The Antitrust Implications of the Biden Administration's Whole of Government Approach on Intellectual Property, Trade, and National Security

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Overview

The Biden Administration has embraced a comprehensive "whole of government approach" to fulfill its antitrust policy goals.[1] Historically, competition advocacy played a role in the rulemaking processes of various agencies; however, the strategic guidance issued directly from the White House in this regard is novel. This directive aligns the objectives of the antitrust agencies with the regulatory powers of other government bodies that do not typically focus on competition matters. This coordinated effort represents a shift towards a more integrated and cross-agency strategy to promote competitive practices across the entire spectrum of government operations.

The "whole of government" approach signals a move away from a focus on traditional US trade liberalization and the promotion of consumer welfare and efficiency towards the adoption of progressive competition policies and notions of fairness and equity that progressives argue have not been addressed adequately through antitrust law and the consumer welfare standard. This commentary highlights how this approach has impacted or may impact other important economic policies, namely: 1) the protection of intellectual property and promotion of innovation, 2) international trade, and 3) national security and foreign direct investment.

Intellectual Property

The thrust of President Biden's economic policy is to strengthen economic growth by bringing more output, more competition, lower prices, and broader choices to consumers.[2] The protection of intellectual property and resulting promotion of innovation should be an important tenet of such economic policy, but there continues to be unhelpful uncertainty and inconsistency in the U.S. approach towards IP policy, particularly with respect to Standard Essential Patents ("SEP"), and Fair Reasonable and Non-Discriminatory ("FRAND") commitments.

A Standard Essential Patent is a patent that has been deemed necessary for compliance with an industry standard.[3] Put another way, SEPs claim technologies that are

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[1] On July 9, 2021, President Biden issued the Executive Order on Promoting Competition in the American Economy. Since then, the Biden Administration has released several Memoranda of Understanding directing agencies to coalesce to achieve its antitrust and competition objectives.

[2] Herbert J. Hovenkamp, *President Biden's Executive Order on Promoting Competition: an Antitrust Analysis*, 64 Ariz. L. Rev. 383 (2022).

[3] Mark A. Lemley & Timothy Simcoe, How Essential are Standard-Essential Patents? 104 Cornell L. Rev. 607 (2019).

critical to an industry—everyday examples that come to mind include WiFi, USB-C, and 5G.[4] Because of their essential nature and the value that can be attained from having an essential patent, SEPs owners may agree with standard-setting organizations that adopt them to license SEPs on Fair, Reasonable and Non-Discriminatory ("FRAND") agreements.[5]

SEPs and FRAND agreements have great potential to produce economic growth in networked high-tech markets, enabling both competition and cooperation in a market.[6] However, there is tension between inventors (i.e., patent holders) and implementers (i.e., the businesses seeking to license and manufacture products using the SEP) caused by the possibility of "hold up" by SEP owners and "hold out" by implementers. Put simply, the theory of hold up is that a SEP owner will exploit the essentiality of its technology and the ability to obtain injunctive relief under 19 U.S.C. § 1337 ("Section 337") to extract supra-competitive license terms. Conversely, without the threat of an injunction, implementers may be willing to continue infringing a patent instead of coming to FRAND terms.

Both patent holdout and patent holdup are poor outcomes for the innovation economy. Competition policy plays an important role in balancing the interests of both patent holders and implementers. Over the last decade, however, antitrust enforcement policy has see-sawed, depending on the administration. Under the Obama Administration, the DOJ and Patent and Trademark Office ("PTO") released a joint policy statement that highlighted concerns over patent holdup on competition and, in turn, disfavored the use of injunctions by patent holders.[7] In 2019, under the Trump Administration, the DOJ, PTO, and National Institute of Standards and Technology ("NIST") issued a revised joint policy statement, which withdrew the Obama-era policy, swinging the pendulum to favor patent holders, in part by emphasizing that patent holders should be free to seek injunctive relief even in cases involving essential patents.[8]

In 2021, under the Biden Administration, the DOJ, PTO, and NIST released a draft policy statement, which swung noticeably in the other direction, stating that SEP holders "seeking injunctive relief in lieu of good-faith negotiations is inconsistent with the goals of the F/RAND commitment."[9] However, the 2021 SEP Draft Policy Statement never went into effect. Instead, the DOJ formally withdrew the 2019 Trump-era policy without

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[4] Shriya Ghosh, *What are SEPs and How Do They Affect Efficiency in the Tech Industry?*, N.Y.S. Sci. & Tech. L. Ctr. (May 11, 2023), https://nysstlc.syr.edu/what-are-seps-and-how-do-they-affect-efficiency-in-the-tech-industry/.

