Competition

To live or die in DC – getting deals done amid US antitrust crackdown

Elite US law firms are stocking up on antitrust expertise as the Federal Trade Commission cracks down on enforcement. Barnaby Merrill speaks to top practitioners about the current deal landscape and the key issues for clients under scrutiny

Barnaby Merrill

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In many ways, the deal is the easy part. Financing in place, subclauses, choosing exactly the right type of pen to make things official, and there you have it – it's announced. Your company intends to acquire another company – and at a great price! You're confident this is a transaction from which the public will benefit as well. You, the buyer. Them, the seller. Any number of interested third parties. You hold these things to be self-evident – it's a good deal.

Then the phone rings. Your blood chills. There's somebody you forgot to ask.

The Federal Trade Commission. Worse still – the Department of Justice agrees with them.

This is a situation that businesses have found themselves in on any number of occasions since the infancy of antitrust enforcement in the US. While trust-busting goes up and down the political agenda depending on the administration in power, the need to ensure mergers maintain competition within the wider US and global economy is something that businesses and their legal advisers are well aware of. Similarly, class actions challenging corporate behaviour, and even criminal cartel cases, are part-and-parcel of the legal fabric. However, in 2024, many parts of the antitrust world are changing. The Biden administration, and its appointees to the Federal Trade Commission (FTC) and the Department of Justice (DOJ) Antitrust Division, have fired a number of broadsides at corporate America, advancing bold and innovative theories of harm, and causing consternation in boardrooms and law firm offices alike. Success has been mixed for Lina Khan, chair

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of the FTC, and Jonathan Kanter, assistant attorney general for antitrust, but their impact has been undeniable.

Managing this new environment, as well as the demands and preferences of past antitrust regimes, is a key concern for self-respecting corporate law firms, with new and expanding antitrust teams popping up everywhere – exemplified most recently by Freshfields Bruckhaus Deringer's hire of former FTC commissioner Christine Wilson in February 2024, with similar moves – both from the agencies and private practice – occurring on a nigh-constant basis. The key question, however, is how firms can best position themselves to understand the shifting regulatory framework, and appropriately guide clients through punishing merger review processes. What is the secret ingredient to a successful antitrust practice – both in terms of legal practice and in-house expertise?

Welcome to the new age

First up – what is actually going on right now? Lawyers in private practice – with varying levels of outrage – concur that the antitrust agencies, exemplified by chair Khan, a campaigning former academic highly critical of Amazon and big tech companies, are intervening earlier and harder than ever to prevent anti-competitive behaviour among businesses, especially relating to proposed mergers.

'Promoting competition is a central part of the Biden administration's economic agenda – antitrust is officially part of Bidenomics', explains Ryan Thomas, a partner in the antitrust team at Jones Day. 'Not since the turn of the century and Theodore Roosevelt's administration have we seen a similarly concerted effort at using executive power to shape antitrust enforcement through agency guidelines, rulemaking and case law.'

This is echoed by Lindsey Champlin, the vice chair of Latham & Watkins' global antitrust and competition practice: 'US regulators under the Biden administration have taken the President's executive order on "a whole-of-government approach" to antitrust enforcement to heart, and we've seen them: attempt to leverage every tool in their arsenal, dust off statutes that haven't been enforced in decades, litigate aggressively, and take an expanded view of their role to maximise enforcement.'

The youngest FTC chair in history at only 32 years old upon her confirmation, Khan, alongside AAG Jonathan Kanter (an experienced antitrust adviser at firms including Paul, Weiss, Rifkind, Wharton & Garrison (Paul Weiss) and Cadwalader, Wickersham & Taft), has been active in blocking proposed mergers, including a record number of blocks in 2022, alongside attacking anti-competitive behaviour in the healthcare space, seeking to investigate the likes of Facebook and Amazon on antitrust grounds, and advancing arguments into novel areas of social welfare, particularly labour, with the FTC pushing to ban non-compete and no-poach agreements on competition grounds.

This has led to criticism, even from those more sympathetic to the administration's broad aims, with the deployment of antitrust law to attempt to right social wrongs, particularly in the labour space, causing concern for lawyers, as well as a tendency towards 'litigation over legislation', with the FTC in particular pushing for judicial enforcement of its stated aims in the absence of Congressional action.

'We have seen a step-change increase in antitrust enforcement during the Biden administration,' says Craig Minerva, a partner at antitrust boutique Axinn, Veltrop & Harkrider (Axinn).

'In some instances, DOJ and FTC have repealed longstanding prior guidance and indicated that new guidelines are not planned, instead simply informing companies and their counsel that enforcement decisions will be made on a case-by-case basis', explains Thomas. 'FTC chair Khan and AAG Kanter have hit reset on antitrust enforcement across the board, including in M&A (eg, releasing new, more aggressive merger guidelines) and litigation (eg, bringing several once-in-a-generation monopolisation cases against tech companies).'

