Making The Antitrust Division Competitive: A Look At Capacity As Biden Revitalizes Enforcement

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Introduction

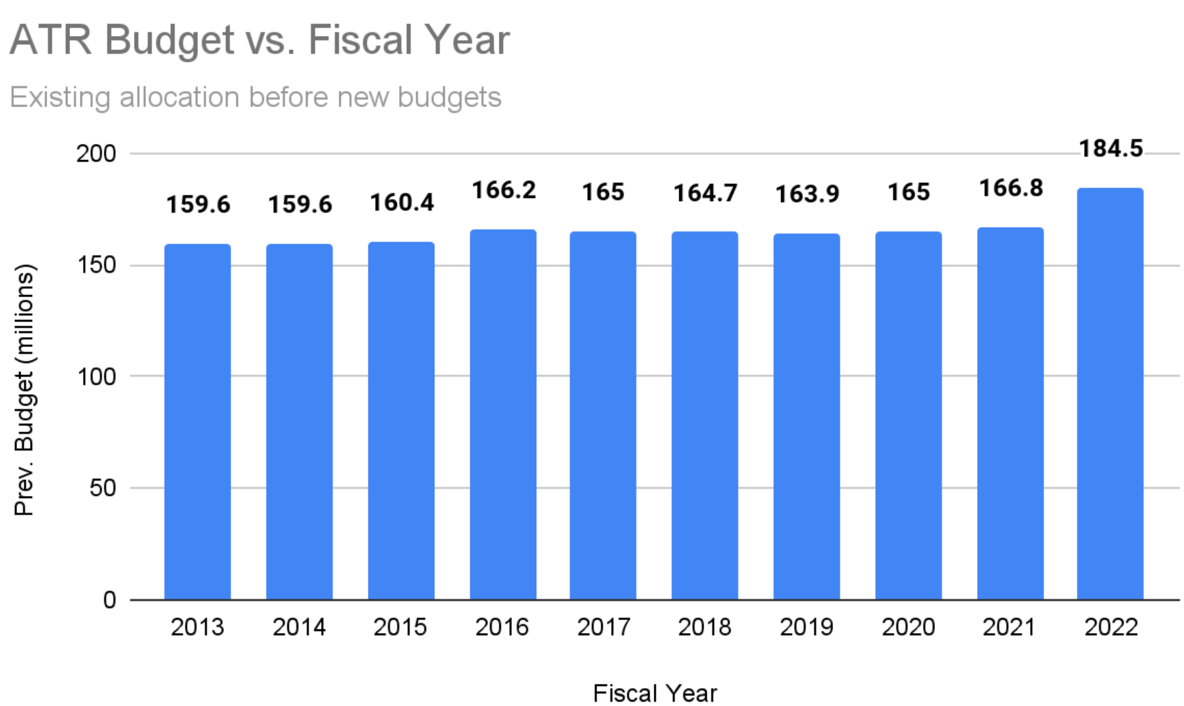
The Department of Justice's Antitrust Division (ATR) is, along with the Federal Trade Commission (FTC), the primary regulator of antitrust law and is responsible for ensuring markets' competitiveness. In that capacity, it investigates corporate consolidation and allegations of collusion and anticompetitive practices that undermine the free market. ATR is also responsible for supervising mergers and acquisitions to ensure that companies cannot establish monopolies. While both ATR and the FTC share this objective, the two divide jurisdiction based on industry. ATR also investigates and prosecutes criminal antitrust violations.

Consistent with President Biden's executive order calling for a reversal of the trend of industry consolidation, "which constrain[s] the growth and dynamism of our economy, impair[s] the creation of high-quality jobs, and threaten[s] America's economic standing in the world," the administration has moved to revitalize antitrust enforcement to "combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony."

