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10 Ways Antitrust Scrutiny Is Heating Up In 2021

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The antitrust enforcement pendulum is swinging toward an increasingly interventionist approach, and with the incoming Biden administration, there is no reversal in sight.

The current enforcement environment is red hot. Monopolization complaints filed by the U.S. Department of Justice, Federal Trade Commission and state attorneys general against some of the largest tech companies in the world have grabbed headlines and will continue to do so in the coming years. Merger challenges involving novel antitrust theories are also on the docket in 2021 and are likely to yield important precedents.

As the Trump administration exits, companies must navigate antitrust forces on the horizon, including the potential for more aggressive antitrust enforcement under the Biden administration, intense scrutiny of acquisitions of nascent competitors, heightened focus on life sciences, the FTC's ability to recover monetary remedies, and other trends discussed below that will impact businesses in 2021 and years to come.

Antitrust Under Biden: Expect More Aggressive, Less Politically Charged Enforcement

President-elect Joe Biden and Vice President-elect Kamala Harris both signaled a more aggressive antitrust approach on the campaign trail, with Biden remarking: "I don't think we spend nearly enough time focusing on antitrust measures. And the truth of the matter is, I think it's something we should take a really hard look at."

At the same time, the Biden administration is likely to stay out of enforcement decisions, in contrast with the Trump administration, which was tainted by allegations that political pressure influenced enforcement. In keeping with a long-standing tradition of avoiding even the appearance of political influence in antitrust decisions, the Biden administration has promised a return to a hands off approach, with Harris pledging that they "will not tell the Justice Department how to do its job" and Biden affirming that "I guarantee that's how it'll be run."

The members of the Biden transition team for the DOJ and FTC, made up of senior officials who served in the Obama administration, suggest we are likely to see pro-enforcement — but not radical — enforcers lead the agencies. It could take months to get Senate-confirmed appointees in place, though lower level political employees could start leading the Antitrust Division sooner and the president could quickly name a sitting Democratic commissioner to chair the FTC.

Merger Enforcement Protecting Nascent Competition on the Rise

One of the most significant trends in U.S. merger enforcement is the agencies' focus on investigating and challenging acquisitions[1] by incumbent firms of emerging or nascent competitors, especially in high-tech and life sciences. Both agencies are laser focused on preserving competition in industries dominated by established players that are being disrupted by new technologies and business models.

In December 2020, the FTC sued to block Procter & Gamble Co.'s acquisition of startup Billie Inc., a direct-to-consumer company that began selling women's razors and body care products in 2017. The FTC alleged that Billie had grown rapidly, that in response P&G had introduced its own DTC services, and asserted the acquisition would "eliminate [an] innovative nascent competitor." The parties recently abandoned the transaction in the face of the FTC's challenge.

The DOJ has also jumped on the nascent competition bandwagon. Most recently, the DOJ challenged Visa's proposed acquisition of Plaid, an emerging fintech player that "does not compete directly with Visa today," but which the DOJ asserted is "a nascent competitor developing a disruptive, lower cost option for online debit payments" and is "uniquely positioned" to challenge Visa's online debit business in the future. That matter is being hotly litigated and the outcome could have implications for future challenges based on nascent competition theories.

Life Sciences Squarely in the Antitrust Crosshairs

2020 also witnessed vigorous antitrust enforcement in life sciences, as well as calls for even tougher enforcement against what some perceive to be high drug prices enabled by anti-competitive acquisitions, sometimes branded as "killer acquisitions,"[2] and conduct that prevents or delays generic entry.

Notably, the two FTC Democrat commissioners, Rohit Chopra and Rebecca Slaughter, have dissented from consent decrees allowing pharmaceutical mergers to proceed with divestitures. They have argued the FTC's current approach to analyzing pharma mergers is "narrow, flawed, and ineffective," "misses the big picture" and that the FTC's record suggests it "will simply never seek to block a merger" and instead "strike narrow settlements," encouraging firms "to propose even more unlawful mergers."

Those dissents suggest a split[3] on pushing the boundaries of merger enforcement in the FTC's life sciences program, and with the FTC majority set to flip, this is a development worth watching.