'The agencies' track record in court has been mixed,' notes Champlin. 'The government has succeeded in blocking certain transactions and obtaining guilty pleas and consent decrees, while failing in other instances.'

Land of confusion

The broad picture, reported by practitioners, is that of a less predictable environment – while the systems and procedures remain the same, the willingness of the agencies to ignore established precedent makes advising clients more challenging, as transactions that were previously nodded through under successive administrations – Democratic and Republican – instead face renewed scrutiny in the form of second requests and formal legal challenges.

As such, practitioners have to deal with dual pressures – the economic imperative of clients to get deals done quickly, and the parallel need to prepare for earlier and tougher enforcement – even as far as litigation.

How, then, do firms help clients in this environment?

One challenge is the growing awareness of antitrust and consumer protection policy – major headlines have been grabbed by the FTC and DOJ's action against deals such as Simon & Schuster's acquisition by Paramount, or Microsoft's purchase of Activision Blizzard. As such, increasingly sophisticated in-house legal teams – and the C-suite executives they report to – have their own preconceived views and ideas about the action that may be taken against them – as Thomas notes, 'one certain legacy of the Biden administration's antitrust team is that they have brought antitrust into the mainstream – company executives and boards are more sensitive to competition issues, and the media is covering the topic more regularly perhaps than at any time in the past 20-plus years.'

Lisl Dunlop, a partner at Axinn, takes a similar view: 'The expansive scope of antitrust concerns has elevated antitrust in the C-suite and the boardroom. Antitrust risk has moved beyond price-fixing and infiltrated a wide swath of a company's operations.'

Dunlop goes on to note that 'preparation is key… clients need to incorporate antitrust early in their strategic development process.'

More generally, a key issue is how firms can get clients through less predictable and more expensive processes, with agencies seeking to challenge mergers as extensively possible, and eschewing previous consent agreements.

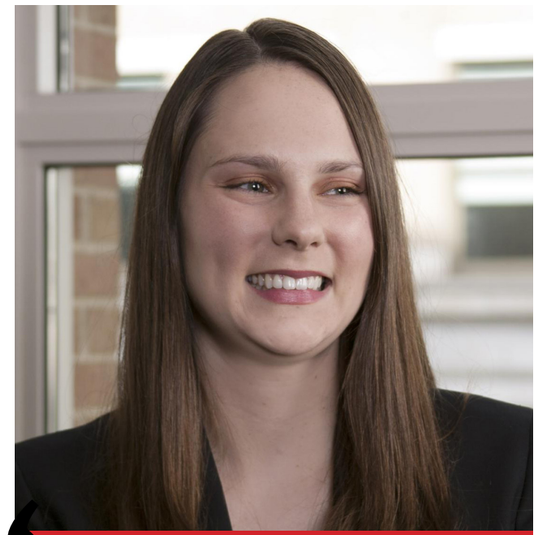
'Understanding career staff's approach to your deal and the industry in which your client operates is critical. It could enable you to short-circuit an investigation by providing staff with all of the information that you believe that staff will require to complete [their] analysis – without the need for extended review', says Scott Sher, a partner in the antitrust team at Paul Weiss.

Daniel Zach, former assistant director of the FTC and a partner in the antitrust team at Kirkland & Ellis, agrees: 'While the best strategy can vary based on the facts and options available with the agency, mergers raising the most difficult issues require you to understand as early as possible what issues enforcers will focus on and maintaining the flexibility to either convince staff of your position with effective advocacy during the investigation or, if necessary, to move the investigation to a conclusion and litigate in the time you have to consummate the deal.'

More prosaically, law firms also need to apply joined-up thinking. 'Very close coordination between the M&A and antitrust groups is increasingly important', notes Marin Boney, a partner in Kirkland & Ellis's antitrust team, 'Large deals have a lot of moving parts, and with outside dates now regularly being negotiated to 18 or 24 months in strategic deals, it's essential that the team is working closely together from well before signing until close to ensure the best possible client outcome.'

Revolving doors and secret handshakes

A broader challenge, particularly in this environment, then is the need for firms to see around corners and be able to demonstrate to prospective clients that they have the requisite experience to navigate the agencies. As well as knowledge of the law and litigation skills, many also point to the need for



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relationships with agency staff, and, in many cases, first-hand experience of working at the agencies.

This has led to many firms, particularly New York corporate shops seeking to expand their antitrust capabilities to meet renewed demand, recruiting practice leaders from senior positions at the FTC and DOJ, while lawyers continue to move between positions at the agencies and private practice at varying levels of experience.

