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Antitrust in 2025: Shifting Sands and What to Expect

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In the US, the election of Donald Trump for a second term has significant implications for antitrust enforcement at the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC). New leadership is expected to implement an agenda that hews more closely to traditional antitrust norms but will be an aggressive enforcer within that framework.

In Europe, enforcement will continue to be shaped by evolving political and regulatory dynamics. The new appointments to the European Commission (EC) will balance competition enforcement and the desire to strengthen the competitiveness of European Union companies. This includes continued focus on dominance concerns in digital markets and sustainability, reflecting broader EU policy priorities. Similarly, the UK's new government has emphasized that Competition and Markets Authority (CMA) enforcement should better factor in competitiveness of the UK economy. The CMA's chair resigned in response, but the implications of the agency's post-Brexit interventionist position in scrutinizing global transactions remain to be seen. However, recent collaboration between the EC and CMA is expected to bring more harmony between outcomes.

This alert discusses the shifting sands of the global antitrust landscape and what it means for antitrust enforcement in the year ahead.

Second Trump administration expected to be aggressive, but traditional, antitrust enforcer

Personnel choices at DOJ and FTC indicate robust enforcement under more traditional theories

The prior Trump administration saw the initiation of investigations targeting Big Tech, even though the investigations ripened into litigation mostly under President Joe Biden (e.g., the FTC's 2023 lawsuit against Amazon for illegally maintaining monopoly power). Antitrust did not languish under Trump 1.0, but the antitrust theories were more traditional than those pursued by the Biden administration. The proposed Trump nominees signal a return to more traditional antitrust analysis, even if that analysis will continue to be aggressive, particularly for certain industries:

- **Gail Slater** as assistant attorney general for the Antitrust Division of the DOJ. Slater, who previously served as advisor to Vice President JD Vance, is a veteran of the FTC and is expected to carry forward ongoing cases against Big Tech in the new administration. Trump cited Big Tech as having "run wild for years" in announcing Slater to lead the DOJ's Antitrust Division.
- FTC Commissioner **Andrew Ferguson** as FTC chair. Ferguson was previously the solicitor general of the Commonwealth of Virginia and served as chief counsel to Sen. Mitch McConnell of Kentucky and as a Republican counsel on the Senate Judiciary Committee. Ferguson has touted himself as a pro-business and pro-innovation pick. He promised to "[s]top Lina Khan's war on mergers" and "[e]nd the FTC's attempt to become an AI regulator." Ferguson also has noted that he will prioritize "antitrust enforcement against Big Tech monopolies, especially those companies engaged in unlawful censorship."
- **Mark Meador** as the proposed third Republican FTC commissioner. Meador was a former staffer for Senate Antitrust Subcommittee ranking member Mike Lee of Utah. He is nominated for the seat that FTC Chair Lina Khan will leave vacant when she resigns on January 31. Meador's history suggests he will not only take an aggressive stance against Big Tech, but also that he may align with a populist approach that goes further than his fellow Republican commissioners. For example, he has called for greater Robinson-Patman enforcement and shown at least some support for the 2023 Merger Guidelines.

Meador and Slater will need to be confirmed by the Senate, a process that can take up to six months from nomination.[1] Ferguson, as a sitting commissioner, has already taken the reigns, focusing his first weeks on implanting Trumps's diversity, equity and inclusion (DEI) objectives at the FTC, though he will need to await Meador's appointment to have a Republican majority at the FTC to fully implement his agenda.

Many of the more aggressive rules and guidance of the Biden administration may be revisited

The FTC and DOJ are likely to revisit many of the rules and guidelines issued under the Biden administration. For example, the new administration is expected to reinstate early terminations under the Hart-Scott-Rodino (HSR) rules, ending the pause imposed by Khan. The FTC also will likely revisit its controversial noncompete ban, which sought to make almost all noncompete provisions unenforceable. The ban was set to go into effect on September 4, 2024, but, as of August 2024, the rule was set aside by a court in the Northern District of Texas, pending an FTC appeal to the US Court of Appeals for the Fifth Circuit. It is not expected that the FTC will offer robust support for this initiative, which became a hallmark of the FTC under Khan. The FTC may ultimately decide to withdraw the rule entirely or choose not to appeal if the Fifth Circuit were to rule against the proposed rule.

The fate of the pending changes to the HSR premerger notification program also is unclear. The rules are currently scheduled to go into effect on February 10, 2025, but the Chamber of Commerce sued shortly before Trump's inauguration to block the rules, which may result in a stay of implementation. It also is possible the FTC could pursue methods to withdraw or modify the rules outside of that litigation. However, the support of Republican commissioners, including Ferguson, on issuance of the rules suggests that this may not be a priority, particularly given the burden of an entirely new rulemaking.

