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**AMERICAS**  
ANTITRUST REVIEW 2020

# **AMERICAS**

## ANTITRUST REVIEW 2020

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# Preface

Global Competition Review's *Americas Antitrust Review 2020* is one of a series of regional reviews that have been conceived to deliver specialist intelligence and research to our readers – in-house counsel, government agencies and private practice lawyers – who must navigate the world's increasingly complex competition regimes.

Like its sister reports covering the Asia-Pacific, Europe, the Middle East and Africa, this book provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in the field.

In preparing this report, Global Competition Review has worked with leading competition lawyers and government officials. Their knowledge and experience – and above all their ability to put law and policy into context – give the report special value. We are grateful to all of the contributors and their firms for their time and commitment to the publication.

Changes from the previous edition include adding a chapter on US class action defence, focusing on the perspective of plaintiffs. Along with the new topics, contributors' roles highlight trends in competition law. For example, the Federal Trade Commission chapter was penned by Daniel Francis, associate director for digital markets – an area of particular interest globally.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws over the coming year.

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# United States: Digital Platforms

Scott Sher, Michelle Yost Hale and Robin Crauthers

Wilson Sonsini Goodrich & Rosati

## Introduction

US antitrust agencies' focus on big technology and mergers involving digital platforms is becoming increasingly sharp. Antitrust issues related to digital platforms operated by 'tech giants' are at the forefront of the public, legislative and US antitrust agencies' discussions.<sup>1</sup> With the renewed focus, the Federal Trade Commission (FTC) has defined a new task force and the US agencies have divided the responsibilities for reviewing digital platforms' competitive behaviour and acquisitions. Despite this renewed emphasis on digital platforms, the agencies have many existing tools and precedents to guide them, including careful analysis of market shares, employment of a rule of reason analysis for conduct involving dominant firms and, in merger investigations, consideration of the merger's likely competitive effects and resulting efficiencies.

Since the publication of the past two editions of the *Americas Antitrust Review*, competition issues in technology, specifically in the context of digital platforms, have become central to anti-trust policy discussions in the United States. In October 2018, the FTC held a series of competition and consumer protection hearings that included discussions of multisided platforms and nascent or potential competition in platform markets.<sup>2</sup> Further, in February 2019, the FTC announced it was launching a technology task force to monitor technology-related markets, including online platform markets.<sup>3</sup>

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1 Cecilia Kang, David Streitfeld, and Annie Karni, 'Antitrust Troubles Snowball for Tech Giants as Lawmakers Join In', *The New York Times*, June 3, 2019 available at [www.nytimes.com/2019/06/03/technology/facebook-ftc-antitrust.html](http://www.nytimes.com/2019/06/03/technology/facebook-ftc-antitrust.html).

2 Press Release, 'FTC Hearing #3: Multi-Sided Platforms, Labor Markets, and Potential Competition, Hearings on Competition and Consumer Protection in the 21st Century' (Oct. 15-27, 2018), available at [www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century](http://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century).

3 Press Release, 'FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets', (Feb. 26, 2019), available at [www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology](http://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology).

According to FTC Bureau of Competition Director Bruce Hoffman:

*Technology markets, which are rapidly evolving and touch so many other sectors of the economy, raise distinct challenges for antitrust enforcement. By centralizing our expertise and attention, the new task force will be able to focus on these markets exclusively – ensuring they are operating pursuant to the antitrust laws, and taking action where they are not.<sup>4</sup>*

The newly formed group will review prospective technology mergers and consummated technology mergers, potentially including previously cleared mergers.<sup>5</sup>

In addition to the FTC's task force, the US agencies are generally positioning for broad antitrust review and scrutiny of online digital platform companies. Very recently, news reports indicate that the FTC and the Department of Justice (DOJ) have allocated jurisdiction over the firms that control online platforms between the two antitrust agencies for the purposes of evaluating anti-competitive conduct.<sup>6</sup> The FTC will have oversight of Facebook and Amazon; the DOJ over Google and Apple. Early indications are that the agencies will also investigate past, consummated and previously cleared transactions to evaluate whether the acquisitions were anticompetitive under the Sherman Act or the Clayton Act.<sup>7</sup> It is not inevitable, however, that this directed oversight will result in hyperactive enforcement. Leaders at the DOJ Antitrust Division are sceptical that regulation of digital platforms is necessary, as Principal Deputy Assistant Attorney General Andrew Finch noted in recent remarks, because 'blunt approaches may ultimately harm the consumers and sellers that we seek to protect.'<sup>8</sup>

