Abbott’s US\$8.3 billion acquisition of Alere would result in a firm with a combined share of 97 per cent in point-of-care blood gas testing systems and a 100 per cent share in point-of-care cardiac marker testing systems.<sup>12</sup> The consent order required the parties to divest Alere’s blood gas testing and cardiac marker testing systems, including intellectual property, technology, and manufacturing facilities.<sup>13</sup>

In December 2017, the FTC entered a final order requiring Integra LifeSciences to divest five medical device product lines

to complete its US\$1 billion acquisition of Johnson & Johnson's Codman Neuro division, alleging the transaction, as proposed, would harm competition in multiple markets, including dural grafts and intracranial pressure monitoring systems.<sup>14</sup> In each of the five markets, the FTC alleged that Integra and Codman were 'the only', 'two of only three', or '[with Medtronic] the only three' significant suppliers in the United States.<sup>15</sup> The FTC consent order required Integra to divest related product lines and a manufacturing facility and to supply the buyer with cranial access kits until the buyer is able to secure a different supply source.<sup>16</sup>

### Agencies continue to challenge non-reportable high-tech, pharmaceutical and medical device deals

Deals that do not have to be reported to the DOJ and FTC under the Hart-Scott-Rodino (HSR) Act – because they fall below the HSR 'size of person' and 'size of transaction' thresholds – continue to be a focus of the agencies, including in the tech and pharmaceutical and medical device industries.

In December 2017, for instance, the FTC filed an administrative complaint to challenge Otto Bock's acquisition of FIH Group, a transaction that closed in September 2017.<sup>17</sup> The FTC alleged that Otto Bock is 'the leading manufacturer and supplier of microprocessor prosthetic knees' and through this transaction acquired 'its closest [and] most significant and disruptive competitor' in the market for microprocessor prosthetic knees. The FTC alleged that Otto Bock thereby eliminated 'direct and substantial competition' between the companies, 'further entrenching Otto Bock as the dominant supplier'.<sup>18</sup>

The FTC alleged that competition between Otto Bock and FIH promoted innovation and asked the administrative law judge to 'unscramble the eggs' to 'restore two or more distinct and separate, viable and independent businesses'.<sup>19</sup> In June 2018, the judge certified the matter to the FTC for consideration of a proposed consent proposal, finding there was a reasonable possibility of settlement, even though complaint counsel did not agree to the proposed settlement.<sup>20</sup>

In December 2017, the DOJ filed a complaint challenging the February 2017 acquisition by TransDigm Group of Schroth Safety Products and Schroth Protection Systems, and simultaneously filed a proposed consent order.<sup>21</sup> According to the DOJ, the acquisition combined the 'world's dominant supplier of restraint systems used on commercial airplanes' and its 'closest and only meaningful competitor' in restraint systems, which had 'embarked on an ambitious plan to capture market share . . . by competing . . . on price and heavily investing in research and development of new restraint technologies', resulting in lower prices for customers.<sup>22</sup> TransDigm agreed to divest the entire business acquired.<sup>23</sup>

### What remedies will US antitrust enforcers accept? Trump officials sceptical of behavioural remedies, even to resolve concerns raised by vertical mergers

The DOJ and FTC have long preferred 'structural' remedies – divestiture of an ongoing business – while sometimes accepting divestiture of specific assets, to enable a firm to compete and preserve competition lost by proposed mergers and acquisitions involving horizontal competitors.

On the other hand, both the DOJ and FTC have historically accepted 'behavioural' remedies to resolve antitrust concerns raised by proposed vertical mergers and acquisitions, such as a prohibition on discrimination, while allowing the parties to complete the merger to obtain efficiencies from vertical integration.

That position was memorialised in the DOJ's 2011 Antitrust Division Policy Guide to Merger Remedies, which advised that when addressing a horizontal merger, 'the Division will pursue a divestiture remedy in the vast majority of cases', but in addressing a vertical merger, 'the Division will consider tailored conduct remedies designed to prevent conduct that might harm consumers while still allowing the efficiencies that may come from the merger to be realised'.<sup>24</sup>

Soon after his confirmation, Delrahim announced that the DOJ under his watch would 'return to the preferred focus on structural relief to remedy mergers that violate the law'.<sup>25</sup> He argued that behavioural remedies adopted to resolve competitive concerns raised by vertical mergers in recent years, including in the 2010 *Ticketmaster/Live Nation* and 2011 *Comcast/NBC Universal* mergers, 'supplant competition with regulation'.<sup>26</sup> Antitrust law, Delrahim argued, should be 'law enforcement, not regulation'.<sup>27</sup> Other DOJ officials, including DOJ Deputy Assistant Attorney General Barry Nigro, have argued that '[t]he imposition of a behavioural remedy inverts the Division's role into something it is not – the hall monitor for private businesses operating in a free market economy'.<sup>28</sup> Nigro also stated that the DOJ's obligation to 'accept only a complete and effective solution to anticompetitive transactions' means that the DOJ 'favours structural fixes that promote and protect competition rather than substitute competition with regulation'.<sup>29</sup>

