

e-Competitions

Antitrust Case Laws e-Bulletin

July 2021

The US President Joe Biden signs an executive order aimed at promoting competition in the American economy using antitrust laws

REGULATORY, PRICES, AGRICULTURE / FOOD PRODUCTS , FINANCIAL SERVICES, PHARMACEUTICAL, TELECOMMUNICATIONS, TRANSPORTS, HEALTHCARE, LICENSING, BARRIERS TO ENTRY, COMPETENCE, UNFAIR COMPETITION, MERGER (NOTION), REFORM, UNITED STATES OF AMERICA, INSTITUTIONS, FRAND, STANDARD ESSENTIAL PATENT, COMPETITION POLICY, PUBLIC PROCUREMENT

US President Joe Biden, *Executive Order on Promoting Competition in the American Economy*, Executive Order, 9 July 2021

Ryan Shores | Shearman & Sterling (Washington)
Benjamin Gris | Shearman & Sterling (Washington)
David A. Higbee | Shearman & Sterling (Washington)
Jessica K. Delbaum | Shearman & Sterling (New York)
Djordje Petkoski | Shearman & Sterling (Washington)
Noni Nelson | New York University
Caitlin Hutchinson Maddox | Shearman & Sterling (New York)
Reena Agrawal Sahn | Shearman & Sterling (New York)

e-Competitions News Issue July 2021

What This Means for Merger Enforcement, Technology Platforms, Healthcare, Banking and Consumer Finance and Labor Markets

On Friday, July 9, 2021, President Biden signed a sweeping *Executive Order* ^[1] (and provided an accompanying *FACT Sheet* ^[2]) with the stated goal of using existing antitrust laws and policy to “reduce the trend of corporate consolidation, increase competition,” and “promote competition in the American economy.” The Executive Order takes a “whole of government” approach to competition policy and includes 72 initiatives to be implemented by over a dozen federal agencies [1] across a wide range of industries, including technology platforms, defense, health care, banking, beverage alcohol, agriculture, transportation and labor markets, and establishes a new White House Competition Council to oversee implementation of the Executive Order and coordinate across agencies. [2]

Antitrust is core to President Biden’s initiative. The Executive Order deems antitrust laws the “first line of defense

against the monopolization of the American economy” and affirms the use of “antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony.” To that end, many aspects of the Executive Order are aimed at mergers and acquisitions, most notably calling for the heads of the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) to enforce antitrust laws “vigorously,” to challenge “prior bad mergers,” and to consider revising the horizontal and vertical merger guidelines (discussed further below).

Because the Executive Order by itself does not impose new regulations, its success will depend on government agencies implementing the suggested policies, some of which are likely to face court challenges. That said, the Executive Order nonetheless intensifies the current Administration’s already significant focus on antitrust enforcement and heightened scrutiny of “Big Business” and underscores the comprehensive agenda for antitrust reform already underway by lawmakers and enforcers on both sides of the political aisle. [3] It also highlights a shift from an ex-post enforcement to an ex-ante competition regime wherein agencies are called upon to make rules related to current perceived anticompetitive practices (e.g., the proposed FTC rulemaking to limit the use of non-compete clauses, discussed below).

Below we provide the key takeaways related to merger enforcement, technology platforms, healthcare, banking and consumer finance, and labor markets. Businesses in these areas should expect increased enforcement efforts, with agencies likely taking a closer and stricter (and therefore longer) look at mergers and acquisitions, especially in “big tech,” hospital, and banking transactions. Moreover, businesses and workers should expect increased efforts to limit or eliminate non-compete clauses in employment contracts and restrictive licensing requirements. More generally, businesses should expect that agencies will use more aggressive and coordinated tactics, having been expressly encouraged by the Executive Order to work together and share information going forward.

Merger Enforcement Policies

One of the most important aspects of the Executive Order is the call for the DOJ and FTC to reconsider both the horizontal and vertical merger guidelines. These guidelines outline the enforcement policies and analytical techniques of the antitrust agencies reviewing proposed transactions and are widely relied upon by practitioners and courts alike to guide their advice and decision-making. The long-accepted horizontal merger guidelines were last updated in 2010. The vertical merger guidelines were updated in 2020, the first update since 1984, over the objections of FTC Commissioners Rebecca Slaughter and Rohit Chopra (then in the minority).