[5] Dhananjay Kumar Das, The Fairness of FRAND: Patent Pools, SSO Policies and the Way Forward (ipwatchdog.com).

[6] Hovenkamp, at 404.

[7] DOJ & PTO Policy Statement on Remedies for Standards-Essentials Patents Subject to Voluntary F/RAND Commitments, https://www.justice.gov/atr/page/file/1118381/download (January 8, 2013)

[8] The 2019 Trump Administration Policy Statement noted that that FRAND commitments should not act as a bar to any particular remedy (i.e., injunctive relief).

[9] *See* 2021 SEP Draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents to Voluntary F/RAND Commitments https://www.justice.gov/atr/page/file/1453471/dl?inline (December 6, 2021) (taking aim at "opportunistic conduct by SEP holders" using their standardized patents to attain higher compensation with the thread of exclusion).

replacing it with any formal guidance on remedies or enforcement priorities, leaving a vacuum for a clear policy position or guidance for both SEP holders and licensees engaged in negotiations. Nonetheless, the 2022 Withdrawal Statement notes that the DOJ will continue to review conduct on a "case-by-case" basis to determine if parties are engaging in practices resulting in "anticompetitive use[s] of market power" or other "abusive processes."[10]

While the DOJ and FTC are in lockstep with respect to other administration priorities, they do not seem aligned when it comes to SEPs and FRAND. For example, in one joint submission submitted by Chair Khan and Commissioner Slaughter on behalf of the FTC in a Section 337 investigation before the International Trade Commission ("ITC"), the Commissioners argue that SEP holders often seek exclusionary orders through the ITC in order to gain improper leverage during licensing, and that SEP holders should not be allowed to seek exclusion orders at the ITC while a district court reviews FRAND terms.[11] But the DOJ, PTO, and NIST never formalized that position, and instead adopted a "case by case" approach. While the FTC's position expresses concern over patent holdup, the DOJ's approach can be seen as trying to toe the line between concerns of patent holdup and holdout. On its face, that approach is not a bad thing, but parties in SEP license negotiations remain in the dark as to which conduct may raise concerns at the agencies. Given that SEPs and FRAND licensing continue to be a live issue in markets around the globe, it seems that the Administration would be well-served by coordinating across agencies—as it has with respect to labor, agriculture, healthcare, and telecommunications—to create a clear policy statement that would both clarify U.S. policy and potentially influence the adoption of sound policy in other jurisdictions.

Trade

The Biden Administration has been vocal in its intent to change the framework of how it engages in trade, moving away from an emphasis on the free flow of information and goods across borders and towards a model that utilizes trade as a vehicle to increase domestic production and improve labor and environmental standards abroad. The traditional U.S. framework has centered domestic antitrust policy around the consumer welfare standard, entered into trade liberalization agreements, and encouraged foreign nations to adopt domestic antitrust policies.[12] Since the 1980s, trade liberalization has been focused on global welfare by limiting inefficiencies and market distortions while

[10] Withdraw of 2019 Policy Statement on Remedies for Standard-Essential Patents Subject to Voluntary F/RAND Commitments (June 8, 2022).
[11] Written Submission on the Public Interest of Federal Trade Commission Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter, Inv. No. 337-TA-1240 (May 16, 2022); *see also* Biden administration and US antitrust agencies balance IP protection with competition concerns, Brad Tennis, John Ceccio, and Dillon Ostlund (Global Competition Review – August 25, 2023).
[12] Melike Arslan, *Legal Diffusion as Protectionism: the Case of the U.S. Promotion of Antitrust Laws*, Rev. Int'l Pol. Econ. 6 (2023).

optimizing consumer welfare.[13] Practically speaking, this meant lower tariffs and reduction of barriers to trade, and lower prices for consumers. The Biden Administration, however, is less concerned with tariffs and consumer impact that would be present in a traditional analysis of free trade agreements, and instead focused on "raising standards, building resiliency, driving sustainability, and fostering more inclusive prosperity at home and abroad."[14]

