

## ANTITRUST TRADE AND PRACTICE

# Antitrust Yearly Recap: New Faces, New Directions, More Uncertainty

The past year brought profound changes to antitrust enforcement, both in the United States and around the world. In the United States, President Biden's appointments to head the federal antitrust agencies have signaled a willingness to more aggressively enforce the antitrust laws. European regulators have also assessed the tech industry with record fines. Meanwhile, legal changes loom as Congress and the European Union debate a suite of new bills that could reshape antitrust enforcement. Here's a recap of the major events of 2021 and issues to watch for in 2022.

### Leadership Transition

**Presidential Appointments.** With a new presidential administration comes the opportunity to appoint new agency heads. President Biden's appointment of Columbia Law School professor Lina Khan as Federal Trade Commission (FTC) Chair has garnered the most attention. Chair Khan gained recognition in 2017 for her student



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law-review note—*Amazon's Antitrust Paradox*—which argued for renewed enforcement against Amazon, which helped spur a new movement of advocates for stronger antitrust enforcement. Khan, who is the youngest FTC Chair in its history, has imprinted a markedly progressive view of antitrust on the agency.

Within the White House, President Biden appointed Columbia Law School professor Tim Wu to serve on the National Economic Council as special assistant for technology and competition policy. Wu is another leading critic of “big tech” and helped spawn the “net neutrality” movement that took issue with Federal Communications Commission rules for internet providers.

On the Department of Justice (DOJ) side, President Biden appointed Jonathan Kanter as assistant attorney general of the Antitrust Division. Kanter has spent most of his career in private

practice. He has refrained from calling for as many large-scale changes as Chair Khan or Wu, but has nevertheless fashioned himself as a progressive reformer and critic of big tech.

**The FTC's New Direction.** These appointments have ushered in changes at both antitrust agencies, but the change has been particularly acute at the FTC. President Biden's election allowed him to flip the Commission from a 3-2 Republican-appointed majority to a 3-2 Democratic-appointed majority. With a new majority, Chair Khan has led the FTC to take a series of votes to expand the FTC's enforcement authority and challenge recent antitrust orthodoxy—often over stinging dissents by the Republican-appointed commissioners. For example, the commissioners recently voted along party lines to rescind a policy that tied its authority under FTC Act §5 to the Sherman and Clayton Acts; to withdraw its approval of the 2020 DOJ/FTC Vertical Merger Guidelines (VMGs); and to revive and expand the Commission's “prior approval” program, repealing a longstanding policy that disfavored the use of those provisions.

The FTC's withdrawal from the 2020 DOJ/FTC Vertical Merger Guidelines in

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September signals a split from previous merger-review regimes. The accompanying statement issued by the majority commissioners challenged the notion that vertical mergers generally create efficiencies and lead to decreases in price, further arguing that vertical mergers may reduce competition along non-price dimensions like product quality and innovation. Republican-appointed commissioners Noah Phillips and Christine Wilson criticized the withdrawal for “sowing confusion regarding the legality of vertical mergers” in a dissenting statement. Notably, the DOJ has not withdrawn its adoption of the VMGs, meaning that vertical-merger analysis between the two agencies may differ somewhat.

Meanwhile, the FTC’s new prior-approval program may have far-reaching implications for merger conduct. Under the FTC’s expanded program, parties that agree to divest assets, or otherwise remedy a challenged transaction, as part of a consent decree may need to obtain prior approval from the Commission before closing any future transaction in the relevant product and geographic markets for 10 years. The FTC warned that it may seek to impose prior-approval provisions that cover product and geographic markets beyond just the relevant product and geographic markets affected by the merger, and it may even impose provisions on parties that abandon their deals. In addition, buyers of divested assets could also be subject to a prior-approval requirement for any future sale of the divested assets. Commissioners Phillips and Wilson warned in a dissenting statement that the new policy would “impose substan-

tial costs and uncertainty on future transactions” and “mak[e] it more difficult to find divestiture buyers.”

President Biden’s nomination of privacy expert Alvaro Bedoya to replace Commissioner Rohit Chopra, who left the FTC to head the Consumer Financial Protection Bureau, has advanced out of Senate committee. Bedoya is expected to follow Chair Khan’s lead in pursuing aggressive antitrust enforcement.

### Tech Update

Antitrust enforcers continued to investigate and penalize big tech firms last year. Within the United States and

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Europe, regulators are taking a more aggressive stance toward tech company acquisitions—especially when a company acquires an industry competitor.

