

## How The Election Might Affect Antitrust On Capitol Hill

By **Bryan Koenig and Matthew Perlman**

*Law360 (October 29, 2020, 5:25 PM EDT)* -- With the 2020 vote count imminent and possession of the White House in the balance, antitrust professionals are keeping a close eye on how the outcome will affect leadership at the competition agencies and the priorities of the administration and Congress.

The U.S. Department of Justice under President Donald Trump has been largely sympathetic to the justifications for major mergers, and in the name of protecting innovation it has actively defended patent holders against accusations that they've used their portfolios anticompetitively. But it has also targeted major technology companies with probes into online platforms and the new monopolization lawsuit against Google.

Former Vice President Joe Biden, on the other hand, has not staked out a position as aggressive on antitrust enforcement as some of the rivals he beat to win the Democratic nomination. But professionals say that a Biden administration could still prove an important turning point for competition policy.

"I think it will be a momentous time for antitrust," former Federal Trade Commission chair and current Hogan Lovells competition practice co-head Edith Ramirez said of a prospective Biden administration during an Oct. 20 competition policy event, even as she said she doesn't know exactly how that moment might play out.

### **An Aggressive Congress**

A groundswell of public attention on competition policy in recent years, driven at least in part by growing pushback on the power of online technology companies, could put antitrust legislation front and center for Democrats if they keep the House of Representatives and gain control of the Senate.

Many liberal lawmakers have been heavily critical of what they see as lax and overly permissive antitrust enforcement, including in decisions to clear major technology mergers over the years.

The Democratic House has shown itself highly receptive to pushing antitrust enforcement and competition legislation to gain more tools to prevent consolidation and the accumulation of market power by a handful of companies.

A key source of ideas to watch in the new Congress will be the report released in early October by Democratic staffers on the House antitrust subcommittee that accused Google LLC, Facebook Inc., Apple

Inc. and Amazon.com Inc. of forcefully clinging onto their respective monopolies.

The report also laid out a list of possible ways to tackle the market dominance of online platforms, including by overriding various judicial precedents that have made antitrust enforcement more difficult, mandating separations between different lines of business at the companies, and requiring interoperability and data portability between competing products.

Rep. David Cicilline, D-R.I., head of the Subcommittee on Antitrust, Commercial and Administrative Law, said shortly after the report's release that he expected to see legislation in the coming months to implement some of the recommendations. But he said the tech giants will fight back.

"Look, this is going to be a battle," he said. "They're going to resist these changes like you've never seen before."

Maureen K. Ohlhausen, a Baker Botts LLP partner who previously headed up the FTC, said the report is "laying the groundwork for the next Congress."

Tad B. Lipsky Jr., head of the competition advocacy program at the Global Antitrust Institute at George Mason University's Antonin Scalia Law School, argues, however, that a lot more work needs to be done before the report translates into workable policy proposals. Right now, Lipsky said, the report serves as little more than an airing of grievances that doesn't consider the full history of antitrust law.

He also said the report indicated there's some chance for bipartisan antitrust bills, but Republicans' reservations would need to be addressed.

"I think we're a long way away from any ... serious or far-reaching actions," Lipsky said.

A report from Republicans on the House subcommittee mostly embraced the majority's findings in terms of the four tech companies' dominance and the harm they've caused, but threw cold water on calls for major regulatory solutions and instead contended that the bulk of the issues can be tackled with tweaks to current law.

While the panel's more conservative members said they were open to exploring some significant reforms, the only real agreement was on boosting funding to the antitrust agencies and imposing data portability and interoperability requirements on the platforms.

On the Senate side, Republicans including Sen. Mike Lee, R-Utah, the current head of the chamber's antitrust subcommittee, introduced legislation in late October that is the latest iteration of the SMARTER — Standard Merger and Acquisition Reviews Through Equal Rules — Act. The bill would harmonize the merger review procedures at the FTC and DOJ, eliminating the commission's adjudicative process, which has been criticized as an unfair playing field in which the FTC serves as judge, jury and prosecutor. The bill would also set a deadline for Federal Communications Commission merger reviews.

A previous iteration of the SMARTER Act passed the House in 2016 but was never taken up by the Senate. Another version passed in the House in 2018 but moved no further. It's not clear if the latest efforts will see any more success.

At least one Democratic lawmaker appears more optimistic about pushing ahead with other extensive action.

The ranking member of the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights, Amy Klobuchar of Minnesota, indicated Oct. 27 that she'd be pushing an array of legislation she's introduced over the years, including a measure that would make it easier to challenge mergers by lowering the threshold for likelihood of harm that enforcers must prove. Those bills, Klobuchar said during an online competition policy event, should serve as a guidepost on what to expect from a Democratic-controlled antitrust subcommittee if the Senate flips.

