

The New Antitrust Agenda's Impact On Energy And Chemicals

By **Darren Tucker, Jason Powers and James Leader**

(January 25, 2022, 4:45 PM EST)

The Biden administration is working to shake up American antitrust enforcement with new policies and new faces in key roles at the Federal Trade Commission and the U.S. Department of Justice.

In the past year, Lina Khan took over as chair of the FTC and Alvaro Bedoya was nominated as a commissioner. Plus, Jonathan Kanter is now the assistant attorney general at the DOJ's Antitrust Division. All three are poised to implement a new, more aggressive antitrust agenda.

Private antitrust litigation activity in these sectors remained robust last year. This activity includes the September 2021 headline-grabbing \$85 million damages verdict in *Ingevity Corp. v. BASF Corp.* where a jury in the U.S. District Court for the District of Delaware ruled in favor of chemical manufacturer BASF, based on a monopolization claim.

New class action antitrust claims were filed around the country, including a claim accusing certain retailers and manufacturers of agricultural chemicals of attempting to raise prices by squeezing out new online distribution platforms.

While there are several class actions worth tracking in 2022, opinions and rulings issued in 2021 indicate that courts continue to enforce procedural requirements for class certification strictly and to block claims that attempt to use the antitrust laws to address alleged market manipulation by traders.

Increased FTC Scrutiny of Energy Industry Transactions

Prior to Khan's appointment, no senior enforcement official from either the FTC or DOJ had discussed antitrust enforcement in the energy sector for a number of years. In 2021, both Khan and new FTC Bureau of Competition Director Holly Vedova have indicated energy mergers are a top agency focus.

White House National Economic Council Director Brian Deese issued a letter to the FTC on Aug. 11 raising concerns about "divergences between oil prices and the cost of gasoline at the pump" during the 2021 summer season. Deese urged the FTC to use "all



Darren Tucker



Jason Powers



James Leader

of its available tools to monitor the U.S. gasoline market and address any illegal conduct that might be contributing to price increase for consumers at the pump."

Khan responded by lamenting that the FTC had previously "enabled significant consolidation," which may have paved the way for "price coordination and other collusive practices." Khan noted the FTC's plan to impose "prior approval" requirements to deter illegal merger proposals, including for retail gas acquisitions.

She noted plans to identify additional legal theories to challenge retail fuel deals "where dominant players are buying up family-run businesses." Khan expressed particular interest in ways by which large national chains may "restore" higher prices through collusive practices. She promised to direct her staff to investigate whether such chains are able to force their franchisees to sell gasoline at higher prices to benefit the chain over the franchisee.

In 2021, the FTC sought relief to address competitive concerns for three energy transactions but no chemicals transactions. All three cases involved the retail fuel marketing business and resulted in the FTC obtaining divestitures of overlapping facilities. As in 2020, however, the DOJ did not bring any merger enforcement actions involving energy or chemical companies in 2021.

First, on April 28, 2021, the FTC issued an administrative complaint and proposed consent order in connection with the acquisition of retail fuel outlets and other interests from Steven Buchanan and Buck's Intermediate Holdings LLC by Casey's General Stores Inc.

The complaint alleged that the acquisition would substantially lessen competition in the markets for the retail sale of gasoline and diesel fuel in certain highly-concentrated markets in Iowa and Nebraska. Under the terms of the proposed consent order, Casey's agreed to divest six retail fuel outlets, and the parties are required to provide the Commission with notice before acquiring retail fuel assets in certain locations for the next 10 years.

Second, on May 14, 2021, Seven & i Holdings Co. Ltd., or 7-Eleven Inc., acquired substantially all of Marathon's Speedway LLC's business following the expiration of the Hart-Scott-Rodino waiting period without the FTC taking action. 7-Eleven had previously entered into a proposed consent agreement with FTC staff to divest 293 retail fuel outlets, but the commissioners could not agree as to whether the agreement was sufficient.

When the parties closed the transaction and announced that they would honor the previously agreed-to divestiture commitment, the FTC's acting chair publicly condemned the decision.

