

Questions for the Record from the Honorable David N. Cicilline, Chairman, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary

Questions for the Honorable Makan Delrahim, Assistant Attorney General, Antitrust Division, U.S. Department of Justice

Conduct Enforcement

1. The *Financial Times* recently reported that criminal prosecutions for price-fixing have reached a historic low for the third consecutive year.¹ According to this report, the Trump Administration's Antitrust Division has brought fewer criminal antitrust prosecutions than any administration in the last 50 years. Is it your view that market participants are no longer engaging in price-fixing at the rates they previously had?
2. Why has criminal enforcement been at a historic low for the past three consecutive years?
3. Since your time leading the Antitrust Division, how many monopolization cases under Section 2 of the Sherman Act has the Division brought?
4. Please identify, to the nearest 10 hours, the number of attorney hours that the Antitrust Division has devoted since January 2017 to its own enforcement actions.
5. Please identify, to the nearest 10 hours, the number of attorney hours that the Antitrust Division has devoted since January 2017 to any Section 2 investigations.

Merger Enforcement

6. Please identify the performance objectives for section chiefs.
7. Are any section chiefs evaluated based on the number of settlements they reach? If so, do you believe that this incentivizes reaching settlements over litigation?
8. How does the Division incentivize staff to recommend and litigate cases where it finds there has been—or is likely to be—harm to competition, even where that litigation may end in a loss?
9. How does the Division factor in litigation risk when deciding whether to challenge a merger?
10. Is it appropriate for the Division to consider litigation risk when deciding whether to file a complaint in a merger or a case of anti-competitive conduct if the Division otherwise believes the transaction or conduct is illegal under antitrust law?

¹ Kadhim Shubber, *US price-fixing prosecutions at historic low for third straight year*, FIN. TIMES (Nov. 5, 2019), <https://www.ft.com/content/a3b75c80-fe74-11e9-be59-e49b2a136b8d>.

11. How do you think the Division should analyze transactions involving a private equity buyer? Do these transactions raise any unique issues?
12. What percentage of the Division's second requests in the last six months have been issued for transactions involving or relating to the marijuana industry?
13. For each of the transactions relating to the marijuana industry in which the Antitrust Division has issued a second request, please identify:
 - a. Whether the transaction fell above the HSR threshold;
 - b. The pre-merger market share and predicted post-merger market share for the companies involved in the transaction; and
 - c. The attorneys reviewing the transaction and which section or office they work in.

Digital Markets

14. According to Columbia Law School Professor Tim Wu, dominant technology platforms have completed more than 350 mergers and acquisitions to date. Many of these involved Facebook and Google acquiring actual and nascent competitors. Professor Wu observed, "As with a basketball referee who never calls a foul, the question is whether the players have really been faultless—or whether the referee is missing something."² How do you respond to the Professor Wu's criticism that the antitrust agencies have been missing something when it comes to merger enforcement in digital markets?
15. In June 2019, Google announced its \$2.6 billion acquisition of Looker Data Sciences, a leading startup in data analytics and business intelligence. The American Antitrust Institute and other experts observed that the deal risked eliminating an important competitor to Google and urged the DOJ to scrutinize several aspects of the proposed transaction. In November, the DOJ approved the transaction without pursuing a second request. The UK's Competition Markets Authority, by contrast, has initiated a full investigation into the transaction.
 - a. How many attorneys at the Antitrust Division worked on reviewing the Google-Looker transaction?
 - b. How many outside parties did the Antitrust Division interview as part of its review of this transaction?
 - c. What factors led the Antitrust Division to conclude that this acquisition did not warrant a more in-depth investigation?

² Tim Wu & Stuart A. Thomson, *The Roots of Big Tech Run Disturbingly Deep*, N.Y. TIMES (June 7, 2019), <https://www.nytimes.com/interactive/2019/06/07/opinion/google-facebook-mergers-acquisitions-antitrust.html>.

- d. The American Antitrust Institute identified three issues for the Antitrust Division to examine: (1) whether the acquisition would eliminate Looker as an independent competitor in data analytics and business intelligence tools; (2) whether the acquisition would harm competition in the broader cloud infrastructure market; and (3) whether the acquisition would enhance Google's incentive to withhold Looker's services to rivals. Does the Antitrust Division believe the acquisition will not have any of these effects? If so, please describe the evidence in support of this belief.
16. Do you believe that antitrust enforcers' past reluctance to view concentrated control over data as an entry barrier was a mistake? If yes, what are you doing to make sure the Division does not repeat this error?
17. How many full-time technologists are on the staff of the Antitrust Division?

