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## *DOJ and State Attorneys General Antitrust Enforcement Activity—Competition or Collaboration?*

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As we head toward the November elections, a number of high-profile antitrust investigations and possible enforcement actions continue to swirl around federal and state orbits. A targeted review of recent significant antitrust activity suggests an uncertain outlook in the months ahead leading up to the elections and beyond. What remains to be seen is whether the Department of Justice (“DOJ”) and state Attorneys General will pursue separate paths—or join forces—as they inch closer to bringing cases against dominant players in the tech industry.

Recent investigations and actions by the DOJ and state Attorneys General have been mired in controversy rather than cooperation and collaboration, most recently demonstrated by a highly-publicized disagreement in connection with the proposed Sprint/T-Mobile merger. DOJ (led by President Trump appointees) decided against blocking the merger while state Attorneys General (led by significant state Democratic Attorneys General in New York and California) decided to pursue their own case in court without federal support.<sup>1</sup> Although initially the state-led merger opposition was supported by a sole, but powerhouse Republican Attorney General in Texas, Ken Paxton, a Texas-specific agreement with the companies left a formidable group of Democratic Attorneys General bringing the case—without bipartisan support—which ultimately the court rejected.<sup>2</sup>

As the case played out both publicly and privately, an increasing number of territorial skirmishes broke out as to whether the state Attorneys General had independent authority to bring a case without DOJ backing—the typical scenario in such actions. Indeed, the DOJ asserted its authority over mergers, most notably in its Statement of Interest filed in the Sprint/T-Mobile action, in which it argued that state Attorneys General play a limited role in antitrust enforcement.<sup>3</sup> Specifically, DOJ argued that “states cannot and should not displace the federal government’s role as the nation’s federal antitrust enforcer” and that when “a group of states attempts to do so by seeking relief that quite arguably may benefit certain citizens while harming others, such a remedy is not in the public interest.”<sup>4</sup>

Washington state Attorney General Bob Ferguson fired back, writing in a letter to the Honorable Victor Marrero that “DOJ’s Statement unnecessarily and without legal basis seeks to undermine the states’ important and independent role in enforcing antitrust laws.”<sup>5</sup> Although this argument is the subject of intense debate, it remains unsettled and will loom larger no matter who occupies the White House and who leads the DOJ come January 2021. And given the court’s rejection of the state Attorney General

group in the Sprint/T-Mobile case, query whether they will reconsider moving forward in the future without both the resources and support of the DOJ or aggressively exercise their independent authority.

What is noteworthy given past history is that when the DOJ and state Attorneys General work together, their collaboration in blocking perceived anti-competitive and anti-consumer mergers has been met with success. It was only a few short years ago when the DOJ and state Attorneys General teamed up to successfully fend off mergers between the nation's largest healthcare insurers in a policy-driven effort to maintain healthy competition among them for consumers across the country.<sup>6</sup> Still, those efforts largely turned on an Obama-era DOJ and support from Democratic Attorneys General, with certain Republican-led states joining the fight. Those days are a distant memory in the current President Trump-led DOJ that has also openly opposed the legal positions maintained by its own appointed Antitrust Division Chief, struggling to maintain any semblance of a coordinated and united front as it comes to federal antitrust policy. Indeed, President Trump's first term has seen a very highly-publicized example in the entertainment/telecommunications space, where he broke with his own DOJ-led Antitrust Division and ordered it to file suit to block a vertical merger, which the court ultimately approved.<sup>7</sup>

Flash forward to today, with the most high-profile investigations on the doorsteps of the state Attorneys General and DOJ as they pertain to certain tech giants such as Facebook, Google, and possibly Amazon, and the stage is set for a classic showdown with ramifications for generations to come. As both DOJ lawyers and investigators have been conducting their own investigations parallel to those being conducted by the state Attorneys General—and as it pertains to Google, one in which 50 states have joined—the sides have been coordinating and may be preparing joint enforcement actions.

