Insight

Biden's Antitrust Autopsy

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Executive Summary

- Just months into his term in office, President Biden issued an executive order on competition policy that upended the competition regime that had been in place for more than 40 years.
- The executive order directed Biden's trustbusters to replace the consumer welfare standard with a big-is-bad approach to enforcement, raise the cost of mergers and acquisitions to chill merger activity – while overlooking the economic benefits of mergers that allow firms to offer cheaper, higher quality, and more innovative products while often accessing new markets – and attempt to expand the reach of the Federal Trade Commission, arguably beyond its statutory authority, among other pursuits.
- Despite limited success in broadly moving the courts' interpretation of antitrust law, the Biden Administration's approach to antitrust could have staying power in the next administration as a philosophy skeptical of corporate power and industry concentration has attracted followers on both sides of the political aisle.

Introduction

Just months into his term in office, President Biden issued the Executive Order on Promoting Competition in the American Economy that upended the competition regulatory apparatus that had been in place for more than 40 years.

President Biden's antitrust enforcers at the Federal Trade Commission (FTC) under Chair Lina Khan, Assistant Attorney General Jonathan Kanter at the Department of Justice Antitrust Division (DOJ), and special assistant to the president Tim Wu pursued an agenda that sought to transform competition policy in the United States. Federal trustbusters called

the past 40 years of enforcement a "failed experiment" and worked to replace the consumer welfare standard with a big-is-bad approach focused on market concentration, raise the cost of mergers and acquisitions to chill activity, and attempt to expand the reach of the FTC – arguably beyond its statutory authority – among other pursuits. As inflation reached multi-decade highs early in the Biden Administration, large firms and corporate concentration were often blamed. This economic backdrop was likely an impetus for initiating this approach to competition policy.

While the agencies had only limited success in broadly moving the courts' interpretation of antitrust law, the Biden Administration's approach could have lasting effects as a philosophy skeptical of corporate power and concentration has attracted followers on both sides of the political aisle.

The Executive Order

On July 9, 2021, President Biden signed the Executive Order on Promoting Competition in the American Economy (EO). The EO called for a "whole-of-government" approach to competition policy and tasked more than a dozen federal agencies with 72 initiatives seeking to remedy "excess market concentration [that] threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers."

The order faulted industry consolidation for weakened competition that "den[ies] Americans the benefits of an open economy and widening racial, income, and wealth inequality," and added that "federal government inaction has contributed to these problems." In other words, the president claimed that the nation's competition laws have been underenforced and allowed the nation's largest companies to amass too much power.

The EO also established the White House Competition Council to be headed by the director of the National Economic Council, the purpose of which is to oversee and coordinate the implementation of all the initiatives outlined. Several new policy initiatives were announced following the council meetings, including plans to combat "junk fees," a "Strike Force" to "crack down on unfair and illegal pricing," and the Consumer Financial Protection Bureau's plan to cap credit card late fees.

Consumer Welfare Standard

Among the most obvious changes under the Biden Administration to federal competition policy – and the one that guided many of the enforcement agencies' decisions – was its abandonment of the consumer welfare standard. The consumer welfare standard – the prevailing enforcement standard for nearly 50 years – guided enforcers, practitioners, and

the courts to consider a given business practice and its effects on consumers, often in the form of prices, output, choice, and innovation. Moreover, it provided a consistent and measurable basis on which to enforce antitrust laws.

The Biden Administration's approach moved away from this competition and consumer-centric analysis and toward a fixation on market concentration and the market share of individual firms – in other words, a firm's size. This new big-is-bad approach is what has guided many of the changes to enforcement policy during the Biden Administration.

