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Antitrust Trends to Look Out for in 2022

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One year into his administration, President Joe Biden has made clear that aggressive competition policy is on the agenda. With a team of progressives filling leadership roles at the Federal Trade Commission and in the Antitrust Division of the US Department of Justice, companies are able to predict what the next several years may look like.

Lina Khan, a former Columbia Law professor, has headed the FTC since June 15, 2021, and has filled top spots in the Bureau of Competition and Consumer Protection with former staffers of Rohit Chopra, who left the FTC in October. Chopra's proposed replacement, Alvaro Bedoya, was renominated on January 4, 2022, after his nomination deadlocked on a 14–14 party line vote in December. Meanwhile, Jonathan Kanter was sworn in to lead the Antitrust Division on November 18, 2021.

Procedural upheavals have swept the merger review process, erecting new hurdles that merging parties must leap over, from the "temporary" suspension of early termination to the FTC's issuance of pre-consummation "warning letters." Substantively, merging companies are facing greater scrutiny and novel antitrust theories of harm.

Legislators have introduced a variety of bills that could lead to restrictions on conduct in the technology and life science sectors.

As 2022 kicks off, the Cooley antitrust team has highlighted below developments and trends that corporate counsel should be aware of – and that are likely to impact businesses in 2022 and beyond.

Increasing procedural hurdles to merger review

New obstacles to the merger review process are significant. As the increase in reportable transactions continues to strain agency resources, this trend may continue into 2022.

In February 2021, the FTC and the DOJ announced that they were temporarily suspending the granting of early termination. It has yet to be fully reinstated, though the FTC clarified in March 2021 that early termination will be granted when the agencies conclude that a transaction is unlikely to substantially lessen competition or agree to a consent agreement resolving competitive concerns before the parties fully comply with outstanding second requests.

The FTC also introduced additional obstacles when it rescinded a 1995 Policy Statement on Prior Approval and Prior Notice Provisions by a 3-2 vote in July 2021. The 1995 statement required prior approval and prior notice provisions only for parties who had previously consummated an unlawful merger when there was a "credible risk" of a future unlawful merger. The rescission of the 1995 statement means that parties to FTC consent decrees must agree to obtain prior approval and give prior notice for future mergers in the same product and geographic market, which may put those firms at a disadvantage when competing to acquire future businesses. Whether the FTC will continue administrative litigation to impose a prior approval order when parties abandon proposed transactions during litigation, as it did before 1995, remains to be seen.

In August 2021, the FTC announced it would begin sending letters notifying parties to certain transactions that its investigation is continuing, even past the 30-day statutory waiting period. The letters warn that the agency's failing to challenge a transaction during the statutory 30-day waiting period does not indicate that the transaction has been approved, and that parties consummating transactions that have not been fully investigated do so “at their own risk.” We are now seeing such letters issued on a regular basis, even when parties are not contacted during the initial Hart-Scott-Rodino Act waiting period, and are not in fact seeing an ongoing investigation, so the letters appear to be aimed simply at deterring transactions or in some cases, even years later, the agency learns new information and decides to investigate and challenge a transaction.

Withdrawal of 2020 Vertical Merger Guidelines

In addition to the aforementioned procedural hurdles, the FTC introduced ambiguity to the merger review process when it withdrew its approval of the DOJ/FTC 2020 Vertical Merger Guidelines in September 2021. In its **press release**, the FTC stated that the guidelines “include unsound economic theories that are unsupported by the law or market realities” and that it was withdrawing its approval “to prevent industry or judicial reliance on a flawed approach.” The FTC’s shift signals that vertical mergers will be more closely scrutinized, as the FTC explores new theories of vertical harm.

Notably, the DOJ did not withdraw its approval of the 2020 Vertical Merger Guidelines, which continue to provide transparency and guidance for deals pending before that agency. By withdrawing its approval, the FTC has increased the risk for divergence in outcomes between the two federal antitrust enforcement agencies.

The FTC has indicated that new guidance is in the works, with a focus on the characteristics of transactions that are likely to be challenged, expansion of harms identified in the 2020 guidelines, and guidance on remedies to address vertical concerns.

Companies may expect to see new guidance, likely issued jointly by the DOJ and FTC, in 2022. In the meantime, parties must navigate vertical merger analysis with a lack of transparency.

Antitrust reform movement of 2021

During 2021, major pieces of legislation aimed at antitrust enforcement in key industries, including Big Tech and life sciences, were introduced.

The Competition and Antitrust Law Enforcement Reform Act (CALERA), introduced by Democratic Sen. Amy Klobuchar of Minnesota in February, seeks to give the FTC more power to block mergers and acquisitions. Provisions aimed at doing so include lowering the threshold for assessing whether a merger or acquisition is prohibited under the Clayton Act from the current standard of “may substantially lessen competition” to “creat[ing] an appreciable risk of materially lessening competition.”[1] CALERA would also shift the burden to companies to affirmatively prove that their merger or acquisition would not harm competition. These provisions, together with an increase in the FTC’s budget and the establishment of an FTC division to study the effects of past mergers, would make it easier for the government to challenge transactions.

