

Antitrust Action on M&A Deals in the Biden Administration – A Timeline

Introduction

Since Joe Biden was elected President of the United States in late 2020, antitrust enforcement action has, in the general population's mind, moved from something we read about in history textbooks to something dominating the headlines. Whether it is through challenging the latest multi-billion dollar merger or attempting to break apart big tech monopolies, US antitrust enforcement has been revitalized during the Biden administration. Naturally, this had a detrimental effect on M&A activity, as many managers didn't want to attempt deals that might be challenged by the FTC. In order to shed some light on how the antitrust environment has changed in the past few years, in this article we will discuss the most important players in US antitrust enforcement and their recent track record.

Who is Lina Kahn?

Lina Kahn is the Chair of the Federal Trade Commission (FTC). Before being nominated by US President Joe Biden to the position, she showed an acute interest in antitrust matters and American competition law, becoming an Associate professor at Columbia Law School at a young age. She famously wrote a piece titled "Amazon's Antitrust Paradox" which was published in the Yale Law Journal in 2017. This essay attempted to analyse the current situation of tech giants such as Amazon [NASDAQ: AMZN] and proposed solutions for how to navigate and apply competition and antitrust laws to large companies.

The FTC's mission is "protecting the public from deceptive or unfair business practices and from unfair methods of competition through law enforcement, advocacy, research, and education." A subdivision of the FTC dubbed the Bureau of Competition oversees preventing M&A deals that may reduce competition in the markets and lead to higher prices for consumers, lower quality goods and services or a potential decrease in innovation. Usually, the bureau (due to the Hart-Scott-Rodino amendments to the Clayton act) receives premerger notifications from parties that are engaging or planning to engage in large mergers. Following that, lawyers and economists investigate the market to determine whether the proposed merger has a positive impact of consumers. Both members of the agreement may not take further action until the FTC has had time to review it and decide. If the FTC deems that the merger is uncompetitive, they are allowed to take formal legal action to stop the merger.

Who is Jonathan Kanter?

Jonathan Kanter is an American attorney dedicated to anti-monopolistic policies. As the assistant attorney general for the Department of Justice (DOJ), he uses his prior experience at the FTC to pursue antitrust cases and works jointly with Lina Kahn to revolutionize the way the federal government handles mergers.

The antitrust division of the Department of Justice follows the mission statement "The mission of the Antitrust Division is to promote economic competition through enforcing and providing guidance on antitrust laws and principles." Both the FTC and the DOJ's Antitrust department are government agencies that have the

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responsibility of enforcing federal antitrust regulations. They have some overlap in terms of scope, but the two agencies work together as they can complement each other. Both have developed expertise in certain markets/industries with the FTC spending more time in high consumer spending markets such as health care, pharmaceuticals, and food. Before filing a formal investigation, the two agencies will discuss to avoid pursuing the same case. Overall, the FTC is typically in charge of provider markets while the DOJ's purview is tilted towards insurance markets. The two agencies work together to establish the "Horizontal Merger Guidelines", which outline the criteria that the FTC and DOJ consider when reviewing horizontal mergers. In the guidelines they use the "Herfindahl-Hirschman Index" (HHI) to evaluate market concentration.

"The HHI is calculated based on provider market shares for a given product—such as inpatient general acute care services or inpatient orthopedic surgical services—and geographic market. The HHI for a market can range from nearly 0 (a perfectly competitive market) to 10,000 (a market with a single provider)." The Horizontal Merger Guidelines define the level of market concentration as follows:

Unconcentrated: $HHI < 1,500$

Moderately concentrated: HHI between 1,500 and 2,500

Highly concentrated: $HHI > 2,500$

The Biden Administration – A New Stance on Antitrust

The election of President Joe Biden led not only to key pieces of legislature for the US economy, such as the Inflation Reduction Act, but also saw a harsher antitrust enforcement, as he placed Jonathan Kanter and Lina Kahn at the helm of his quest to break up big tech and stop mergers that would reduce competition and hence harm society.

In July of 2023, the DOJ and FTC jointly released 13 draft guidelines addressing several corporate practices, including acquisitions of minority interests that could harm competition and mergers that may squeeze competition for workers and suppress wages. These guidelines were built on the back of President Joe Biden's executive order to combat corporate power – a stark comparison to his predecessor Donald Trump. With a particular emphasis on Big Tech and Private Equity companies, the agencies argue that "A firm that engages in an anti-competitive pattern or strategy of multiple small acquisitions in the same business line may violate antitrust laws, even if no single deal would harm competition or tend to create a monopoly, according to the proposal." The main addendum to the guidelines includes a change to the Hart-Scott-Rodino (HSR) form, which would force financial sponsors to disclose significantly more information in the early stages of a transaction.