Attention is also warranted to activity on Capitol Hill. In November 2020, the House Judiciary Antitrust Subcommittee called for an investigation of competitive concerns in the pharmaceutical industry, following the House's high-tech antitrust report. Rep. Joe Neguse, D-Colo., questioned the FTC's approach to assessing pharmaceutical mergers and divestitures, citing Commissioner Rohit Chopra's criticism of the FTC's "myopic" approach toward pharmaceutical mergers.

Life sciences companies should also anticipate that the FTC and state attorneys general will continue to scrutinize alleged anti-competitive conduct. Ongoing litigation against Vyera Pharmaceuticals, alleging a scheme to preserve a monopoly through distribution and active pharmaceutical ingredient sourcing agreements is one matter to watch, along with continued enforcement against reverse-payment settlements, sham petitioning and product hopping.

Increased Scrutiny of Divestitures Extending Investigation Timelines

Parties to transactions that may require a divestiture should expect a longer and more rigorous review, as the agencies are scrutinizing proposed remedies more closely.

Such increased scrutiny derives in part from the FTC's 2017 merger remedy retrospective, "to see if ... antitrust enforcement is working correctly." That study concluded that FTC orders had generally succeeded, but the scope of divestiture packages and terms in consent orders could be improved.

FTC Commissioner Chopra has also been vocal in dissent against certain divestitures, arguing the FTC's processes do not adequately ensure the buyer has sufficient incentive and ability to compete, and thus that the FTC must "enhance [its] divestiture buyer evaluation process." These statements appear to have influenced staff to dig deeply, leading to prolonged divestiture reviews.

The DOJ also recently released a new Merger Remedies Manual,[4] setting out the analytical framework it uses to evaluate proposed divestitures.

With the incoming Biden administration, parties to transactions that raise competitive concerns, as well as proposed acquirers of divested businesses, should expect both agencies to continue their close scrutiny of proposed acquirers and their post-divestiture business plans.

Refusal to Deal at a Crossroads

Antitrust enforcers and private plaintiffs are increasingly targeting platforms, challenging refusals to provide access to essential technologies or data. 2021 promises to bring new developments to the law governing such companies' freedom to refuse to deal with competitors.

While the U.S. Supreme Court has chipped away at the refusal to deal doctrine for decades, making such cases increasingly difficult to bring, the U.S. Court of Appeals for the Seventh Circuit's 2020 decision in Viamedia Inc. v. Comcast Corp. stands out as notably plaintiff-friendly.

There, the court ruled Viamedia could proceed on its allegations that Comcast unlawfully terminated Viamedia's access to interconnects, to favor Comcast's competing advertisement representation services.

The lower court had reasoned that because Comcast's conduct offered plausible efficiencies, Viamedia's refusal to deal claim failed. The Seventh Circuit, however, held that Viamedia sufficiently alleged a refusal to deal claim based on Comcast having "abruptly terminated decade-long, profitable agreements and sacrificed short-term profits to obtain and entrench market power."

Comcast has petitioned the Supreme Court for certiorari, and in December 2020, the Supreme Court invited the solicitor general to brief whether the circuit court erred by allowing the claim to proceed "despite the presence of valid business justification."

If the Supreme Court takes this case, its ruling is likely to have a significant impact on the flexibility of dominant firms to terminate competitors, either limiting application of the refusal to deal doctrine or potentially breathing new life into it.

DOJ's First Wage-Fixing Prosecution Reflects Enforcement Priority in Labor Markets

For the first time since the Antitrust Division announced its intent[5] in 2016 to criminally prosecute naked wage-fixing and no-poach agreements, a federal grand jury returned an indictment in December 2020 against a former owner of a staffing company for conspiring to pay lower rates to physical therapists and assistants.

The indictment underscores the DOJ's focus on anti-competitive conduct in labor markets. DOJ leadership has repeatedly indicated that criminal enforcement of naked wage-fixing and no-poach agreements would be coming soon. The DOJ reaffirmed[6] this commitment at the outset of the COVID-19 pandemic, emphasizing it would "prosecute any criminal violations of the antitrust laws," including "between individuals or business to fix prices or wages."

