# COMPETITION ENFORCEMENT AGENCIES
# HANDBOOK 2019

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# Competition Enforcement Agencies Handbook 2019

A Global Competition Review Special Report



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**Competition Enforcement Agencies Handbook 2019**

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*Global Competition Review*'s 2019 edition of the *Competition Enforcement Agencies Handbook* provides full contact details for competition agencies in over 100 jurisdictions, together with charts showing their structure and a Q&A explaining their funding and powers. The information has been provided by the agencies themselves and by a panel of specialist local contributors.

The *Competition Enforcement Agencies Handbook* is part of the *Global Competition Review* subscription service, which also includes online community and case news, enforcer interviews and rankings, bar surveys, data tools and more.

We would like to thank all those who have worked on the research and production of this publication: the enforcement agencies and our external contributors.

The information listed is correct as of April 2019.

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# Overview

David Meyer and Mary Kaiser
Morrison & Foerster LLP

The Federal Trade Commission (FTC) is an independent federal agency created in 1914 to address 'unfair competition' in an administrative agency setting, supplementing the Department of Justice's (DOJ) authority to enforce the antitrust laws in court. The FTC also has authority to address 'deceptive acts and practices' and administer certain other consumer protection laws. The FTC is headed by five commissioners who serve seven-year terms. Commissioners are nominated by the President and confirmed by the Senate, and no more than three can be from the same political party.

In the competition field, the FTC shares responsibility for civil enforcement against anticompetitive mergers and non-merger conduct with the DOJ. The agencies decide which of them will investigate a particular matter in accord with a long-standing interagency 'clearance' agreement. Unlike the DOJ, the FTC has no authority to file criminal antitrust charges and so refers any potentially criminal antitrust conduct to the DOJ.

As with the DOJ, the FTC's principal tools for merger enforcement are the Clayton Act's prohibition against mergers and acquisitions the effect of which 'may be substantially to lessen competition' and the Hart–Scott–Rodino (HSR) Act, which requires parties proposing transactions meeting certain size thresholds to notify the agencies and observe an initial waiting period, which can be extended by a 'second request' seeking additional information.

For non-merger conduct, the FTC enforces section 5 of the FTC Act, which prohibits 'unfair methods of competition'. Section 5 applies to conduct that would violate the Sherman Act (for example, agreements that unreasonably restrain competition and single-firm conduct constituting monopolisation), as well as some forms of anticompetitive conduct beyond the reach of the Sherman Act, such as invitations to collude that do not result in any actual agreement.

When authorised by the commissioners, FTC staff can challenge transactions or conduct before an FTC administrative law judge, decisions of which may be appealed to the full commission and then to the federal courts of appeals. The FTC may impose 'equitable' relief, including forward-looking injunctions and in some cases restitution or disgorgement of illegal profits. The FTC also has authority to seek preliminary injunctions in federal court under section 13(b) of the FTC Act, such as to block consummation of a merger pending resolution of in-house administrative proceedings.

## Recent developments

In April 2018, the US Senate confirmed President Trump's nomination of Joseph Simons as FTC chairman and Noah Phillips (R), Christine Wilson (R), Rohit Chopra (D) and Rebecca Kelly Slaughter (D) as commissioners, filling all five seats on the Commission. Chairman Simons has signalled an aggressive approach to enforcement. Remarks by Simons, including during his confirmation hearing, have foreshadowed that the FTC may intensify its focus on the technology, internet and social media sectors – where there is a concern that a small number of firms are growing too large and too powerful.

### Merger enforcement

In 2018, both the DOJ and the FTC announced reforms to their merger review process, issuing new model timing agreements. Parties often enter a timing agreement with the FTC when the commission issues a second request, seeking additional information about a potential merger, in order to set out an agreed-upon timeline for key steps in the investigation. The FTC's new model timing agreement requires parties to agree not to close a proposed transaction until 60 to 90 days following certification of compliance with a second request, depending on the complexity of the deal. This is longer than the DOJ's model timing agreement, which requires 60 days post-certification. The FTC's agreement also requires that parties provide 30 calendar days' notice before certifying substantial compliance with the second request and 30 calendar days' notice before consummating the proposed transaction (compared to 10 days for the DOJ). The model timing agreement does not alter the statutory waiting period under the HSR Act, which expires 30 days after the parties certify substantial compliance with the second request, as the additional time provided under a timing agreement is solely by agreement between the merging parties and the commission.

The FTC sued to block five transactions in 2018. In two of those cases, the parties abandoned the merger after the FTC intervened, in one, the parties walked away after the District Court granted a preliminary injunction and two remain in litigation. One of the abandoned mergers was between CDK Global and Auto/Mate, two firms that provide dealer management software (DMS) for car dealerships. In March, the FTC filed a complaint alleging that the merger would reduce competition by expanding CDK's lead as the largest provider of DMS. According to the FTC, while Auto/Mate had a relatively small share of the DMS market, it was poised to become a strong competitor in the future. The FTC cited this as an example of the agency taking action when a large incumbent firm seeks to reduce competition by acquiring a nascent, but strengthening competitor.