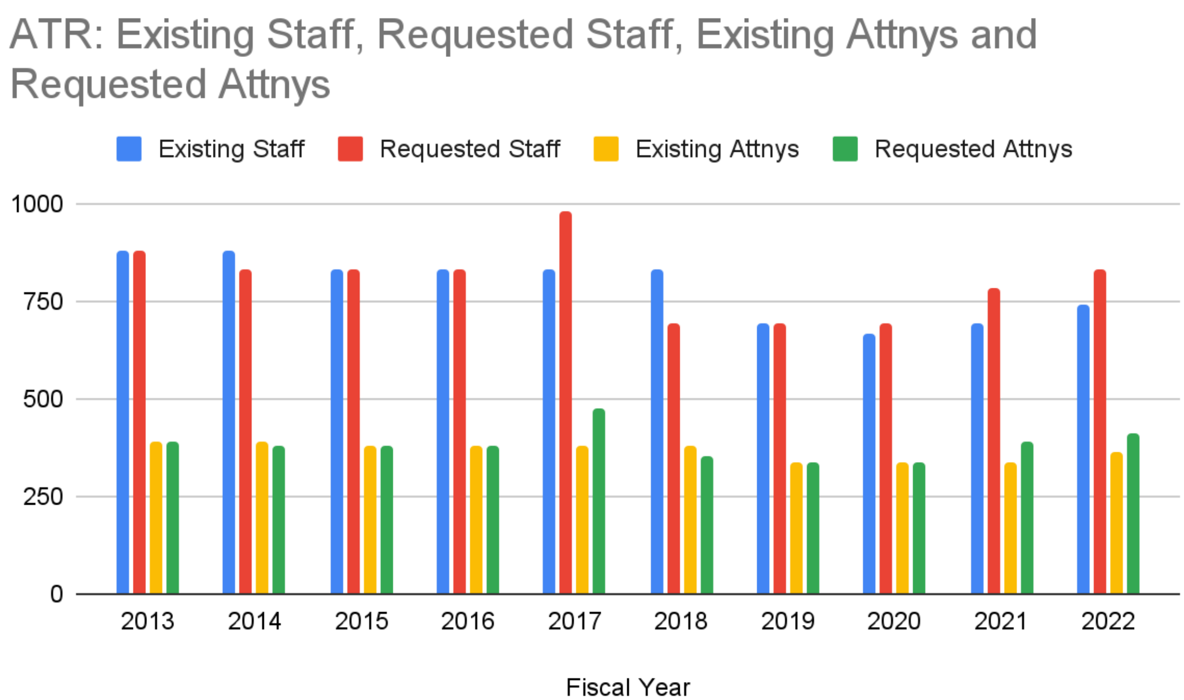
The Antitrust Division is currently headed by Assistant Attorney General Jonathan Kanter, who, along with Lina Khan at the FTC, Rohit Chopra at the Consumer Financial Protection Bureau, and Gary Gensler at the Securities and Exchange Commission, headlines the slate of corporate critics Biden has tapped to lead renewed corporate regulation and combat monopolization.

Capacity

Funding for the ATR has remained fairly flat over the past several years around $163-167 million since fiscal year (FY) 2016, with the exception of FY 2021, when the division received an 11% increase in funding up to $184 million. These numbers, and all monetary data throughout this report, are nominal, so this flatlining is not adjusted for inflation, meaning that in terms of spending power the budget actually decreased. Staffing levels, however, saw an even more significant dropoff over the same time period. In FY 2017, ATR leadership appointed by former President Obama requested a $15 million budget increase as well as boosting staff from 830 (of which 380 were attorneys) to 982 (of which 478 would be attorneys). This would have represented an 18% increase in total staff and a 26% increase in the number of attorneys. However, Trump's anti-regulatory imperative and sequestration gutted the request: the division was allocated $300,000 less than in the previous year. As a result, staff levels first stagnated then fell precipitously over the remaining years of the Trump administration, to a low of 635 total staff and 335 attorneys in FY 2020.



Source: Department of Justice Management Division Archives, Budget and Performance Summaries (2013-2014);Department of Justice Budget and Performance Summaries (2015-2022)