Mergers and Acquisitions

Importance of Mergers to U.S. Economic Activity

Mergers and acquisitions are just a couple of market mechanisms through which capital may be more efficiently allocated and are vital components of U.S. economic dynamism. Through mergers and acquisitions, firms can often achieve economies of scale, gain access to new markets, offer new and innovative products, and lower prices. Moreover, merger and acquisition activity is essential to small businesses. Prior American Action Forum (AAF) research found that venture capital, a main source of small business funding, is often tied to exit strategies that are dominated by acquisitions. A regulatory environment that makes it more difficult for small businesses to be acquired could dry up their access to venture capital.

Merger Guidelines

The EO instructed the FTC and DOJ to take a tougher stance on mergers and acquisitions. Specifically, the agencies were charged with reviewing the horizontal and vertical merger guidelines and considering whether to revise them. The order also directed the agencies to prioritize the acquisition of nascent competitors, serial mergers, and even challenging already consummated mergers that may have violated antitrust laws in their enforcement efforts.

The merger guidelines were first issued by the DOJ in 1968 and centered on the idea of market concentration; these guidelines were revised in 1982, 1984, 1992, 1997, and 2010. With each iteration, the guidelines became more grounded in economic analysis and gravitated toward the consumer welfare standard as the guiding principle.

The 2023 Merger Guidelines replaced the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines. The 2023 Merger Guidelines also abandoned the consumer welfare standard and reverted to a structural approach focused on market share found in the earliest set of guidelines.

The new guidelines lowered the concentration thresholds – as measured by the Herfindahl-Hirschman Index – back to what they were in 1982 when they first appeared in the merger guidelines. Moreover, they introduced several theories of harm related to mergers, including harm to workers.

HSR Rules

On October 10, 2024, the FTC and the DOJ finalized new rules and instructions governing the Hart-Scott-Rodino Antitrust Improvements Act (HSR). The HSR, enacted in 1976, established the federal premerger notification program, which requires certain businesses planning mergers and acquisitions to notify the agencies and provide documents detailing the deal before consummating the transaction. The current premerger filing threshold is for deals valued at more than $126.4 million, updated by the agencies on January 10, 2025.

The FTC estimated that completing the rule's new reporting requirements would take an average of 68 hours – an average low of 10 hours and an average high of 121 hours – for an additional cost of $139.3 million (based on the 3,515 HSR filings in 2023), or $39,644 per filing, on average.

The new rule is ostensibly intended to provide the agencies with more up-front information to better screen for anticompetitive mergers. Yet recent data from the FTC and DOJ showed that 98 percent of transactions in 2023 did not trigger a second request by the agencies, meaning they were competitively benign. Second requests require companies to submit additional information to the agencies, including the information that is now required to be produced up-front. The added cost and time required by the new HSR rules would almost certainly delay deals or simply cause them to be abandoned.

Early Termination

In February 2021, the FTC and DOJ suspended early termination, a practice that allowed mergers and acquisitions that posed no competitive concerns to close quickly.

Over most of the past decade, the agencies granted between 73 and 81 percent of early termination requests. That share dropped to 20 percent in 2021 after the early termination suspension was announced four months into the fiscal year. With the suspension in effect for the entirety of fiscal year 2022, only 0.4 percent of such requests were granted in that year, and none were granted in 2023. AAF summarized the effects of suspending early termination.

Remedies

A 2017 report from the FTC's Bureaus of Competition and Economics found that the overwhelming share of merger remedies between 2006 and 2012 were successful at maintaining or restoring competition in the relevant market.

Nevertheless, FTC Chair Khan and Competition Director Holly Vedova, along with DOJ Assistant Attorney General Jonathan Kanter, voiced skepticism about the practice of business divestiture offers as remedies in merger cases.

The Chilling Effect

The Merger Guidelines, the new HSR rules, and – during much of the Biden antitrust era – the suspension of early termination raised the cost of mergers and acquisitions. The goal was to chill merger activity.

Advancement of the Law and Future Influence

The Biden antitrust team was able to establish some legal precedents.

