

December 21, 2021

Antitrust Enforcement at the End of 2021: Looking Back and Looking Forward

- The past year has been marked by several significant antitrust enforcement policy developments, especially at the FTC. We expect there to be continued policy evolution in the year to come.
- Given the current policy environment, businesses would do well to keep antitrust issues at top of mind.

In the past year, new leadership took office at both the Federal Trade Commission (FTC) and Antitrust Division of the Department of Justice (DOJ) while antitrust issues continued to be a prominent topic in national policy debates. The FTC in particular was a focus of significant change as old policies were rescinded and new policies were adopted. Jonathan Kanter, the new assistant attorney general at the DOJ Antitrust Division was only recently confirmed; nevertheless, hints of policy reform and areas of focus have emerged. President Biden issued an [Executive Order on Promoting Competition in the American Economy](#) which called for several reforms. Numerous bills were introduced in Congress and one was introduced in the New York state legislature, which, if passed, could have a significant impact on antitrust enforcement. In this memorandum, we reflect on these developments and discuss what might lie ahead for antitrust enforcement in the year to come.

Looking Back

Merger enforcement has received a great deal of attention over the past year, in large part due to several actions at the FTC. In February, citing the transition and an “unprecedented volume of HSR filings,” the FTC and DOJ announced a [“temporary” suspension](#) of granting early terminations of the waiting period under the Hart-Scott-Rodino Antitrust Improvements (HSR) Act. Prior to this, the agencies routinely would grant parties’ requests to terminate the waiting period where it was clear that the proposed transaction posed no competitive issues. Although described as “temporary,” the suspension remains in effect. This announcement, before Chair Lina Khan assumed office, was a bellwether for things to come: it was the first of several actions at the FTC affecting the merger review process, and it was an action that drew objection from the two Republican commissioners.

Once Chair Khan was in place, several merger policy changes were implemented in short order. In August, the FTC, again citing capacity constraints, announced that it had instituted a practice of sending [warning letters](#) to deal parties when it does not complete merger investigations within the waiting period established under the HSR Act. The letters state that the parties consummate transactions in these circumstances “at their own risk” if they do so prior to the completion of the Commission’s investigation. More recently, the FTC announced that the Commission will now require [“prior approval” provisions](#) in its orders relating to mergers, which companies may become subject to if they settle or lose an FTC merger challenge. These provisions would require parties to obtain approval from the FTC for future transactions involving the same relevant market as the transaction in question and for re-sale of assets acquired by a divestiture purchaser as part of a merger remedy. In certain circumstances, the FTC said that it might also require prior approval provisions for future transactions involving different relevant markets, and for future transactions of parties that abandon a transaction after an FTC challenge.

[Vertical mergers](#) have received increased attention. Quite significantly, in September, the FTC [rescinded](#) the Vertical Merger Guidelines which it issued just last year in conjunction with the DOJ. In a statement announcing the rescinding, the FTC expressed general skepticism about the procompetitive efficiency claims that have long been associated with vertical transactions. The guidelines remain in place – though under review – at the DOJ. The FTC also challenged two vertical mergers. In March, the Commission took action against DNA sequencing company Illumina’s acquisition of Grail, a company developing a cancer test which relies on DNA sequencing. More recently, the FTC challenged microchip supplier Nvidia’s proposed acquisition of Arm, which develops and licenses microchip technology. It bears noting that both challenges allege theories of harm described in the now-rescinded Vertical Merger Guidelines and the Commission votes to bring these challenges were bipartisan.

We have also seen a willingness by the agencies to pursue buy-side merger cases, i.e., cases in which the agencies allege that the harm to competition arises from an increase in buyer power. In November, the DOJ sued to block Penguin Random House’s proposed acquisition of Simon & Schuster on the theory that the deal would reduce competition for signing authors and reduce authors’ advances.

Looking Forward

The agencies have several major conduct investigations pending, and it remains to be seen if and how these will resolve in the year to come. In addition to these matters, merger policy and enforcement are likely to remain key areas of attention. We will watch with interest to see how the FTC’s new policies play out and what the DOJ will do now that AAG Kanter has taken office. One critically important question is: How will the agencies fare in the courts? The answer to this question will have a key impact on future merger enforcement policy. Among the other questions for the coming year are:

Will the Horizontal Merger Guidelines be significantly revised? Both the DOJ and FTC are reviewing the agencies’ Horizontal Merger Guidelines. In a [policy document](#) issued in September, Chair Khan wrote that the FTC “needs to address rampant consolidation and the dominance that it has enabled across markets” and needs “to find ways to deter unlawful transactions.” She also wrote that revising merger guidelines will be a “key project” and described prior guidelines as representing “a somewhat narrow and outdated framework for assessing mergers.” The DOJ, as part of an ongoing effort by federal banking regulators, will continue its [review of the Bank Merger Competitive Review Guidelines](#), which were issued in 1995, “to ensure that [they] reflect current economic realities and empirical learning, ensure Americans have choices among financial institutions, and guard against the accumulation of market power.”