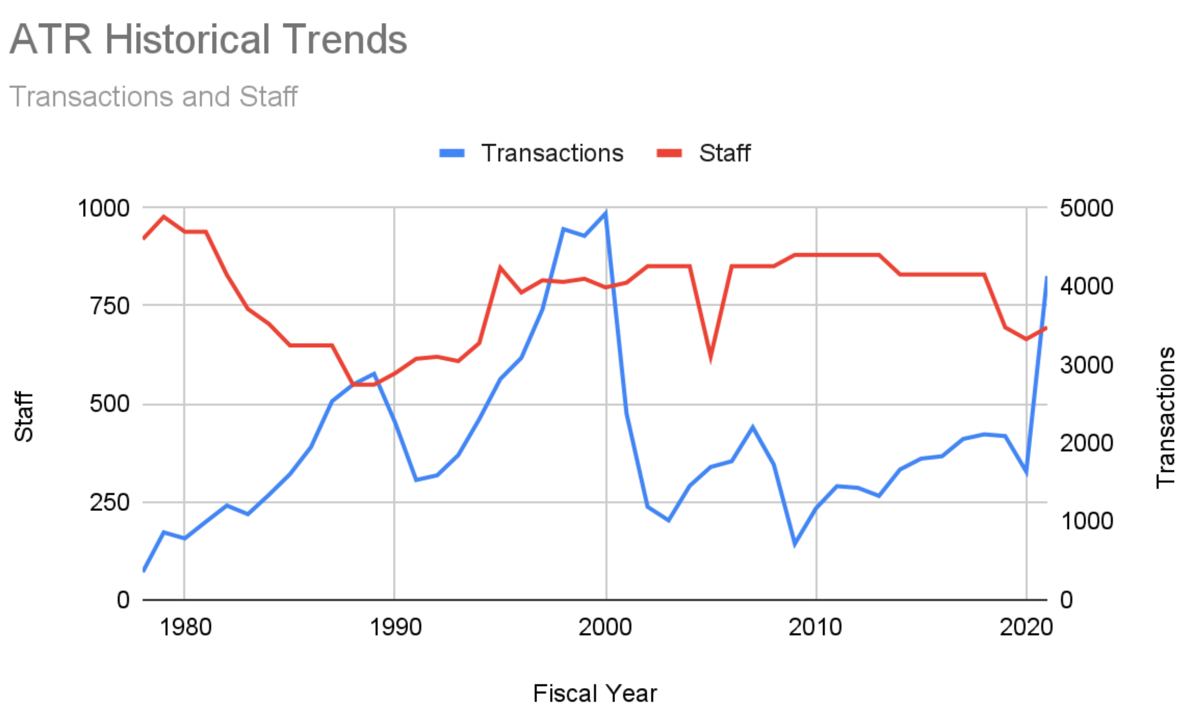


Source: Department of Justice Management Division Archives, Budget and Performance Summaries (2013-2014);Department of Justice Budget and Performance Summaries (2015-2022)

The recent 11% uptick in funding is a welcome sign, but the ATR is still less well staffed than it was at the end of the Obama administration in 2016 and even further below the level ATR requested in 2017. And while the ATR's budget and staffing floundered, corporations the division is charged with regulating went on buying sprees, creating more concentrated major industries, leading to the high prices and weak supply chains Americans deal with today.

The current capacity at ATR is out of line with recent historical levels; since FY 1995, ATR had between 780 and 880 employees every year (with the exception of a decrease in FY 2005, but the level rebounded immediately the next year) until the Trump budget cuts. Under the Trump cuts, ATR staffing levels fell to about where they were in Reagan's second term and to below 700 in multiple consecutive years for the first time since FY 1993-1994. For reference, in FY 1986 Reagan's ATR had 649 staff to manage competitiveness in an economy with a real GDP of just under $8 trillion and a population of roughly 240 million people (note that FY 1986 roughly corresponds to calendar year 1985 in these data, not 1986). In FY 2020, Trump's ATR had 665 staff to manage competition in an economy with a real GDP of $19 trillion and a population of over 328 million. It seems implausible that an economy moving more than twice as much value and comprising 90 million more people would require only an additional 16 staff to manage large swaths of industrial and commercial behavior.

Added to that, the number of corporate transactions (proposed mergers and acquisitions) reported under the Hart-Scott Rodino-Act spiked from 2020 to 2021 to a level not seen since the late 90s. According to a joint ATR/FTC press release, mergers more than doubled between 2020 and 2021. All told, the present situation is an Antitrust Division with fewer staff than they've had for most of the past 25 years dealing with the largest caseload in the past 20 years.



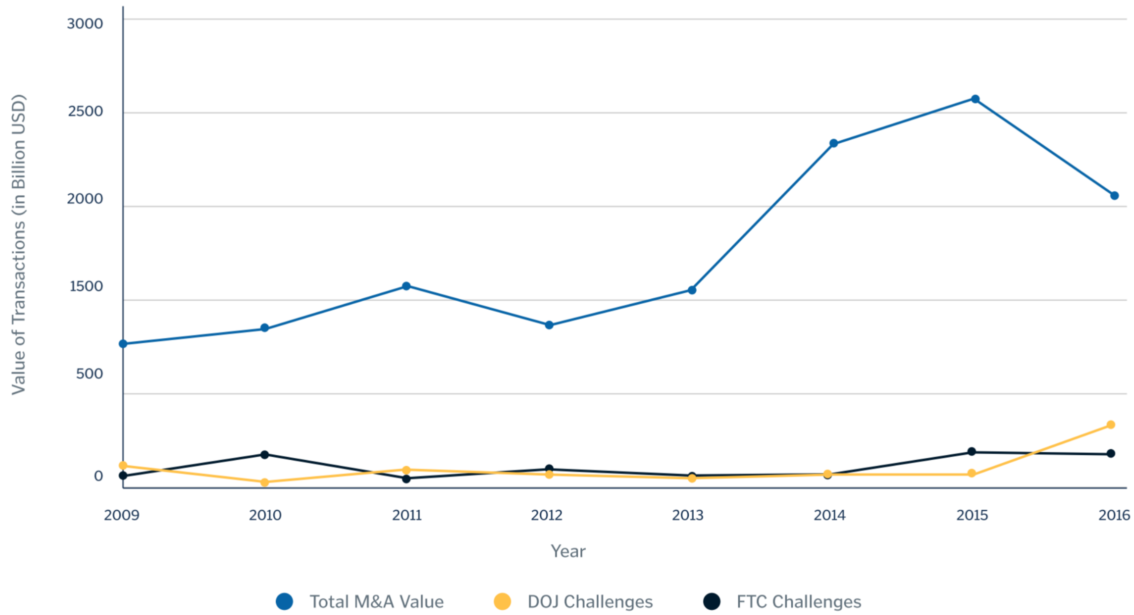
Source: Department of Justice Budget Trend Data 1975-2003; Department of Justice Management Division Archives, Budget and Performance Summaries (2005-2014); Department of Justice Budget and Performance Summaries (2015-2022); Federal Trade Commission Annual HSR Reports to Congress