In the FTC's successful challenge to the Kroger and Albertsons merger, the agency earned an endorsement from the courts of its newly lowered concentration thresholds. Furthermore, the court agreed with the FTC's claim that labor markets could be an independent basis for [antitrust] liability, even though the court did not cite it as a reason to block the merger.

The FTC's skepticism of remedies also seemed to have been persuasive in the court's ruling in the Kroger and Albertsons case. The court agreed with the FTC that the remedy proposed by Kroger and Albertsons was "not sufficient in scale to adequately compete with the merged firm."

It was not just the new legal precedents that were important to Biden's antitrust enforcers. Future influence would also hinge on convincing the court that the Merger Guidelines were persuasive. In a speech at the Brookings Institution, FTC Chair Khan noted that the "2023 Merger Guidelines have been cited favorably by over a dozen courts in just a single year." The judge in the Kroger/Albertsons case found that "the Court sees no reason to reject the 2023 Merger Guidelines in favor of a previous edition."

Yet most of the FTC and DOJ victories relied on traditional theories of harm to consumers, not the novel theories the agencies wished to advance.

Unfair Methods of Competition

Policy Statement

On November 10, 2022, the FTC published a policy statement broadening the agency's interpretation of its authority to challenge "unfair methods of competition" under Section 5 of the FTC Act. The new policy statement signaled a monumental shift in enforcement policy.

Many of the policies outlined in the statement directly conflict with previously issued guidance on Section 5 enforcement and abandoned the long-held consumer welfare standard in favor of a focus on "fairness."

At the time, FTC Commissioner Christine Wilson described the new policy as an "'I know it when I see it' approach…[that] provides no methodology…[and] no meaningful guidance to courts and businesses to analyze unfair methods of competition." Wilson, speaking of the policy statement, said it was analogous to the Monopoly game instructions where the "respondent essentially will be told, 'Go to jail. Go directly to jail. Do not pass go. Do not collect $200."

The vagueness of what the FTC would deem as "unfair" left businesses vulnerable to costly investigations. It is still unclear whether the courts will accept this expanded interpretation following the Supreme Court's decision in *Loper Bright v. Raimondo*, which overturned *Chevron* deference.

Competition Rulemaking

Under the direction of Chair Khan, the FTC attempted to expand its reach by issuing a competition rule banning most noncompete agreements. The FTC's authority to issue competition rules is ambiguous, even more so after the U.S. Supreme Court ruling on the major questions doctrine in *West Virginia v. EPA* and *Chevron* deference in *Loper Bright*.

A U.S. District Court for the Northern District of Texas temporarily blocked the noncompete ban. The court ruled that the FTC lacked substantive rulemaking authority with respect to unfair methods of competition based on the "text, structure, and history" of the FTC Act. By contrast, a U.S. District judge for the Eastern District of Pennsylvania upheld the FTC rule and found that the agency had authority to promulgate the rule. Future court challenges are expected.

Robinson-Patman Act

On December 12, 2024, the FTC sued Southern Glazer's Wine and Spirits, alleging the company violated the Robinson-Patman Act (RPA). The RPA is a Depression-era law that prohibits sellers from direct or indirect price discrimination of commodities of like grade or quality among different purchasers where the effect may be to substantially lessen

competition. It is the first RPA lawsuit brought by the FTC since 2000.

Congress passed the RPA in 1936 in response to a new, growing business model that threatened to transform the supply chain relationship among manufacturers, wholesalers, and producers. Large chain stores, most notably groceries, began to side-step wholesale middlemen to purchase goods directly from manufacturers. Purchasing directly from manufacturers in large, predictable quantities introduced an efficiency that enabled large retailers to better negotiate more favorable exchange terms that small competitors – still reliant on wholesalers – could not match. These cost savings were passed along to the consumer. The innovative approach to the high-volume and low-margin retailing model that removed costly middlemen from the supply chain pushed many small "mom-and-pop" shops out of the market.

