

Recent merger challenges show DOJ and FTC focus on nascent competition

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Concern about protecting “nascent” competition is a hot topic in the antitrust world. In particular, enforcement authorities and others are expressing heightened interest in acquisitions of small emerging competitors or potential competitors that could represent a serious future threat to dominant incumbent firms. Recent merger challenges by both the Department of Justice, Antitrust Division (“DOJ”) and Federal Trade Commission (“FTC”), as well as other enforcement authorities outside the United States, have brought issues relating to elimination of nascent competition to the forefront.

These enforcement actions are consistent with recent agency priorities, and demonstrate the agencies’ willingness to challenge mergers—almost always a predictive enterprise even in conventional cases—on increasingly aggressive grounds. We anticipate that this focus will continue and intensify at the agencies as new Biden appointees take office. In addition, as discussed below, we expect similar trends in other jurisdictions and we note the possibility of legislative action in this area.

As a result, firms contemplating transactions should be mindful when undertaking acquisitions of smaller, arguably innovative firms, even if such firms are not currently direct or obvious competitors. Similarly, smaller firms should be cognizant of the enhanced risks of a sale to a larger industry incumbent.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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