Another notable bill, the Platform Competition and Opportunity Act, introduced by Klobuchar and Arkansas Republican Sen. Tom Cotton as a bipartisan effort in November, shares significant elements with CALERA. The bill is focused on blocking acquisitions in the “dominant online platform” industry, by similarly shifting the burden to force tech companies to prove that proposed mergers and acquisitions are not anticompetitive.[2]

FTC updates to rulemaking processes also seek to enhance enforcement, empowered by Biden’s July **executive order** on “Promoting Competition in the American Economy” which, in part, encouraged agencies to “vigorously” enforce the antitrust laws, including through rulemaking. That same month, the FTC approved changes to its rulemaking process to facilitate issuance of new FTC unfair and deceptive acts and practices (UDAP) rules. Changes include shifting oversight from an administrative law judge to the FTC chair, eliminating a staff report on proceedings and cutting public comment periods. A recent FTC solicitation for public comments on contract terms that may harm competition, which may lead to limits on use of exclusive contracts, and FTC/DOJ workshop on noncompete agreements may foreshadow future rules limiting common business practices.

Labor markets and ESG – antitrust beyond the headlines

Antitrust considerations for 2022 go beyond the press headlines highlighting enforcement challenging mergers and taking aim at high-tech and life sciences companies.

Recent months have witnessed increased enforcement of conduct affecting competition in labor markets, a priority of the antitrust enforcers in the Biden administration.[3] DOJ has now brought four criminal cases that allege collusion in labor markets, including its first-ever criminal indictment of a no-poach agreement, making true on its promise to criminally prosecute such conduct.[4]

Following the DOJ's case against a former healthcare staffing company owner and, later, an ex-director, for conspiring to fix rates paid to physical therapists and therapist assistants, the DOJ brought several new charges against individuals and companies in healthcare and other sectors.

The DOJ recently scored a victory when a federal court declined a motion to dismiss of the DOJ's charges against the two individuals, who had attempted to have the charges tossed on account of the lack of precedent in criminal charges for wage-fixing. In the order denying the motion to dismiss, the judge found that the indictment alleges a naked price-fixing conspiracy that is per se unlawful. While other defendants try to advance similar arguments against the DOJ's criminal suits, how these arguments will resolve in the courts remains to be seen.

Continued antitrust focus on labor markets is expected in 2022. Following Biden's July executive order declaring "the policy of his administration to enforce the antitrust laws in labor markets," the DOJ and the FTC hosted a joint workshop on promoting competition in labor markets. Assistant Attorney General Kanter asserted that "principles for addressing and preventing concentration in the horizontal merger guidelines apply just as much to labor markets as in any other market," while **FTC Chair Khan said** her agency is committed "to investigating potentially unlawful transactions or anticompetitive conduct that harms workers" and further committed the FTC to consider competitive issues arising from noncompetition agreements through enforcement and rulemaking. With respect to mergers, the primary concern appears to be that mergers that lead to market concentration may result in monopsony power over labor, leading agency staff members to ask about mergers leading to layoffs, historically seen as procompetitive by reducing costs.

Environmental, social and governance considerations are also poised to intersect with antitrust law. Indeed, the FTC has started inquiring about ESG practices in investigating mergers. Additionally, ESG initiatives – which Biden has promoted over the past year – may require navigation around antitrust issues regarding competitor collaborations.

AMG: Boon or bust?

For decades, the FTC has used Section 13(b) as its primary recourse to collect money from companies it deemed to have committed unfair or deceptive practices in violation of the FTC Act.

While Section 13(b) only explicitly allows the FTC to seek injunctive relief, federal courts had previously ruled that the agency could also seek equitable monetary relief, including restitution and disgorgement. These rulings allowed the FTC to use the federal courts as a one-stop shop for altering behavior and collecting money versus the more lengthy and arduous administrative process. Additionally, the FTC was able to use the threat of Section 13(b) as a way to seek monetary settlements from investigation targets. However, in April 2021, the US Supreme Court in *AMG Capital Management v. FTC* unanimously ruled that the FTC does not have authority to seek monetary relief under Section 13(b).

While some thought the *AMG* decision was a boon for companies, it may be akin to kicking a hornets' nest. Even before the *AMG* decision was issued, FTC commissioners were discussing alternative means of enforcement that would allow the FTC to seek monetary remedies while also imploring Congress to reinstate its broader Section 13(b) authority.

In the months that have followed *AMG*, the FTC has continued to seek monetary relief in federal court under other statutes, including civil penalties of up to $43,792 per violation, with each day being a separate violation for ongoing activities, which can amount to extraordinary sums.

The FTC has sent out several thousand Notices of Penalty Offenses to companies with the goal of being able to prove under Section 5(m)(1)(B) that these companies had "actual knowledge" that certain practices have been found to violate the FTC Act.

Return to Obama-era standard-essential patents antitrust policy

The DOJ has signaled a shift in its approach to "standard-essential patents" (SEPs), that is, patents considered "essential" for implementers of a standard articulated by a standard-setting organization (SSO) to exercise when implementing the standard.