An eventual consent order memorialized the original proposed agreement and added a requirement that the parties not acquire any of the divested assets without approval for five years and to provide prior notice of an acquisition of the divested assets or other identified assets in the 293 markets, plus three others, for a period of 10 years. The agency's leadership faced significant criticism from Capitol Hill and former FTC officials for its unorthodox handling of this matter.

Third and finally, on Dec. 20, 2021, the FTC issued an administrative complaint and proposed consent order in connection with the acquisition of Wheels-branded retail fuel outlets from Richard Wiehl by Global Partners LP.

The complaint alleged that the acquisition would harm competition for the retail sale of gasoline in

certain Connecticut markets by reducing the already low number of independent participants in those markets. The resulting consent order required the parties to dispose of one fuel outlet per market and obtain prior approval for certain transactions for a period of 10 years.

In addition, Berkshire Hathaway in July 2021 abandoned its proposed \$1.7 billion acquisition of Dominion Energy Inc.'s Questar Pipeline in central Utah.

In a press release, Vedova applauded the parties' abandonment of the transaction but was also unusually critical of the parties for proposing a transaction that was allegedly similar to a prior transaction the FTC had blocked.

And in January 2021, Tronox Holdings PLC. abandoned its proposed acquisition of TiZIr Titanium and Iron after FTC staff recommended that the commission challenge the transaction.

While the number of enforcement actions involving the energy and chemicals industries in 2021 was limited, publicly reported matters do not tell the full story of changes underway at the agency. For energy deals and more high-profile transactions, investigations are becoming more frequent and longer on average.

The FTC appears to be applying lower standards for the issuance of second requests, and FTC leadership appears to be increasingly overruling staff attorneys' recommendations to close investigations, and is instead directing the staff to issue second requests.

FTC staff are also investigating a wider range of concerns in merger reviews. For example, a Sept. 28, 2021, blog post by Vedova cited concerns about "an unduly narrow approach" that created historical "blind spots" in the agency's merger analysis framework.

Vedova stated that heightened scrutiny would be applied "to a broader range of relevant market realities" as a result. The blog post came on the heels of an internal memorandum, addressed to FTC staff and commissioners, in which Khan called for a "holistic approach" that considers harm to workers and independent businesses, in addition to consumers.

The FTC also implemented a number of significant changes to its merger review processes in 2021. For example:

- Withdrawing the Vertical Merger Guidelines only a year after promulgating them;
- Announcing a temporary — but still ongoing a year later — suspension of a policy that allowed for the early termination of the initial waiting period under the HSR Act; and
- Sending pre-consummation warning letters putting parties on notice that waiting-period inaction from the FTC does not constitute a confirmation of the lawfulness of the transaction.

These significant procedural changes to the HSR compliance process have added newfound uncertainty for merging parties.

State and Private Antitrust Developments

Perhaps the most significant private antitrust outcome in 2021 was the award of \$28 million in antitrust

damages, trebled to nearly \$85 million, awarded to BASF Corporation by a Delaware jury.[1] In that case, BASF alleged that the defendant, a producer of inserts for vehicle fuel vapor capture canisters, had required purchasers of its inserts to also acquire a license to a key patent from the defendant.

BASF, which produced a competing insert for the canisters, alleged that the license terms required by the defendant prevented its customers from buying any of BASF's inserts, effectively blocking its product from the market. The jury agreed, awarding \$28 million in actual damages in September. The defendant has indicated it plans to appeal the judgment.

Outside of this sizable judgment, if industry players were troubled by an active year of antitrust enforcement by federal and state governments in 2021, they could take solace in a smattering of bright spots in private antitrust litigation.

Plaintiffs who missed deadlines, failed to disclose damages models, or bungled class certification requirements faced federal courts willing to enforce rules, even when doing so meant tossing potentially valuable claims out of court or sending plaintiffs back to the drawing board.

