



Insight

The Biden Antitrust Legacy

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Executive Summary

- With Republicans winning the White House and both chambers of Congress, the Biden Administration's efforts to dramatically reshape competition policy in the United States are at an end, but their impacts may not be.
- Over the past four years, the Biden Administration has pushed three policy initiatives – replace the longstanding the consumer welfare standard with a big-is-bad approach to antitrust, chill mergers by bringing more enforcement actions and raising costs on transactions, and attempt to pass competition-related rules – with limited success, especially before the courts.
- Despite its failure to change legal standards, the Biden Administration could have a lasting impact on competition policy, especially if its concerns about concentration of corporate power resonate with the Trump Administration.

Introduction

The Biden Administration's ambitious efforts to reshape competition policy in the United States will end as Republicans take control of both the White House and Congress, and thus the antitrust agenda. Yet the change in party leadership does not necessarily mean that the dramatic changes of the past four years will be reversed.

Specifically, the Biden Administration's Federal Trade Commission (FTC) and Department of Justice (DOJ) pursued an [aggressive agenda](#) that sought to overturn the longstanding consumer welfare standard, which examines competition through the lens of how a given practice would affect consumers and competition as a whole. At the heart of this push was a concern about concentration in markets, and as a result the administration also sought to halt merger activity writ large, making it more costly for all mergers to consummate and

challenging the most high-profile ones. Finally, the FTC sought to proactively set the rules of the road by expanding competition rules, notably banning non-compete contracts in most cases.

The future impact of these changes is not clear. While the Biden Administration was able to block a variety of mergers, most of the success stemmed from simply making “winning” too costly for the parties; the courts have yet to turn away from the consumer welfare standard. At the same time, this approach not only resonated with the populist wing of the Democratic party, but also some on the right concerned with concentration, especially in the technology sector. Ultimately, the Biden Administration’s antitrust legacy isn’t yet set in stone, and its impact may depend on how the next administration approaches these issues.

Elimination of the Consumer Welfare Standard

At the core of the Biden Administration’s competition policy agenda is the replacement of the longstanding consumer welfare standard with a “big is bad” approach. The consumer welfare standard – the prevailing antitrust standard for over 40 years – directs courts to examine the effect that a given practice will have on competition and consumers, rather than on specific competitors who may struggle to keep up. As a result, many firms have successfully argued that practices that may otherwise harm an individual competitor benefit competition because the firm can offer goods at a lower price, offer a superior service, or otherwise provide some benefit to consumers.

The Biden Administration, however, has pushed courts to move away from this competition-centric analysis due to concerns that it leads to concentration in markets, and has pursued cases that ignore the benefits that the practices at issue provide to consumers. The most significant cases largely came in the tech sector, as many firms both operate platforms and act as competitors within that platform, meaning smaller competitors on that platform could be disadvantaged. For example, the DOJ recently won a case originally brought during the Trump Administration against Google under the theory that it illegally maintained its monopoly in online search by using “exclusive agreements” to be the default search engine for web browsers and smart phones, essentially foreclosing competition from rivals.

Currently, the FTC and DOJ are bringing illegal monopolization cases against four of the largest technology companies in the world. The DOJ is suing Google for its ad tech business that acts as buyer, seller, and middleman for online ads, and Apple for monopolizing the smartphone market by limiting functionality between Apple and Android devices. The FTC, for its part, is suing Amazon for preferencing products that use Amazon Fulfillment and downgrading in visibility products that are offered for lower prices elsewhere and Meta for its acquisition of Instagram.

Anti-monopoly claims tend to take years to resolve, and therefore the direct impact of these cases is unclear. The key element to watch from the courts is how willing judges are to accept the pro-competitive arguments – that is, that their behavior creates benefits for consumers that outweigh any harms – proffered by the firms. If courts begin to dismiss the pro-competitive justifications proffered by defendants, it could shift antitrust enforcement to solely a question of monopoly power, meaning any firm that outcompetes its rivals could face scrutiny from regulators.

Mergers and Acquisitions

While the cases brought under the Sherman Act may take years to resolve, the Biden Administration’s merger policies had an immediate impact on businesses in the United States.