To be sure, anticompetitive conduct by digital platforms is also not 'immune from anti-trust scrutiny',<sup>9</sup> as demonstrated by the FTC's recently filed section 2 monopolisation complaint against Surescripts. The FTC alleges that Surescripts, a dominant multisided platform that provides e-prescribing services to the prescribing physician and pharmacy benefit managers,

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4 *ibid.*

5 MP McQueen, 'The New FTC Task Force: Will Tech Giants Face a Day of Reckoning on Antitrust?', *Legaltech news*, Mar. 06, 2019, available at [www.law.com/legaltechnews/2019/03/06/ftc-task-force-will-tech-giants-face-a-day-of-reckoning-on-antitrust-397-17616/?slreturn=20190526185017](http://www.law.com/legaltechnews/2019/03/06/ftc-task-force-will-tech-giants-face-a-day-of-reckoning-on-antitrust-397-17616/?slreturn=20190526185017).

6 Brent Kendall and John D. McKinnon, 'Congress, Enforcement Agencies Target Tech', *The Wall Street Journal*, June 3, 2019, available at <https://www.wsj.com/articles/ftc-to-examine-how-facebook-s-practices-affect-digital-competition-11559576731?mod=searchresults&page=1&pos=7>.

7 Tim Wu and Stuart A. Thompson, 'The Roots of Big Tech Run Disturbingly Deep', *The New York Times*, June 7, 2019, available at [www.nytimes.com/interactive/2019/06/07/opinion/google-facebook-mergers-acquisitions-antitrust.html](http://www.nytimes.com/interactive/2019/06/07/opinion/google-facebook-mergers-acquisitions-antitrust.html); Jeffrey Wilder, 'Potential Competition in Platform Markets', Remarks at Hal White Antitrust Conference (Jun. 10, 2019), remarks available at [www.justice.gov/opa/speech/acting-deputy-assistant-attorney-general-jeffrey-m-wilder-delivers-remarks-hal-white](http://www.justice.gov/opa/speech/acting-deputy-assistant-attorney-general-jeffrey-m-wilder-delivers-remarks-hal-white).

8 Andrew Finch, Principal Deputy Assistant Attorney General, 'Concentrating on Competition: An Antitrust Perspective on Platforms and Industry Consolidation,' Remarks at Capitol Forum's Fifth Annual Tech, Media & Telecom Competition Conference, Dec. 14, 2018, Remarks available at [www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-andrew-finch-delivers-keynote-address-capitol](http://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-andrew-finch-delivers-keynote-address-capitol).

9 D. Bruce Hoffman, Director, Bureau of Competition, Federal Trade Commission, 'Antitrust in the Digital Economy: A snapshot of FTC Issues', Remarks at GCR Live Antitrust in the Digital Economy, May 2019.

used exclusive contracts and loyalty programmes to monopolise the e-prescription market and harm consumers.<sup>10</sup> Though it is too early to predict,<sup>11</sup> the case could provide important insight into courts' treatment of section 2 in digital platforms markets.

Turning to recent two recent merger matters involving digital platforms, the remainder of this article examines the DOJ and the FTC's considerations of factors affecting relevant product market analysis, market shares and competitive effects in investigations. Specifically, we will examine the basis for FTC's assertion that Auto/Mate, Inc's (Auto/Mate) current market shares understated Auto/Mate's competitive significance in its challenge to CDK Global, Inc's (CDK) acquisition of Auto/Mate, and evaluate factors that may have led to the DOJ's early termination of WeddingWire's acquisition of The Knot's<sup>12</sup> parent company, XO Group, despite the outward appearance of competition between the two online digital platforms for wedding planning.