Klobuchar also indicated that she intends to chair the antitrust subcommittee, stating that she would have pursued an investigation of the online platform giants had she held the gavel. "And that's what I'm hoping I'm going to get soon," she said.

The election's effect on the composition and leadership of the subcommittees in both chambers, and thus their priorities, remains to be seen. Adam Russell, press secretary for Sen. Dianne Feinstein, D-Calif., ranking member of the Senate Judiciary Committee, told Law360 that it's "a little early to discuss" committee assignments since so many factors depend on the election's outcome.

"Besides party control and the individual senators who are up for re-election, the balance of power, potential cabinet members and new committee assignments will also come into play," Russell said.

### **An X-Factor White House**

If Biden wins the presidency, however, it would still be the White House that calls the shots on enforcement, especially in appointing the head of the DOJ's Antitrust Division and a new third Democrat on the FTC, absent a major legislative overhaul. Personnel is policy, Ohlhausen noted, and who Biden picks in a hypothetical White House "will determine a lot of what the administration does."

And next to some of the other Democratic candidates, Biden "hasn't been as outspoken on antitrust," said Alexis J. Gilman, a partner at Crowell & Moring LLP and former assistant director at the FTC.

Within the FTC, Republican Commissioner Christine Wilson said, during the Oct. 20 event in which Ramirez also spoke, that dissents by the commission's two Democrats serve as a "good guidepost" for what to expect from an agency controlled by Democrats, likely indicating more enforcement cases against vertical mergers and more efforts to hold corporate executives directly accountable. And that's not all.

"I think you would see far greater horizontal merger enforcement," said Wilson, who also predicted that a Democratic FTC would bring more unilateral enforcement cases.

Biden is sure to face significant pressure from the left for more aggressive antitrust enforcement, Gilman said, but the former vice president may not be as receptive as other Democratic candidates who'd called for things like merger moratoriums during the coronavirus pandemic. "It's not as clear that he will be more aggressive," Gilman said, at least, not as aggressive as some on the left want Biden to be.

If, however, the House and Senate are both controlled by Democrats, "he may have a hard time vetoing that and moderating that," Gilman said.

FTC Commissioner Rebecca Kelly Slaughter, a Democrat, argued during the Oct. 20 event with Ramirez that Democrats are generally united on a desire to brush off old tools and be more aggressive not just in

big tech but "across the economy."

"There's a lot of common ground about how we should be doing things," Slaughter said.

Legislative prospects for an antitrust overhaul may depend, Gilman said, on a much broader prospective fight for a Democratic Senate: the fate of the filibuster the Republicans could otherwise use to kill or moderate bills. If Democrats eliminate the filibuster to pass legislation with a simple majority, "you could see broader legislation," perhaps in line with the House antitrust staff report, Gilman said.

If the GOP does manage to hold onto the upper chamber, "any approach will be more moderate," Gilman said, pointing to possibilities like greater financial resources for enforcers.

### **Agency Funding**

The limits on U.S. antitrust enforcers' resources has been an issue for years, but some see in the election one of the best chances, and perhaps stronger priorities, to put more budgetary power behind enforcement.

Slaughter emphasized last week that funding remains a major bipartisan concern.

"Everybody understands that funding is an issue," Slaughter said at the time, arguing that both parties recognize that antitrust enforcers operate on constrained financial resources.

Slaughter also noted that some of the burden comes from Congressional mandates for reports and other FTC work. "That burden on us needs to be addressed somehow," she said.

Makan Delrahim, head of the DOJ's antitrust unit, said during a virtual conference hosted by Fordham University School of Law in early October that he's been "pounding the pavement" for the last two years trying to secure a funding increase. He said the agencies are at the same resource level they were at 20 years ago but are facing increased demands due to the complexity and amount of data they have to comb through.

"The volume of information that we get in an investigation is huge, and the number of staff we have has remained the same," he said.

Delrahim also said he was pleased to see that there was bipartisan support from the House antitrust subcommittee to boost agency funding.

Ohlhausen agrees that a push to increase enforcer funding is a strong possibility in the new Congress.

"There's bipartisan support for that," Ohlhausen said.

Investigations, merger retrospectives and case litigation are all highly resource-intensive, Ohlhausen pointed out. The FTC must do that work alongside the growing number of transactions submitted for reviews that come with mandatory timetables. Without a budget increase, Ohlhausen said she's not sure how serious any calls for enforcers to do more can be taken. "You have to have more resources to do more," she said.