The 2023 Merger Guidelines also are likely to be revisited. Ferguson has suggested that while he would be open to revising the guidelines, he "doesn't think they should be categorically rescinded," or that "we should get into a cycle where we are just rescinding guidelines every time the chairmanship changes hands." Melissa Holyoak, the other Republican commissioner, has been more outspoken about the guidelines, saying, "I do have a lot of concerns about those guidelines," and "I would strongly consider rescinding or revising them."

It also will be interesting to see what the new leadership does with the flurry of enforcement actions and policies announced by both the DOJ and FTC in the week leading up to Trump's inauguration – including a complaint against a PE firm alleging it failed to comply with the HSR rules, issuance of guidelines on practices that impact workers, and issues of reports on pharmacy benefit managers (PBMs) and reverse payment settlements. Many of these actions were taken despite Republican dissents at the FTC and have been criticized as "political" and rushed.

US merger enforcement expected to see returned focus on the consumer welfare standard

On the merger front, Ferguson's promise to "[s]top Lina Khan's war on mergers" given that "most mergers benefit Americans" will likely translate to more streamlined processes regarding merger review (e.g., resuming early termination), similar to merger enforcement during the first Trump administration. It also is expected that merger review in the new administration will return to more focus on the consumer welfare standard, examining the impact of a merger or action on prices and innovation. It also should be expected that both the FTC and DOJ will be more open to "fixes" to resolve competitive concerns, with a continued preference for structural divestitures.

The mergers litigated by the FTC at the end of the Biden administration may provide a useful roadmap for the likely Trump administration, given that complaints were issued without Republican dissents. While they each included some ancillary novel theories, there also were victories for the FTC on the traditional approach of defining a relevant market in which the parties' had large combined shares.

- In the FTC's successful federal block of Kroger's proposed $24.6 billion merger with Albertsons, the FTC argued the merger would substantially lessen competition in supermarkets and large format stores in certain geographic markets. The FTC also argued that the merger would harm workers by reducing bargaining power for unions resulting in lower wages, worse benefits and degraded working conditions. The court adopted the FTC's market definition and thus agreed that the deal would result in a harm to competition given market shares, again relying heavily on internal documents, though it declined to take on the FTC's novel labor market theory of harm.
- While we await a decision in Tempur Sealy/Mattress Firm as of publication of this alert, the FTC's complaint alleged that the combination – which would vertically integrate manufacturing (Tempur Sealy) and the largest retail channel (Mattress Firm) – would allow the combined firm to raise rival mattress manufacturers' distribution costs or exclude them entirely. The parties

had offered a commitment that the combined firm would leave a portion of the Mattress Firm floorspace available to competing manufacturers, and the court encouraged the parties to increase to the percentage used by competitors today, which the parties did.

Looking forward, we expect the DOJ and FTC to build on these successes, pursuing cases based on closeness of competition and vertical foreclosure, relying on company documents, and placing even greater emphasis on economic analysis and the consumer welfare standard.

Uncertainty caused by divergent outcomes in EU and UK merger cases expected to improve

In recent years, parties have sometimes faced divergent outcomes in antitrust and merger cases in the UK and EU – for example, in *ALD/ LeasePlan*, where the CMA found the merged entity would continue facing competition, but the EC only saw limited competitive constraints in several EU member states, thus requiring divestment remedies.

To establish a formal framework for cooperation, in October 2024, the EU and UK concluded technical negotiations for a future cooperation agreement, which will allow for closer cooperation between the EU's competition authorities and the UK's CMA. For example, should the agreement (which is now subject to parliamentary scrutiny before it can be signed) go into effect, then EU member state authorities, the CMA and the EC will be able to cooperate directly during merger control investigations, thus potentially streamlining processes and reducing divergence in the outcome of reviews.

EC no longer reviewing mergers under expansive approach to jurisdiction referrals

The EC's merger control jurisdiction has been pared back, which limits its ability to review certain transactions. In 2019, the EC announced that EU member states could refer to it (under the so-called "Article 22 mechanism") transactions that potentially gave rise to competitive concerns, even if deals did not meet the criteria for review under member states' laws, and the EC would review such deals under the EU merger control rules. Many criticized that approach as an expansive interpretation of established rules and a practice that created legal and deal timeline uncertainty.

In 2024, the European Court of Justice ruled that the EC's expanded approach to the Article 22 mechanism was unlawful; member states can only call on the EC to assume jurisdiction over a transaction if the deal satisfies the criteria for notification in (at least) one of the member states. This decision provides greater legal certainty for dealmakers when assessing whether a deal might be reviewable by the EC.

Still, in the wake of the judgment of the European Court of Justice, the EC has explained that it intends to evaluate whether the EU merger control rules enable review of certain transactions not caught by the current criteria, especially transactions involving established players and promising nascent rivals. In addition, EU member states are reviewing, and some are introducing, expanded domestic review thresholds that would expand domestic jurisdiction and, in some cases, the potential for referral to the EC. This continues to be a space to watch, not least given recent case law confirming that agencies may review transactions under the general competition law rules (on abuse of dominance or anti-competitive agreements) where mergers fall outside the jurisdiction of merger control.

