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ANTITRUST TRADE AND PRACTICE

Reflections on the Antitrust Agencies' Virtual Workshop

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Over the course of the past decade, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have ramped up their efforts to combat anticompetitive practices in labor markets. These efforts began in earnest in 2010, when the DOJ filed and settled a civil action against major tech companies alleging that they violated the antitrust laws by agreeing not to "cold call" one another's employees. Since then, the DOJ has commenced several *criminal* actions against individuals who have allegedly entered into "no-poach" agreements or engaged in wage fixing. More recently, in July 2021, President Biden signed an Executive Order that, among other things, directed the agencies to consider strengthening guidance concerning wage collusion and curtailing the unfair use of noncompete clauses in employment agreements. And as part of its Draft Strategic Plan for Fiscal Years 2022–2026, released this past month, the FTC announced plans to increase the use of provisions in merger consent orders that improve worker mobility.

On the heels of these developments, on Dec. 6 and 7, 2021, the agencies hosted a virtual workshop to discuss potential future efforts to promote competitive labor markets and worker mobility. The workshop, titled "Making Competition Work: Promoting Competition in Labor Markets," featured conversations on a wide array of topics, including labor monopsony, the relationship between antitrust law and collective bargaining in the "gig economy," and more. This article outlines the key discussions that took place during the workshop.

Day One: Labor Monopsony, Labor Perspectives, and Contractual Restraints. Assistant Attorney General (AAG) Jonathan Kanter and FTC Chair Lina Khan kicked off the workshop with introductory remarks. In his first public appearance since being confirmed, AAG Kanter presented the workshop as a key step to developing tools that will help workers realize the benefits of robust competition. To AAG Kanter's mind, the issue of labor market competition is a moral one, requiring "extraordinary vigilance" from the agencies. AAG Kanter expressed excitement at the prospect of implementing President Biden's Executive Order, suggesting that efforts to update guidance—including the 2016 Antitrust Guidance for Human Resource Professionals and the Horizontal Merger Guidelines—to improve labor competition have

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already began. Chair Khan followed up, stressing the need for the agencies' enforcement tools to keep pace with the realities of the labor economy. She added that the FTC is investigating the extent to which terms such as noncompete clauses may be unlawful. Both AAG Kanter and Chair Khan emphasized the importance of collaboration between the agencies in this space.

With the workshop underway, the first discussion of the day, "Litigating Labor Monopsony: Mergers and Unilateral Conduct," focused on challenges parties face in addressing labor-market-power issues in litigation and merger review. Two themes arose from the panel of antitrust scholars, practitioners, and policy experts. First, several panelists noted that, in contrast to the classical monopsony model, scrutiny of labor monopsony should often focus on wages and bargaining power rather than output effects. Second, several panelists agreed that concentration should not be a prerequisite to a finding of market power in labor monopsony cases, given high switching costs for workers and other factors. The panelists then explored a range of topics, including the characteristics of transactions that should prompt the agencies to investigate labor market harms, the tools the agencies might use to review the labor market effects of a transaction, the difficulties the agencies might face in scrutinizing unspecialized versus specialized labor markets, the standards courts should use to review labor-facing antitrust conduct, and the remedies parties and agencies may seek in labor market cases and merger review.

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The second discussion, "Labor Perspectives on Competition Issues," featured a panel of leaders from labor unions. Each of the panelists recounted the problems that workers in their industries face due to employer market power that, in their view, has increased substantially alongside corporate consolidation. The panelists suggested that this increase in employer market power has been accompanied by a decrease in worker bargaining power stemming from, among other things, the franchising model, restrictive contractual terms in employment contracts, misclassification of employees as independent contractors, and the fissured workplace. Some panelists proposed that the agencies—in particular, the FTC pursuant to its authority under §5 of the FTC Act—should regulate these practices. At the same time, panelists thought that Congress and regulators should explore whether independent contractors deserve an antitrust exemption that would allow them to bargain collectively without fear of antitrust liability.

The final discussion, "Contractual Restraints that Can Impede Worker Mobility," addressed the extent to which restrictive conditions of employment may affect labor mobility and, accordingly, labor competition. Noncompete clauses took center stage. Some individuals among the panel of economics scholars and legal practitioners suggested that regulators should prohibit such clauses outright as harmful to labor competition. Others suggested that such clauses should be regulated holistically, with an eye toward the benefits they afford employers seeking to protect trade secrets. The conversation also turned to the potentially anticompetitive effects of employment terms like training repayment agreements, nondisclosure agreements (NDAs), and non-disparagement agreements.

Day Two: Information Sharing, Worker Bargaining, and a 'Whole-of-Government' Approach to Competition Policy. Day two of the workshop opened with a keynote address by Prof. Joseph Stiglitz, winner of the

2001 Nobel Prize in Economics. At the start, Professor Stiglitz lamented inequality, one source of which he noted is the imbalance between the market power of corporations and the market power of workers. Labor markets, in Professor Stiglitz's view, are imperfectly competitive, and firms have developed contractual innovations to amplify their labor market power. To protect workers against labor-market-power imbalance, Professor Stiglitz suggested that the government should implement broader legislative and regulatory changes to the rules of the game, via a whole-of-government approach. Zooming in more narrowly to what the antitrust agencies can do now, Professor Stiglitz proposed more stringently scrutinizing terms such as noncompete agreements, arbitration clauses, NDAs and nondisparagement agreements. Ultimately, Professor Stiglitz remarked, companies must face the threat of government action.