## Case studies

### The FTC's challenge in CDK's acquisition of Auto/Mate

In March 2018, the FTC filed a complaint in its investigation into CDK's acquisition of Auto/Mate.<sup>13</sup> The complaint alleged that CDK's acquisition of Auto/Mate would harm competition in the dealer management systems (DMS) in the market for franchise car dealerships. DMS is 'mission-critical business software used by dealerships to manage nearly every aspect of their business, including accounting, payroll, parts and vehicle inventory, service repair scheduling, and vehicle financing'.<sup>14</sup> A DMS platform manages dealerships' back-office functions such as accounting and payroll, and its service functions such as parts and scheduling, and it permits sharing of 'sales, inventory, parts, service and warranties' between the dealerships and manufacturers, such as Ford or Toyota.<sup>15</sup>

The DMS market consisted of two well-established DMS firms – CDK and Reynolds and Reynolds – that accounted for approximately 70 per cent of the market and a smaller fringe of competitors, including Auto/Mate.<sup>16</sup> The next tranche of DMS providers included Dealertrack, Auto/Mate and Autosoft.<sup>17</sup> Auto/Mate was the fifth-largest DMS provider at the time the complaint was filed.<sup>18</sup> Thus, the remaining 30 per cent of the DMS market was divided among at least three firms and Auto/Mate's share was less than the two other firms. Despite Auto/Mate's position in the market and relatively small share of the market, the FTC alleged the post-merger market concentration levels were above 2,500 and the change in concentration was over 200, as measured by

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10 *Complaint Federal Trade Commission v Surescripts, LLC*, 1:19 cv-01080-JDB, Apr. 17, 2019.

11 The case is in the motion to dismiss stage.

12 Wilson Sonsini Goodrich & Rosati represented Permira Funds and WeddingWire in the transaction.

13 Administrative Complaint at 1, *Fed. Trade Comm'n v CDK Global, Inc., Auto/Mate, Inc., et al* (Federal Trade Commission, Mar. 19, 2019) (Docket No. 9382) (Complaint).

14 Complaint at 2.

15 Complaint at 6.

16 Complaint at 4.

17 *ibid.*

18 *ibid.*

the Herfindahl-Hirschman Index,<sup>19</sup> satisfying the presumption.<sup>20</sup> The FTC's complaint explained that the 'current market shares materially understate Auto/Mate's competitive significance'.<sup>21</sup> To substantiate that claim, the FTC cited to Auto/Mate's 'significant year-over-year rooftop growth', improved software functionality and low prices, all of which were attracting sophisticated dealers.<sup>22</sup>

Another important feature of the FTC's argument that Auto/Mate's static market share understated its future competitive significance was Auto/Mate's ability to penetrate a market characterised by high barriers to entry and two dominant firms. In its complaint, the FTC alleged that Auto/Mate was uniquely positioned to disrupt the DMS market owing to its strong reputation and demonstrated ability to make inroads with customers in a market that exhibited high entry barriers. The FTC identified several entry and expansion barriers, including up-front investments in product development, reputation and an ability to obtain certification from manufacturers such as Ford, Chevrolet and General Motors.<sup>23</sup> It can be inferred that the FTC had strong supportive evidence from dealer customers to corroborate its claims that Auto/Mate's current market share was not indicative of its competitive viability or significance in the future.

### The DOJ's investigation of WeddingWire's acquisition of XO Group

In September 2018, WeddingWire and XO Group, the parent company of The Knot, announced plans to merge. The two digital platform providers of wedding planning services connect on one side of the market, couples engaged to be married, to vendors of professional wedding services such as photographers, venues, florists and bakers on the other side of the market. For engaged couples, the platforms also offer wedding planning tips, tools and tricks – all for free. On the other side of the market, the platforms provide the vendor businesses with lead opportunities – for a fee.

The two platforms offered similar local advertising and search services for vendors but the platforms were differentiated in other offerings. For example, The Knot published a magazine, WeddingWire did not. Also, the Knot's offering consisted of other non-wedding brands such as The Bump (resources for new parents) and The Nest (resources for newlyweds and entertainment vendor directories). In contrast, WeddingWire was solely focused on weddings. Nonetheless, for vendors seeking to target soon-to-be married couples with local advertising and search services, WeddingWire and The Knot outwardly appeared to be close competitors given the similarities in their online platform offerings.<sup>24</sup>

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19 Complaint at 3; US Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, at §5, page 18, Aug. 19, 2010 (Merger Guidelines).