Take, for example, the Nov. 30 2021, *Black v. Occidental Petroleum Corp.* ruling, in which the U.S. District Court for the District of Wyoming denied class certification without prejudice and vacated the class certification hearing based on a finding that the plaintiffs had used their reply brief to "do over" the class certification briefing by revising and narrowing the class definition on which they had initially moved.[2]

State courts in Pennsylvania and Texas reinforced the boundaries of antitrust law, where it abutted other substantive law. In the March 2021 *Commonwealth v. Chesapeake Energy Corp.* ruling, the Pennsylvania Supreme Court dismissed claims brought by the Commonwealth of Pennsylvania under that state's Unfair Trade Practices and Consumer Protection Law, or UTPCPL, on behalf of private landowners against natural gas exploration and production companies.

The claims, which also included antitrust remedies based on the UTPCPL, alleged that the defendants had formed a joint venture that included an oral market allocation agreement whereby the companies allotted the territories in which they would acquire oil and gas leases.[3]

The court held that the UTPCPL only encompassed claims related to "selling," meaning that the defendants' conduct in buying or leasing mineral assets could not form the basis of a valid claim. The court also held that since the activity in question was not covered by the UTPCPL, the plaintiffs could not use that statute to obtain the antitrust remedies they sought.

In the January 2021 *Western Marketing Inc. v. AEG Petroleum*, the Texas Court of Appeals' Seventh District addressed claims of antitrust, conspiracy and Latham Act violations lodged against a petroleum product distributor and its employee for allegedly making defamatory comments about the plaintiff in attempt to restrain trade and harm the plaintiff's business.[4]

The defendants argued that the claims related to the defendants' use of free speech, and invoked the Texas Citizens Participation Act, Texas's Anti-SLAPP statute, to seek dismissal. The trial court denied the motion, but the state appeals court reversed, holding that the claims related to "free speech" concerning a "good, product or service in the marketplace."

While the court held some of the alleged statements were outside TCPA protection, the court held those

remaining statements could not constitute clear and specific evidence to support the antitrust claims.

Likewise, federal courts policed the boundaries between antitrust and market manipulation law, rejecting claims based upon alleged market manipulation that reduced prices to the detriment of traders but to the apparent benefit of consumers.

In an August 2021, *Midwest Renewable Energy v. Archer Daniels Midland* ruling, the U.S. District Court for the Central District of Illinois federal court rejected such claims involving manipulation of ethanol prices at the Argo terminal on the grounds that a price reduction does not give rise to antitrust injury unless a showing of predatory pricing has been made.[5]

One significant matter for the year ahead involves online distribution of crop inputs. Starting in February 2021, retail purchasers of seed and crop protection chemicals like herbicides filed a number of cases against major manufacturers, wholesalers, and retailers of those products.

The plaintiffs accuse the defendants of conspiring to raise wholesale and retail prices by boycotting online sellers, thereby restricting public access to price information.[6]

The plaintiffs, bringing claims based on the Sherman Act and analogous state law, allege that the defendants took collective steps to stop third-party distributors from purchasing crop inputs from manufacturers and selling them online. The cases were consolidated in the *In re: Crop Inputs Antitrust Litigation* multidistrict litigation in June 2021.

Darren Tucker is a partner and chair of the antitrust practice group at Vinson & Elkins LLP.

Jason Powers is a partner at the firm.

James Leader is counsel at the firm.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] *Ingevity Corp. & Ingevity South Carolina, LLC v. BASF Corp.*, Case No. 18-01391 (D. Del.).

[2] *Black v. Occidental Petroleum*, Case No. 2:19-cv-00243 (D. Wyo.).

[3] *Commonwealth v. Chesapeake Energy Corp.*, 247 A.3d 934 (Pa. 2021).

[4] *Western Mktg., Inc. v. AEG Petroleum, LLC*, 616 S.W.3d 903 (Tex. App.—Amarillo 2021), opinion modified on reh'g, 621 S.W.3d 88 (Tex. App.—Amarillo 2021, no pet.).

[5] *Midwest Renewable Energy LLC v. Archer Daniels Midland Company*, Case No. 2:20-cv-02212 (C.D. Ill.).

[6] *In re Crop Inputs Antitrust Litigation*, Case No. 4:21-md-02993 (E.D. Mo.).