The benefits of this so-called 'revolving door' are the source of much debate. Some, like Jeannie Rhee, a former DOJ litigator and chair of Paul Weiss's DC office, argue that agency experience, while useful, matters more from a credibility and business development standpoint, and lacks meaningful impact in practice:

'Simply adding attorneys with government experience without regard to the nature of the practice you are building and the clients you are serving can be counterproductive. Cultural fit and compatibility with clients is of paramount importance, regardless of an attorney's past experiences.'

For some, this is a simple issue of private practice experience – lawyers who are long-term agency 'lifers', or political appointees, lack the client-facing expertise of those who have weathered private practice.

For others, the issue is the type of experience – and any potential political experience. A former FTC commissioner under the lax Bush administration, for example, would have a very different perspective and expectations of how the agencies can and should operate, than veterans of the more active Trump and Biden administrations.

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Others defend the poaching of talent from the agencies – both at senior and staff levels. In particular, Minerva argues, it is crucial to offer lawyers with credibility before staff – lawyers who have existing and productive relationships with staff attorneys, including the ability to negotiate and anticipate action from political leadership – or mitigate it:

'In my own experience, having led major merger reviews at DOJ, I counsel clients with authority about how the government is likely to analyse a particular issue and what types of strategies are most effective.'

This is a view widely shared. 'Agency staff, for example, may provide helpful insights about the daily blocking and tackling of running a merger review or monopolisation investigation. More senior agency officials, by contrast, may provide useful information about policy priorities, arguments that are likely/unlikely to prevail, and key decision makers at various stages of an investigation/litigation', says Thomas, while Zach points to his own experience of moving between private practice and the agencies:

'My experience managing a merger division and overseeing hundreds of reviews allows me to explain credibly to clients how the agencies will analyse each merger, what theories they will employ, and what evidence they will find most credible… I believe the most valuable experience is gained by government officials who not only lead investigations or serve as senior managers, but those who also lead agency litigations. In this environment, those attorneys who have what I refer to as "soup to nuts" experience.'

Others point out this can be gained through private practice experience of negotiation with the agencies, and that no 'secret handshake' exists between former and current agency officials. Indeed, the 'wrong' experience – leadership in a hostile administration, or simply a less impressive record as an administrator, may set lawyers back.

The key, then, is to staff a practice with agency experience – from either perspective – and the necessary corporate law skills to ensure client expectations (and demands) can be met.

'The first question to consider about any potential move is "How would this benefit clients?"', says Thomas, 'that is true whether someone is moving from a government position, another law firm, or in-house. Understanding how a potential hire could support the clients' businesses and their legal needs is the best way to assess if that individual is likely to benefit the practice and firm.'

'Utilising government experience requires a thoughtful recruiting, on-boarding and integration plan', agrees Scott Scheele, a partner in the Kirkland & Ellis antitrust team.

The more things change…

A final reflection is the prospect of political change – both in the specific case of the upcoming 2024 presidential election, and the cyclical nature of American political leadership.

First of all is the potential of a second Trump administration, and new leadership (and direction) at the agencies. Some lawyers report that their current advice to clients is simply: 'wait until November', with the likelihood that a return to the White House for Republicans would see a more relaxed dealmaking environment.

'A Republican administration, for example, could potentially adopt a less sceptical view of M&A and issue entirely new merger guidelines', suggests Thomas, while Minerva points out that 'some companies are thinking about the possibility of differential antitrust treatment in the current environment compared to a possible second Trump administration.'

Others, however, point out that the first Trump administration was much more active in the antitrust sphere than previous Republican administrations, taking a more activist, state-led conservative approach, rather than the lassez-faire Reaganite approach that had previously dominated. As such, argues Sher, changes would be more incremental than some perhaps hope.

'We always counsel our clients to expect the unexpected and to not count on changes in political leadership when considering whether to enter into a deal today. Changes in administrations, however, do bring changes in enforcement priorities, and deals that companies would not consider in this aggressive regime may be viable in different administrations, even if in the same political party'.

Any change in administration, whether to a second Biden or a second Trump administration, will see some change in leadership, and as a result, regulatory priorities. However the sentiment is that the core skills necessary for getting deals through remain the same.

'Regardless of who wins, companies and their counsel will need to be prepared for a continuation of the same, pro-enforcement policies, or for a change in approach,' says Thomas, reflecting the uncertain picture ahead of the election.

The same cold chill may run down the spine of in-house and private counsel alike regardless of the political situation in Washington DC, but this remains, at the very least, a manageable situation – providing lawyers are able to keep their heads amid swirling headlines and unpredictability. ■