Qualcomm

18. In 2016, the FTC filed suit to challenge illegal monopolization by Qualcomm. This year DOJ took the remarkable step of intervening in the case—to file briefs in defense of Qualcomm. Please explain why it is a good or proper use of agency resources to intervene to defend an alleged monopolist in a monopolization case brought by another federal agency.
19. As has been publicly reported, Qualcomm was your former client. You did not sign the Antitrust Division's amicus brief in favor of Qualcomm in *Federal Trade Commission v. Qualcomm* but you did sign the Antitrust Division's amicus brief in favor of Qualcomm in *Karen Stromberg, et al. v. Qualcomm*. What accounts for this discrepancy?
20. What involvement did you have with the Division's decision to file its statement of interest and subsequent brief in *FTC v. Qualcomm*?
21. Since 1948, the Antitrust Division and the Federal Trade Commission have relied on a formal clearance process to allocate primary areas of enforcement responsibility and to avoid overlap and duplicative activity. In light of the Division's recent filing in *FTC v. Qualcomm*, what is the current status and scope of the clearance process? If certain types of activity or certain types of cases are not governed by the clearance process, please identify those instances, the reasons why, and whether this is a departure from past Division process.

T-Mobile/Sprint

22. Did the staff memorandum and staff attorneys reviewing the Sprint/T-Mobile transaction unanimously recommend blocking the merger?

23. The Department of Justice recently reached a settlement that will allow T-Mobile to acquire Sprint. As several leading economists noted in a court filing, the DOJ's proposed settlement does not address the significant anti-competitive effects that the DOJ outlines in its complaint.³ Why do you believe that Dish, a company with no history or experience in this market, will be a robust competitor as envisioned by the settlement?
24. These experts also noted that Dish has "repeatedly failed to meet" prior requirements stipulated by the Federal Communications Commission.⁴ As these experts note, a T-Mobile attorney previously observed that "Dish has a track record of price increases for its services, speculative warehousing of spectrum, and failing to meet FCC-imposed deadlines to construct the facilities required."⁵ In light of Dish's failure to meet previous build-out requirements, why do you believe Dish will be successful in building out a 5G network, despite lacking experience and presence in the market?
25. As noted in the economists' comments, even if Dish meets its commitments to build a 5G network covering 70 percent of the population, it would not replace Sprint, which currently reaches over 90 percent of Americans.⁶ How would you justify DOJ's settlement to Americans who were covered by Sprint's network but will not be covered by Dish's network?
26. The DOJ has repeatedly cited the fact that Dish is committing to build a 5G network as a factor in favor of approving the transaction. But the DOJ's complaint is clear that the transaction will harm some parties. Although the complaint states that the merging parties may offer some benefits to rural subscribers, it does not address the fact that the merger will harm other consumers. Is it your view that benefits to one set of customers can justify anti-competitive harms to another set of customers? If so, please describe the circumstances in which you view this to be the case.
27. If it is your view that benefits to one set of customers can justify anti-competitive harms to another set of customers, how do you reconcile this position with *Philadelphia National Bank*, where the Supreme Court rejected the idea that some prospective economic or social benefits could remedy anti-competitive harm resulting from an illegal transaction?⁷

³ Nicholas Economides et al., Economists' Tunney Act Comments on the DOJ's Proposed Remedy in the Sprint/T-Mobile Merger Proceeding, <https://www.justice.gov/atr/page/file/1214781/download>.

⁴ *Id.* at 9-10.

⁵ *Id.* at 9-10.

⁶ *Id.*

⁷ *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 370 (1963).

28. You have been deeply critical of the use of behavioral remedies, observing that they are “merely temporary fixes for an ongoing problem.”⁸ Yet the Division’s proposed remedy includes a long list of commitments that T-Mobile must undertake for seven or more years to help Dish. These include offering operational support, handling billing support, and meeting specific traffic management requirements. The success of the remedy is contingent on the merging firms adhering to these behavioral conditions, yet this requires the merging firms to act against their economic interest by helping Dish
- a. As a law enforcement agency, how is the Justice Department equipped to oversee and evaluate the relationship between T-Mobile and Dish in the years ahead?
 - b. How is this settlement warranted in light of your criticisms of behavioral remedies and commitment to structural remedies?
29. Nine states and the District of Columbia are suing to block the Sprint/T-Mobile merger. Has the Antitrust Division, at any time, made any formal or informal commitment to support T-Mobile/Sprint in their litigation against the state attorneys general? If so, please describe this commitment.
30. Based on comity and respect for the states challenging the deal, would you be willing to ask the court to delay approving your settlement until the trial court in New York has issued a decision regarding the state’s challenge to the Sprint/T-Mobile transaction?
31. The states’ litigation recently revealed text messages between you and executives at Dish. In one of these texts, you wrote to Dish Chairman Charlie Ergen, “Today would be a good day to have your Senator friends contact the chairman,” referring to FCC Chairman Ajit Pai.⁹
- a. Please identify all other transactions in which you have offered merging parties political advice on how to secure approval for their merger.
 - b. Do you believe it is appropriate for the Assistant Attorney General of the Antitrust Division to offer merging parties political advice on how to secure approval for their merger?
 - c. Why did you undertake this action?