Notably, Lina Khan, the Chair of the FTC, and Richard Powers, the Acting Assistant Attorney General of the Antitrust Division of the DOJ, issued a joint statement the same day the Executive Order was announced expressing their intention to launch a review of the merger guidelines. This will be a “hard look” and the agencies will aim to ensure that the guidelines “reflect current economic realities and empirical learning and that they guide enforcers to review mergers with the skepticism the law demands.” [4]

Amendments to the merger guidelines may be the most significant and enduring impact of the Executive Order on antitrust law given their important practical, and overarching philosophical, role. Although these changes will take time to move through the relevant procedural steps, sentiment for quickly commencing the process exists.

But that is just one aspect of the Executive Order’s overall skepticism and push back against mergers. For example, the Executive Order specifically calls out – and seemingly encourages – challenges to consummated mergers, at least where they have led to significant market consolidation. This is not surprising, as one of the

architects of the Executive Order – Tim Wu – has written recently and favorably about such after-the-fact challenges. [5] As the recent dismissal of the FTC’s and states’ monopolization challenge against Facebook shows, however, these actions may face headwinds in courts.

Reports on Competition

Under the Executive Order, multiple agencies – often in collaboration with the DOJ and FTC – have been given deadlines to submit reports to the White House Competition Council on the competitive nature of several specific markets. These reports presumably will be then used by the Council to suggest further action. They also could be used by legislators to suggest or support legislative reform, and by antitrust enforcers to consider guideline changes or perhaps enforcement actions. Businesses, therefore, should pay close attention to these reports, and make sure that their voices are heard.

The reports include:

- The Treasury Department is directed to, within 120 days, submit a report assessing the current market structure and conditions of competition, including an assessment of any threats to competition and barriers to new entrants, in markets for beer, wine and spirits;
- The Treasury Department is directed to, within 180 days, submit a report on the impact of the current lack of competition on labor markets;
- The Treasury Department is directed to, within 270 days, submit a report examining the impact on competition of large technology firms’ and other nonbank companies’ entry into consumer finance markets;
- The Secretary of Transportation is directed to, within 45 days, submit a report on the progress of the Department of Transportation’s investigatory and enforcement activities to address the failure of airlines to provide timely refunds for flights canceled as a result of the COVID-19 pandemic;
- The USDA is directed to, within 300 days, issue a report on the effect of retail concentration on competition in the food industries and a report detailing any concerns related to intellectual property, antitrust and other relevant laws;
- The Department of Defense is directed to, within 180 days, submit a report assessing the state of competition within the defense industrial base, as well as a plan for avoiding contract terms in procurement agreements that limit the ability of the Department or service members to repair their equipment; and
- The Secretary of Health and Human Services is directed to, within 45 days, submit a report with a plan to continue the effort to combat excessive pricing of prescription drugs and enhance domestic pharmaceutical supply chains, to reduce the prices paid by the Federal Government for such drugs, and to address price gouging.

Technology – Dominant Platforms

The Executive Order tackles the position of so-called dominant technology firms, which it views as undermining competition and reducing innovation by using “their power to exclude market entrants, extract monopoly profits, and gather intimate personal information that they can exploit to their advantage.” The Executive Order encourages the FTC to write first-ever rules barring certain types of allegedly anticompetitive practices, including “unfair methods of competition on internet marketplaces.” According to the Executive Order, large platforms exploit small

businesses that rely on them to reach their customers, specifically referring to the practice of selling and promoting copycat products based on user data – an apparent reference to Amazon. The recently appointed Chair of the FTC, Lina Khan, has previously voiced support for such efforts, though they are likely to spark a partisan battle on the five-member commission. [6]

The Executive Order also announced an “administrative policy” of greater scrutiny of mergers involving dominant “Big Tech” platforms purchasing would-be or nascent competitors (so-called “killer acquisitions”), focusing especially on those that do so on a “serial” basis or for the accumulation of data, and compete in “free products,” as well a specific call to evaluate the effect of such transactions on users privacy. The fact that this is a stated policy rather than simply an “encouragement” signifies the President’s belief that, “too often, federal agencies have not blocked, conditioned, or, in some cases, meaningfully examined these acquisitions” over the past 10 years. It seems reasonable to expect the aforementioned review of the merger guidelines to more explicitly condemn a wide range of acquisition strategies by the large platform competitors.

Related to privacy concerns, the Executive Order also encourages the FTC to establish rules on surveillance and the accumulation of data, which is at the heart of “[m]any of the large platforms’ business models.”

