

The Legal Landscape Under a New U.S. Administration

Tech in Focus: Regulatory and Litigation Risk Facing the Tech Industry Under the Biden Administration

Contributors

Renata Hesse – Co-head of S&C’s Antitrust Group; former Acting Assistant Attorney General in the Antitrust Division of the Department of Justice; former Chief of the Networks and Technology Section at the Antitrust Division; former Senior Counsel to the Chairman of the Federal Communications Commission.

Joseph Matelis – Partner in S&C’s Antitrust Group and former Chief Counsel for Innovation at the U.S. Department of Justice’s Antitrust Division

Steven Holley – Co-head of S&C’s Antitrust Group and a member of its Litigation Group

Robert Giuffra Jr. – Vice-chair of S&C and Litigation Partner

Six Key Questions

Technology companies face increasingly complex challenges when confronted with antitrust and competition issues, which are attracting more and more public attention. Interpreting laws written decades ago for new technologies and business practices requires a deep understanding of the law and of emerging technologies. As the Biden administration moves ahead, the European Union considers more sweeping powers to address competition, and private plaintiffs become more aggressive, antitrust and competition issues promise to play an increased role in the industry.

Here are six key questions to consider.

1. Broadly speaking, what can we expect the Biden administration to do in antitrust enforcement against tech companies?

Although we’re at a very early stage, we expect there will be a big focus on technology cases and matters. The pending monopolization cases against Google, filed by the U.S. Department of Justice and State Attorneys General, and the Federal Trade Commission action against Facebook, will continue and may well expand in focus. We may also see monopolization cases against other tech companies brought by the DOJ, the FTC or State Attorneys General.

SULLIVAN & CROMWELL LLP

We expect antitrust enforcement with a sharper edge. For instance, the prior administration cleared a four-to-three transaction in the T-Mobile-Sprint transaction. Clearance for similar transactions may be harder to achieve in the Biden administration.

In concentrated industries, we may see regulators focused on nascent competition or so-called killer acquisitions. These are acquisitions by large companies of small companies that don't appear to have horizontal overlaps but that increase the size and scope of the acquiring company. In the past, antitrust agencies often cleared these deals because it's difficult to assert a theory of harm. The enforcement agencies under the Biden administration may continue developing new economic and legal theories enabling them to block acquisitions that historically may not have raised concern.

Taking a global view, enforcement authorities and legislatures in other countries and regions—including the European Commission, the German Parliament, the UK's Competition and Markets Authority, the UK legislature and authorities in Australia—are looking at expanding their ability to reign in big tech. We expect U.S. agencies will increasingly coordinate with enforcement authorities around the globe and will look to, if not emulate, the tougher enforcement environment in Europe.

2. What do the government lawsuits against Google tell us about likely enforcement strategies?

Three significant actions have been filed against Google, one by the Department of Justice, one by a group of 38 State Attorneys General and a third by another group of State Attorneys General led by Texas. These cases all focus on monopoly maintenance theories of harm, which are fundamentally the same theories the government used against Microsoft years ago. They claim that Google has allegedly taken actions that thwart the development of competitors in an effort to maintain its significant position in search advertising and related markets. A trial in the DOJ case is not scheduled until 2023, suggesting that the allegations may evolve as discovery takes place over the next few years.

It's also notable that State Attorneys General from both the Democratic and Republican parties brought action, reflecting broad concern with large tech companies.

3. What do the enforcement actions against Facebook tell us?

Facebook is facing a lawsuit by the FTC and a separate action by a bipartisan group of State Attorneys General. In those cases, the authorities are focusing on mergers that Facebook did years ago – its purchase of WhatsApp in 2014 and of Instagram in 2012. This raises the question of how often the government will examine mergers retroactively.

It's particularly interesting that the FTC is challenging past acquisitions of companies that were very small at the time. This indicates an increased focus on nascent competition, perhaps in response to criticism that the government should have taken action against these acquisitions when they happened.

These cases also raise questions about potential remedies. Industry participants through the tech ecosystem face serious repercussions and potential opportunities if injunctive relief changes long-standing practices.

4. What might Congress do?

Last year, the House Subcommittee on Antitrust, Commercial and Administrative Law issued a lengthy report about the four largest U.S. tech companies: Apple, Amazon, Google and Facebook. After live hearings with testimony by the four companies' CEOs, the committee issued a report that found very significant problems in the tech space.

Those conclusions have prompted proposed legislation, some of it very focused on the tech space. The most far-reaching proposal would, in certain categories of mergers, shift the burden to the merging parties to show the procompetitive effects of the merger. An S&C memo to clients addressing a recent proposal is available [here](#).

There appears to be growing bipartisan support for action against the technology companies. In the last days of the Trump administration, Assistant Attorney General Makan Delrahim gave a speech in which he embraced many of these ideas, including the possibility of a digital regulator and specialized antitrust courts.

5. What can some of the landmark government antitrust cases from years ago teach us about the viability of enforcement strategies?

The Microsoft cases are at least 20 years old now, but they provide an interesting perspective on the limits of antitrust litigation in controlling the behavior of large tech companies. In those actions, the district court ordered that Microsoft be broken in half, with one company focused on operating systems and the other focused on applications, but that ruling was reversed on appeal. The company's settlement with the DOJ focused on providing end users with choices involving web browsing software and media playback software, but those features remained built into Windows and are now crucial to both iOS and Android. Nevertheless, commentators credit the settlement with opening up competition to Microsoft from browser-based competitors like Google.

Numerous Microsoft competitors sued in the wake of the DOJ case. Those cases were settled for billions of dollars, but did not fundamentally affect Microsoft's business.

More generally, remedial issues in monopolization cases raise difficult, fact-specific questions that have the potential to affect profoundly many industry

6. How can tech companies targeted by multiple regulators in the United States and abroad and by private plaintiffs manage these cases to minimize their impact on the company's business?

Companies faced with these challenges need to think in a multi-dimensional way. There are several concrete lessons we've learned from past large litigation matters.

First, communication matters. It's important to have sophisticated press professionals with a consistent message who understand the political dynamics.

Be patient at the beginning and have a long-term strategy. These situations can take a long time to resolve, and so strategic choices at the outset can have repercussions for years.

As noted above, the remedial aspects of government monopolization cases have the ability to reshape industries and have far-reaching effects.

Lawyers, advisers and PR people need to understand the need for a holistic resolution and work together for that goal.

* * *

SULLIVAN & CROMWELL LLP

ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 875 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers or to any other Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future publications by sending an e-mail to SCPublications@sullcrom.com.