The massive upswing in transactions is all the more significant because of a change in the filing requirements from an amendment to the Hart-Scott-Rodino Act. When the amended HSR Act went into effect in 2001, the minimum threshold for being required to file was raised from $15 million to $50 million and, starting in 2004, was chained to GDP growth and revised annually. This is clearly reflected in the graph above, where reported transactions dropped dramatically following the shift in guidelines. Additionally, as noted in an article published by the American

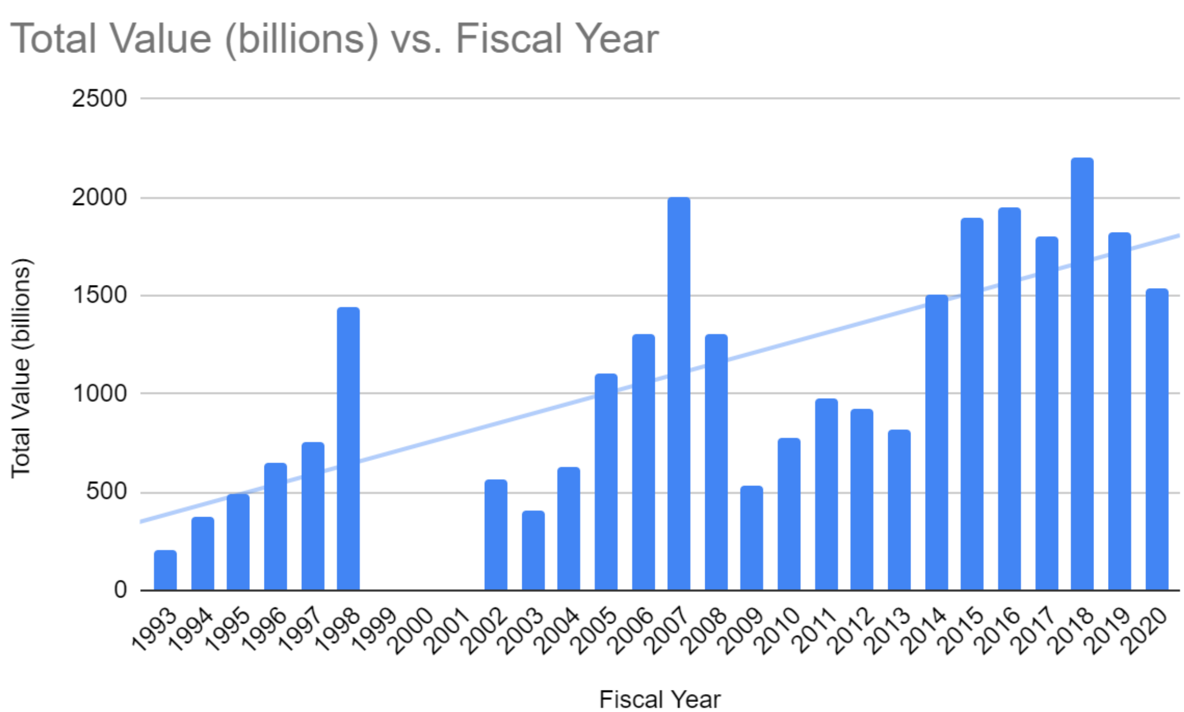
Bar Association, there is evidence that the filing requirement has increased merger activity occurring just below the threshold, meaning that the current groundswell of mergers and acquisitions is in all likelihood underrepresented. While ATR does not have to review those mergers through the Hart-Scott-Rodino process, the division may still need to get involved when mergers below the threshold undermine competitive markets. As the same piece also notes, indexing the filing threshold to GDP rather than some measure of inflation has resulted in the requirement increasing by more than is necessary to account for adjustments in valuations. As it notes, “the size-of-transaction test is now [in 2020] $94 million; the threshold would be $76.4 million had it been indexed to the Consumer Price Index.” Such a high threshold makes the sudden surge of reported transactions all the more significant.

Recently, thanks to this surge in corporate mergers and acquisitions and the Biden administration’s zeal for antitrust enforcement, ATR has more work than ever. But corporations also noticed the turning tide of antitrust enforcement, spurring a recent buying spree, particularly for big tech companies, after the appointment of Lina Khan to head the FTC. The idea is that either tech companies get away with anticompetitive consolidation before regulators are fully staffed or they create court cases that can inconvenience regulation. Whatever the explanation, Amazon, Microsoft, and Alphabet (Google’s parent company) all had more acquisitions in 2021 than in the previous decade. Hart-Scott-Rodino notifications (HSR) – which corporations file to inform ATR and the FTC of companies’ intent to merge – rose throughout 2021. This increase in consolidation is not isolated to 2021; between 2010 and 2019 the number of HSR filings increased by over 80% creating even more strain on ATR and the FTC’s limited resources.