Healthcare

The Executive Order announced several initiatives for the healthcare sector (related to hospitals, health insurers, prescription drugs, and hearing aids), where it says a “lack of competition...increases prices and reduces access to quality care.” Notably, the Executive Order encourages the FTC to ban “pay-for-delay” and similar “price-gouging agreements” used by drug manufacturers to allegedly “avoid competition.” “Pay-for-delay” agreements between brand name manufacturers and generic competitors delay the entry of cheaper products.

The Executive Order also takes aim at consolidation in the hospital and health insurance industries that, “[t]hanks to unchecked mergers,” has, according to the FACT Sheet, led to “the ten largest healthcare systems now control[ing] a quarter of the market” and “hospitals in consolidated markets charg[ing] far higher prices than hospitals in markets with several competitors.”

These initiatives are likely to result in increased scrutiny of hospital consolidation as well as hospital acquisition of physician practices. President Biden explicitly is calling on the FTC and DOJ to “review and revise their merger guidelines to ensure patients are not harmed by such mergers.” The FTC has long focused enforcement efforts on hospital mergers. [7] More recently, the FTC has launched a review into the impact of physician group and healthcare facility mergers as part of the FTC’s Bureau of Economics broader merger retrospective program. [8]

Banking and Consumer Finance

The Executive Order will also impact the banking and consumer finance sectors through several different measures. According to the Executive Order, these measures – and in particular possible updates to the review of banking mergers – are intended to ensure consumer choice among financial institutions and to prevent the concentration of excessive market power in the financial sector.

First, the Executive Order encourages the Attorney General and the heads of the federal agencies with supervisory oversight of banks, including the Chair of the Federal Reserve Board, the Chair of the Federal Deposit Insurance Corporation, and the Comptroller of the Currency, to “update guidelines on banking mergers to provide more robust

scrutiny of mergers” and set forth a plan of action for revitalizing merger oversight under the Bank Merger Act and the Bank Holding Company Act within 180 days. The accompanying FACT Sheet prominently notes that the federal banking agencies “have not formally denied a bank merger application in more than 15 years” and that approximately 10,000 banks have closed in the last four decades due, among other factors, to mergers and acquisitions.

The FACT Sheet further argues that such closures and the resulting consolidation among banks have negatively impacted consumers, small businesses, and low-income communities. As a result, the Biden Administration has indicated through the Executive Order that “revitalization of merger oversight” is required. The full effect of the Executive Order on bank mergers will depend on the forthcoming assessments of the federal banking agencies and the plans of action outlined pursuant to the Executive Order; however, in the interim, the agencies likely will review bank mergers carefully and apply the current bank merger rules, guidelines and practices more stringently.

In addition, the Executive Order specifically calls on the Consumer Financial Protection Bureau (CFPB) to issue rules allowing customers to move their financial transaction data between different banks and financial institutions, thereby ensuring that consumers can switch providers more easily (so-called “open-banking” measures). The Executive Order is aimed at encouraging the CFPB to finalize rulemaking required under Section 1033 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which provides the right of consumers to access their financial information, subject to CFPB rulemaking. The CFPB has previously issued a proposed rule regarding the accessibility of consumer financial transaction data in October 2020 (with the comment period ending in early February 2021) [9] but has yet to finalize such a rule. The Executive Order may place pressure on the CFPB to do so swiftly. [10]

These initiatives are consistent with the expectation that the Biden Administration would toughen scrutiny of bank mergers and prioritize consumer protection. Innovation within the financial sector also has been a focus for years – including by regulators and antitrust enforcers – and this focus promises to become even more acute going forward.

Labor Markets

The most significant aspect of the Executive Order relating to labor markets is the suggestion that the FTC ban or limit non-compete agreements between employers and employees through its rulemaking authority under the FTC Act. Non-compete clauses typically require employees to agree not to work for a competitor within a certain defined region and duration. According to the FACT Sheet, “[r]oughly half of private-sector businesses require at least some employees to enter non-compete agreements, affecting some 36 to 60 million workers.” According to the Executive Order, they drive down wages and impair work conditions because workers have less opportunity to negotiate and switch employment.

The FTC and DOJ are also encouraged to review and revise as necessary the Antitrust Guidance for Human Resource Professionals of October 2016, which the Order suggests may be harming workers by allowing third parties to make wage data available to employers – and not to workers – in certain circumstances without triggering antitrust scrutiny.

This emphasis on labor markets comes as no surprise, especially for non-compete clauses that President Biden had highlighted previously, including on his campaign trail. In 2016, then-President Barack Obama announced steps to “enhance competition to benefit consumers, workers, and entrepreneurs,” which led to some increased

enforcement in this area. It now seems likely that federal enforcers may move to outlaw the practice altogether in certain instances.