The hostility with which these leaders have approached their mandates as antitrust regulators has sent shockwaves across corporate America with some of the largest challenges to colossal mergers that have been tied up in litigation for months. Some of the deals include Microsoft's [NASDAQ: MSFT] acquisition of Activision Blizzard and Amgen's [NASDAQ: AMGN] acquisition of Horizon Therapeutics. Not only does this antitrust crusade lead to a larger bureaucratic burden for large companies, but it has deterred corporations from pursuing mergers that might be held up in court for months, or even years.

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High-Profile Defeats of Antitrust Enforcement

Under the guide of Lina Khan, the Federal Trade Commission has adopted a more rigid stance on antitrust matters, in line with the public declarations made by its representatives. However, despite this assertive stance, the FTC has recently faced notable high-profile court setbacks in the attempt to enjoin M&A deals worth billions. In the following paragraphs, we will cover the most significant ones.

A first case involves Meta's [NASDAQ: META] acquisition of fitness VR developer Within for \$400m, initially announced in 2021 but officially closed only in February 2023. The FTC, concerned about the impact on competition in virtual reality fitness apps, opposed the deal as it alleged that Meta was a potential entrant in such industry and the acquisition would eliminate any potential future competition between the two companies. However, it critically failed to demonstrate any "reasonable probability" that this could be the case. According to Judge Edward J. Davila's ruling, in fact, the advanced theory of harm was "impermissibly speculative", since there was no evidence suggesting that Meta had either the capabilities or the intention to build on its own a direct competitor to Within's Supernatural.

Possibly a better-known episode, Microsoft's troubled acquisition of Activision Blizzard, which was contested by the FTC for its potential harm to competition in the video game industry, was finally closed on October 13. The core argument for preventing the deal was Microsoft's alleged financial incentives to withhold Call of Duty from Sony's [NYSE: SONY] PlayStation, a rival gaming console of Microsoft's Xbox. The FTC built its case on an economic analysis by Professor Robin Lee from Harvard, but the court found it to be unreliable due to various unsupported assumptions. As further evidence presented was either deemed irrelevant or unpersuasive, the court ultimately agreed that there was no substantial incentive for the combined Microsoft-Activision Blizzard entity to restrict the popular game saga's availability, especially when considering Microsoft's commitments to continue offering the game on Sony's console. Consequently, Judge Jacqueline S. Corly ruled in favour of the deal on July 11, 2023.

Even more recent was the FTC's opposition to the \$28bn acquisition of Horizon Therapeutics by healthcare company Amgen, announced in late 2022. On September 1st, however, a resolution was reached between the two parties. The agreement allowed the deal to proceed, with the condition that Amgen committed not to bundle Horizon's two most popular drugs – "Tepezza" and "Krystexxa" – with any from its current offer. The element of concern for the FTC in this transaction was, in fact, the possibility for an anticompetitive use of rebates for health insurers on Amgen's existing drugs, conditioned on the purchase of Horizon's two monopoly drugs. Crucially, this opposition marked a significant move by the FTC, being its first attempt to challenge a pharmaceutical deal in over a decade. On top of that, at least according to the former FTC chair William Kovacic, it was uncommon that the Federal Trade Commission opted for a settlement. Perhaps influenced by previous legal setbacks, the FTC may have acknowledged the potential risk of losing in court, especially with what Kovacic defined a "very contestable theory of harm." Ultimately, he pointed at the choice of settling after such a peculiar opposition as "realism tempering ambition".

The abovementioned "defeats" in antitrust enforcement by the Federal Trade Commission all share an underlying approach that is certainly more ambitious compared to the one adopted by previous commissioners. Significantly, the FTC also evaluated the mere possibility of future missed competitive scenarios – Meta/Within case – as well as industries that were left "undisturbed" for a considerable time: healthcare. While it is true that for a change in policy to be durable it is necessary to ultimately win the cases, commissioners certainly sent a signal to dealmakers. As a matter of fact, Khan emphasised this point by stating "You lose all the shots you don't take" when referring to pursuing potentially losing cases. Conversely, though, the cases also had in common weak supporting evidence,

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for an outcome that ultimately cost taxpayers money. Additionally, in its plausible mission to send a message to corporate America, the FTC needs to consider the risk that companies may perceive such negative records as an increased probability of prevailing in court for such weak cases, while the FTC may erode its credibility.