In addition to an increase in the volume of mergers and acquisitions, there is also evidence that the complexity of those cases has increased in recent years. As antitrust regulators take on cases with higher market valuations, that indicates more complicated suits as larger corporations, by their very nature, have more assets, liabilities, and financial relationships. As a report from the American Economic Liberty Project depicts, the value of mergers has been substantially higher after 2013 than in the years preceding 2013. This aligns with a trend of growing total merger valuations since at least FY 1993.



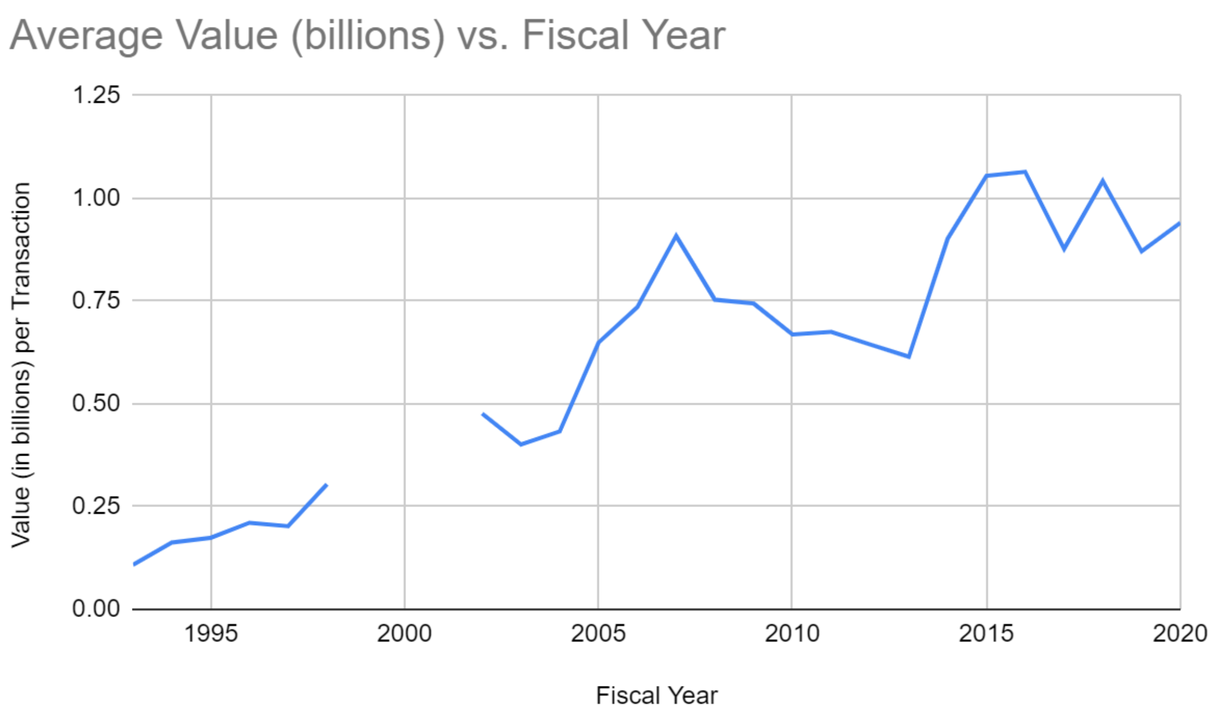
Source: American Economic Liberties Project [The Courage To Learn]



Note: Annual HSR Reports 22-24, corresponding to FYs 1999-2001 included only relative numbers (i.e. more than x) and are therefore excluded.

Source: Federal Trade Commission [Annual HSR Reports to Congress] (Reports 21, 25-43)

In addition to the total valuation of mergers and acquisitions trending up significantly over the past 30 years, the average value of transactions reported has also climbed steadily, from roughly $108 million in FY 1993 to a high of $1.06 billion in FY 2016. Since FY 2014, the average value has been between $870 million and slightly over $1 billion every year.



Note: Annual HSR Reports 22-24, corresponding to FYs 1999-2001 included only relative numbers (i.e. more than x) and are therefore excluded.

Source: Federal Trade Commission Annual HSR Reports to Congress (Reports 21, 25-43)

There is also a less obvious issue undermining ATR's capacity. Attorney General Merrick Garland is preventing Assistant Attorney General Jonathan Kanter from staffing up his division, especially in terms of Deputy Assistant Attorneys General. Effectively, Garland is getting in the way of setting up an effective leadership structure in ATR, which is prohibiting Kanter's division from properly fulfilling its mandate of regulating corporate concentration. Additionally, as the Revolving Door Project's Max Moran noted, Garland has reportedly pushed for appointing deputies under Kanter that actively oppose Kanter's vision, potentially impeding the Biden administration's antitrust agenda.