Both the FTC and the DOJ continued to seek structural fixes rather than behavioral remedies in 2018, particularly against horizontal mergers. For example, in October the commission announced that it would require industrial gas suppliers Praxair, Inc and Linde AG to divest assets in nine industrial gas product markets across the United States in order to resolve charges that their proposed US$80 billion merger would likely be anticompetitive. Echoing his counterpart at the DOJ, Chairman Simons has made public remarks emphasising the agency's preference for structural remedies and it is anticipated that this trend will continue under his leadership.

In one vertical merger case, however, the FTC resolved its concerns through imposition of behavioral remedies. Northrop Grumman announced plans to acquire Orbital ATK for US$7.8 billion in September 2017. Northrop is one of four companies that supplies missile systems to the US Department of Defense, while Orbital was the leading provider of solid rocket motors (SRMs), a key input in missile systems. In June 2018, the FTC settled its claim that the transaction would reduce competition in the market for missile systems purchased by the US government by requiring Northrop to agree to separate the operation of its SRM business from the rest of the company and to supply SRMs to competitors on a non-discriminatory basis. The settlement also provided for the Department of Defense to appoint a compliance officer to oversee Northrop's compliance with the settlement. In announcing the settlement, the FTC stated that while it typically disfavours behavioural remedies, the particular circumstances of this acquisition and industry (and the role of the Department of Defense in that industry) made it an appropriate case in which to rely upon a behavioural remedy.

Finally, the FTC has continued its recent trend of bringing cases for repeated failure to comply with HSR Act obligations. Under the HSR statute, companies and individuals must notify the FTC and the DOJ of acquisitions that cause their voting shares in a company to increase over a certain dollar amount (and comply with a waiting period before completing the transaction). In December 2018, the agency fined James L Dolan, executive chairman of the Madison Square Garden Company (MSG) – owner of the New York Knicks and New York Rangers sports teams – US$609,810 for failing to report his acquisition of voting securities in MSG in September 2017. Mr Dolan had previously failed to submit HSR filings for two similar acquisitions, but avoided penalties by arguing that the failures were inadvertent.

## Non-merger enforcement

The FTC brought one of its most significant non-merger cases of recent years against chipmaker, Qualcomm. The FTC won an important victory in November 2018, securing partial summary judgment, and the case proceeded to trial in early 2019. The FTC had sued Qualcomm in early 2017 for allegedly refusing to license its standard essential patents (SEPs) to rival chipmakers in order to maintain its monopoly over baseband processors used in cellphones. The commission also alleged that Qualcomm leveraged its dominant position in the semiconductor market to extract higher royalties and anticompetitive licensing terms from cellphone makers. In November, a California federal district judge granted partial summary judgment in the FTC's favour, holding that Qualcomm was required to license SEPs on FRAND terms pursuant to binding industry agreements Qualcomm had entered into. The decision strengthened the FTC's position going into trial, but the agency must still prove that Qualcomm's conduct was anticompetitive and allowed it to maintain monopoly power. The outcome of the FTC's trial will garner international attention in light of other pending actions against Qualcomm, including enforcement action in the European Union and private US litigation against Apple and a class of cellphone buyers who claim they overpaid for their devices as a result of Qualcomm's licensing practices.

The FTC also secured a landmark ruling from a Pennsylvania District Court in June 2018 in its long-running case against AbbVie. The court ruled that

AbbVie used sham litigation against generic drug makers to unlawfully maintain its monopoly over the testosterone replacement drug, AndroGel. The FTC sued AbbVie and its partner, Besins Healthcare, in 2014, alleging that it filed baseless patent infringement lawsuits against generic drug makers, Teva Pharmaceutical and Perrigo, in order to delay the launch of their generic versions of AndroGel. According to the FTC, AbbVie and Besins then entered into a pay-for-delay settlement with Teva that delayed the launch of a competing generic. The court agreed with the FTC that AbbVie's lawsuits were frivolous and, absent the litigation and settlement agreements, a competing generic version of AndroGel would have entered in the market approximately 18 months earlier than it did. This is the first time a court has held that sham litigation violated the Sherman Act since the theory was recognised by the Supreme Court in 1992. The court ordered AbbVie to pay US$448 million, plus interest, in relief to consumers who overpaid for AndroGel as a result of the anticompetitive conduct, which according to the agency, is the largest award ever in an antitrust case it has litigated in court.

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According to *The Legal 500*, clients credit Mr Meyer's 'deep expertise and a very strong intellect'. *Chambers USA* sources recognise him as a 'really smart, really strong lawyer' who 'understands the issues well and is well connected'. Mr Meyer is also named in *Who's Who Legal: Competition*, and recognised by *Best Lawyers* and *Washingtonian* magazine in the area of antitrust law.

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