ECONOMY AND ECOLOGY 06.06.2023 | Steven Hill

A new sheriff in monopoly town

The Biden administration has started a fight against monopolies. But it remains to be seen if they can maintain and even extend their efforts

The United States under the Biden administration has been quietly engineering a new and more robust anti-monopoly policy aimed at reining in Big Tech and other large American companies. So far, its accomplishments have been modest. But the overall direction has put the US on a clear path that is closer to enforcement approaches used in the EU. A transatlantic convergence could benefit the world's economy by opening up more markets that are currently dominated by US giants. This will also likely impact mergers and acquisitions in the fast-emerging market for generative artificial intelligence.

The global tone and pace of antitrust policy and regulation were established by the US decades ago. The Reagan administration started scaling back enforcement, inspired by what has become known as the University of Chicago School, which prioritised a narrow definition of 'monopoly' based on consumer welfare and economic efficiency over trying to limit raw market power and economic dominance. The results are the emergence of giant monopoly companies that, like large mountains, create their own weather which everyone else must deal with.

With both Democratic and Republican parties captured by this philosophy, for decades, this *laissez faire* capitalism meant there have been hardly any enforcement actions brought against monopolies or mergers. Historically, this has resulted in the loss of millions of good jobs, significant wage losses of remaining employees, a loss of new business start-ups and unreasonable price increases in the airline, food, pharmaceutical and other industries. With the rise of digital media platforms – and most recently the strange science of generative AI – this has resulted in threats to democracy itself.

Capitalism without competition is not

But a new breed of legal scholars and regulators have pushed back against the Chicago School. The emerging philosophy argues that recent anticompetitive risks posed by tech giants like Google, Meta/Facebook, Amazon, Microsoft and Apple, as well as concentrated corporate power in a range of industries including airline, railroads, publishing, banks, broadband and prescriptions drugs, require government refereeing and innovative solutions. This vision has been embraced by the Biden administration as the basis for its competition policy.

'Capitalism without competition is not capitalism', said President Biden in his State of the Union address on 7 February 2023. Biden urged Congress to pass legislation 'to strengthen antitrust enforcement and prevent big online platforms from giving their own products an unfair advantage.' His call to action was the first time a president had mentioned 'antitrust' in a State of the Union since former President Jimmy Carter in 1979.

Already, Biden has signed a sweeping Executive Order on Promoting Competition in the American Economy, which included 72 action items that require more than a dozen federal agencies to more closely scrutinise and take action against corporate mergers. The administration has also appointed a team of strong enforcement-minded leaders to head the main antitrust agencies — lawyer Lina M. Khan as chair of the Federal Trade Commission (FTC) and lawyer Jonathan Kanter to head the Justice Department's Antitrust Division. Biden has also prioritised the appointment of judges sympathetic to the new anti-monopoly philosophy.

So far Khan and Kanter's tenures have included a string of moves to stop violations of anti-monopoly laws, including: filing a lawsuit against Facebook to break it up for maintaining its monopoly power by acquiring Instagram and WhatsApp (a merger which the Obama administration previously had approved); And issuing an order that requires nine tech companies, including Amazon, Facebook, Google, and TikTok, to provide data on how they collect and use information from their users.

Many of these small-looking steps have undone decades-old policies and practices, replacing them with aggressive approaches that add more oversight to corporate abuses.

A powerful signal

In January 2023, the Justice Department and eight states filed a suit aiming to break up Google's lucrative online advertising business, which would be a major intervention since advertising revenue makes up 80 per cent of Google's business. The FTC is also attempting to prevent Microsoft from gobbling up smaller firms, joining UK authorities to block its $69 bn acquisition of gaming company Activision Blizzard (a merger deal that the European Commission recently approved).

Most recently on 7 March, the Justice Department filed a legal complaint opposing the merger of JetBlue and Spirit Airlines. The federal government, including the Department of Transportation, has not opposed an airline merger since the 1980s, despite the profit per passenger in the US being three times that of Europe. Other industries are also being targeted, including some of the biggest players in pharmaceuticals, book publishing and charging networks for electric vehicles.

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Combined, Kanter's Justice Department and Khan's FTC have launched a surge of lawsuits, including cases they may not win in court, but which will send a powerful signal to these companies that a new sheriff is in town.

Meanwhile, states as well as private actors, encouraged by the Biden administration, are also using their courts. State attorney generals have filed important legal actions, including California v. Amazon, which alleges that Amazon prevents sellers from lowering their prices at other retailers, keeping prices artificially high. Texas, Colorado and Utah also have pending cases against Google.

Other agencies of the Biden administration are pushing a complementary pro-labour agenda. Recently, a regional director of the National Labor Relations Board (NLRB) ruled that Google is a 'joint employer' and therefore legally required to negotiate with its YouTube contract workers if they form a union. Google has tried to argue it is not the employer of contracted staff, but the NLRB so far has rejected Google's rationale.

All of these interventions reflect the biggest change in US anti-monopoly and pro-consumer policy in decades. But if this new approach is to survive after Biden's presidency, it needs to be locked into new laws to prevent any victories from being overturned by future courts or executive orders from different presidents. And that's where this effort so far has

stumbled.

Just a part of the cost of doing business

With the Democrats holding a razor-thin majority in the Senate and a hostile Republican caucus that knee-jerk blocks any Democratic successes, Biden and the Democrats have few legislative successes to show for their efforts.

Big Tech is not taking any of this lying down, fighting back against legislation as well as lawsuits. Google, Meta, Apple and others have hired legions of lawyers and lobbyists to fight antitrust legislation and lawsuits. They are even hiring former federal government insiders to do the job. The tech companies also have been tapping into the latest wave of anti-China hysteria, claiming that legislation would benefit Chinese rivals.

Modern antitrust laws were invented in America and for decades, the influential Chicago School promulgated its deregulatory philosophy which became dominant all over the world, including in the EU. Nevertheless, in the complete absence of US leadership, Europe's 'better than nothing' regulatory approach has provided the only global authority over competition.

The EU's Digital Markets Act, while limited in its ambition, scope and effectiveness, smartly targets systemically important gatekeeper companies that are so large that they have the ability to manipulate markets.

Despite its recent cave-in to Microsoft, the EU has tried to keep US companies in check for years with its antitrust enforcement. The European Commission has fined Google nearly $10 bn for breaching EU antitrust laws, and Meta/Facebook $725 million over the Cambridge Analytica scandal and another $414 million for other privacy violations. The European Commission is threatening Apple with billions in fines for blocking competing financial services on the iPhone in favour of its own service, ApplePay.

But for companies that raked in net profits in 2022 of $95 bn (Apple), $23 bn (Facebook) and $60 bn (Google), these 'small' fines are just part of the cost of doing business.

Nevertheless, one recent study of antitrust statutes from 125 countries found they had adopted domestic antitrust laws more similar in substance to the EU than the US. And the EU's Digital Markets Act, while limited in its ambition, scope and effectiveness, smartly targets systemically important gatekeeper companies that are so large that

they have the ability to manipulate markets.

The changes afoot in Washington DC are an important shift that has potential to be systemically important to the global economy. A transatlantic convergence could prevent predatory Silicon Valley companies from monopolizing global markets, buying up smaller competitors, stifling innovation and dominating politically in a way that undermines democracy. But it remains to be seen if the Biden administration can maintain and even extend its efforts.



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