Will the agencies continue to challenge vertical mergers? The outcome of the FTC’s current vertical challenges will, one imagines, factor in to the agencies’ willingness to bring future vertical challenges. While the majority of vertical mergers will likely not present competitive concerns and will not attract lengthy agency investigation, companies should evaluate potential vertical theories when planning for deals.

Will cross-border merger enforcement coordination affect parties’ ability to address challenges in U.S. courts in a timely way? At a recent summit, the heads of the US agencies met with heads of competition agencies from other G7 countries and, among other things, [discussed](#) opportunities for “increased cooperation and coordination.” In some cases, cross-border coordination of merger challenges could lead to delays in challenges being brought in U.S. courts if foreign proceedings stand in the way of closing a transaction. For example, the FTC may choose to file an administrative proceeding without filing a simultaneous complaint seeking an injunction in federal court if the parties are unable to close because of foreign challenges. This could potentially deprive the parties of an immediate opportunity to make their case before a federal judge. Indeed, the United Kingdom and European Commission have opened in-depth investigations into the proposed Nvidia-Arm deal, and the FTC chose to file only an administrative proceeding challenging that transaction.

How will the agencies’ focus on labor markets play out? Issues relating to labor market competition were raised in the President’s executive order and the FTC may seek to issue rules in this area. Additionally, in the coming year we will see how labor issues are dealt with during merger reviews and challenges, including in the DOJ’s pending Penguin Random House-Simon & Schuster case. Also, quite significantly, we expect that the DOJ will continue to prosecute criminal antitrust violations in labor

markets. In the closing days of the prior administration, the DOJ announced its [first criminal charges](#) in this area. More recently, the DOJ announced that several executives in the aerospace industry were [indicted](#) “for participating in a long-running conspiracy to restrict the hiring and recruiting of employees among their respective companies.” This is an area of serious focus for the DOJ, and, especially with a tight labor market, companies should be aware of the risks.

Will the FTC engage in competition-focused rulemaking? Chair Khan and Commissioner Slaughter have expressed support for the FTC to engage in antitrust rulemaking, while Commissioner Wilson in particular has expressed opposition to such an undertaking. The FTC would need three votes to promulgate a rule, and the Commission currently has two Democrats and two Republicans. The President nominated Alvaro Bedoya, a law professor who focuses on privacy issues, to fill the open seat. If Mr. Bedoya is confirmed and aligns with the current Democratic commissioners, the promulgation of antitrust rules by the FTC could result in a significant regulatory expansion.

Will the FTC bring a “standalone” unfair methods of competition case? In July, the [FTC rescinded its 2015 Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act](#) which provided guidance on when the FTC would use its authority to challenge anticompetitive conduct that does not fall within the prohibitions of other antitrust laws. This action signaled that the FTC may take action against a broader range of conduct it deems to be unfair, beyond what the FTC has historically found to violate Section 5. However, the FTC has not issued any new guidance on what additional conduct may now be subject to enforcement scrutiny.

What will become of all of the proposed legislation? We will be keeping a watchful eye on potential legislative developments. In February, Sen. Amy Klobuchar kicked off a wave of antitrust legislating in the new Congress when she introduced the [Competition and Antitrust Law Enforcement Reform Act](#). The bill would significantly alter federal law for mergers and exclusionary conduct. Additionally, several pending bills target the conduct of online platforms. A proposed provision of the Build Back Better Act under discussion on Capitol Hill would give the FTC the authority to levy civil penalties for unfair or deceptive acts or practices which violate the FTC Act. State-level antitrust reform legislation may also be coming. Earlier this year [a bill was introduced in New York](#) which would significantly alter New York state antitrust law. We have also seen reports that legislators in California may seek to revise the Cartwright Act.

Takeaways

Given the current policy environment, businesspeople and their advisers would do well to keep antitrust issues at top of mind in the year to come. For example, companies planning deals should consider the implications of the evolving merger enforcement landscape when assessing transaction timetables and when negotiating provisions in merger agreements. More broadly, it is always a good idea to review compliance programs periodically to ensure that they are fit for purpose in light of the particular risks a company might face.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Joseph J. Bial
+1 202-223-7318
jbial@paulweiss.com

Andrew C. Finch
+1 212-373-3417
afinch@paulweiss.com

William B. Michael
+1 212-373-3648
wmichael@paulweiss.com

Jacqueline P. Rubin
+1 212-373-3056
jrubin@paulweiss.com

Charles F. (Rick) Rule
+1 202-223-7320
rrule@paulweiss.com

Aidan Synnott
+1 212-373-3213
asynnott@paulweiss.com

Brette Tannenbaum
+1 212-373-3852
btannenbaum@paulweiss.com

Daniel J. Howley
+1 202-223-7372
dhowley@paulweiss.com

Jared P. Nagley
+1 212-373-3114
jnagley@paulweiss.com

Practice Management Attorney Mark R. Laramie contributed to this Client Memorandum.