### Facebook Monopolization Claims.

As covered in last year’s recap article, the FTC and 48 state attorneys general made headlines in December 2020 by suing Facebook for allegedly maintaining its monopoly through anticompetitive acts. Regulators specifically allege that Facebook used its acquisitions of messaging platform WhatsApp and photo-sharing-network Instagram to eliminate threats to its monopoly status. U.S. District Judge James Boasberg

dismissed the FTC’s complaint in June, finding that the FTC had not sufficiently alleged “that Facebook has monopoly power in the market for Personal Social Networking Services.” *FTC v. Facebook*, No. 20-3590, 2021 U.S. Dist. LEXIS 119540, at \*3 (D.D.C. June 28, 2021).

In August, the FTC filed an amended complaint, which “includes additional data and evidence to support the FTC’s contention that Facebook is a monopolist that abused its excessive market power to eliminate threats to its dominance,” including additional statistics, market analysis, and history. Press Release, FTC, FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme to Crush Competition After String of Failed Attempts To Innovate (Aug. 19, 2021). The Commission voted 3-2 to amend its claims against Facebook, with Commissioner Wilson writing in a dissenting statement that the FTC’s examination of consummated mergers is bad policy that could undermine the integrity of the premerger notification process. Judge Boasberg has not ruled on Facebook’s motion to dismiss the amended complaint, but his disposition will be an important barometer of courts’ receptiveness to the FTC’s expansive theories of harm in tech mergers and conduct.

**Proposed Legislation.** The nature of judicial scrutiny may change significantly for tech mergers and monopoly conduct if a suite of proposed bills passes Congress. On mergers, the Platform Competition and Opportunity Act, filed by Democrat Hakeem Jeffries and Republican Ken Buck, would shift the burden of proof to tech firms in acquiring potential competitors: The

firms would need to show by clear and convincing evidence that the acquisitions would not enhance their market power. On anticompetitive conduct, the American Innovation and Choice Online Act, which has versions introduced in both the House and Senate, would create a class of “covered platforms”—including only Google, Amazon, Facebook and Apple—and plaintiffs suing a “covered platform” would no longer need to show that the firm is a monopoly to allege an antitrust violation. Passage of either of these bills would improve the FTC’s chances of successfully challenging tech mergers or potentially anticompetitive conduct by these firms in the future.

Two other bills targeting anticompetitive conduct among tech firms have been proposed in the House. All four bills have been advanced by the House Judiciary Committee on a bipartisan vote, but the full House has yet to schedule a vote. Sen. Amy Klobuchar leads a bipartisan group of twelve senators pushing for the American Innovation and Choice Online Act’s passage, but it has yet to advance in committee or in the full Senate.

Regardless of their ultimate fate, these bills represent the most significant attempt at antitrust law reform in decades, with potentially major effects on the structure of antitrust enforcement.

**European Enforcement.** European governments have been cracking down on big tech firms’ networks and platforms as well. The European Union (EU) is debating sweeping changes in a new tech law, the Digital Markets Act, which would set out a series of restrictions for dominant tech platforms and

empower the European Commission to more effectively challenge acquisitions of potential competitors.

The EU’s actions have not stopped member states from conducting their own tech investigations. The Italian Competition Authority handed down a \$1.3 billion fine to Amazon for anticompetitive conduct and abuse of its dominant position in the market. In the

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United Kingdom, the Competition and Markets Authority is using its newly created Digital Markets Unit to investigate Google’s and Apple’s alleged market dominance in phone software. European interest in regulating big tech reinforces that tech firms must track of multiple jurisdictions when evaluating mergers and conduct that might run into competition issues.

### Merger Enforcement

In addition to stepping up scrutiny of the tech industry, antitrust regulators have signaled that they will also be aggressive in merger enforcement.

**DOJ Merger Challenges.** The DOJ brought its first merger challenge under Jonathan Kanter in November to prevent U.S. Sugar’s proposed \$315 million acquisition of Imperial Sugar Co. The DOJ alleges that the merger would leave just two sugar producers in the southeast, U.S. Sugar and American Sugar Refining, controlling 75% of the regional market.

The DOJ made headlines again when it announced that it was challenging

Penguin Random House’s proposed acquisition of Simon & Schuster. The DOJ alleged that the transaction would shrink the number of large publishers from five to four and eliminate competition for the purchase of publishing rights from top-selling authors (i.e., a “monopsony” concern), indicating that the DOJ will continue to scrutinize competitive effects for sellers as well as buyers. The FTC has suggested that it will step up scrutiny of monopsony concerns in merger review as well, advising parties that they may need to address transactions’ effects on labor markets.

