

ANTITRUST TRADE AND PRACTICE

Expert Analysis

Khan and Kanter Show No Signs of Slowing Antitrust Enforcement

Antitrust regulators had a busy September making appearances at the Georgetown Annual Antitrust Enforcement Symposium and the Fordham Competition Law Institute's Annual Conference on International Antitrust Law and Policy. Federal Trade Commission (FTC) Chair Lina Khan and Assistant Attorney General for the Department of Justice (DOJ) Antitrust Division Jonathan Kanter provided agency updates and highlighted where their current priorities lie. During his speech at Georgetown, AAG Kanter spoke primarily about enforcement stateside, and at the Fordham conference Khan and Kanter expanded their worldview, encouraging global enforcers to follow their lead and more rigorously enforce antitrust laws.

AAG Kanter told the audience at Georgetown that the DOJ has no intention of slowing enforcement efforts. "People who had never before heard of the antitrust laws are realizing the costs of underen-



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forcement." Press Release, DOJ, Assistant Attorney General Jonathan Kanter Delivers Keynote Speech at Georgetown Antitrust Law Symposium (Sept. 13, 2022) (hereinafter Kanter Keynote Release). Kanter explained that antitrust enforcement protects consumers, workers, citizens, entrepreneurs and others against the improper exercise of market power, permits markets to operate more effectively, supports economic liberty, and protects democracy. *Id.*

Kanter stated that the DOJ has ramped up enforcement efforts since he was confirmed in November 2021. The agency has challenged or obtained merger abandonment in six cases, while several other mergers were abandoned after the parties were informed that they would receive second requests. Kanter reported that the

agency is currently litigating six civil antitrust lawsuits, the largest number of civil cases in litigation in the last 20 years. And the DOJ will litigate more merger trials this year than in any fiscal year on record.

In addition, Kanter reported, the DOJ has indicted defendants in 20 criminal cases since last November—more than any time since the 1980s—and ended 2021 with 146 pending grand jury investigations. Criminal cases have been prosecuted in the construction, defense contracting, transportation, poultry, aerospace and health care industries.

At the Fordham conference, Chair Khan focused her comments on what she referred to as a "core value at the center of the FTC's antitrust agenda: the rule of law." Lina M. Khan, Chair, FTC, Remarks of Chair Lina M. Khan as Prepared for Delivery Fordham Annual Conference on International Antitrust Law & Policy, 1 (Sept. 16, 2022) (hereinafter Khan Fordham Remarks). Chair Khan directed her comments to the global antitrust community, noting that while enforcers must exercise discretion in deciding which cases to bring, they cannot ignore the text

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of governing statutes and congressional mandates. *Id.* at 4.

Global Monopolization

The focus of AAG Kanter's address at Fordham was global monopolization. He highlighted the digital economy, acknowledging that it has served as a driver of growth and innovation while identifying changes that have led "to the collection of corporate power that threatens our liberty." Press Release, DOJ, Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Keynote at Fordham Competition Law Institute's 49th Annual Conference on International Antitrust Law and Policy (Sept. 16, 2022). He called digital monopolization a global challenge and analogized attempting to restrict conduct by monopolists to a game of Whac-A-Mole: "[o]ne mole's head pops up, we focus on batting it back down, and by the time we look again two more have jumped out at us." *Id.* Kanter's aggressive solution to this never-ending game—"unplug the machine." *Id.*

Kanter offered four ways that enforcers can "unplug the monopolization machine in digital platform industries." *Id.* *First*, he said that enforcers need to examine a monopolist's course of conduct. Kanter proposes that in order to understand a monopolist's exclusionary behavior, enforcement agencies need to "understand their monopoly, what it is and what protects it," recognizing that monopolies—especially digital platform monopolies strengthened by network effects—do not self-correct. *Id.* *Second*, he suggested that, rather than focusing on past bad

acts, enforcers need to focus on the bad acts that are happening now and that are threatened to occur in the future, seeking preliminary injunctive relief "before practices or policies with exclusionary impact are able to irreparably harm the markets." *Id.* In this regard, Kanter lauded the United Kingdom's Competition and Markets Authority for its work building out its data unit and sharing its information with partner agencies. *Third*, the AAG called for the prevention of mergers that, in the words of the Clayton Act, "tend to create a monopoly." *Id.* (quoting 15 U.S.C. §18). Kanter advocated a reduced