20 Complaint at 3.

21 Complaint at 7.

22 Complaint at 10.

23 Complaint at 3.

24 Brienne Walsh, 'WeddingWire is Tying The Knot with XO Group', *RangeFinder*, Sept. 29, 2018, available at [www.rangefinderonline.com/news-features/industry-news/weddingwire-is-tying-the-knot-with-xo-group](http://www.rangefinderonline.com/news-features/industry-news/weddingwire-is-tying-the-knot-with-xo-group).

Despite the apparent closeness of competition between WeddingWire and The Knot, the DOJ cleared the transaction without issuing a second request. The DOJ did not issue a closing statement or publicly comment about its investigation. However, based on public information, a few insights can be gleaned. First, the merger was unlikely to cause harm on the consumer side, where both platforms were free – which begs the question of whether the combination would result in harm to competition for advertising for wedding services. Because the DOJ elected not to continue its investigation pursuant to a second request, it can be inferred that the DOJ found that the merger was unlikely to result in increased advertising costs. Second, consistent with the DOJ's approach in prior two-sided online platform investigations (eg, *Expedia/Orbit* and *Cvent/Lanyon*, discussed in last year's edition),<sup>25</sup> the interdependence of the two-sided offering of an online platform likely played a role in the deal's clearance. Like the matters discussed in the prior two editions of this title, advertisers that utilise WeddingWire and The Knot have a variety of alternatives to reach engaged couples such that the combined firm would be unable to increase prices post-merger. And, for engaged couples, presumably they had many alternatives to identify photographers, venues and florists.

### The role of market share in agency review of online platforms

Before turning to the role of market share analysis in two recent merger reviews of online platforms, a brief discussion of the agencies' market definition analysis is warranted. The agencies' market share analysis is inextricably linked to its market definition and competitive effects analyses. The Merger Guidelines advise that a narrowly defined market 'is more likely [to] capture the relative competitive significance of' the products and 'accurately reflect competition between close substitutes'.<sup>26</sup> The Guidelines instruct that the closeness of competition and the ability to substitute the two products should inform market definition and market share analysis.

Conforming to the Merger Guidelines, the FTC's market definition in *CDK/Auto/Mate* was indeed narrow. The FTC defined the market as the sale of DMS for franchise dealers. This definition excluded independent DMS products sold to used car dealers. The FTC excluded independent DMS from the market on the basis that independent DMS products did not provide an original equipment manufacturer certification, which was essential to franchise dealerships. Although inclusion of independent DMS in the market would have diluted the parties' market shares, the FTC's complaint made clear that original equipment manufacturer certificates were a critical feature for meeting the needs of franchise dealers in providing a DMS solution; as a consequence, independent DMS was properly excluded from the relevant market.

In contrast, in *WeddingWire/The Knot*, it does not appear that the DOJ adopted a narrow market definition of online wedding planning platforms, which would have resulted in high combined market shares for the merging companies. Though the DOJ never publicly stated the market definitions under consideration in *WeddingWire/The Knot*, it is plausible that it evaluated a narrower

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25 See Scott Sher and Michelle Hale, 'Digital Platforms', Global Competition Review, *The Antitrust Review of the Americas* 2019, 26 Sept, 2018.

26 Merger Guidelines at §4, page 19.

definition such as local advertising on wedding planning platforms. At first glance, WeddingWire and The Knot appear to compete for local advertisers to use their platform to reach and sell their services to soon-to-be married couples. WeddingWire and The Knot also competed for those soon-to-be-married couples to use their platforms to plan their weddings. If the DOJ considered a narrow market comprising local advertising on wedding planning platforms, its analysis did not end there. The DOJ, however, terminated its review without issuing a second request, which suggests that evidence to sustain a narrow market definition did not exist.

Closely associated with market definition and competitive effects analysis, are market shares, which are required in the agencies' analysis. Market shares are far from the end of the inquiry, however.<sup>27</sup> Even if market shares appear high in a potential relevant product market that is narrowly defined, the agency does not stop its analysis upon a finding of high combined market shares. In *WeddingWire/The Knot*, it is likely the DOJ considered a narrowly defined market comprising advertising via online wedding planning platforms but, with further examination and consideration of other factors, the DOJ concluded that advertisers will have sufficient substitutes, such as whether vendors targeted engaged couples only through advertising via online wedding planning platforms or had other means to target couples. For example, Facebook, Instagram and Google's Life Events offer local advertising targeting engaged couples. Similarly, for the consumer side of the platform, the DOJ likely considered evidence of whether engaged couples had alternatives for online wedding planning platforms, including tips, tricks and recommendations for local vendors and venues, even though this service is offered for free. For example, engaged couples can use Pinterest, wedding magazines and wedding shows for tips and tricks, and Google and Facebook for vendor and venue recommendations. Notably, the DOJ has taken the position that zero-priced platforms are not exempt from anticompetitive behaviour and merger review.<sup>28</sup> Accordingly, it stands to reason that the DOJ would have analysed market definition and shares on both sides of the platform.