⁸ Makan Delrahim, Assistant Att’y Gen., U.S. Dep’t of Justice, Remarks at the Federal Telecommunications Institute’s Conference in Mexico City (Nov. 7, 2018), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-federal-institute>.

⁹ Sheila Dang, *Dish founder Ergen says he asked for senator’s help on T-Mobile/Sprint*, REUTERS (Dec. 18, 2019), <https://www.reuters.com/article/us-sprint-corp-m-a-t-mobile-us-dish-netw/dish-chief-ergen-says-he-asked-for-senators-help-on-t-mobile-sprint-idUSKBN1YM2D3>.

32. The trial also revealed that you gave Mr. Ergen your personal email address.¹⁰
- a. Why did you give Mr. Ergen your personal email address?
 - b. Did Mr. Ergen send any emails to you about the Sprint/T-Mobile transaction at your personal email address?
 - c. Please identify all other instances during your tenure as AAG in which you have given your personal email address to parties whose transaction or conduct is being reviewed by the Antitrust Division.
33. Did you receive any commitment, gifts, or other benefit from Dish, Sprint, or T-Mobile in exchange for your work facilitating the Sprint/T-Mobile transaction?
34. Please identify what steps you are taking to ensure that you are complying with government record-keeping requirements when you use your personal cell phone or personal email account to discuss Antitrust Division matters.

Vertical Integration

35. In its challenge to the AT&T/Time Warner transaction, the Justice Department argued that the merger would undermine competition despite the existence of new distribution channels available through Netflix, Amazon Prime, Sling TV, and other companies. Yet, in its recent press statement announcing that the Antitrust Division would be filing to terminate the *Paramount Pictures* consent decree, the Division cited the existence of new technology and distribution channels as a reason why the Paramount decrees were no longer necessary. Why, in your view, is the existence of new distribution channels insufficient to check the anti-competitive incentives created by the vertical merger of AT&T/Time Warner, but sufficient to check the anti-competitive incentives created by vertical integration in the film industry?
36. The Writers Guild of America noted in its submitted comment to the Antitrust Division that “large theatrical distributors wield significant market power over theater owners” and that just three companies are likely to account for more than two-thirds of annual box office receipts. Given the degree of control wielded by distributors, what led the Antitrust Division to conclude that vertical integration by dominant distributors will not result in anti-competitive practices like block-booking and circuit dealing?

¹⁰ Erik Larson, *Texts Show DOJ Effort to Enlist Senators in T-Mobile Deal*, BLOOMBERG (Dec. 19, 2019), <https://www.bloomberg.com/news/articles/2019-12-18/doj-antitrust-head-told-dish-to-enlist-senators-in-t-mobile-deal>.

Monopsony and Labor

37. Do you believe that anti-competitive restraints on workers that deliver some consumer benefits are permissible under the antitrust laws? If so, please explain why.
38. In its recent amicus filing in *William Morris Endeavor Entertainment, LLC v. Writers Guild of America, West, Inc.*, the Antitrust Division argued that—contrary to the view of the Writers Guild of America—certain individuals participating in the alleged group boycott are not covered by the labor exemption. The Division’s argument seems to rest on the proposition that producers (or some producers) who are Guild members do not fall within the labor exemption either because they are not employees or because they operate in product rather than labor markets, or some combination of the two. How is this position consistent with the Supreme Court’s holding in *American Federation of Musicians v. Carroll*?¹¹
39. Do you believe that the Court’s holding in *Carroll* does not apply to coordination at issue here—a boycott called by the WGA involving its own members—and that producers operate in product markets and do not fall within the labor exemption? If so, how does this position reflect the business model of talent agencies, which involves aggregating bargaining power across multiple producers?

40 U.S.C. § 559

40. 40 U.S.C. § 559 states: “An executive agency shall not dispose of property to a private interest until the agency has received the advice of the Attorney General on whether the disposal to a private interest would tend to create or maintain a situation inconsistent with antitrust law.” Please provide a full list of matters on which executive agencies have consulted with the Attorney General on antitrust matters pursuant to this statutory provision.

Amicus Program

41. Please identify, to the nearest 10 hours, the number of attorney hours that the Antitrust Division has devoted since January 2017 to statements of interest and amicus briefs in cases where the United States is not a party and where its participation has not been requested by a court.
42. What effect has the Division’s amicus program had on its ability to fulfill its obligation to enforce the antitrust laws?