This approach is an explicit rejection of the way prior administrations have thought about trade and a further rejection of the consumer welfare standard in lieu of progressive competition principles that focus on equity and fairness, even if that means disadvantaging U.S. firms abroad. The shift in approach has already had a notable impact on the way America enters into trade agreements. Take, for example, the Indo-Pacific Economic Framework ("IPEF")—a framework that the Biden Administration originally proposed—and was meant to be a means to filling the void left by the abandonment of the Trans-Pacific Partnership in 2016.[15] The IPEF, rather than being structured as a traditional free trade agreement, which would require Congressional approval, is pitched as a "trade and economic initiative," with commitments from Indo-Pacific nations and the U.S. for different pillars, including trade. The most recent round of talks concluded in November 2023, with countries unable to reach an agreement on trade.[16] Per reports from the talks, there was resistance from some countries regarding conditions on improvement of labor and environmental standards, as well as the enforcement compliance regimes that would need to be implemented for such standards.[17]

While the Biden Administration has shifted its trade policy to emphasize progressive priorities, the rest of the world has not yet followed. It will be interesting to see how these novel economic and trade initiatives unfold in the coming years, especially with a potential change in administration on the horizon. In the interim, America's failure to enter into meaningful trade agreements leaves a void in the Indo-Pacific, creating an ample opportunity for another rival to exert its soft power.

FDI and National Security

To respond to escalating and evolving national security concerns, the Biden Administration and Congress have ramped up scrutiny of foreign direct investment ("FDI") in the United States, including by revising the Hart-Scott-Rodino ("HSR") premerger

[13] Shanker A. Singham & Alden F. Abbott, *Trade, Competition and Domestic Regulatory Policy* at 7 (1st ed. 2023).
[14] Ambassador Katherine Tai's Remarks at the National Press Club on Supply Chain Resilience, (ustr.gov) (June 15, 2023).
[15] David Uren, *Biden's Trade Policy U-Turn Bodes Ill for Indo-Pacific* Security, The Strategist, https://www.aspistrategist.org.au/bidens-trade-policy-u-turn-bodes-ill-for-indo-pacific-security/ (December 14 2023).
[16] Shunsuke Ushigome, IPEF trade talks stall over cross-border data flows, labor rules, Nikkei Asia (November 15, 2023).
[17] David Lawder & Ann Saphir, Yellen: Indo-Pacific trade talks need 'further work', Reuters (November 13, 2023).

notification rules to require the reporting of specific foreign subsidies, marking a significant shift in the traditional merger review process by the antitrust agencies.

The expansion of the United States FDI regime under the Foreign Investment Risk Review Modernization Act ("FIRRMA")[18] of 2018 marked a significant evolution in the United States' approach to scrutinizing foreign investments in light of rising national security concerns. FIRRMA expanded the authority of the Committee on Foreign Investment in the United States ("CFIUS") to enable it to review a broader array of transactions, including certain non-controlling investments and real estate transactions near sensitive U.S. government facilities.[19] This legislative reform was driven by growing concerns over the potential for foreign investments, particularly from strategic competitors like China, who have become the focal point of U.S. national security interests in recent years. FIRRMA's enhancements to CFIUS's enforcement powers reflect a strategic shift towards more rigorous oversight of foreign investments, aiming to safeguard critical technology, infrastructure, and data within the United States.[20]

Since the enactment of FIRRMA, the Biden Administration has taken further steps to expand the United States FDI regime. In 2022, President Biden issued an Executive Order indicating the types of transactions of particular interest to CFIUS review.[21] Shortly thereafter, the Administration issued the first-ever CFIUS Guidelines.[22] While not introducing new legal powers or mandates, the Guidelines suggest a more complex pursuit of compliance for foreign investors. They outline specific conduct, such as neglecting mandatory filings, ignoring CFIUS directives or agreements, and providing inaccurate or incomplete information that could violate CFIUS regulations.

Emboldened by FIRRMA and recent enhancements by the Biden Administration, CFIUS now intervenes in more transactions than ever before. The number of deals reviewed by CFIUS has increased from a few to hundreds, including undoing completed deals and obstructing several others. In 2022, the investigation rate for CFIUS reviews increased to 57%, meaning there was a greater-than-50% chance that transactions would not be cleared during the initial review period and would require further investigation. CFIUS also set new records in 2022 for the highest number of withdrawal-refiles in a single year, indicating significant challenges for investors in completing reviews within the 90-day statutory deadline.[23] This heightened scrutiny and intervention by CFIUS has caused greater uncertainty for corporate deal parties, and may impede transactions that would have otherwise been completed smoothly under the previous FDI regime.