Conclusion

As outlined, Friday's Executive Order proposes sweeping initiatives and policy changes across a wide range of industries aimed at using existing antitrust laws and other laws to combat unfair competition. The Executive Order is part and parcel of a broader push by the Administration towards a more aggressive antitrust posture.

Corporations and investors should expect the FTC and DOJ (and the government writ large) to take a more skeptical view of merger and acquisition activity, with a broader view of potential harm than the consumer harm standard. The Executive Order will also trigger closer and stricter scrutiny of activities such as non-compete clauses in employment contracts that may give rise to decreased worker mobility. Government agencies also will likely use more aggressive and coordinated enforcement tactics, having been expressly encouraged to work together and share information going forward.

[1] As part of a “whole of government” approach to transforming competition policy, President Biden listed the agencies tasked with protecting conditions of fair competition as including the Department of Justice, the Department of the Treasury, the Department of Agriculture, the Department of Health and Human Services, the Department of Transportation, the Federal Reserve System, the Federal Trade Commission, the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, the Federal Communications Commission, the Federal Maritime Commission, the Commodity Futures Trading Commission, the Federal Energy Regulatory Commission, the Consumer Financial Protection Bureau and the Surface Transportation Board.

[2] The Competition Council will be headed up by the director of the National Economic Council.

[3] Such scrutiny includes the appointment of Lina Khan, a vocal critic of the consumer welfare standard in the application of the antitrust laws, as the Chair of the FTC, the recent withdrawal of the 2015 Statement of Enforcement Principles Regarding Unfair Methods of Competition under Section 5 of the FTC Act, the unveiling of six antitrust bills targeting Big Tech and other competition-related initiatives advanced from the House Judiciary Committee in late June 2021, proposed legislative reforms supported by Democrats and Republicans in the Senate, and numerous pending federal and state lawsuits challenging the alleged market power and business practices of Google, Facebook, and Amazon.

[4] See <https://www.ftc.gov/news-events/press-releases/2021/07/statement-ftc-chair-lina-khan-antitrust-division-acting-assistant>.

[5] Scott Hemphill & Tim Wu, Nascent Competitors, *University of Pennsylvania Law Review*, Vol. 168, P. 1879, 2020; New York University Law & Economics Research Paper No. 20-50; Columbia Law & Economics Working Paper No. 645 (2020). [[See, e.g., Lina Khan, *The Separation of Platforms and Commerce*, 2019 *Columbia Law Review*, Vol. 119, No. 4, at 937-1098.

[6] See, e.g., Lina Khan, *The Separation of Platforms and Commerce*, 2019 *Columbia Law Review*, Vol. 119, No. 4, at 937-1098.

[7] The FTC has challenged or threatened to challenge numerous recent hospital consolidations including the proposed mergers of Atrium Health Navicent, Inc. and Houston Healthcare System, Inc. (since abandoned), Methodist Le Bonheur Healthcare and two Memphis Hospitals owned by Tenet Healthcare (since abandoned) and Jefferson Health and Albert Einstein Healthcare Network (allowed to proceed after a federal court ruled in the parties' favor).]

More recently, the FTC has launched a review into the impact of physician group and healthcare facility mergers as part of the FTC's Bureau of Economics broader merger retrospective program. [[See <https://www.ftc.gov/news-events/press-releases/2021/01/ftc-study-impact-physician-group-healthcare-facility-mergers> ⁷. Then FTC Chairman Joseph Simons stated that the goal of this initiative is "to encourage economists both inside and outside the agency to carry out more retrospective studies to test our analytical tools and strengthen our enforcement efforts."

[8] See <https://www.ftc.gov/news-events/press-releases/2021/01/ftc-study-impact-physician-group-healthcare-facility-mergers> ⁷. Then FTC Chairman Joseph Simons stated that the goal of this initiative is "to encourage economists both inside and outside the agency to carry out more retrospective studies to test our analytical tools and strengthen our enforcement efforts."

[9] Bureau of Consumer Financial Protection, Consumer Access to Financial Records, 85 Fed. Reg. 71003 (Nov. 2020), <https://www.govinfo.gov/content/pkg/FR-2020-11-06/pdf/2020-23723.pdf> ⁷.

[10] As noted above, the Executive Order also instructs the Secretary of the Treasury to submit a report examining the impact on competition of large technology firms' and other nonbank companies' entry into consumer finance markets.