Under the Obama administration, **the DOJ expressed concern** that SEP holders could violate the antitrust laws by engaging in "patent hold-up," that is, exercising "power to extract higher royalties or other licensing terms that reflect the absence of competitive alternatives" because "the SSO chose it as the standard."

In line with this concern, in 2013, the DOJ and the US Patent and Trademark Office (PTO) **issued guidance** stating that while it "may be appropriate in some circumstances" for a SEP holder to seek injunctive relief against infringing implementers, the "public interest may preclude the issuance of an exclusion order in cases where the infringer is acting within the scope of the patent holder's F/RAND commitment and is able, and has not refused, to license on F/RAND terms."

Under the Trump administration, the DOJ shifted to what it called a "New Madison" approach, where it considered concerted efforts of implementers to engage in patent "hold-out" (where implementers delay making royalty payments to SEP holders) a more significant antitrust concern than patent hold-up. The **DOJ characterized hold-up** as "fundamentally not an *antitrust* problem" but instead an issue where "contract or common law remedies would be adequate." In 2019, the DOJ and the PTO rescinded the 2013 guidance and **issued new guidance** advising that injunctive relief "should be made available" to SEP holders.

Under the Biden administration, the DOJ has backed away from the "New Madison" approach as being overly favorable to SEP holders. Most recently, on December 6, 2021, the DOJ and the PTO announced that they were reviewing the 2019 joint guidance and **issued new draft guidance for public comment**, stating that "monetary remedies will usually be adequate to fully compensate a SEP holder for infringement."

Congress targets pharmaceutical industry pricing and business practices

On December 10, 2021, the US House of Representatives Committee on Oversight and Reform released a **269-page report** publishing findings from a three-year investigation into the pharmaceutical industry. The report focuses on pricing and business practices in the pharmaceutical industry, finding that companies have engaged in strategies to suppress competition and maintain monopoly pricing.

According to the report, "companies have specifically targeted the U.S. market for higher prices, even while cutting prices in other countries, because weaknesses in our health care system have allowed them to get away with outrageous prices and anticompetitive conduct."

The report details three practices:

1. It asserts that pharmaceutical companies “have raised prices with abandon, especially when they succeed in delaying or blocking competition.”
2. It asserts “companies have manipulated the patent system and marketing exclusivities granted by the Food and Drug Administration to extend their monopolies far longer than lawmakers envisioned when they created these systems.”
3. It argues “all the companies the Committee investigated have employed anticompetitive strategies to suppress generic competition.”

With this report fresh in lawmakers’ minds going in to 2022, pharmaceutical companies can expect to see a continued focus on competition in the industry. Like the October 2020 House Judiciary Committee’s report on “Competition in Digital Markets,” this report may well lead to legislative proposals.

New scrutiny for tech and life science deals across the pond

In April 2021, the European Commission accepted the referral of Illumina’s proposed acquisition of GRAIL under Article 22 of the EU Merger Regulation. Article 22 allows member states to refer transactions to the EC for review, even when they are not required to notify the EU or any member state.

Article 22 referrals are possible if the turnover of one of the parties is found to not reflect its actual or future competitive position, or where the value of the transaction is disproportionately high compared to the target’s current turnover.

The EC’s guidance points specifically to the digital and pharmaceutical sectors for which innovation is a key parameter and research and development results are not yet commercialized at the time of the acquisition.

In practice, this means we are likely to see more cases like Illumina and GRAIL. Given the EC’s view on a broad application of Article 22, a large number of transactions are at least theoretically exposed to EU review, which can result in substantial delays of up to 40 working days, or eight weeks, for transactions that do not raise significant issues.

In the future, merging parties need to plan and take this new referral procedure into account when negotiating transaction documents and timelines. As the number of Article 22 cases increases, it is expected that the EC will codify procedural considerations to provide more certainty.

New rules for distribution agreements in the EU

The EU’s Vertical Block Exemption Regulation (VBER) and Vertical Guidelines govern distribution agreements. In July 2021, the EC published proposals to replace the current regime, which is set to expire on May 31, 2022. The EC claims that the current rules require reform, as they lack clarity and have not adapted to the growth of online sales and the emergence of new market players, including online platforms.

Concurrently, the UK Competition and Markets Authority (CMA) is considering a Vertical Agreements Block Exemption Order tailored specifically to business and consumers in the UK, which would widen its powers.

In parallel, the CMA is at the consultation stage to review its two Horizontal Block Exemption Regulations covering research and development and specialization agreements, which are set to expire.

Notes

1. Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. § 4 (2021).
2. Platform Competition and Opportunity Act of 2021, S.3197, S, 117 Congress (2021).
3. See GCR US Courts Annual Review, **The 'No-Poach' Approach: Antitrust Enforcement of Employment Agreements**.
4. See Cooley Alert, **DOJ Criminally Prosecutes First No-Poach Agreement on Heels of First Criminal Wage Fixing-Indictment**.

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