To date, the federal and state inquiries have focused on different areas. The DOJ has focused on “search, advertising, and management of [Google’s] Android operating system,”<sup>8</sup> while the state bipartisan multistate investigation has focused on “online advertising markets and search traffic that may have led to anticompetitive behavior that harms consumers.”<sup>9</sup> Both the DOJ and bipartisan coalition have announced plans to file lawsuits in the coming months. At least one state Attorney General, Mark Brnovich from Arizona, has already filed suit against Google, focusing on unfair practices related to the use of customers’ location data.<sup>10</sup>

Although the only issue that is clear is that additional actions are looming and potentially imminent, what they will look like in breadth and scope and whether the state Attorneys General and DOJ will join forces remains an open question. Certainly, the Attorneys General are stretched thin given their tireless work prosecuting opioid and generic drug pricing cases, and query whether this will drive their decision to join forces or fly solo. And of course there is the ever present policy considerations that will come into play from the Democratic and Republican sides of the aisle. Will the state Attorneys General be able to put aside their deep philosophical differences on actions against the Trump administration, the lingering partisan resentments built up from the Purdue Pharma bankruptcy, and divides over global opioid settlement frameworks to coalesce around a common target? Alternatively—and assuming they can agree on a plan of attack—will they again be in a position to put aside partisan differences and join forces with a President Trump-led DOJ that, depending on which state you are from, has clashed time and time again over the last three and a half years over antitrust policy?

Only time will tell and we may have an answer in the coming weeks or months, but one thing for certain is that whoever is elected in November (consider a DOJ led by current Senator and former California Attorney General Kamala Harris) could change the dynamics, tech landscape, and that of competition across the board for years to come.



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- <sup>1</sup> Press Release, Office of the Att’y Gen. of N.Y., New York Attorney General James Moves to Block T-Mobile and Sprint Megamerger (June 11, 2019), <https://ag.ny.gov/press-release/2019/new-york-attorney-general-james-moves-block-t-mobile-and-sprint-megamerger-0>.
  - <sup>2</sup> Decision and Order, State of New York v. Deutsche Telekom, No. 1-19-cv-5434 (S.D.N.Y. Feb. 11, 2020), ECF No. 409.
  - <sup>3</sup> Kirk Victor, *More Tensions Erupt Between States*, DOJ, MLEX (Feb. 3, 2020), <https://mlexmarketinsight.com/insights-center/editors-picks/area-of-expertise/antitrust/more-tensions-erupt-between-states-doj>.
  - <sup>4</sup> Statement of Interest, Deutsche Telekom, No. 1-19-cv-5434 (S.D.N.Y. Dec. 20, 2019), ECF No. 348 at 25.
  - <sup>5</sup> Endorsed Letter, Deutsche Telekom, No. 1-19-cv-5434 (S.D.N.Y. Jan 14, 2020), ECF No. 372 at 1.
  - <sup>6</sup> Press Release, DOJ, Justice Department and State Attorneys General Sue to Block Anthem’s Acquisition of Cigna, Aetna’s Acquisition of Humana (July 21, 2016), <https://www.justice.gov/opa/pr/justice-department-and-state-attorneys-general-sue-block-anthem-s-acquisition-cigna-aetna-s>; see also Press Release, DOJ, D.C. Circuit Affirms Decision Blocking Anthem’s Acquisition of Cigna (Apr. 28, 2017), <https://www.justice.gov/opa/pr/dc-circuit-affirms-decision-blocking-anthem-s-acquisition-cigna>.
  - <sup>7</sup> A similar pattern of cooperation and tension has played out in the relationship between the FTC and state Attorneys General. See, e.g., Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L. J. 911 (2017).
  - <sup>8</sup> Diane Bartz and Akanksha Rana, *U.S. State Attorneys General Likely to Bring Antitrust Lawsuits Against Google*, REUTERS (May 15, 2020), <https://www.reuters.com/article/us-google-doj-idUSKBN22R37I>.
  - <sup>9</sup> Press Release, Office of the Att’y Gen. of Tex., Attorney General Paxton Leads 50 Attorneys General in Google Multistate Bipartisan Antitrust Litigation (Sept. 9, 2019), <https://www.texasattorneygeneral.gov/news/releases/attorney-general-paxton-leads-50-attorneys-general-google-multistate-bipartisan-antitrust>.
  - <sup>10</sup> See Press Release, Office of the Att’y Gen. of Ariz., Attorney General Mark Brnovich Files Lawsuit Against Google Over Deceptive and Unfair Location Tracking (May 27, 2020), <https://www.azag.gov/press-release/attorney-general-mark-brnovich-files-lawsuit-against-google-over-deceptive-and-unfair> (“Arizona has brought forward this action under the Arizona Consumer Fraud Act to put a stop to Google’s deceptive collection of user data”).

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