Joe Simons' FTC is largely following suit, though it has left the door open to occasionally accepting behavioural relief. When asked to name the top three challenges facing the FTC, Joe Simons stated that the '30 per cent failure rate [for remedies] is too high and needs to be lowered substantially'.<sup>30</sup> In June 2018, Simons said '[t]he best approach is a non-behavioural remedy' though he said the FTC will accept behavioural remedies in 'rare, very limited' circumstances.<sup>31</sup>

This policy shift is already having ramifications for merger challenges. The DOJ refused to accept proffered behavioural remedies in reviewing AT&T's proposed acquisition of Time Warner and instead sought a preliminary injunction to block the merger. The same district court judge that found the DOJ's consent agreement, resolving concerns raised by Comcast's acquisition of NBC Universal to be 'in the public interest', denied the DOJ's effort to block AT&T's acquisition of Time Warner, discussed further below.

The FTC meanwhile appears to be changing its approach to remedies to resolve potential competition concerns in the pharmaceutical industry. The director of the FTC's Bureau of Competition said during a speech in February 2018 that the FTC will be more sceptical of divestitures of pipeline assets:

*[P]arties should expect that in transactions where complex pharmaceutical products . . . need to be divested, we will require the divestiture of contract manufacturing capabilities rather than other assets, such as pipeline products. Based on a history of problems with divestitures in this area, our view is that divesting ongoing manufacturing rather than products that haven't yet come to market places the greater risk of failure on the merging firms, rather than the American public.*<sup>32</sup>

### High-profile DOJ losses may impact market definition in high-tech platforms

The DOJ suffered two high-profile losses in June 2018, which may influence market definition in high-tech mergers.

After a yearlong investigation and six-week trial, the DC District Court refused to enjoin the merger of AT&T and Time Warner.<sup>33</sup> The DOJ alleged that the combination of Time Warner's media

content with AT&T's video distribution network would allow the combined firm to 'use its control over Time Warner's valuable and highly popular networks to hinder its rivals by forcing them to pay hundreds of millions of dollars more per year for the right to distribute those networks.'<sup>34</sup>

In its 172-page decision, now on appeal, the DC District Court accepted 'that vertical mergers "are not invariably innocuous," but found that the DOJ failed to 'meet its burden to establish that the proposed "transaction is likely to lessen competition substantially"'<sup>35</sup>

Of particular interest, the court 'factor[ed] in the dramatic changes that are transforming how consumers view video content' in his decision.<sup>36</sup> This acknowledgement of the importance of forward-looking analysis should lend credibility to arguments about changing industry dynamics in future mergers involving high-tech firms, in horizontal as well as vertical mergers.

The AT&T decision was followed two weeks later by the Supreme Court's decision in *Ohio v American Express*.<sup>37</sup> There, the Supreme Court held that the DOJ and state attorneys general did not prove that American Express's non-discrimination rules, prohibiting merchants from steering customers to Visa and MasterCard, were anticompetitive.<sup>38</sup>

The Supreme Court in *Amex* reasoned that the effect of conduct on both sides of a 'two-sided' market must be considered before concluding conduct is anticompetitive:

*Focusing on merchant fees alone misses the mark because the product that credit-card companies sell is transactions, not services to merchants, and the competitive effects of a restraint on transactions cannot be judged by looking at merchants alone. Evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power.*<sup>39</sup>

While the *Amex* decision leaves many questions unanswered, it opens the door to arguments to win approval for high tech mergers in multi-sided markets.<sup>40</sup> In particular, the Supreme Court's recognition that the 'commercial realities' of credit card transactions required looking to both sides of a market provides strong support for the concept that all incentives on parties' pricing and output decisions must be taken into account in both defining a market, and assessing the harm in that market.<sup>41</sup>