In response, small retailers and the displaced middlemen turned to Congress, which passed the RPA to protect these small retailers and re-establish the traditional supply chain that included wholesalers, even though it would increase prices for the end-consumer.

For decades, the RPA was condemned by enforcers because it was viewed as inconsistent with antitrust enforcement that focused on the welfare of consumers. Moreover, a 2007 report from the Antitrust Modernization Commission called for its repeal.

Reinvigorating RPA enforcement is consistent with the Biden Administration's focus on protecting smaller competitors rather than the effect business practices have on consumers and the competitive process.

Guidance

The FTC and DOJ withdrew several policy statements during the Biden Administration without replacements or even plans to replace them.

Such policy statements include several documents related to enforcement in health care markets. Most recently, the FTC and DOJ withdrew guidelines for collaboration among competitors. In the announcement, the FTC and DOJ advised "businesses considering collaborating with competitors…to review the relevant statutes and caselaw to assess whether a collaboration would violate the law." Presumably, these guidance documents reflected the "relevant statutes and caselaw," but did so with minimal legalese so businesses could understand them. Without timely replacements, businesses seeking to work within the law were left in the dark.

Economics

Section 6(b) of the FTC Act allows the agency to conduct industry studies. The agency uses these studies to better understand competition and the competitive effects of certain business practices.

The FTC opened several 6(b) studies during the Biden Administration. One such study investigated the role pharmacy benefit managers (PBM) play in the cost of prescription drugs. A second study investigated grocery store supply chains and how pandemic-related disruptions affected competition among retailers, wholesalers, and producers.

Both studies largely failed to answer even the most basic questions related to the competitive dynamics of the industry and the effect on consumers. They lacked sound economic analysis.

Speaking of the PBM report, FTC Commissioner Holyoak's dissent summarized the report's deficiencies, arguing that "perhaps the most troubling is the Report's failure to examine how PBM practices affect consumer prices," and added that the "Report does not present empirical evidence that demonstrates PBMs have market power." Moreover, Holyoak cited concerns over the report's lack of "substance" and economic rigor. When discussing 6(b) reports more broadly in her dissent, Holyoak raised concerns for what the report meant for the agency's future. She explained that 6(b) reports "have provided Congress and the public with evidence-based, objective, and economically sound information that can shape the national debate," noting that "the standard of these reports has been nothing short of excellence." She concluded, however, that the PBM report "fail[ed] to meet that rigorous standard," and that the report "will only exacerbate ideological schisms and further degrade the legitimacy of the Commission."

Will the Biden Antitrust Agenda Continue to Have Legs?

The Biden Administration's approach to antitrust may not have had the desired success in broadly moving the courts' interpretation of antitrust law, yet its impacts will likely continue well into the next administration. An antitrust philosophy focusing on concentration, corporate power, and fairness has attracted followers on both sides of the political aisle.

Progressives such as Senator Elizabeth Warren (D-MA) have routinely blamed corporate concentration for inflation. Several conservatives – dubbed "Khanservatives" for their embrace of the chair's populist policies – have also begun to express concerns about concentration. Vice President-elect JD Vance, for example, has praised FTC Chair Lina Khan's work in competition policy, primarily due to concerns about big tech. And Senator Josh Hawley (R-MO) introduced the Strengthening Antitrust Enforcement for Meatpacking Act, which would establish concentration thresholds to define a merger in the industry that

results in a monopoly in violation of antitrust law. Should the second Trump Administration continue many of the Biden Administration's policies, it will afford the FTC and DOJ more time to push these theories in the courts.

Conclusion

While the Biden Administration came out swinging against the competition regulatory regime that had been in place for more than 40 years, its antitrust enforcers largely failed in unseating the consumer welfare standard as the guiding principle of antitrust enforcement. There are, however, reasons to believe that the focus on market concentration – the "big is bad" approach – may have staying power in the next administration. While business competitors may benefit under the continuation of such a regime, consumers would suffer.