New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 267—NO. 89
TUESDAY, MAY 10, 2022

ANTITRUST TRADE AND PRACTICE

Expert Analysis

Expect Aggressive Antitrust Enforcement and Novel Theories

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From April 5 through April 8, 2022, the Antitrust Section of the American Bar Association held its annual Spring Meeting in Washington, D.C. A prominent theme throughout the week was the role of the antitrust laws in the lives of the American public. Carol Sipperly, Acting Deputy Assistant Attorney General at the Department of Justice's (DOJ) Antitrust Division, said that the DOJ wants to create merger guidelines that can be picked up, read, and understood by anyone, while the Chair's Showcase began by asking the panelists whether antitrust can repair the world. Between these expressions of antitrust policy's infiltration beyond academia, the Spring Meeting provided agency status updates, platforms to debate the Merger Guidelines, and opportunities to address the most pressing topics in antitrust law today. Based on the events that featured representatives from the enforcement agencies, it was clear that the DOJ and Federal Trade Commission (FTC) have been attempting to meet the Biden administration's progressive antitrust agenda.

'We are not afraid to litigate'

At the Enforcers Roundtable, Assistant Attorney General Jonathan Kanter's opening remarks emphasized the Division's focus on large companies in both the merger and conduct contexts, stating, "We are not afraid to take on big companies and we are not afraid to litigate." FTC Chair Lina Khan echoed that sentiment, noting the FTC's recent successes in merger enforcement, particularly in encouraging numerous abandonments in the context of vertical challenges.

At their respective annual Agency Updates, representatives from both the DOJ's Antitrust Division and the FTC emphasized the agencies' bullish approach to litigation. In the FTC Agency Update panel, Holly Vedova, Director of the Bureau of Competition, highlighted the Bureau's focus on litigation during what she described as a "merger boom." After listing several deals that had recently been abandoned, including Nvidia-Arm, Lockheed-Airjet, and Berkshire Hathaway-Dominion, Ms. Vedova warned that the FTC is not accepting "weak" settlements and behavioral remedies, but rather the Commission expects meaningful structural relief—i.e., divestiture of a standalone, viable business. She also noted that the FTC would not engage in settlement talks unless parties agree to stop the Hart-Scott-Rodino (HSR) clock. In the DOJ Agency Update panel, Doha Mekki, Principal Deputy Assistant Attorney General for the DOJ's Antitrust Division, told

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listeners that she expected litigation from the DOJ at "four or five or six or seven times" the current amount. As with the FTC, she echoed that the Division also has a preference for structural relief over behavioral remedies, and that risky and inadequate settlements will likely be rejected more often under the current administration.

In the session titled "Merger Enforcement Trends: Forging New Boundaries?," the panel discussed the agencies' suspension of early termination of the HSR waiting period. Defense practitioners argued that the uncertainty generated by the agencies' suspension of early termination has caused significant time pressures for companies, particularly because waiting periods in the United States and other countries are not aligned. FTC Commissioner Noah Phillips criticized the suspension of early termination as an effort to "throw sand in the gears" of many proposed mergers. He asserted that granting early termination does not pose major costs to the agencies, and that the agencies' new approach raised transaction costs, disproportionately harming smaller companies, and lengthened investigations, taking resources away from areas of greater importance. Despite these concerns, he said, there is no indication that early termination will return any time soon.

The Merger Enforcement Trends panel also discussed the FTC's restoration of its "prior approval" policy. Pursuant to that policy, the FTC had in the past imposed, as a condition of its approval of certain mergers, a requirement that for at least ten years following the merger in question, the merging firms had to obtain prior approval from the agency before closing any subsequent transaction affecting the same relevant markets. Commissioner Phillips observed that the restoration of this policy is inefficient, bad for consumers, and unfair, particularly in the divestiture context as it essentially penalizes the buyer of the divested assets for assisting in the consummation of the transaction. FTC Commissioner Christine Wilson expressed the same view during a session titled "Biden's Big Moves: Antitrust Beyond Big Tech." She lamented that lengthy prior approval provisions in consent decrees are concerning in technology industries, which often change considerably or become obsolete during the life of the provision.