Impact on Operations

Without proper resources and personnel, ATR has had and will continue to have issues implementing serious antitrust oversight. In December 2021, ATR announced that it was delaying potential suits against Apple and Google because of a lack of sufficient funding. As the Revolving Door Project's Eleanor Eagan explained, the government is currently operating under continuing resolutions (CR) that hold funding levels from the final Trump budget constant. Given that those levels fall short of what was judged to be sufficient in 2017, and that the economy has grown and corporate concentration accelerated in the meantime, it follows that ATR is currently under-resourced to implement its agenda of more hands-on oversight under the Biden administration. Additionally, antitrust enforcement actions taken by ATR and the FTC have failed to keep pace with the increase in merger filings.

Democratic commissioners on the FTC have specified the need for additional experts to carry out investigations and litigation, noting "the amount of money the FTC spends on expert costs has risen dramatically over the last several years." As new technologies are developed, the antitrust investigations are bound to increase in complexity, necessitating additional resources for hiring more technologists, economists, and other experts. This creates a problem for ATR and FTC investigators as more and more subject matter experts are required for successful operations.

Besides investigating mergers and acquisitions, there are other actions that can be taken by a better resourced ATR. One seldomly used tool is the power to retroactively review transactions that had been allowed. This is one particular point where political support for antitrust (detailed in the next section) may be counterproductive. There is public agitation to apply heightened pressure to monopolists actively engaging in market abuses that are firmly entrenched in the media discourse: Facebook, Amazon, Google, meatpackers, oil companies, and the like. There is an emphasis on ongoing anticompetitive practices that consumers are regularly encountering. This may lead to a diversion away from other past consolidations worthy of review, simply because of political and Congressional pressure to focus on anti-competitive behavior that is still ongoing. It will increase pressure to review a select set of past acquisitions, which could decrease the breadth of cases that could be subject to retroactive review.

Antitrust regulators have other tools that go beyond mergers and acquisitions as well. ATR has authority to pursue criminal charges under the Sherman Act when companies engage in illegal anti-competitive activities. Such activities include creating artificial barriers to entry that keep competitors from entering a market and price-fixing (except in certain industries with antitrust exemptions), among other offenses. When prosecuting these violations, there are a range of consequences that can be deployed, including hefty fines, jail time, and individual charges for executives that were directly involved, as well as merely blocking companies from continuing these practices. Such actions are taken only rarely, but become more viable as more attorneys are kept on staff and more resources are available for criminal investigations.

Fines can be an especially powerful tool when they are able to be levied because they can create a positive feedback loop of additional funding. When ATR is funded sufficiently to levy them, those fines can be a significant source of revenue. And while increased staffing is needed regardless, even austerity lovers in Congress should be aware that when they allocate resources to ATR, the division might well bring in more money in fines than its new appropriations. For example, in 2017 alone ATR collected massive fines of $925 million from Citicorp, $650 million from Barclays, $550 million from JP Morgan Chase, and $395 million from the Royal Bank of Scotland. That adds up to $2.52 billion from the four largest fines assessed in a single year. That would be enough to entirely offset 12 years at the 2022 budget level requested by the division and still bring in additional revenue. While this level of revenue from fines cannot be expected to be an annual occurrence, even one fine in this range every 3-5 years could offset costs, especially combined with smaller fines.

Another key tool available to ATR in criminal enforcement is its leniency program, where a member of a cartel can gain immunity to prosecution in exchange for reporting the existence of the cartel and its other members. The Antitrust Division considers this to be its “most important investigative tool for detecting cartel[s].” This is an instance where effectiveness will increase as the threat of prosecution becomes more real. When companies view the benefits of forming cartels as greater than the risk of ATR criminal investigations, there is no reason for any cartel member to turn on the others. But raising the risk of criminal charges can tip the scales in that cost-benefit analysis towards aiding ATR investigators. And the most surefire way to increase that risk is by creating a well staffed, heavily resourced Antitrust Division.

ATR also has authority over civil non-mergers, which is a broad category that encompasses most anticompetitive activities that are neither a specific criminal offense nor an acquisition. Non-merger civil cases are under the authority of the division's Civil Conduct Task Force (CCTF) which has broad investigative and prosecutorial authority, fields complaints from the public about allegations of anticompetitive practices, and manages timelines of non-merger work to ensure that mergers do not "overtake the Division's ability to move forward our priority civil conduct investigations." ATR also has several industry-specific offices with narrower jurisdiction over specific types of goods and services. These offices tend to be tailored primarily for large, omnipresent industries like healthcare, the financial sector, and communications and media. These offices work on both mergers and civil non-mergers.

As the CCTF's mission implies, scarce staffing requires a balance to be struck between merger and non-merger civil enforcement. Given the abnormally high numbers of mergers and acquisitions, ATR could well find themselves in a precarious balancing act where a number of serious civil non-merger cases are forced to go unaddressed because of limited capacity.