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[18] 50 U.S.C.A. § 4565 (2021).
[19] Sonali Dohale, Kara M. Bambach, Cyril T. Brennan, Renee A. Latour, and Axel S. Urie, *CFIUS issues final regulations on national security review of foreign investments in the United States under FIRRMA: broader reach, mandatory filings, and limited exceptions*, Journal of Investment Compliance (2020).
[20] Amy Deen Westbrook, *Securing the Nation or Entrenching the Board? The Evolution of CFIUS Review of Corporate Acquisitions*, 102 MARQ. L. REV. 643 (2019).
[21] Exec. Order No. 14083, 3 C.F.R. 14083 (2022).
[22] United States Department of the Treasury, CFIUS Enforcement and Penalty Guidelines (2022).
[23] Committee on Foreign Investment in the United States, Annual Report to Congress (2022).

In 2023, Congress passed the Foreign Merger Subsidy Disclosure Act ("FMSDA") to[24] require the reporting of certain foreign subsidies in premerger notifications filed under the Hart-Scott-Rodino Act of 1976.[25] This legislation marks a significant shift in modern U.S. antitrust enforcement, which previously has been used to address general trade policy or foreign investment considerations. Aimed at addressing strategic trade and security issues, the FMSDA specifically focuses on countries perceived as strategic or economic threats to the U.S., including China, Russia, Iran, and North Korea.[26]

The FTC was directed to amend the HSR rules and report form in consultation with the Chair of the Committee on Foreign Investment in the United States, the Secretary of Commerce, the Chair of the International Trade Commission, the U.S. Trade Representative and the heads of "other appropriate agencies."[27] On June 27, 2023, the FTC proposed revisions to the HSR pre-merger notification guidelines to include a requirement for additional details and documents related to any subsidies a reporting entity receives from a "foreign entity of concern"[28] identified as a "strategic or economic threat to United States interests."[29] This implementing rule clarifies that foreign subsidies "can take the form of direct subsidies, grants, loans (including below-market loans), loan guarantees, tax concessions, preferential government procurement policies, or government ownership or control."[30] However, the FTC stopped short of providing a precise definition for "subsidies." The FTC intends to adopt the subsidy definition from the 1930 Tariff Act of the United States, which encompasses financial aid that supports the production, manufacture, or exportation of goods. This includes direct cash payments, tax credits, and loans with non-market terms.

While the FTC's proposed rule provided some clarity, the potential for government subsidies to serve as the sole basis for successfully challenging a merger remains ambiguous. Under the existing case law, the antitrust agencies must convince a court that a merger would significantly reduce competition. Contrary to FIRMA, the FMSDA does not appear poised to increase the number or nature of merger challenges that would not have arisen in its absence. Beyond the risk of political backlash, the most tangible effect of the legislation may be to discourage transactions involving state-owned or controlled entities reluctant to reveal their government financial support. Yet, its significance lies in

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[24] H.R. 2617, 117th Cong. (2022) (enacted), Division GG, Title II (2022), *see* pp. 1151-1512, Sections 201-202 of Title II of the Merger Filing Fee Modernization Act of 2022.

[25] 15 U.S.C. 18a.

[26] In practical terms, the FMSDA is expected to affect transactions involving Chinese companies most significantly due to China's economic strategy of pursuing growth through acquisitions and investments abroad.

[27] Title II, Sect. 201(b)(2).

[28] A foreign entity of concern is an entity identified as such in Section 40207 of the Infrastructure Investment and Jobs Act (42 U.S.C 18741(a)). In addition to other governmental and non-governmental entities flagged for national security concerns, Section 40207 defines "foreign entity of concern" to include entities owned by, controlled by, or subject to the jurisdiction or direction of, China, Russia, Iran, and North Korea.

[29] FTC Premerger Notification, Reporting and Waiting Period Requirements, 16 C.F.R. §§ 801,803 (2023).

[30] *Id*.

the explicit application of U.S. antitrust law as an instrument of national security and trade policy.