In the first discussion of the day, "Information Sharing Among Employers: Harms, Benchmarks, & Lessons from Industry," a panel of legal scholars, economics scholars and policy experts discussed the harms and benefits of information exchanges among firms and the legal standards and regulations that apply to such exchanges. Panelists variously noted that, on the one hand, exchanges can allow firms to make more efficient investment decisions, avoid mismatches between supply and demand, and, if made public, promote equity. On the other hand, they can promote collusion, particularly where they remain confidential. As for legal standards, the panelists expressed some agreement that courts should move away from rule-of-reason analysis when scrutinizing information exchanges,

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though they disagreed as to whether courts should employ a quick-look or per se approach. And as for regulatory action, the panelists debated whether the agencies should abandon or adjust the safe harbor for certain exchanges outlined in the 2016 Antitrust Guidance for Human Resource Professionals.

In his afternoon keynote address, Special Assistant to the President Tim Wu characterized the present focus on the cross-section between labor and antitrust as an important antitrust moment. He raised four specific points. First, Wu suggested that reviews of mergers should focus on worker effects. Second, he expressed a hope that §2 would be enforced against monopolies and monopsonies alike. Third, he observed that imbalances of power can be clear in franchises and other areas in which large businesses control small businesses. And fourth, he noted that contracts firms employ to avoid classifying their workers as employees should be carefully examined under antitrust law.

The next conversation, "Building a 'Whole-of-Government' Competition Policy," addressed the observation in President Biden's Executive Order "that a whole-of-government approach is necessary to address overconcentration, monopolization and unfair competition in the American economy." The panel gathered individuals from diverse domains of government and policy, including the Office of Information and Regulatory Affairs, the Department of Treasury, the Department of Labor, the Economic Policy Institute and the Council of Economic Advisors. Panelists discussed the tools that government agencies may offer to promote labor competition and how better to coordinate on labor market issues going forward.

The fourth item of the day, "Fireside Chat: Worker Bargaining and the Antitrust Laws—19th Century through the Present," offered a historical look at the relationship between labor markets and antitrust law from Profs. Herbert Hovenkamp and Sanjukta Paul. Professors Hovenkamp and Paul offered various, sometimes competing, insights about the history of the intersec-

tion between labor and antitrust. In particular, Professors Hovenkamp and Paul highlighted the historical application of the antitrust laws to labor organizers, closing with a discussion both of the brevity of §6 of the Clayton Act and of other legislative attempts to create antitrust immunities for labor.

The final discussion of the workshop, "Collective Bargaining in the Gig Economy," addressed the natural evolution of this history: the relationship between labor in the "gig economy" and antitrust law. The panel consisting of economics scholars, antitrust practitioners and NLRB General Counsel Jennifer Abruzzo, questioned the extent to which §6 of the Clayton Act—which itself does not distinguish between independent contractors and employees—may protect gig-economy workers. On one side of the spectrum, Prof. Marshall Steinbaum urged the FTC to classify gig workers as employees and to opine that antitrust exemptions extend to them. On the other side of the spectrum, practitioner John Taladay urged caution, stressing that lower input costs typically mean lower prices. In his view, it is for the legislature to determine whether the tradeoff of higher prices is worth an exemption for gig-economy employees. Toward the end of the discussion, panelists explored the FTC's authority to combat misclassification under §5 of the FTC Act.

Key Takeaways

Myriad takeaways emerge from the discussions that occurred during the workshop. We focus our attention on two.

First, the agencies appear poised to issue guidance relating to the enforcement of our nation's antitrust laws in labor markets. Specifically, the agencies appear keen to update the 2016 Antitrust Guidance for Human Resource Professionals to account more fully for the antitrust significance of information exchanges about employees' wages and benefits. This includes amending safe-harbor provisions that permit certain information exchanges. The FTC also appears ready to issue guidance or take action to address: (1) the antitrust significance of requiring employees to enter into arrangements like noncompetes and NDAs; and (2) the extent to which §5 of the FTC Act offers a means to challenge misclassification and other arrangements that affect worker bargaining power.

Second, the agencies seem ready to exercise their authority under the Hart-Scott-Rodino Act to scrutinize more closely mergers they believe will have anticompetitive effects on labor markets. The agencies appear primed to amend the Horizontal Merger Guidelines to account for the effects of transactions on labor markets. Beyond that, both the FTC and the DOJ have already previewed an intensifying focus on labor markets as part of the merger-review process. As noted above, the FTC's Draft Strategic Plan includes plans to increase the use of consent orders designed to improve worker mobility. And the DOJ's early-November suit to enjoin Penguin Random House's acquisition of Simon & Schuster is proceeding in large part on the labor-centric theory that the acquisition will give Penguin Random House outsized influence over author pay.

Whether or not these predictions come to pass, one thing is clear: The decade-long trend of growing regulatory interest in addressing competition in labor markets will continue well into the foreseeable future.

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