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How Biden's Competition Order Affects The Antitrust Agencies

By **Matthew Perlman**

Law360 (July 15, 2021, 5:50 PM EDT) -- President Joe Biden put competition issues at the forefront of his administration's agenda with an executive order July 9 seeking a change in course after what he called a 40-year "failed" experiment in lax enforcement, imploring the FTC and DOJ to be more active in challenging deals and calling for use of other tools to promote competition.

Biden's remarks before signing the order laid out in sweeping rhetoric a view that decades of corporate consolidation have led to a few large winners in many sectors of the economy, placing blame on past administrations from both parties and on under-enforcement of the antitrust laws.

The order directs agencies across the federal government to implement regulations aimed at making markets more competitive and encourages the Federal Trade Commission and Department of Justice to step up their enforcement efforts. It also singles out specific industries for action, including agriculture, prescription drugs and technology, and spotlights labor issues that can arise with consolidation.

"Let me be very clear," Biden said at the White House Friday. "Capitalism without competition isn't capitalism; it's exploitation. Without healthy competition, big players can change and charge whatever they want and treat you however they want."

The move, and the speech, come at a time when there's already a groundswell of attention on antitrust issues, particularly surrounding Big Tech, with the DOJ and FTC already pursuing landmark monopolization cases against Google and Facebook, respectively.

Congress is also mulling a spate of legislative changes that would give enforcers new tools to take on technology giants and various forms of corporate consolidation, following a sprawling House subcommittee probe of Amazon.com, Apple, Facebook and Google last year.

Reactions to the order were swift and varied, with consumer groups, advocates for robust enforcement and trade associations from industries that stand to benefit from the scrutiny all cheering the move. Other groups, like the U.S. Chamber of Commerce, said the effort was based on the "flawed belief" that our economy is over-concentrated and called the claims "out of touch with reality."

"Our economy needs both large and small businesses to thrive — not centralized government dictates," the chamber said in a statement Friday.

Ted Hassi, a partner with Debevoise & Plimpton LLP and a former chief trial counsel for the FTC, told

Law360 the executive order calls for a policy to promote competition from an angle we haven't seen in a long time. That angle, he said, is very focused on wages and labor markets and "fighting consolidation for the sake of fighting consolidation."

"It's a big deal," Hassi said, also noting that much of the order reaches well beyond traditional antitrust issues: "Are we going to see a broad rethinking of antitrust generally over the course of this presidency? When you look at the legislative proposals that are pending, it feels that way."

Paul Swanson, of counsel with Holland & Hart LLP, told Law360 that the order is more of a political message to the public than a catalyst to spur immediate government action. Many of the things it calls for would already have been pursued by the FTC and DOJ, he said.

"I think this is the first step towards getting popular political support for what will probably be more aggressive and concrete action from the administration over the next couple of years," Swanson said. "I think more than getting the government to do anything, this is a clarion call to the public to say, 'Hey, this stuff matters to you, and here's what we're going to start to do to try and address it.'"

Immediate Impact

The order's broad directive calls for the FTC and DOJ to "enforce the antitrust laws vigorously and recognizes that the law allows them to challenge prior bad mergers that past administrations did not previously challenge," according to a White House fact sheet.

But it also calls for more specific action, including a review of the joint horizontal and vertical merger guidelines, which lay out the approach the two antitrust agencies employ when reviewing mergers for competitive issues.

Horizontal mergers are those between direct competitors, and the guidance was last updated during the Obama administration in 2010. The vertical merger guidelines, covering deals between companies that do not compete directly, were updated last year.

The guidelines appear to be among the first policy areas to be impacted by the executive order, with acting Assistant Attorney General Richard A. Powers, head of the DOJ's Antitrust Division, and FTC Chair Lina Khan issuing a joint statement Friday saying the guidance will need a hard look to determine whether it is "overly permissive."

The agency guidelines are not binding on courts but are frequently cited by enforcers and private parties in litigation.

William Stallings, a partner with Mayer Brown LLP and a former section chief in the DOJ's Antitrust Division, told Law360 the process behind the 2010 revisions involved a public notice and comments that were reflected in the final document. This process helped convince courts to accept the guidance, he said, and it's not clear whether judges will be as accepting this time around.

"Legal purists will say that the courts should not look at the guidelines because they're not law; it's just a statement by one of the parties," Stallings said. "So the process does need real buy-in."

