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PERSPECTIVE

Antitrust issues to watch during the Biden administration

By Anna Pletcher, Patrick Jones and Bess Hanish

During the 2020 presidential campaign, a spokesperson for President Joe Biden stated, "Many technology giants and their executives have not only abused their power, but misled the American people, damaged our democracy and evaded any form of responsibility… That ends with a President Biden." How the new administration plans to take on big tech firms remains to be seen, but antitrust enforcement is almost certainly at the top of the list.

More broadly, what steps the new administration can and will take to enforce and, potentially, reform antitrust laws depends on who is chosen for leadership positions at the Department of Justice and Federal Trade Commission — which share the government's jurisdiction to pursue antitrust actions — as well as the actions of the two other branches of government, Congress and the courts. Given the president's priorities, the current political climate, and the state of the federal judiciary, here's what to expect and to look out for during the Biden administration.

More enforcement actions, especially against technology and pharmaceutical companies.

President Biden and the team of advisors he has assembled have signaled that the incoming administration will pursue vigorous antitrust enforcement, and in particular, respond to rising concentration in health care and technology industries. The recent appointment of Democratic Commissioner Rebecca Kelly Slaughter as acting FTC chair indicates that the FTC will be taking a more aggressive approach, especially against tech companies. Slaughter has been outspoken about her views that the FTC should have acted more swiftly and decisively in the tech space. Expect the DOJ and FTC to increase scrutiny of mergers and acquisitions, and to raise more challenges to the conduct of single, dominant firms that engage in conduct that excludes or impedes rivals from competing.

The principal legislative tools available to target potentially anticompetitive conduct by dominant firms are Section 7 of the Clayton Act, which governs the competitive implications of mergers, acquisitions and joint ventures, and Section 2 of the Sherman Act, which governs anticompetitive conduct by monopolists.

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A proposed merger, acquisition or joint venture — or even one that has already been consummated — can be challenged under Section 7 or, more rarely, Section 2. One issue that has been at the forefront of the discussion in political and antitrust circles in recent years is the acquisition of so-called "nascent competitors" by big tech firms, a practice that has traditionally been difficult to challenge under Section 7's "potential competition" doctrine. Under the Trump administration, the DOJ and FTC have taken the position that potentially anticompetitive acquisitions can be more easily challenged as a species of monopolistic, anticompetitive conduct under Section 2 of the Sherman Act. Consistent with this theory, earlier this month, the FTC sued Facebook, alleging the company has illegally maintained its monopoly in the personal social networking market by, among other things, pursuing a strategy of acquiring nascent rivals such as Instagram and WhatsApp.

The FTC's suit against Facebook follows DOJ's suit against Google, which alleges that Google maintained its own monopolies (in the search and search advertising markets) by entering into agreements requiring Google's search engine to be the default search engine on various desktop and mobile devices and platforms.

The Biden administration will likely continue pursuing these actions against large tech companies — and perhaps even push to break up one or more big tech firms. Among those advising the transition team are Gene Kimmelman, an advisor at Public Knowledge who has advocated for the DOJ bringing a case against Google; Terrell McSweeney, a former member of the FTC; and Bill Baer, former head of DOJ's Antitrust Division, both of whom have argued that antitrust enforcers (including at their own former agencies) have become too cautious in recent years. After the DOJ sued Google in October, Biden's campaign issued a statement suggesting support: While he would "not comment on specific lawsuits and companies, Vice President Biden has long said that one of the greatest sins is the abuse of power, … [a]nd growing economic concentration and monopoly power in our nation today threatens our American values of competition, choice, and shared prosperity." Moreover, although as a candidate President Biden did not go so far as some of his rivals, including Elizabeth Warren, in calling for the breakup of big tech firms, he has suggested "we should take a really hard look at" it.

In addition to big tech, many expect the pharmaceutical industry to be a focus of the incoming administration's efforts. Notably, Democratic commissioners at the FTC have recently objected to FTC decisions approving mergers in that industry. And members of Biden's transition team have decried drug price increases that are perceived to be the result of market concentration and anticompetitive deals.

Administrative and legislative reforms modifying antitrust legal standards and changing how the enforcement agencies operate.

In addition to an increased focus on enforcement, there is a real potential during the Biden administration for legislative and administrative reforms that could fundamentally alter the way antitrust cases are litigated and the government enforcement agencies operate.

Most likely, the onus will be on Congress to update antitrust regulations — a task that has historically rested in the courts. Antitrust law is largely judge-made. The Sherman Act and Clayton Act give broad outlines and the judiciary has filled in the blanks over the last 130 years by developing a set of rules. The current, conservative Supreme Court is not likely to make sweeping changes. The FTC also has the ability to promulgate rules prohibiting "unfair competition" under Section 5 of the Federal Tort Claims Act, and Democratic com-

missioners have called for the FTC to use its rulemaking authority to combat more anticompetitive conduct. But the FTC will continue to have a Republican majority until 2023, unless one of the three current Republican members resigns before the end of their seven- year terms. Under these circumstances, if Congress wants immediate impact, it will have to pass legislation.