One of the FTC and ATR's most commonly used tools is imposing conditions on mergers. As CFO – a publication targeted to finance executives – notes: "Under existing guidelines, the DOJ favors structural remedies (divestitures of businesses or assets by the merging firms) over behavioral remedies (restraining the merged firm's conduct or pricing authority)." In this approach, rather than actively aiming to block consolidation, antitrust regulators force companies to change the terms of the purchase agreement, forcing companies to offload certain assets, sell off subsidiaries, or exclude certain parts of the purchase. An outspoken opponent of using this mechanism, John Kwoka, is now the chief economist at the FTC and a key adviser to Chair Lina Khan, potentially indicating willingness in the Biden administration to move away from the process. Kanter has also noted his qualms about this approach. However, any move away from reliance on such practices will be limited by the resources on hand at the FTC and ATR. If regulators remain underfunded and understaffed, a large number of divestitures will be a necessity because they are less taxing in terms of labor.

The Consequences of Capacity

In addition to being unable to fulfill their mandate, capacity shortfalls at ATR have another harm: corporations knowing that ATR is unable to regulate them. Despite signals of a crackdown on anticompetitive behavior, most industries see this as a minimal threat and are largely continuing business as usual – mergers and all. Effective regulation has two key mechanisms: threat and enforcement. The FTC and ATR have been meek and underfunded for so long that their threats are no longer seen as entirely credible, which negates the deterrent effect that Biden's strong anti-monopoly stance could have.

ATR's capacity shortfalls have not gone unnoticed by businesses. As the head of mergers and acquisitions at Sullivan and Cromwell said, a handful of firms will be deterred by the risk of antitrust enforcement but "the vast majority of transactions will move forward and all but a select few will ultimately close." Lawyers at Sheppard Mullin also noted that while companies should start preparing for greater scrutiny, "inasmuch as the enforcers remain 'severely under-resourced,' they will likely have to continue to selectively pick and choose which mergers to investigate and potentially challenge." Law360 has reported that "Antitrust professionals" believe that Kanter's more aggressive enforcement will be "tempered by limited government resources." Clearly corporations are not overly concerned about Biden's antitrust enforcement.

Although antitrust enforcers are known for an aversion to costly litigation necessitated by budgetary constraints (a fact which corporations use to their advantage), increased funding would allow the agency to hire more attorneys to carry out challenges in court. If ATR were a private law firm, it would have been the 129th largest by lawyer headcount in the United States in 2018, according to data from PublicLegal. The legal team responsible for regulating competition in multibillion dollar industries – including oversight of behemoths like Apple – is not even remotely close to cracking the top 50 law firms by number of attorneys. Moreover, some of the firms that are at the top are frequently involved in representing corporations being targeted by antitrust complaints. For instance, Norton Rose Fulbright is number 3 (3376 attorneys), Jones Day is number 6 (2518 attorneys), and Kirkland and Ellis is number 7 (2307 attorneys). Even though that includes lawyers who work outside of antitrust, those lawyers could still provide help with administrative and discovery processes. BigLaw firms also recently moved to expand their antitrust outfits, anticipating more work under the Biden administration. For the same year, ATR had 335 attorneys. Even with the highest number of attorneys the division ever requested (in that 2017 budget request), ATR would still barely have been in the top 100 (96th). Increasing ATR's funding would give megacorporations and their BigLaw allies less of an edge in legal proceedings, which could go a long way in making regulators less timid.

With corporations undeterred by what they see as a fairly minimal threat of enforcement, the existing trends of consolidation of market share and by extension capital and wealth will be able to continue largely unabated. Besides this undermining a large part of Biden-era industrial policy, it will impair ATR's ability to protect consumers and small businesses. As a consequence, small businesses will continue to be exposed to market exploitation that can drive them out of the market and consumers will be left at the mercy of predatory pricing and other abuses. As ATR notes, the division can save consumers millions or even billions of dollars each year through enforcing competition standards. But when the enforcement needed exceeds the resources available, real financial harms can go unaddressed.

One way that a strong ATR is especially useful in protecting small businesses and consumers is by setting the ground for class action lawsuits. ATR investigations can at the very least provide important information on corporate behavior that plaintiffs need to build strong cases. But helping the aggrieved parties can go much further than that. If an investigation is successful in finding wrongdoing, it can often result in some level of illegal behavior becoming a matter of fact for future legal proceedings, which makes class action lawsuits far more tenable. Additionally, when criminal charges are brought by ATR, there is a built-in mechanism for those harmed by the anticompetitive abuses to recover damages. As John Connor explains in his account of the lysine pricing scandal of the mid-1990s, "When criminal guilty pleas are entered, injured private parties usually bring a civil class-action suit seeking treble damages under the Sherman Act." In that particular case, a class action suit was settled prior to the conclusion of the criminal investigation. But that itself is indicative of the benefits of enforcement; with the threat of criminal penalties looming, settling class action lawsuits becomes more appealing, since the suits will only gain leverage if they wait until the criminal penalties are meted out. This can increase the aggrieved parties' bargaining power.