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emphasis on whether a given merger is horizontal or vertical in nature, and an increased emphasis on whether the merger tends to enhance the acquirer digital platform's market power. Kanter also cautioned that a merger may simply be one more mole popping its head up in an exclusionary strategy, so enforcement agencies should assess whether and how a proposed merger may fit into an exclusionary course of conduct. *Id.* *Finally*, and what AAG Kanter identified as most important, he called for "effective remedies that actually breach the moats and allow competitors to reach the castle." *Id.* He suggested these could come in the

form of non-discrimination legislation, like the American Innovation and Choice Online Act, and carefully designed remedies in cases under existing laws. *Id.* In this vein, Kanter expressed his commitment to deepening the DOJ's international partnerships, and his enthusiasm for the implementation of the European Digital Markets Act. *Id.*

Merger Enforcement and Guideline Reform

In addition to his focus on global monopolization, AAG Kanter called effective merger enforcement "critical" to the agencies' enforcement agenda. Kanter Keynote Release, *supra*. He highlighted the DOJ and FTC's joint efforts to revise the merger guidelines, which he claims will be changed to better reflect the law as interpreted by the Supreme Court and allow them to be more accessible to users. Earlier this year, the DOJ and FTC received over 5,000 public comments on the agencies' proposal to revise the guidelines and, according to Kanter, the Competition Policy and Advocacy section has "been through every one" of those public comments. *Id.* The FTC and DOJ merger staffs have begun discussing updates to the merger guidelines and preparing a draft of the guidelines for public comment.

Chair Khan also emphasized the importance of these new merger guidelines, which she views as a return to the rule of law. She recounted the history of merger antitrust enforcement, beginning with the Supreme Court's 1948 decision in *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948), which, as she described it, "held

that a clearly anticompetitive merger did not amount to an unreasonable restraint of trade under the Sherman Act.” Khan Fordham Remarks, *supra*, at 5. That decision prompted Congress to introduce a stricter standard of illegality, resulting in the passage of the Anti-Merger Act of 1950, ch. 1184, 65 Stat. 1125 (codified as amended at 15 U.S.C. §§18, 21), which amended §7 of the Clayton Act, 15 U.S.C. §18. These statutes outlawed mergers that “may” substantially lessen competition, even if they might also “be deemed beneficial on some ultimate reckoning of economic debits and credits.” Khan Fordham Remarks, *supra*, at 6. According to Chair Khan, beginning in the 1980s, merger guidance departed from the rule of law. The 1982 merger guidelines, for example, “first introduced the notion that efficiencies might justify a merger that was otherwise illegal, despite clear precedent rejecting such a balancing test given the text of the statute.” *Id.* at 7. The 1982 guidelines also deemphasized the role of the structural presumption in horizontal mergers and focused on effects, imposing a standard of proof so high that, in Khan’s view, it effectively ignored the law’s focus on probabilities.

Khan promised that the upcoming revisions to the merger guidelines would bring merger enforcement more in line with the statutory language and “bring antitrust more squarely within the rule of law.” *Id.* at 8.

Khan Calls for the Reactivation of §5

Following her theme of “the rule of law” as a core value of the center of FTC antitrust enforcement, FTC

Chair Khan expressed her belief that “respect for the rule of law requires us to reactivate our standalone §5 enforcement program.” Khan Fordham Remarks, *supra*, at 4. In 1914, Congress passed the Federal Trade Commission Act (the FTC Act). §5 of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. §45. Chair Khan recalled the

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history of the FTC Act, tracing its origins back to the judicial creation of the “rule of reason” in *Standard Oil* and the 1913 Senate Committee’s concerns that the Court’s approach “delayed resolution of cases, delivered inconsistent and unpredictable results, and gave the judiciary outsized and unchecked interpretive authority.” Khan Fordham Remarks, *supra*, at 2. She discussed the history of FTC enforcement of §5, noting that in the 1970s the FTC frequently brought §5 cases to challenge conduct that would not necessarily violate the Sherman Act. Eventually, the FTC backed away from bringing §5 cases, with the height of that retreat coming in 2015, when the FTC announced that it would not bring cases under §5 “unless they met a framework similar to the rule of reason, including taking into account any potential efficiencies and business justifications.” *Id.* at 4.

Believing that the FTC’s retreat from standalone §5 cases represented the

rejection of a clear statutory mandate, Chair Khan told the Fordham audience that the FTC must reactivate its standalone §5 enforcement program. As part of this planned reactivation, the FTC has voted to rescind its 2015 policy statement, and Khan has made, as one of her top priorities, the preparation of a policy statement that would “reflect[] the statutory text, our institutional structure, the history of the statute and the case law.” *Id.* at 4.