Class actions in UK continue to gain momentum

For more than a decade, the UK courts have been a preferred venue for damages litigation that "follow-on" from agency antitrust infringement decisions, where both direct and indirect customers are able to seek compensation for alleged loss suffered. Since 2016, the specialist Competition Appeal Tribunal (CAT) also has had jurisdiction to certify and adjudicate on opt-out class actions based on antitrust claims. Although the regime was initially slow to develop, after a 2020 UK Supreme Court decision established a low bar for class certification, the number of claims issued in the CAT has skyrocketed in recent years.

The UK has become a preferred venue for plaintiff firms to bring parallel actions to class actions commenced in the US, and for unique claims targeting business conduct in the UK and Europe. At the end of 2024, there were more than 50 class actions filed in the CAT, a significant number of which were stand-alone (i.e., independent of an agency infringement decision) and based on monopolization allegations that attack business practices in technology and digital markets.

Looking ahead, 2025 is unlikely to see a slowdown in class action activity in the UK, with important cases proceeding to trial and the UK's new digital markets legislation offering potential new opportunities for plaintiffs.

Sector spotlight: Continued focus on AI and algorithmic pricing for government and private litigants

Concerns about censorship, discrimination, privacy and data misuse will continue to drive litigation and investigations in the US and Europe. In the US, Ferguson has expressed concern about censorship of and discrimination against political content on Big Tech platforms, but also has cautioned against the FTC acting as an artificial intelligence (AI) regulator. In Europe, concerns about access, fairness and privacy have driven investigations and legislation. This section provides a flavor of what to expect in AI and algorithmic pricing.

AI attracting antitrust scrutiny from global regulators, but expect a position shift in the US with new administration

In 2024, regulatory agencies took significant steps to understand and manage the competitive implications of AI. For instance, in the US, the FTC launched inquiries into generative AI investments and partnerships to "build a better internal understanding of these relationships and their impact on the competitive landscape." However, moving forward, the DOJ and FTC are expected to be less skeptical of AI generally. Ferguson has promised to "[e]nd the FTC's attempt to become an AI regulator."

In Europe, regulators are expected to continue investigations examining AI's market structure, particularly concerns related to perceived high barriers to entry, concentrated control of computational resources, and key inputs, such as data and infrastructure.

Governmental and private plaintiffs will continue to target algorithmic pricing

While algorithmic pricing has been a hot topic for several years, this year saw litigation regarding use of algorithmic pricing tools to fix prices or otherwise harm competition in the US.

One case to watch in particular is the DOJ's lawsuit targeting RealPage, a real estate software company, alleging that its algorithmic pricing software reduces competition, increasing rents for tenants. The DOJ alleges that RealPage violated the antitrust laws by requiring landlords to share nonpublic pricing and occupancy data, which it then uses to recommend rents for competitors in the same market. The DOJ argues that the pricing tool's use of competitors' nonpublic data, combined with conduct that educed independent decision-making, harms competition. Notably, DOJ alleged a rule of reason theory to target the use of nonpublic data and landlords' delegation of pricing decisions – rather than alleging a per se illegal price-fixing conspiracy.

In the EU and UK, the EC and CMA are expected to continue to scrutinize developments in algorithmic pricing and its potential to facilitate anti-competitive practices, such as price-fixing, particularly in foundation model markets. Companies should be aware, in particular, that a new law going into effect in January 2025 allows the CMA to observe and even test the algorithms used by companies designated as having strategic market status.

Notes

[1] The average number of days from nomination to confirmation for FTC commissioners is 162.5 days over the past 12 years; for the DOJ, the average is 166.4 days over the past 15 years.

Key Contacts

Megan Browdie **Washington, DC**	**mbrowdie@cooley.com** **+1 202 728 7104**
Jonas Koponen Brussels	jkoponen@cooley.com +32 2 486 7545
Howard Morse Washington, DC	hmorse@cooley.com +1 202 842 7852
Mark Simpson London	msimpson@cooley.com + 44 20 7556 4256
Parker Erkmann Washington, DC	perkmann@cooley.com +1 202 776 2036
Sharon Connaughton Washington, DC	sconnaughton@cooley.com +1 202 728 7007
Julia R. Brinton Washington, DC	jrenehan@cooley.com +1 202 962 8364
Georgina Dietrich Brussels	gdietrich@cooley.com +32 2 486 7532
Athina Gaki Brussels	agaki@cooley.com +32 2 486 75 07
Rubin Waranch Colorado	rwaranch@cooley.com +1 720 566 4484

Nicollette R. Kirby Washington, DC	nkirby@cooley.com +1 202 776 2085
Katie Kaufman Boston	kkaufman@cooley.com +1 617 937 2355