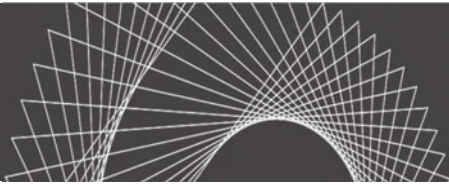


Navigating Shark-Infested Waters

Antitrust Considerations Involving Strategic M&A in Big Technology in the US and Europe



Akin Gump
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May 26, 2022

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Overview

Little question that the antitrust waters for mergers, particularly in technology, have become more dangerous in the U.S. and EU

- **Murky Waters Ahead:** We seem to be at the start of the biggest policy shift in antitrust enforcement in 20+ years
- **Swimming with Sharks:** We expect...
 - More aggressive antitrust enforcement
 - New theories of harm
 - Less predictable outcomes



Antitrust Has Made its Way to Global Prominence



"I'm...commit[ting] the federal government to full and aggressive enforcement of our antitrust laws. No more tolerance for abusive actions by monopolies. No more bad mergers that lead to mass layoffs, higher prices, fewer options for workers and consumers alike." – President Biden (Jul. 9, 2021)



"We have made ambitious proposals in [the digital market] the last year. To contain the gatekeeper power of major platforms; To underpin the democratic responsibility of those platforms; To foster innovation; To channel the power of artificial intelligence. Digital is the make-or-break issue. And Member States share that view. Digital spending in NextGeneration EU will even overshoot the 20% target. That reflects the importance of investing in our European tech sovereignty. We have to double down to shape our digital transformation according to our own rules and values"
President von der Leyen (Sept. 19, 2021)

3

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Murky Waters Ahead, Particularly for Big Technology

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4

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Federal Trade Commission

Democrat-Aligned



Republican-Aligned



"We need to acknowledge that our approach [to merger enforcement] has missed too many transactions that ultimately did substantially lessen competition and spur undue consolidation—contributing to markets now suffering from a lack of dynamism."^{**}

Source: *Statement by FTC Chair Lina Khan, May 6, 2022.

FTC Democrats' Philosophy:

- Antitrust enforcement has been too lax, leading to concentrated markets
- Generally hostile towards concentration
- Particularly hostile towards big tech and pharma

5

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Department of Justice, Antitrust Division

"I've been a strong proponent of vigorous antitrust enforcement in the technology area, among others"



- Like FTC Chair Khan, Kanter is a Big Tech detractor and advocates for more enforcement
 - Rumored architect of case against Google
 - Public critic of consumer welfare standard
- Unlike Chair Khan, Kanter's resume is more conventional
 - Started career at FTC
 - 20+ years in private practice
 - Represented Microsoft, Yelp, Uber, among other technology companies
- DOJ may be more constrained than FTC in pushing legal boundaries

Source: Senate Committee on the Judiciary, Oct. 6, 2021.

6

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