There is a growing political consensus on both the left and right in Congress that antitrust laws need to be updated — but no consensus yet regarding how to go about doing so. In October 2020, the House Judiciary Committee released the results of its year-plus long investigation of competition in digital markets, finding that big tech firms have "too much power," have stifled innovation and free speech, and have unduly infringed on individual privacy. The Democratic majority's report recommended numerous reforms, including:

1. prohibiting dominant platforms from competing with other firms on their own platforms and on "self-preferencing" their own content and services;

2. requiring dominant social networks to be interoperable with other networks and to provide consumers with tools to "port" their data to other networks;

3. strengthening monopolization laws by creating presumptions of "dominance" and eliminating certain legal requirements;

4. reinvigorating the "essential facilities" doctrine, which would require firms that control an essential piece of infrastructure to allow rivals to access their infrastructure;

5. strengthening merger enforcement by creating presumptions that certain mergers would harm competition and subjecting all mergers, regardless of size, to regulatory requirements;

6. overturning judicial decisions that have made it more difficult to bring successful antitrust cases, including the Supreme Court's recent decision in *Ohio v. American Express*, which held that when a firm operates a "two-sided transaction platform," a plaintiff must show a net anticompetitive harm in both sides of the market and suggested that only two-sided platforms can compete against other two-sided platforms; and

7. rethinking the "consumer welfare standard" to broaden cognizable anticompetitive harms and move away from what is seen as an excessive focus on price and output.

The principal Republican response to the House report suggested openness to certain reforms, including on interoperability and data portability, and opposition to other reforms, such as a prohibition on self-preferencing.

Common ground might also be found in reforms to the administrative process, such as merging antitrust oversight into a single agency or increasing funds for enforcement. One intriguing initiative is a recent proposal by Sen. Mike Lee (R-Utah) to merge DOJ and FTC antitrust efforts into a single entity, to end the jurisdictional tangles and turf wars that often hobble government action and produce uneven levels of enforcement between agencies. Senator Lee's proposal could get bipartisan support; the increased efficiency and accountability could appeal to both sides.

In addition, Sen. Amy Klobuchar (D-Minn.) has endorsed dropping the word "antitrust" from the enforcement lexicon in favor of "competition." That name change would more accurately describe the purpose of the laws and the agencies — to protect competition. It would also bring the U.S. in line with the nomenclature used by the rest of the world.

Finally, lawmakers may update and clarify how companies can use Section 230 of the 1996 Communications Decency Act — which provides online platforms immunity from civil liability based on third-party content — as a shield against antitrust/competition enforcement. DOJ has recommended clarifying that Section 230 does not apply in antitrust actions, noting in its review of Section 230 that "[o]ver time, the avenues for engaging in both online commerce and speech have concentrated in the hands of a few key players," so it "makes little sense to enable large online platforms (particularly dominant ones) to invoke Section 230 immunity in antitrust cases, where liability is based on harm to competition, not on third-party speech." Biden has said he supports repealing Section 230, but has he thus far has not proposed any specific changes.

A focus on anticompetitive labor market agreements and labor-side effects of mergers.

One initiative that likely would not require any new legislative or administrative rules would be to broaden antitrust enforcement in labor-intensive markets, challenging noncompete agreements, and dissecting the potential labor-side effects of mergers.

In 2016, the DOJ and FTC issued guidance explaining that, like price-fixing among sellers, "naked" agreements among employers regarding employee wages or other terms of employment are per se violations of the antitrust laws that, going forward, would be prosecuted criminally. The DOJ brought its first criminal wage-fixing case in December 2020, and its first criminal no poach case earlier this month. We could see more under President Biden. As a candidate, Biden specifically called for the elimination of "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."

Biden and his team have indicated that the administration will focus on broader labor-market issues as well. One Biden economic advisor, Ben Harris, is writing a book proposing reforms to labor and antitrust laws to provide "higher wages, safer workplaces, increased ability to report labor violations, greater mobility, more opportunities for workers to build power, and overall better labor protections." And one of the task forces made up of members of Biden's team and supporters of Bernie Sanders has recommended incorporating "broader criteria" into reviews of mergers and other enforcement actions, "including in particular the impact of corporate consolidation on the labor market, underserved communities, and racial equity."

In recent years, antitrust law has morphed from a relatively esoteric topic to a matter of significant political debate. While it's not possible to predict exactly what will happen during the Biden administration, we expect antitrust to remain top-of-mind for regulators and lawmakers, which could lead to administrative and legislative reforms or, at the very least, significant enforcement actions intended to preserve competition. ■

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