Reuters Legal News

Buckle up: Turbulence expected with FTC's new Democratic majority

By Mike Cowie, Esq., and James A. Fishkin, Esq., Dechert LLP

MAY 26, 2022

The Senate confirmed Alvaro Bedoya to the Federal Trade Commission on May 11, 2022, giving Democrats a majority of the five commissioners for the first time since October 2021. Commissioner Bedoya was the founder and director of Georgetown University's Center on Privacy and Technology and former Chief Counsel of the Senate Judiciary Subcommittee on Privacy, Technology and Law.

Bedoya's confirmation ends the FTC's seven-month deadlock along party lines on key enforcement and policy issues. Dealmakers and companies need to be aware that Lina Khan, who became Chair of the FTC in June 2021, now has the majority necessary to fully execute her progressive antitrust agenda.

At the top of Khan's agenda is a significant increase in merger enforcement. Khan, along with Assistant Attorney General Jonathan Kanter, is resetting merger enforcement policy. Together, they assert that merger enforcement over the last 40 years has failed, leading to excessive concentration in many industries, higher prices for consumers, lower wages for workers, and harm inflicted on small, "honest" businesses. In short, the current administration believes that an economy consisting of fewer larger businesses and more small and independent businesses is stronger, better, and fairer.

To put things in context, from the Reagan administration until President Joe Biden took office, bedrock antitrust policy at the FTC and Department of Justice across both Republican and Democratic administrations focused on the consumer welfare standard. Under the consumer welfare standard, mergers are typically only viewed as unlawful under the antitrust laws when they are likely to result in higher prices to consumers or a decrease in quality of the products or services purchased by consumers. A larger merged firm, by itself, is not considered unlawful under the consumer welfare standard.

During this period, sophisticated economic theories predicting whether a merger may harm consumers were developed and fine-tuned by academics and antitrust enforcers, embedded in the agencies' merger guidelines, and accepted by courts. Without economic evidence of likely harm to consumers or clear company documents discussing concrete plans to increase prices (i.e., "end the price wars"), the FTC and DOJ typically did not challenge a merger even if it increased a company's market share or led to higher market concentration levels.

The FTC and DOJ also weighed as a mitigating factor merger-specific efficiencies demonstrated by the merging parties, such as lower operating costs that could be passed on to consumers. In contrast, Biden administration officials have expressed skepticism that efficiencies should be considered at all.

In the past, relatively few mergers were outright blocked. The agencies preferred to resolve anticompetitive aspects of mergers where possible through targeted divestitures of offending overlapping products and services while preserving the neutral or procompetitive aspects of a transaction.

Dealmakers and companies need to be aware that Lina Khan, who became Chair of the FTC in June 2021, now has the majority necessary to fully execute her progressive antitrust agenda.

The new leadership has emphatically stated that solely using the consumer welfare standard to determine whether a merger may lessen competition misses the broader intent enacted by Congress more than 100 years ago to prohibit all mergers that lessen competition, not just mergers that harm consumers. They have stated that a merger that may harm workers and small businesses (including farmers and ranchers) is just as problematic as a merger that may result in higher prices to consumers.

The FTC and DOJ are currently in the process of a top-to-bottom rewrite of their joint merger guidelines, which describe the agencies' merger enforcement policy and methodology for challenging mergers. According to Chair Khan, these new guidelines should be completed before the end of the year. Dealmakers and business leaders contemplating a merger today need to be aware that their merger may be judged under this new set of yet-to-be-released guidelines.

Now that Khan has a firm majority supporting her, the FTC will be able to issue these new guidelines jointly with the DOJ and

Thomson Reuters is a commercial publisher of content that is general and educational in nature, may not reflect all recent legal developments and may not apply to the specific facts and circumstances of individual transactions and cases. Users should consult with qualified legal counsel before acting on any information published by Thomson Reuters online or in print. Thomson Reuters, its affiliates and their editorial staff are not a law firm, do not represent or advise clients in any matter and are not bound by the professional responsibilities and duties of a legal practitioner. Nothing in this publication should be construed as legal advice or creating an attorney-client relationship. The views expressed in this publication by any contributor are not necessarily those of the publisher.

THOMSON REUTERS®

implement their new more progressive approach to evaluating and blocking mergers.

As a preview to the new merger guidelines, Khan and Kanter have stated that they should not have to get bogged down in developing time-consuming and complex economic models to show that a merger is likely to result in higher prices. Instead, they are likely to go back to the standards and concepts outlined in the 1960s Supreme Court merger cases, which establish presumptions that certain mergers are unlawful based on relatively low market shares and market concentration levels.

The FTC and DOJ are currently in the process of a top-to-bottom rewrite of their joint merger guidelines, which describe the agencies' merger enforcement policy and methodology for challenging mergers.

Rather than the government limiting most merger challenges to those with just a few remaining significant competitors, we are more likely to see challenges to mergers that would result in much lower market shares with more remaining competitors in less concentrated markets. We are also likely to see merger challenges that are not focused solely on harm to consumers.

There have already been two recent examples where the absence of a third Democratic commissioner was key. In February 2022, the FTC challenged the merger of Lifespan Corporation and Care New England Health System, the two largest health care providers in Rhode Island. Although a unanimous FTC sued to block the merger, the commissioners deadlocked 2-2 along party lines on whether the complaint should include a charge that the merger would likely substantially lessen competition in a relevant labor market. Commissioner Bedoya likely would have voted in favor of also blocking the merger based on the labor market issue.

The FTC also extensively investigated Amazon's proposed $8.5 billion acquisition of MGM Studios even though the firms are not direct competitors. The merger was announced in May 2021 and closed in March 2022. At the time, Khan apparently did not have the necessary majority of three votes to block the merger and no formal vote occurred. Had Bedoya been on the commission at the time, the outcome may have been different.

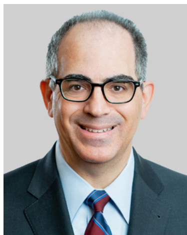
The Democratic majority may also be more likely to block mergers rather than agreeing to divestitures in settlement agreements. As a result, merging parties should consider fixing potential anticompetitive aspects of a merger upfront rather than going through an extensive and time-consuming investigation with an uncertain outcome.

Another item at the top of Khan's antitrust agenda is rulemaking. The FTC has until now avoided issuing formal rules prohibiting certain business actions under the FTC Act. With Bedoya providing a third vote, the FTC under Khan may propose rules banning certain types of behavior as unfair methods of competition. For example, following the president's request, the FTC may issue a rule banning non-compete agreements that unfairly limit the ability of workers to change jobs. A recent Treasury Department study estimated that non-compete agreements may reduce employees' wages by 15-25%.

With Commissioner Bedoya on board, Chair Khan has the necessary three-vote majority to carry out her progressive antitrust agenda. The business and legal communities need to stay tuned for further developments.

Mike Cowie and James A. Fishkin are regular, joint contributing columnists on antitrust law for Reuters Legal News and Westlaw Today.

About the authors



Mike Cowie (L) is a partner and co-chair of **Dechert LLP**'s global antitrust/competition group. He has handled high-profile, strategic projects for some of the world's largest companies. He can be reached at mike.cowie@dechert.com. **James A. Fishkin** (R) is a partner in the firm's global antitrust/competition group. He combines government and private sector experience to obtain government clearances for high-profile mergers and acquisitions. He can be reached at james.fishkin@dechert.com. The authors are based in the Washington, D.C. office.

This article was first published on Reuters Legal News and Westlaw Today on May 26, 2022.

© 2022 Thomson Reuters. This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit legalsolutions.thomsonreuters.com.