

Biden's Executive Order and the shifting US antitrust landscape

Authors: Douglas Tween, William Huynh, Ben Bauer

Publication date: July 2021

On July 9, 2021 the White House released President Biden's "**Executive Order on Promoting Competition in the American Economy**". The Order's purview stretches beyond the country's antitrust agencies and into the broader administrative state, targeting particular industries of concern to the Administration. Its stated purpose is "to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony — especially as these issues arise in labor markets, agricultural markets, internet platform industries, healthcare markets (including insurance, hospital, and prescription drug markets), repair markets, and United States markets directly affected by foreign cartel activity."

The Order (and the 72 specific initiatives referenced in its Section 5) remains to be implemented and, speaking today, its effects are far from certain. But here are the key components we will be watching:

- > **A new antitrust voice:** The Order establishes a White House Competition Council within the Executive Office of the President, with the following remit: "The Council shall coordinate, promote, and advance Federal Government efforts to address overconcentration, monopolization, and unfair competition in or directly affecting the American economy." This includes implementing the administrative actions identified in the Order. The Council will consist of the heads of many government agencies and meet on a semi-annual basis under the auspices of the Chair, the Director of the National Economic Council. Neither the Chair of the FTC nor the Assistant Attorney General for the Antitrust Division appear to be on the Competition Council, which is consistent with the historically independent nature of the antitrust agencies. (Indeed, the Chair of the FTC is invited to participate only "to the extent consistent with their respective statutory authorities and obligations.") Still, it remains to be seen what soft influence this Council may have over the US antitrust agencies and competition policy more generally.
- > **Merger guidelines under the microscope:** The Attorney General and the Chair of the FTC are encouraged to review and consider revisions to the horizontal and vertical merger guidelines. The former were revised in 2010 and **the latter** were issued just over a year ago (despite the dissent of two Democratic FTC commissioners). Acting Assistant Attorney General Richard A. Powers of the DOJ's Antitrust Division and FTC Chair Lina Khan released a **joint statement** agreeing to begin the review posthaste and signaling openness to revisions, stating that "[t]he current guidelines deserve a hard look to determine whether they are overly permissive[.]" and stressing that the guidelines must "reflect economic realities and empirical learning" to analyze mergers "with the skepticism the law demands." FTC Chair Khan may attempt to shift the guidelines away from more traditional conceptions of the consumer welfare standard (focused largely on price and output effects) in favor of a broader interpretation, a move that would be consistent with President Biden's **signing remarks** that "[f]orty years ago, we chose the wrong path... following the misguided philosophy of people like Robert Bork[.]"
- > **HR in the crosshairs:** The Attorney General and the Chair of the FTC are encouraged to consider revising the Antitrust Guidance for Human Resource Professionals of October 2016, which have only recently generated **promised criminal prosecutions** from DOJ Antitrust over so-called "**no poach**" agreements. In addition, the Chair of the FTC is

Linklaters

encouraged to propose a rule curtailing “unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.”

- > **Pharma gets a close look:** The Order mandates the Secretary of Health and Human Services to continue to combat the rising price of prescription drugs, including by working with the Chair of the FTC to address any efforts to impede generic drug competition. Beyond the state attorneys general and DOJ Antitrust’s active cases against alleged cartel activity in the generic pharma industry, the FTC has brought so-called “pay for delay” cases over a number of years, challenging attempts by makers of branded pharmaceuticals to purchase delayed generic entry through patent settlements. The Order’s proposed collaboration may give the FTC new enforcement ideas, including for how the FTC reviews generic pharmaceutical mergers generally.