Renewed Confidence in Dealmaking

The year 2022 was characterised by an industry-wide decline in dealmaking volumes, mainly attributable to hostile macroeconomic conditions – economic uncertainty and valuations slump as a consequence of interest rate hikes. Conversely, the first months of 2023 – while still generally underperforming with respect to previous levels – saw a significant increase of volumes in the pharmaceutical and biotech industries, with \$85bn spent in acquisitions over the first five months of 2023, as opposed to \$35.6bn in 2022. This increase can be attributed to two key factors: the substantial cash reserves accumulated by major pharmaceutical companies during the pandemic – more than \$1.4tn according to EY – and the upcoming expiration of patents, exposing \$200bn worth of top-selling drugs to generic competition before the end of the decade. However, this optimistic outlook faced a setback with the Federal Trade Commission taking steps to block the Amgen/Horizon Therapeutics acquisition. Major M&A deals have been instrumental in empowering healthcare giants to enhance their drug portfolios by acquiring new patented medications through company mergers. According to Paul Hastings, chair of Bio, the primary lobbying group for biotech, this model supports biotech ventures engaged in high-risk research as their investors anticipate that larger companies may later acquire them, providing the necessary funds to navigate costly clinical trials and launch new drugs. For this reason, the FTC's recent attempt to intervene in the sector, the first in over a decade, raised concerns. As a potential consequence of this new antitrust stance on the healthcare industry, Evercore [NYSE: EVR] analysts predicted change in focus toward a greater number of smaller and earlier-stage biotech companies, as opposed to a concentration on a few large entities.

It must, however, be noted that, while the Federal Trade Commission initially sent a negative signal to the healthcare industry with its attempt to block the Amgen acquisition, it ultimately couldn't prevent the deal, as both parties reached a settlement. This perceived “defeat” for FTC chair Lina Khan, especially following other recent setbacks in Microsoft and Meta cases, was met with relief by Wall Street bankers, who – as reported by the Financial Times – widely believed that the negative outcomes would discredit both Khan and the FTC. However, upon closer inspection, the Amgen case can't be classified as a complete loss for the FTC. Firstly, as state above it served as a signalling effect, drawing renewed attention to industries, such as healthcare, that had previously been untouched by regulatory actions. Secondly, the settlement allowed commissioners to obtain the restrictions they sought, demonstrating a degree of regulatory influence. Significantly, various financial newspapers are reporting that some insiders claim several Wall Street donors to the Democratic Party are leveraging their influential positions to persuade Biden to remove Khan in case of re-election. If this is actually the case, it is hard to believe that her efforts aren't influencing dealmaking, even in the face of setbacks.

Reflecting on recent shifts in US antitrust provisions which emerged from our analysis, it becomes evident that a new enforcement approach has emerged, aligned with the principles of the neo-Brandeis movement. This has notably influenced the scrutiny of M&A deals and the regulation of Big Tech monopolies. To better understand its underlying principle, we will briefly cover the claims that the FTC moved to the very firm that gave its chair Lina Khan her academic prominence: Amazon. The neo-Brandeis movement challenges the prevailing notion in modern antitrust law (from the Chicago school of economics), which prioritizes customer welfare in terms of goods prices and availability. In contrast, it advocates for a broader antimonopoly approach, focusing on the structure of the economy and market conditions essential for competition. This movement calls for market

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structures that deter anti-competitive practices, emphasizing increased scrutiny of mergers – including vertical mergers that could export monopolies from one sector to another. Supporters, such as Lina Khan and DOJ Antitrust division's Jonathan Kanter, argue that antitrust laws should shift focus from mergers' short-term price effects to ensuring and improving market conditions that will guarantee genuine competition. As a matter of fact, Khan contended that the Chicago School inadequately addressed platform companies like Amazon and Uber [NYSE: UBER]. She highlighted that these companies had shown pricing at or below cost could be a sustainable strategy for gaining market share. Moreover, platforms provided essential digital infrastructure, potentially leveraging it to harm competition. Therefore, she argued, waiting until prices were manipulated meant antitrust regulators would act too late. Recent news would appear to support Khan's perspective. It has been disclosed that Amazon utilized a secret algorithm, "Project Nessie," between 2015 and 2019 to enhance profits on various items. Controlling 40% of all US ecommerce, Amazon could raise prices across entire product categories, influencing competitors to follow suit and resulting in higher charges for customers. The court proceedings for this case, which see the FTC suing Amazon for illegally maintaining monopoly power are ongoing.

Conclusion

Overall, the Biden administration has successfully brought antitrust enforcement action back to the forefront of dealmakers' minds. However, one could argue that the FTC and DoJ were overly aggressive, which was successful in the short run but may now reduce their credibility. Suing to block many deals was successful at first, as it made many reconsider doing deals, even if they believed they would win the legal battle, as they didn't want the distraction of a long legal fight to do deals. However, given that the antitrust enforcers have lost some battles, they may now regret having been so aggressive, as dealmakers will become more combative themselves, having seen that deals have been gotten done even when they were challenged by the state.

TAGS: Antitrust, M&A, Private Equity, USA, Politics, Joe Biden

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