Though the major challenges receive the most attention, the administration’s primary goal was simply chilling mergers generally, and accomplished this goal through procedural changes. First, the agencies modified existing [merger guidelines](#) that are theoretically designed to provide merging parties with guidance about the types of transactions that will draw scrutiny from the agencies. The new guidelines largely emphasized scrutiny for any merger that would tend to increase concentration in markets, meaning any merger could potentially draw scrutiny. Second, the administration passed rules that would add additional requirements to Hart-Scott-Rodino (HSR) filings (a law requiring premerger notification to agencies), adding a total of [\\$139 million in paperwork costs per year](#). Unsurprisingly, these changes reduced the total number of transactions. Data from the FTC indicates [8,477 transactions have been reported above the HSR threshold](#) within the last three fiscal years, with each year dropping in the total number of mergers.

But while the policies have had their intended effect, substantively the Biden Administration has failed to change precedent because when its challenges go to trial, the agencies tend to lose. For example, in both the Microsoft/Activision and Meta/Within mergers, courts dismissed the FTC’s complaints due to faulty legal theories of harm and the lack of consideration for competitive effects. In the Microsoft case, the FTC claimed that Microsoft’s acquisition of Activision would harm competition in console markets because Microsoft could make the flagship franchise, Call of Duty, exclusive to Microsoft’s Xbox console. But as the court explained, Microsoft had [already signed agreements to make the franchise available on other consoles](#), and the vertical efficiencies created by the merger would allow Activision’s games to reach more consumers. Likewise, Meta’s purchase of a virtual reality fitness app drew scrutiny from the agency because of concerns that the acquisition would prevent Meta from creating its own app, depriving consumers of competition. The court, however, dismissed these arguments because of the “impossibly

speculative” theory of harm and the competitive synergies of the transaction allowing the nascent industry to develop.

The antitrust agencies’ high-profile losses on challenges, primarily those on unprecedented theories of harm, has largely resulted in a maintenance of the status quo at least so far as judicial precedent is concerned.

That said, a Trump Administration could still undertake aggressive merger enforcement, which would be in line with his first term in office. A Trump FTC and DOJ, however, would likely attempt to block mergers without changing the underlying legal standards, and focusing on mergers that may bring identifiable harm to consumers. As such, a Trump Administration could return to [using negotiated merger remedies to alleviate competitive concerns](#) while still allowing deals to proceed. The Biden Administration [abandoned accepting negotiated settlements](#) with offered divestitures that focused on actual harms and instead sought to block transactions outright. A consumer welfare approach, however, would consider remedies to address competitive harms while still allowing firms to create efficiencies and synergies through mergers.

Finally, a Trump Administration could approach sectors of the economy differently, such as heightening scrutiny for tech mergers while [loosening scrutiny in private equity deals](#).

Competition Rulemaking

The FTC attempted to expand its authority directly by passing an unfair methods of competition rule banning noncompete agreements. The FTC’s authority to pass unfair methods of competition rules has never been completely clear, as Congress specifically reined in FTC unfair or deceptive acts or practices rulemakings in the past, but never specifically addressed unfair methods of competition rulemakings. If the rules survive judicial scrutiny, they would essentially be binding and allow the FTC to bring enforcement actions against firms that violate the rules.

Much like the merger and monopolization cases, however, the [FTC largely lost in court](#). Specifically, a district court in Texas set aside the FTC’s rule and ordered that it couldn’t be enforced, though the FTC has appealed the decision. Even with the appeal, the Supreme Court has recently embraced the [major questions doctrine](#) and set aside a [standard of deference](#) previously granted to agency rulemakings, making a successful appeal seem unlikely, though not impossible.

Lasting Impact of the Biden Administration’s Antitrust Policy

The Biden Administration’s antitrust policies may not have had a demonstrable impact on

hard law, yet it may be premature to assume that their impact will be minimal or short-lived. First, many deals that could have been made over the past few years may have failed to materialize due to anticipation of a tough review process. Second, the anti-concentration antitrust push has resonated with a populist audience, especially in light of high costs for goods and services, which [some attribute to concentration](#). These ideas could continue to grow and become more accepted, especially by the courts. Finally, support for anti-concentration policies isn't exclusive to progressives, and many conservatives have begun to express concerns about concentration. In fact, the Vice President-elect has [praised FTC Chair Lina Khan's work in competition policy](#), largely due to concerns about big tech. A Trump Administration could largely continue the policies of the Biden Administration, giving the FTC and the DOJ additional opportunities to advance these theories in the courts.

Conclusion

Despite lofty goals and aspirations, the Biden Administration largely failed in its efforts to abandon the consumer welfare standard. Still, there are reasons to believe that the impact of the administration's competition agenda may not be a temporary blip on the radar. If the Trump Administration continues its predecessor's policies, "big is bad" could once again become the law of the land, and it will be American consumers that suffer.