## Notes

- 1 *Ohio v American Express Co*, No. 16-1454 (25 June 2018).
- 2 Delrahim and Simons each bring years of antitrust experience and served in senior antitrust enforcement positions in the George W Bush Administration – Delrahim as Deputy Assistant Attorney General at the DOJ and Simons as Director of the Bureau of Competition at the FTC. Both appointees emphasise the importance of taking an economic-focused approach to analysing antitrust issues.
- 3 Fed. Trade Comm'n Nomination Hearing Before the S. Comm. on Commerce, Science & Transp., 115 Cong. (14 February 2018) (witness testimony of Joseph Simons) ('Let me ask one final question which is a number of members of this committee are concerned about the scope and control of big tech . . . The scope of market power and size and control of public disclose is unprecedented').
- 4 Makan Delrahim, Assistant Attorney General, Antitrust Division, 'Don't Stop Believin': Antitrust Enforcement in the Digital Era', 19 April 2018, at [www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-university-chicagos](http://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-university-chicagos).
- 5 *Id.*
- 6 *Id.*
- 7 Leah Nylen, 'FTC should examine whether merger enforcement "too lax," chairman nominee says', *MLex* (2 February 2018).
- 8 FTC Press Release, 'FTC Announces Hearings On Competition and Consumer Protection in the 21st Century', 20 June 2018, [www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st?utm\\_source=govdelivery](http://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st?utm_source=govdelivery).
- 9 Mike Swift, Leah Nylen, Kirk Victor, and Claude Marks, 'FTC's Simons promises "vigorous enforcement" amid review of antitrust, consumer protection in digital age', *MLex* (20 June 2018).
- 10 Sarah Karlin-Smith, *Politico*, 'Trump Says Drug Industry "Getting Away with Murder"' (11 January 2017) (quoting a press conference of then president-elect Donald Trump), [www.politico.com/story/2017/01/trump-press-conference-drug-industry-233475](http://www.politico.com/story/2017/01/trump-press-conference-drug-industry-233475); Jessie Hellmann, *The Hill*, 'Trump to Congress: We Must Bring Down Drug Prices "Immediately"', (28 February 2017) (quoting President Trump's first address to Congress), <http://thehill.com/policy/healthcare/321706-trump-to-congress-we-must-bring-down-drug-prices-immediately>.
- 11 David McLaughlin, 'Trump FTC Pick Suggests Task Force to Monitor Drug Prices', *Bloomberg* (14 February 2018), <https://www.bloomberg.com/news/articles/2018-02-14/trump-ftc-pick-simons-suggests-task-force-to-monitor-drug-prices>.
- 12 Complaint, *In re Abbott Labs. & Alere, Inc*, Docket No. C-4625 (28 September 2017), [https://www.ftc.gov/system/files/documents/cases/1610084\\_abbott\\_alere\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/1610084_abbott_alere_complaint.pdf).
- 13 Press Release, 'FTC Approves Final Order Preserving Competition in the US Markets for Two Types of Medical Testing Devices' (14 November 2017), <https://www.ftc.gov/news-events/press-releases/2017/11/ftc-approves-final-order-preserving-competition-us-markets-two>. See also *FTC v Mallinckrodt ARD Inc*, Case No. 1:17-cv-120 (DDC 25 January 2017) (describing Mallinckrodt's acquisition of Syncathen as 'a defensive move designed to protect its monopoly over ACTH drugs in the United States').
- 14 Press Release, 'FTC Approves Final Order Preserving Competition in Markets for Five Types of Medical Devices' (22 December 2017), [www.ftc.gov/news-events/press-releases/2017/12/ftc-approves-final-order-preserving-competition-markets-five](http://www.ftc.gov/news-events/press-releases/2017/12/ftc-approves-final-order-preserving-competition-markets-five).
- 15 *In re Integra Lifesciences Holdings Corp. & Johnson & Johnson*, Docket No. C-4624 (27 September 2017), [https://www.ftc.gov/system/files/documents/cases/1710084\\_integra\\_johnson\\_johnson\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/1710084_integra_johnson_johnson_complaint.pdf).
- 16 *Id.*
- 17 Complaint, *In re Otto Bock HealthCare North America, Inc*, FTC No. 9378 (20 December 2017), [https://www.ftc.gov/system/files/documents/cases/otto\\_bock\\_part\\_3\\_complaint\\_redacted\\_public\\_version.pdf](https://www.ftc.gov/system/files/documents/cases/otto_bock_part_3_complaint_redacted_public_version.pdf).
- 18 *Id.*
- 19 *Id.*
- 20 Certification to the Commission, *In re Otto Bock HealthCare North America, Inc*, FTC No. 9378 (22 June 2018), <https://www.ftc.gov/system/files/documents/cases/062218aljcertification591285.pdf>.
- 21 Complaint, *United States v TransDigm Group Inc*, Civil Action No. 1:17-cv-02735 (DDC 21 December 2017), <https://www.justice.gov/opa/press-release/file/1019806/download>.
- 22 *Id.* at 2, 11. The DOJ specifically alleged that 'prior to the acquisition, AmSafe and SCHROTH also competed to develop new restraint technologies'.
- 23 Press Release, 'Justice Department Requires TransDigm Group to Divest Airplane Restraint Businesses Acquired from Takata' (21 December 2017), [www.justice.gov/opa/pr/justice-department-requires-transdigm-group-divest-airplane-restraint-businesses-acquired](http://www.justice.gov/opa/pr/justice-department-requires-transdigm-group-divest-airplane-restraint-businesses-acquired).
- 24 Antitrust Division Policy Guide to Merger Remedies (June 2011), <https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf>.