Swanson said he expected any new guidelines from the Biden administration to take a more holistic view of a merger's impact, with more of a focus on factors beyond consumer prices, especially considering the "free" services offered by many digital companies. This means the guidelines could include consideration of the personal data users provide in return for services, and losses in quality attributable to mergers.

"In short, new guidelines will likely concede that a merger is not pro-competitive and beneficial to consumers just because the merger causes the price of a good or service to fall or stay cheap," Swanson said. "Hidden, indirect costs and populist notions about consolidation will likely carry just as much weight as price effects and business synergies."

Erica S. Weisgerber, a partner with Debevoise & Plimpton, said that an update could also implement some changes to merger reviews being proposed in Congress, which include legislation that would make it easier to challenge acquisitions made by large technology companies.

"That's definitely an area that seems ripe for potential focus," she said.

FTC Impact

Biden had already signaled an aggressive approach to antitrust with the selection of Khan to serve on the FTC — and then her elevation to chair in a surprise move. Khan is known for being a progressive thinker on competition issues and has already started implementing an aggressive agenda at the commission.

Under her leadership, the commission held its first public meeting last month, which included a number of votes to help streamline the process for rulemaking and pulled back guidance restricting use of its unfair method of competition tool. She had previously written an academic paper with fellow Democratic Commissioner Rohit Chopra calling for use of the tool through rulemaking.

Biden's order on Friday outlined a number of areas where the administration believes the FTC can use its rulemaking ability, including in labor markets to address noncompete agreements and in the pharmaceutical industry to address delays to generic-drug entry. But it also said enforcers should consider rules governing data collection and rules barring unfair competition in digital marketplaces.

While there are limits to the amount of control the executive branch has over independent agencies like the FTC, Hassi said Biden's order "clearly was coordinated" with antitrust experts familiar with the agency's wish list.

"There are a number of things in the executive order that the FTC has long sought," he said.

Debevoise & Plimpton partner Michael Schaper told Law360 that the commission would likely be quite receptive to the executive order and could be emboldened to engage in rulemaking for many of the areas suggested by the White House, even though it's not required too.

"While it probably didn't need the encouragement, it will be happy to have support from the administration," Schaper said.

But support from the FTC doesn't guarantee a favorable reception in court, Schaper warned.

"The fact that the administration is behind this may not have a significant impact if and when any new rules are reviewed by the courts," he said.

Swanson said he expected at least some rules the FTC ultimately promulgates to be challenged in the courts, but when it comes to the large technology platforms, he said commissioners might have to consider whether they end up entrenching themselves "as the bad guy in the narrative" by fighting too hard.

This could result in legislation down the line, he said.

"I think there will be a point where they can't fight all these battles," Swanson said. "They're going to have to start finding workable compromises to resolve these fights."

DOJ Impact

In addition to the joint merger guidelines, the DOJ and FTC are also being asked to review joint guidance issued in 2016 for human resources professionals warning that agreements to restrict labor markets could be treated as criminal violations of antitrust law in certain circumstances. The agencies are being asked to consider revising the policy statement "to better protect workers from wage collusion."

Labor issues have been an important front for the DOJ, which is currently prosecuting its first criminal cases for wage-fixing and nonsolicitation agreements, but Stallings said the executive order showed they would continue to be a priority for the Biden administration.

The DOJ is also being asked to coordinate with other agencies to address competition issues in the transportation and banking sectors, particularly in mergers, and to review a policy statement issued in 2019 with the U.S. Patent and Trademark Office.

That statement said owners of patents that are essential to industry standards should be able to obtain injunctions when those patents are infringed. It replaced a statement the two agencies issued in 2013, which cautioned that allowing the owners of standard-essential patents to seek injunctions could harm competition.

Patent issues were a particular area of focus during the previous administration, with President Donald Trump's antitrust chief, Makan Delrahim, giving a number of policy speeches and issuing other statements urging a change in course when it comes to the intersection of intellectual property and antitrust.

But a looming issue at the DOJ is that Biden has yet to nominate someone to serve as chief of the Antitrust Division on a permanent basis. No president in modern history has taken so long to nominate an assistant attorney general for the division.

"Many of the things called for by the executive order will fall under the Antitrust Division, and the leadership, therefore, of the Antitrust Division is critically important," Stallings said. "But no nominee has been named yet."

--Editing by Philip Shea.