**Merger Filing Trends.** Notwithstanding the potential changes in antitrust law and enforcement priorities, 2021 was a banner year for mergers. After a dip last year due to the COVID-19 pandemic, the pace of dealmaking exploded: The DOJ and FTC recorded 3,845 HSR filings through the first 11 months of the year, more than double the number of filings in 2020, and more than 80% above the previous annual high in 2018.

The large number of deals and the agencies’ increased scrutiny of transactions have led to delays in completing merger review. Under the Hart-Scott-Rodino (HSR) Act, the DOJ and FTC generally have 30 days to review a transaction and decide whether to issue a “second request” for information, so that they can perform a more thorough investigation. But in August, the FTC announced that it has begun to send letters to merging parties advising that it may continue to review transactions even outside of the 30-day window—warning that merging parties that proceed while investigations are

still ongoing do so at their own risk.

Two bills in Congress are attempting to remedy the longer review times by providing the agencies additional resources. The Merger Filing Fee Modernization Act would increase the HSR filing fees for large transactions, which would expand the agencies' budgets by hundreds of millions of dollars. Meanwhile, the Build Back Better Act passed by the House last November would allocate \$1 billion split between the FTC and DOJ for antitrust enforcement. The bill is still being debated by the Senate, although recent comments by Sen. Joe Manchin make it unlikely that the bill will pass the Senate in its current form.

### Civil and Criminal Enforcement

The Supreme Court handed down two major antitrust cases in 2021 dealing with anticompetitive conduct.

**Restitution and Disgorgement Under §13(b).** In April, the Supreme Court decided *AMG Capital Management v. FTC*, 141 S. Ct. 1341 (2021), which asked the court to determine the scope of FTC Act §13(b). The FTC had long used §13(b) to seek restitution and disgorgement of ill-gotten gains in equitable relief. In a unanimous decision, the court held that §13(b) does not allow restitution or disgorgement in equitable relief, invalidating this FTC practice. The ruling still allows the FTC to seek restitution or disgorgement under §§5 and 19, but those sections require the FTC to adjudicate the case first before an administrative law judge. *Id.* at 1352. FTC Commissioner Rebecca Slaughter criticized the ruling and called on Congress to pass legislation allowing the FTC to renew this practice;

that legislation has been drafted but not yet considered.

**College Athletics.** In the highest-profile antitrust case of the year, the Supreme Court held that the National Collegiate Athletic Association (NCAA) and its conferences ran afoul of antitrust laws when it restricted schools from conferring certain education-related benefits to athletes. In *NCAA v. Alston*, 141 S. Ct. 2141 (2021), the court rejected the NCAA's arguments that the amateurism inherent in college athletics and the cooperative nature of sports ventures shield the NCAA from exacting antitrust scrutiny. The court found no fault with the district court's rule-of-reason analysis and upheld an injunction against the NCAA. *Id.* at 2156-59. Since the ruling, the NCAA has adopted a new policy allowing athletes to profit from name, image and likeness (NIL) deals in under certain conditions.

**Criminal Enforcement.** In the criminal space, 2021 saw a marked rise in criminal prosecutions for antitrust violations related to labor-market restraints. The DOJ first announced it intended to prosecute "naked" wage-fixing and no-poach agreements in 2016, and it brought its first indictment for a wage-fixing scheme in December 2020. This past November, a district court rejected the defendant's attempt to dismiss the charges. *United States v. Jindal*, 4:20-CR-358, 2021 U.S. Dist. LEXIS 227474 (E.D. Tex. Nov. 29, 2021). In December, the DOJ expanded the criminal program even further, announcing an indictment of six aerospace executives for no-poach agreements. The first trials for labor-side criminal antitrust cases are likely to start in 2022, giving

a first glimpse into how juries will treat these types of cases.

### Predictions for 2022

This year promises to be a seminal year for antitrust enforcement in the United States and around the world. President Biden's appointees have made scrutinizing big tech a priority and seem poised to expand and continue investigations into the tech giants. They will be joined by the EU and other European states. Legislative battles appear to be on the horizon, as well. U.S. Republicans and Democrats appear interested in antitrust reform, especially making it easier for plaintiffs to sue the tech giants—though the bills proposed must clear several more hurdles before becoming law. EU lawmakers have shown even more interest in increased tech regulation.

Outside of tech, the DOJ and especially the FTC are likely to challenge mergers more aggressively, with a renewed focus on vertical mergers and effects on labor markets. With mergers continuing in record numbers, firms should plan for long lags between agreement and consummation. Further, as the *AMG Capital Management* decision shows, courts may push back against FTC and DOJ attempts to expand their authority.

In sum, antitrust enforcement is more popular than ever, but where it will go from here is anything but certain.