- 25 Makan Delrahim, Ass. Attorney Gen., Keynote Address at the American Bar Association's Fall Forum (16 November 2017).
- 26 Id.
- 27 Id.
- 28 Barry Nigro, Remarks at the Annual Antitrust Law Leaders Forum in Miami, Florida: A Partnership to Promote and Protect Competition for the Benefit of Consumers (2 February 2018), [www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-remarks-annual-antitrust-law](http://www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-remarks-annual-antitrust-law).
- 29 Id.
- 30 Joseph Simons, Initial Senate Committee Questionnaire (14 February 2018), [https://www.commerce.senate.gov/public/\\_cache/files/6c4149af-3023-4825-90f1-3c38e279fd0d/6A0CCF409AF89DC8D5C0A84CE8730012.confidential---simons---committee-questionnaire-redacted.pdf](https://www.commerce.senate.gov/public/_cache/files/6c4149af-3023-4825-90f1-3c38e279fd0d/6A0CCF409AF89DC8D5C0A84CE8730012.confidential---simons---committee-questionnaire-redacted.pdf).
- 31 Flavia Fortes, 'FTC accepts use of behavioral remedies in "rare, very limited" circumstances, Simons says', *MLex* (20 June 2018).
- 32 D Bruce Hoffman, Acting Director, Bureau of Competition, Fed. Trade Comm'n, Remarks at GCR Live 7th Annual Antitrust Law Leaders Forum: It Only Takes Two to Tango: Reflections on Six Months at the FTC (2 February 2018), [https://www.ftc.gov/system/files/documents/public\\_statements/1318363/hoffman\\_gcr\\_live\\_feb\\_2018\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1318363/hoffman_gcr_live_feb_2018_final.pdf).
- 33 Memorandum Opinion, *United States v AT&T Inc, et al*, No. 17-2511 (RJL) (DDC 12 June 2018).
- 34 Complaint at 2, *United States v AT&T Inc, et al*, No. 1:17-cv-02511 (RJL) (DDC 20 November 2017).
- 35 Memorandum Opinion at 4, 59, *United States v AT&T Inc, et al*, No. 17-2511 (RJL) (DDC 12 June 2018).
- 36 Id at 65.
- 37 *Ohio v American Express Co*, No. 16-1454 (25 June 2018).
- 38 Id at 1, 16.
- 39 Id at 15.
- 40 The *Amex* matter involved alleged anticompetitive conduct, while Section 7 of the Clayton Act makes an acquisition unlawful if it may lessen competition substantially in 'any line of commerce or in any activity affecting commerce in any section of the country.' 15 USC Section 18.
- 41 See *Ohio v American Express Co*, No. 16-1454, at 12.



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Ms Browdie serves as a vice chair on the ABA's Federal Civil Enforcement committee. She has participated in several panels, including 'Standard Setting: Key Antitrust Issues & Developments,' 'FTC v. Sysco/US Foods: Perspectives from The Trenches,' and 'Recent Developments' for the Health Care and Pharmaceuticals Committee, contributed to the DOJ Civil Antitrust Practice and Procedure Manual and been published in the Federal Civil Enforcement Committee and M&A Committee newsletters.

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Ms Grise was ranked as among the top 40 antitrust lawyers worldwide under the age of 40 by *Global Competition Review* (May 2008). She is also recognised as a leading practitioner by *Chambers USA*, *Euromoney's Guide to the World's Leading Competition & Antitrust Lawyers* and *Washington DC Super Lawyers' Top 50 Women*.

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Mr Morse has been at the forefront of applying antitrust law to the high-tech sector and the intersection of antitrust and intellectual property law, including issues related to innovation markets, standard setting, patent pools and the settlement of patent litigation. His clients include companies in the pharmaceutical, biotech and medical device, as well as the telecommunications, computer hardware, software, social media and 3D printing industries.

Mr Morse served for 10 years at the FTC, where he was Assistant Director of the Bureau of Competition and received the FTC's Award for Superior Service for 'furthering the Commission's Merger Enforcement Program' and for 'advancing the antitrust mission of the Federal Trade Commission in innovation markets and high technology industries'.

Mr Morse has been recognised as a leading antitrust lawyer by *Best Lawyers in America*, *Chambers*, *Expert Guides to the World's Leading Competition Lawyers*, *Super Lawyers*, *Who's Who Legal: Competition* and *Who's Who Legal: Life Sciences*.

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