¹¹ Am. Fed’n of Musicians of U. S. & Canada v. Carroll, 391 U.S. 99, 115 (1968).

Expert Costs

43. Please describe each step of the process by which the Antitrust Division selects an economic expert or consulting firm to retain, including any processing for setting up competitive bidding, for negotiating fees, and for determining fees.
44. Please describe how contracts for outside experts and consulting firms are structured.
45. Please identify any features of the current contract structure that might incentivize outside experts and consulting firms to complete their work in a more or less cost-effective manner.
46. Please identify what processes the Antitrust Division has in place to monitor and review the work performed by outside economic experts and consulting firms.
47. In its November 2019 report, the Justice Department's Office of Inspector General identified several instances where the Federal Trade Commission (FTC) failed to fully document the process by which it selects experts.¹² Please identify what steps the Division has taken to ensure this process is fully documented.

Political Influence

48. Earlier this year, the FTC opened an antitrust investigation of Facebook.¹³ Reports suggest DOJ has also recently opened its own separate probe of Facebook.¹⁴ What role, if any, did Attorney General William Barr play in deciding that the Antitrust Division would conduct an antitrust investigation into Facebook?
49. Has Attorney General William Barr attended or otherwise been involved in any of the reviews of mergers involving the marijuana industry?
50. If the Antitrust Division suspects anti-competitive conduct in a particular industry, what is the standard process for opening and conducting an investigation?
51. If the Antitrust Division suspects anti-competitive conduct in the agriculture industry, is it standard process for attorneys from the Transportation, Energy, and Agriculture Section to write the preliminary investigation memo?

¹² Federal Trade Commission Office of Inspector General, Audit of Federal Trade Commission Expert Witness Services, OIG Report No. A-20-03 (Nov. 14, 2019), https://www.ftc.gov/system/files/documents/reports/final-report-audit-expert-witness-services/final_ftc_oig_report_on_expert_witnesses-redacted_11-14-19.pdf.

¹³ Lucas Matney, *Facebook says it's under antitrust investigation by the FTC*, TECHCRUNCH (July 24, 2019), <https://techcrunch.com/2019/07/24/facebook-says-its-under-antitrust-investigation-by-the-ftc>.

¹⁴ David McLaughlin, *Attorney General Barr Seeks DOJ Facebook Antitrust Probe*, BLOOMBERG (Sept. 25, 2019), <https://www.bloomberg.com/news/articles/2019-09-25/attorney-general-barr-sought-doj-facebook-antitrust-probe>.

52. MLex has reported that the investigation memorandum in the automakers investigation was written by the policy staff at the Competition Policy and Advocacy Section at the Division.¹⁵ Was this a departure from standard practice and, if so, what accounted for it?
53. When the Antitrust Division sends out letters to parties informing them that the Division has initiated an investigation, is it standard practice for attorneys from the relevant enforcement section to be the signatories to these letters? For example, would lawyers from the Transportation, Energy, and Agriculture Section sign a letter to agriculture companies that were the subject of an investigation?
54. Did attorneys from the Defense, Industrials, and Aerospace Section sign the letter to the automakers stating that the Antitrust Division was investigating them? If not, why not?
55. Did the Justice Department contact the California Attorney General's office or the California Air Resources Board when deciding whether to initiate the investigation? Has the DOJ been in touch with them since initiating the investigation?
56. If no, then why not? If the DOJ is investigating whether the emissions standards agreement that automakers entered into with California constitutes anti-competitive collusion, is understanding California's involvement—specifically when and how California was involved in drafting the emissions agreement—not imperative to getting the relevant facts?
57. For all cases in which the Division has filed statements of interest or amicus briefs, please identify any outside parties that the Antitrust Division consulted.
58. Please identify each official within the Antitrust Division who has attended meetings in the White House complex since January 2017 and please describe the circumstances of each meeting.

Travel Costs

59. Please identify the travel costs associated with each speech you have given and conference you have attended during your tenure at the Antitrust Division.

¹⁵ Leah Nylen, *Probe of automakers' California emissions deal took uncommon route through DOJ*, MLEX (Oct. 24, 2019), <https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/north-america/probe-of-automakers-california-emissions-deal-took-uncommon-route-through-doj>.

Morale

60. The 2018 Federal employee viewpoint survey reports that the Antitrust Division's employee engagement dropped from a score of 74% in 2015 to a score of 59% in 2018. According to the survey, employee engagement evaluates factors that lead to an engaged workforce, including supporting employee development and communicating agency goals. By comparison, for 2018, the government-wide average was 68% and the FTC score was 83%. What accounts for the Division's below average score? What are you doing to address this significant decline in employee engagement?