Naked agreements not to recruit employees — no-poach agreements — also remain on the DOJ's radar. While the DOJ has not brought such a criminal suit to date, it has investigated alleged misconduct, and advocated its views in private litigation.

Anti-competitive conduct in labor markets is likely to remain a focus in the new administration. As a presidential candidate, Joe Biden pledged to "eliminate non-compete clauses and no-poaching agreements that hinder the ability of employees to seek higher wages, better benefits and working conditions by changing employers."

Antitrust vs. Bankruptcy: Which Law Controls?

Since the start of COVID-19, companies representing brands across a range of industries — retail, energy, communications, health care and high tech — have declared bankruptcy, including Exide Technologies, Gold's Gym, Neiman Marcus, J. Crew and Purdue Pharma.

The aim of bankruptcy law — to maximize the value of the estate and return assets to the market quickly — can at times conflict with antitrust law, which seeks to preserve competition. This conflict can come to a head when a bankruptcy court approves a plan providing for assets to be sold to a competitor. The antitrust agencies have pursued various paths to block such sales, both in and outside the bankruptcy court, sometimes with cases proceeding in tandem.

This recently played out after RentPath Holdings Inc., an internet listing service that connects consumers to rentals, filed for bankruptcy protection, and the bankruptcy court approved its sale to its major competitor, CoStar Group Inc. The FTC sued to block the deal, arguing the transaction would lead to higher prices for advertisers, lower quality listings and reduced innovation.

With companies continuing to declare bankruptcy as the pandemic wreaks havoc on many industries, and the antitrust agencies continuing to vigorously enforce the antitrust laws, we anticipate similar conflicts over the next year.

The FTC and Monetary Remedies — Trouble Ahead, Trouble Behind?

For decades, courts had held that the FTC Act empowers the FTC to seek restitution and disgorgement in federal court as an "equitable remedy." The FTC has used this power to collect billions of dollars from alleged wrongdoers, primarily in consumer protection matters, and occasionally in antitrust cases, including $1.2 billion from Cephalon Inc. in 2015 stemming from a reverse-payment settlement.

The Seventh Circuit and the U.S. Court of Appeals for the Third Circuit have recently concluded, however, that the FTC Act does not authorize such monetary relief. In contrast, the U.S. Court of Appeals for the Ninth Circuit recently followed long-standing precedent to hold otherwise.

AMG Capital Management v. Federal Trade Commission is now before the Supreme Court. If the Supreme Court finds that the FTC lacks authority to obtain monetary relief, the issue is likely to end up in Congress, since many believe that regardless of statutory language, the agency should have the ability to recover from wrongdoers. The standard for such relief, however, is likely to be hotly debated.

In fact, the FTC has already asked Congress to amend the FTC Act to explicitly grant the ability to pursue monetary remedies, and four Republican senators have introduced the SAFE DATA Act. Even if this bill or another legislative fix becomes law, that is unlikely to occur before the Supreme Court rules and potentially strips the FTC of this enforcement arrow for some period of time.

Proposed HSR Rule Changes Target Private Equity and Venture Funds

The Hart-Scott-Rodino Antitrust Improvements Act requires parties to transactions that meet size-of-person and size-of-transaction thresholds (currently $94 million), and that do not qualify for an exemption, to notify the antitrust agencies and observe a waiting period before consummating the transaction.

One important nuance in the HSR rules is that unincorporated entities are considered their own "ultimate parent entity" if no other person or entity has the right to 50% of its profits or 50% of its assets. This means that private equity and venture capital funds within the same fund family — for example, with a common investment manager — often need not aggregate their holdings.

In September 2020, the FTC and DOJ issued a proposed amendment to the HSR rules[7] that would require funds to aggregate the holdings of entities managed by the same investment manager, even if not within the same ultimate parent. Such a change would significantly increase the number of transactions that must be filed, expand the information included in those filings, and increase the cost of HSR analysis for investments by private equity and venture capital funds.

Across the Pond: Brexit, Digital Platforms Scrutiny and EU Rules for Distribution Agreements

Meanwhile, 2021 is expected to bring significant changes to competition law and its enforcement in Europe in a number of key areas.