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Merger Guidelines

Another panel was dedicated to the Vertical and Horizontal Merger Guidelines of the United States DOJ and the FTC and the agencies' current Request for Information in connection with their effort to revise the Guidelines. In initial remarks, FTC Commissioner Rebecca Slaughter advocated for a decreased distinction between vertical and horizontal mergers in the Guidelines, favoring a single set of guidelines with a more holistic approach to relationships between market participants, while Fiona Scott Morton of Yale School of Management advocated for eliminating the Vertical Merger Guidelines entirely. Meanwhile, Jonathan Orszag, Senior Managing Director at Compass Lexecon, expressed a view that the Guidelines need not be changed drastically, but should explicitly state that mergers between competing employers can harm employees. After offering these initial views, the panel turned to specifics in the Request for Information, beginning with the Herfindahl-Hirschman Index (HHI), an empirical measure of market concentration. Ms. Scott Morton argued that the change in HHI following a proposed merger may be more revealing of competitive harm than the resulting HHI itself. Mr. Orszag argued that the current focus on HHI overlooks many potential adverse effects of mergers. He further explained that structural presumptions about certain increases in the merging parties' market share are problematic from an economic perspective because they fail to take into account differences

among industries. Former DOJ AAG Makan Delrahim, reported that, as an enforcer, his "biggest nightmare" were parties that wanted to litigate to the Supreme Court relying on presumptions that, though mentioned in the Horizontal Merger Guidelines and derived from case law, are not present in the antitrust statutes (though, Mr. Delrahim noted that he would like to see these presumptions written into the statutes). Mr. Delrahim also opined that there may be pressure from the Supreme Court's "strict textualists" to eliminate presumptions entirely and overturn *Philadelphia National Bank*, in which the Court held: "Without attempting to specify the smallest market share which would still be considered to threaten undue concentration," it is "clear that 30% presents that threat." *United States v. Phil. Nat'l Bank*, 374 U.S. 321, 363 (1963).

Labor Issues

During the Enforcers Roundtable panel, when asked about the relevance of and increased focus on labor issues from an antitrust perspective, Mr. Kanter stated that the DOJ is dedicated to prosecuting collusive agreements that suppress wages or otherwise reduce competition in labor markets. According to Mr. Kanter, competition benefits workers, and anticompetitive agreements that inhibit workers from seeking higher pay or better working conditions are antitrust problems that the DOJ needs to address. Since the Spring Meeting, however, the DOJ's attempts to bring cases under such novel theories have failed in two separate actions: the DaVita, Inc. no-poach case, and the Jindal wage-fixing allegation.

The Consumer Welfare Panel discussed labor markets as a ripe area for change in antitrust policy, discussing the extent to which the impact of challenged conduct on workers should be considered by regulators. On the one hand, Steven Salop, Professor at Georgetown University Law School, argued that courts should adopt the *Philadelphia National Bank* approach to labor restraints, asserting that this standard would treat workers as consumers and would not allow courts to consider traditional downstream consumer benefits, such as lower prices, to balance the harm to workers. Mr. Salop pointed to the concurrence in *NCAA v. Alston*, in which Justice Kavanaugh advocated that an antitrust defendant should not be permitted to balance the anticompetitive harms in one relevant market against the procompetitive benefits in another relevant market. Diana Moss, President of the American Antitrust Institute, expressed concern over regulators' historic neglect of anticompetitive conduct's impacts on workers. She compared *JBS National Beef*, where the court considered the impact of the challenged conduct on both input and output markets, with labor cases, where courts have frequently ignored the impact of the challenged conduct on workers, explaining that the only difference between the former and the latter is that the inputs in the former were cattle and not workers.

The 2022 Spring Meeting served as a forum for robust discussion and debate among antitrust enforcers, practitioners, academics, and public advocates.. From President Biden's Executive Order on Promoting Competition in the American Economy, to the dozens of proposed legislative initiatives in Congress, to the DOJ and FTC's Request for Information on the Merger Guidelines, the Spring Meeting highlighted the scores of potential changes that antitrust law faces. Exactly which of these changes will come to fruition, and whether antitrust law can repair the world, are questions that remain unanswered, but what is clear is that we can expect to see more aggressive enforcement and increased application of novel theories in the short term.