

Antitrust

# U.S. Antitrust Efforts Pose Risk for Asian Companies

By Michael Murray and Shaun Wu

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The U.S. government's antitrust enforcement efforts pose increased risks to Asian companies, Paul Hastings partners Michael Murray and Shaun Wu explain. It is crucial that companies design compliance systems to appropriately calibrate these risks and that the new antitrust landscape is fully considered when developing growth strategies, they say.

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The U.S. government's strong resolve to enforce its antitrust laws with vigor and ingenuity creates significant and particularized risks for Asian companies.

Although these U.S. government efforts are often viewed as aimed at U.S.-headquartered technology companies, they in fact pose specific and increased risks to Asian companies as well because of the industries the U.S. government is targeting, the relationships between many Asian and U.S. companies, and the history of U.S. government enforcement actions against Asian companies.

Recent events, including President Biden's July 9 executive order on competition, the Federal Trade Commission's new policies on vertical mergers and multilateral cooperation, and the nomination of key personnel, provide the key to understanding and mitigating these risks.

## The New Antitrust Landscape

The previous administration initiated antitrust investigations against major American technology companies. Biden has continued and expanded those efforts. Most prominently, his executive order institutes a whole-of-government approach to increase enforcement.

Biden also specifically criticized particular industries, such as "a small number of dominant Internet platforms" that "extract monopoly profits," telecommunications companies that make consumers "pay too much" for internet services, and "consolidated" shipping and agricultural industries, and called for a recalibrated approach to intellectual property and standard-setting.

More recently, Biden selected aggressive antitrust enforcers for posts at the FTC and the Department of Justice's Antitrust Division.

FTC Chair Lina M. Khan already has eased the threshold for opening investigations and even has engaged international regulators as force multipliers, creating a multilateral pharmaceutical merger task force and coordinating with the EU on merger enforcement.

Jonathan Kanter, the nominee to head the Antitrust Division, received a hearing Oct. 6 before the Senate Judiciary Committee, but the Antitrust Division already has challenged multiple mergers before his arrival.

Khan and Kanter also have the opportunity to enforce new antitrust laws that would make it easier to challenge mergers and anticompetitive conduct.

### **The Implications for Asian Companies**

This antitrust environment has four implications for Asian companies.

First, Asian companies should expect increased criminal cartel enforcement, especially against individual executives, accompanied by a decreased crediting of strong compliance systems. The previous administration instituted an important change when it decided to credit companies for strong compliance systems. The current administration is likely to de-emphasize or even reverse that policy, while emphasizing the leniency program that provides amnesty to the first company to detect and self-report cartel violations.

The Biden administration also is likely to focus its efforts on prosecuting individual executives, and not just companies, in accordance with a renewed emphasis on “individual accountability.” This focus on individual executives is especially significant for Asian technology conglomerates because of the pivotal role the founder or members of the founding family typically play in the decision-making process for expansions and acquisitions.

Second, new antitrust enforcers are likely to focus increasingly on the size of companies and on business relationships that may not previously have attracted scrutiny. For example, the FTC recently rejected the 2020 vertical merger guidelines that provided businesses with some certainty regarding potential acquisitions within their own industry.

Similarly, antitrust regulators have indicated that they will pay particular attention when large companies in an industry seek to purchase smaller, nascent competitors that may be positioned to disrupt an industry. The agencies also have signaled that they intend to police large companies for “self-preferencing” a subsidiary’s product over that of a competitor or for performing intermediary functions. Indeed, many Asian conglomerates have had their subsidiaries perform complementary functions in their own supply chains for self-sufficiency and compatibility.

Third, the agencies have committed to increased numbers of investigations. The FTC has made it easier for agency staff to open investigations and approved novel investigative theories that focus on whether a company’s conduct harms other businesses, regardless of whether it harms consumers.

Finally, the agencies will have a laser focus on labor enforcement issues. The end of the last administration brought the first-ever indictment for wage-fixing and the first-ever indictment for an agreement not to poach employees. The Biden administration is likely to continue these efforts and expand them to other restrictions on employee mobility, such as noncompete agreements.

### Steps for Asian Companies to Take to Mitigate Risk

Asian companies should take three steps to mitigate the risk of these new U.S. enforcement trends.

1. Act now to redesign and tailor compliance systems to appropriately calibrate risk, in a pandemic world, regarding customer/competitor interactions and hiring practices. For example, companies should evaluate their use of ephemeral messaging, place controls in their human resources systems regarding interactions with competitors for employees, and appropriately review existing and new vertical business arrangements.
2. Consider the effect of the new antitrust environment for strategic acquisitions on a company's growth strategies. Companies should consult with counsel with significant government experience when deciding whether to purchase instead of partner.
3. Recognize that increased investigative activity creates risks regarding disclosure of internal documents even when a company is not the subject or target of an investigation. Companies should make sure that their workforces understand those risks in their daily operations.

The effect of changes in the U.S. antitrust environment are not limited to companies that primarily operate in the U.S., but rather affect all companies with business operations, affiliations, or partners in the U.S. Asian companies should prepare for the risks of these enforcement efforts.

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