Moving Forward

The Biden White House has adopted a much more stringent stance on antitrust policy than the U.S. has seen in decades. In the face of rampant inflation, the administration turned to antitrust, arguing that rising prices are, at least in part, being driven up by corporate price-gouging. Biden has issued especially pointed rebukes of the highly consolidated meatpacking, shipping, and oil industries.

Biden is not alone in this renewed opposition to corporate hegemony; there is mounting pressure from both progressives and conservatives to enforce antitrust laws more strictly. One fairly unheralded piece of legislation (at least for those who don't follow antitrust very closely) passed through the House of Representatives in the Fall of 2021: The Ocean Shipping Reform Act of 2021. This act would revise federal antitrust exemptions for ocean shipping companies and give the Federal Maritime Commission additional regulatory authority. The OSRA 2021 passed with enormous bipartisan support. Recently, several antitrust bills have been passed by the senate with bipartisan support, although House Republicans do not seem enthused by them. There is also legislation introduced by Senators Klobuchar (D-MN) and Grassley (R-IA) that targets big tech companies that leverage platforms they run to promote their own products.

There is also some good news in terms of additional funding. Senators Klobuchar and Grassley also introduced the Merger Filing Fee Modernization Act, which changes the fee structure, including making it much steeper for larger transactions. That bill passed the Senate in June of 2021. While it does not expand staff or provide additional resources directly, it will give the FTC and ATR more funding as mergers and acquisitions are filed. A version of the bill has also cleared its first procedural hurdle in the House with some bipartisan support.

This increase in appetite for antitrust enforcement is also reflected in the ATR budget request for fiscal year 2022. ATR requested an additional $16.7 million, and wants to increase its staff from 740 (363 attorneys) up to 830 (412 attorneys). Given the bipartisan support for increased scrutiny and the previous budget allocation, it is not unlikely that ATR will get most of what they have requested. However, even if they get everything they ask for, ATR will still be below the capacity levels the division felt it needed in 2017, before the recent surge in merger filings and before a president who made antitrust a signature facet of his executive economic policy. As the economy has continued to grow and become more consolidated, the level requested in 2017 is surely a significant underestimate.

There is one prominent opposition front to increasing antitrust enforcement: monopolies. Monopolists and their allies have ramped up criticism of Congressional and executive measures that would increase capacity for ATR and the FTC. While groups like the Chamber of Commerce and other megacorporation mouthpieces are against antitrust enforcement generally, and have focused their critiques on Lina Khan, going so far as to initiate a "war" on the FTC, there have also been attacks levied at Kanter. The companies most likely to be targeted by antitrust have also ramped up lobbying efforts in recent years: Amazon alone spent $18 million in 2020. Big tech companies have also launched an all-out ad blitz to try and win in the court of public opinion. However, these efforts so far seem to be falling on deaf ears. The political tide remains firmly against large corporations and, as a joint Data for Progress/Revolving Door Project Corporate Crackdown report found, the public strongly supports more aggressive antitrust enforcement.

In the summer of 2021, Democrats noticed the funding issues for both ATR and the FTC and allocated an additional $1 billion over 10 years split between the FTC and DOJ earmarked for antitrust enforcement. However, the added funding was rolled into the flagship Build Back Better Bill (BBB). Since Senator Joe Manchin (D-WV) killed BBB, the White House and Democrats have not pursued the same kind of aggressive spending increases, for antitrust and in general. One Democratic aide told Politico that they still expected some additional funding rolled into other legislation. However, the government hiring process cannot even begin until the president signs an increase in funds into law, and so the clock is ticking in order to see improved enforcement capacity during this presidential term.

Conclusion

As Eagan noted, “a bold agenda, without adequate investment in the institutions charged with carrying it out, is sure to fall short of its full potential, practical or political.” Without more resources, the Biden administration’s revitalization of antitrust regulation is doomed to flounder. There are steps that can be taken, starting with the next continuing resolution. At the very least, ATR’s funding should be increased to the level they requested for fiscal year 2022 so that they can start bringing on additional staff. If Biden is serious about cracking down on monopoly power, then making the 2017 request the baseline for ATR funding in the next continuing resolution would be an improvement. Better still, given the current political support for antitrust action, give the division more money than they asked for. Give them the $500 million that the Department of Justice would have received for antitrust enforcement under BBB. This funding should just be the start. In addition to funding, the Biden administration should ramp up hiring at ATR to make sure that there is sufficient staff to implement a strong antitrust agenda. Beyond these measures, it is important to establish a framework that will allow ATR to continue to effectively regulate market consolidation in the future. Give the division some teeth so that its threats and enforcement actions are taken seriously by corporations.