DOJ Continues To Monitor Labor Markets

Consistent with efforts over the past year, AAG Kanter discussed developments in the DOJ’s cases in labor markets. In March 2022, the DOJ and the Department of Labor entered into a partnership in an effort to protect workers from “employer collusion, ensure compliance with the labor laws and promote competitive labor markets and worker mobility.” Press Release, DOJ, Departments of Justice and Labor Strengthen Partnership To Protect Workers (March 10, 2022). Since then, the DOJ has continued to scrutinize anticompetitive conduct in labor markets. In July 2022, the DOJ filed a civil lawsuit and consent decree against data consulting firm Webber, Meng, Sahl and Company (WMS) and its President, G. Jonathan Meng, as well as poultry processors Cargill, Cargill Meat Solutions, Sanderson Farms and Wayne Farms, to end an alleged conspiracy to suppress worker pay at poultry processing plants. The proposed consent decree would prohibit the defendants from sharing competitively sensitive information about poultry processing plant workers’

compensation and would impose a court-appointed compliance monitor who would ensure compliance with all federal antitrust laws, permit the Antitrust Division to inspect the processors' facilities and interview their employees to ensure compliance with the consent decree. The companies also agreed to pay \$84.8 million in restitution for poultry processing plant workers who allegedly were harmed by the information exchange. Press Release, DOJ, Justice Department Files Lawsuit and Proposed Consent Decrees To End Long-Running Conspiracy To Suppress Worker Pay at Poultry Processing Plants and Address Deceptive Abuses Against Poultry Growers (July 25, 2022).

Efforts to protect workers from anti-competitive conduct have expanded beyond poultry with the DOJ filing statements of interest and amicus briefs "to oppose non-compete agreements restricting truckers, anesthesiologists, and other workers from switching jobs and to oppose misclassification of workers as independent contractors that deprives them of organizing rights." Kanter Keynote Release, *supra*. And the Department has challenged the Penguin-Random House merger in an effort to protect competition for authors. *Id.*

Looking Forward

Despite strong statements about enforcement efforts, regulators suffered three losses in merger challenges in September. An administrative law judge rejected the FTC's challenge of Illumina's proposed acquisition of Grail. The FTC brought a complaint in March 2021 which alleged that,

because of the parties' vertical relationship and Illumina's dominance in the supply market of a DNA sequencing technology, a merged Illumina-GRAIL would foreclose critical supplies to GRAIL's rivals. Judge Chappell commented that vertical mergers are often pro-competitive and held FTC failed to show the acquisition would result in a substantial lessening of competition or that the acquisition gave Illumina the incentive to harm GRAIL's rivals.

The FTC was not alone in its loss as the DOJ also suffered two losses in September. First, a D.C. District Court judge rejected the DOJ's request to block UnitedHealth's \$13.8 billion acquisition of Change Healthcare. The DOJ argued that UnitedHealth's acquisition would give it access to rival health insurers' data and provide an incentive to slow delivery of new insurance claim processing tools. Judge Nichols indicated little concern that the acquisition would have such anticompetitive effects.

Second, a federal judge ruled U.S. Sugar can proceed with its acquisition of Imperial Sugar, a \$315 million merger that the DOJ challenged arguing that the deal would lead to higher prices for consumers. Significantly, Barbara Fesco, the U.S. Department of Agriculture's top analyst of the sugar industry was a key witness—for *U.S. Sugar*—testifying that she believed the deal would ultimately benefit consumers. After the ruling, the DOJ appealed to the Third Circuit and requested an injunction which would pause the deal until the appeal is decided. On September 30, 2022, the Third Circuit issued an order denying the motion without explanation. *United States v.*

US Sugar, No. 22-2806 (3d Cir. Sept. 30, 2022) ECF No. 27 (order denying motion for an injunction).

Kanter expressed disagreement and disappointment with both the UnitedHealth and U.S. Sugar losses, stating that the DOJ will evaluate next steps. Though we don't expect these losses to slow the FTC or DOJ's efforts, they signal the high burden and uncertainty that all parties face in antitrust cases. These cases provide insight into the novel theories of harm, particularly vertical and innovation theories, the progressive enforcers are looking to prevent and allow companies to prepare for potential action by the FTC and the DOJ.

It is clear that U.S. regulators are making efforts to expand antitrust enforcement globally and in collaboration with enforcers around the world. While regulators are bound by their statutory mandate, a global approach to antitrust enforcement may result in more aggressive enforcement, more frequently putting businesses in a position where they face regulatory action from the competition authorities of multiple countries at the same time.