Brexit — Double the Trouble

Following Brexit, the U.K. is now outside the regulatory umbrella of the EU, and the U.K. Competition and Markets Authority will now be able to review cases in parallel to the European Commission.

This will bring more complexity and costs[8] for companies caught by both regimes. The CMA anticipates an increment of at least 40-50% in its merger caseload. Despite the facially voluntary nature of the U.K.

regime, the CMA has been building a reputation as one of the toughest and most interventionist competition authorities.

Tighter Rules for Gatekeepers

Regulators across Europe are contemplating stricter rules for digital gatekeeper companies.

In December 2020, the European Commission published drafts of a Digital Services Act and Digital Markets Act. Among other things, the Digital Markets Act would empower the EC to impose obligations on "digital gatekeepers" to mandate interoperability or access to data. The EC would be able to impose remedies absent an antitrust infringement — a significant broadening of the EC's toolbox.

Following its study into online advertising, the CMA is also expected to introduce a new code of conduct[9] for digital platforms that are funded through online advertisements and have a "strategic market status." The objective is to address alleged anticompetitive behavior and level the playing field for competitors. A new Digital Markets Unit would be set up to enforce the code.

New Rules for Distribution Agreements — Turning Back the Clock?

The EU's Vertical Block Exemption Regulation and Vertical Guidelines govern distribution agreements. The current VBER came into force in 2010 and one of its core focuses is to allow companies to seize opportunities offered by digitization.

The tides have now turned, as the EC is considering revising the rules to allow, among other things, suppliers to charge online resellers higher prices than offline resellers and provide manufacturers of selective distribution more leeway and to allow stricter criteria for online resellers. The EC is conducting a consultation, in which interested parties can participate through March 2021.

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Disclosure: Cooley represents Plaid in matters unrelated to those mentioned in this article.

[1] See US Technology Mergers chapter in GCR Americas Antitrust Review 2021, https://www.cooley.com/-/media/cooley/pdf/reprints/2020/us-technology-mergers.ashx

[2] See CPI Antitrust Chronicle, The No Kill Zone: The Other Side of Pharma Acquisitions, https://www.cooley.com/news/insight/2020/2020-06-25-the-no-kill-zone-the-other-side-of-pharma-acquisitions

[3] See Cooley Alert, FTC Antitrust Enforcement in Life Sciences Reveals Fissures Among Commissioners, https://www.cooley.com/news/insight/2019/2019-12-03-ftc-focuses-antitrust-enforcement-on-life-sciences

[4] See ABA Newsletter, DOJ Issues Merger Remedies Manual as Both DOJ and FTC Step Up Efforts to

Enforce Consent Decrees, https://www.cooley.com/-/media/cooley/pdf/reprints/2020/the-antitrust-counselor--sept-2020-aba-als-corp-counseling-committee-newsletter-151.ashx?la=en&hash=FEA6DFAA7F16D8A05BDC950369DBEBB2

[5] See Cooley Alert, DOJ to Criminally Pursue Anticompetitive Employment Violations, https://www.cooley.com/news/insight/2016/2016-10-24-doj-to-criminally-pursue-anticompetitive-employment-violations

[6] See Cooley Alert, COVID-19: Antitrust Implications of Dynamic Pricing, Online Third-Party Seller Platforms and Price Gouging, https://www.cooley.com/news/insight/2020/2020-03-30-covid-19-antitrust-implications-of-dynamic-pricing-online-third-party-seller-platforms

[7] See Cooley Alert, Investment Funds Beware: Proposed HSR Amendments Would Increase Reporting Obligations, https://www.cooley.com/news/insight/2020/2020-09-29-investment-funds-beware-proposed-hsr-amendments-would-increase-reporting-obligations

[8] See Cooley Alert, Brexit Readiness: Possible Key Impacts of the Conclusion of the Transition Period on 31 December 2020, https://www.cooley.com/news/insight/2020/2020-12-03-brexit-readiness-possible-key-impacts-of-transition-period

[9] See Cooley Alert, UK Digital Markets Unit – A New Regime for Online Platforms, https://www.cooley.com/news/insight/2020/2020-12-01-uk-digital-markets-unit