Similarly, in CDK's acquisition of Auto/Mate, the FTC did not stop its analysis upon calculating Auto/Mate's alleged small market share and its position as the fifth-largest firm in a DMS market dominated by two other companies with 70 per cent combined share. Nor did the FTC rely on the merger being presumptively illegal.<sup>29</sup> Instead, the FTC delved into whether the market shares for DMS providers reflected the realities of the current market. The FTC engaged in this analysis and alleged that the current market shares 'materially understate Auto/Mate's competitive significance',<sup>30</sup> even though under well-established case law the burden of proving current market shares are not reflective of market realities is typically argued by the defendants.<sup>31</sup> The

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27 *ibid.*

28 Makan Delrahim, Assistant Attorney General, 'I'm Free: Platforms and Antitrust Enforcement in the Zero-Price Economy, Keynote Address at Silicon Flatirons Annual Technology Policy Conference at the University of Colorado Law School', Feb. 11, 2019, address available at [www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-silicon-flatirons](http://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-silicon-flatirons).

29 Merger Guidelines at §5.3, page 12; Complaint at 7.

30 Complaint at 7.

31 *United States v Marine Bancorporation*, 418 US 602, 631 (1974).

FTC argued that Auto/Mate's current market share did not reflect its ability to continue to grow, given its trajectory, strong reputation and aggressive prices.<sup>32</sup> Accordingly, the FTC sued to block the acquisition and preserve the competition that Auto/Mate contributed to the DMS market.<sup>33</sup>

## Conclusion

As public scrutiny increasingly focuses on the antitrust implications of digital platforms controlled by tech giants, the fundamentals of US antitrust agencies' analysis appear stable. The outcome of the two merger investigations discussed in this article provides some insight into how the US antitrust agencies consider market shares and competitive effects analysis in merger reviews involving online platforms. These cases demonstrate that in evaluating market shares, agencies evaluate market shares in the context of competitive effects, consistent with the agencies' analysis in most merger cases.

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<sup>32</sup> Complaint at 7.

<sup>33</sup> Complaint at 11.



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Wilson Sonsini Goodrich & Rosati's (WSGR) antitrust and European competition law attorneys are uniquely positioned to assist clients with a wide range of issues, from day-to-day counselling and compliance to crucial bet-the-company matters. Based in New York City, Washington, DC, San Francisco, Silicon Valley and Brussels, our highly regarded antitrust attorneys advise clients with respect to mergers and acquisitions, criminal and civil investigations by government agencies and antitrust litigation, and issues involving intellectual property, consumer protection and privacy. We advise clients on a full range of issues, including pricing, distribution, vertical restrictions, standard-setting activities, joint ventures and patent pooling. Working with Fortune 100 global enterprises as well as venture-backed start-up companies, our attorneys have expertise in virtually every significant industry sector, including technology, media, healthcare, services, transportation and manufacturing.

WSGR's attorneys have held senior positions at US federal agencies, as well as the European Commission, and have been involved in many of the most important antitrust matters of the past decade. Many of our attorneys also hold high-level positions in numerous national and local antitrust bar organisations. Our attorneys have successfully defended clients in many high-profile litigation matters, such as cases brought against Google, Netflix, Live Nation, Vector Capital, Coca-Cola, Transitions Optical and Clear Channel. In addition, our Brussels-based competition lawyers have advised on some of the most complex cross-border transactions and investigations, representing blue-chip clients such as Air France-KLM, BMW, Chevron, Dell, Dolby, Glencore, Google, Hitachi Chemical, K+S Aktiengesellschaft, Live Nation, Mylan, ÖBB, Silver Lake and Spotify on the full spectrum of competition law issues.

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