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ANTITRUST TRADE AND PRACTICE

Expert Analysis

Antitrust Yearly Recap: Aggressive Agency Enforcement Efforts Continue

By **Karen Hoffman Lent**

And **Kenneth Schwartz**

Antitrust continues to be a hot topic in the law, the news, board rooms and C-Suites. U.S. antitrust agencies have followed through with their promises to be more aggressive and have formally reaffirmed commitments to working with a number of other federal agencies, as well as each other, to further strengthen antitrust enforcement. Despite facing skepticism from and challenges in the courts, both the Federal Trade Commission (FTC) and Department of Justice (DOJ) Antitrust Division have persisted in their efforts to expand their enforcement authority and ramp up enforcement generally. Merger challenges have been on the rise, as well as efforts to pursue civil cases, particularly in the tech industry. Moreover, drastic changes to enforcement policy and guidelines may be on the horizon, in addition to new legislation. Here's a recap of the major events of 2022 and developments to look for in 2023.

DOJ Commits to Criminal Prosecutions

The DOJ Antitrust Division has sought to expand the scope of its enforcement authority, particularly since Jonathan Kanter was appointed Assistant Attorney General at the end of 2021. At the 2022 Spring Enforcers Summit, AAG Kanter emphasized the DOJ's commitment to litigate not only civil but also criminal cases, even those that may be challenging to bring. Indeed, the government attempted three times to win a price-fixing conviction against executives from poultry companies Pilgrim's Pride and Claxton Poultry Farms and was ultimately unsuccessful—a jury found all five defendants not guilty. The DOJ has also continued its crackdown on criminal bid-rigging since the creation of its Procurement Collusion Strike Force (PCSF) at the end of 2019, securing numerous convictions and guilty pleas over the past year in cases across a range of industries—including construction, insulation contracting, farmland auctions, and military contracts.

No-Poach Cases. In its attempt to increase antitrust enforcement in labor markets, the DOJ lost two significant no-poach cases earlier this year, including its first-ever criminal wage-fixing prosecution. See *United States v. DaVita*, No. 1:21-cr-00229 (D. Colo.) and *United States v. Jindal*, No. 4:20-cr-00358 (E.D. Tex.). Initially filed at the end of 2020, the *Jindal* case was seen as a signal that the DOJ would follow through with its 2016 promise to prosecute "naked" no-poach and wage-fixing agreements, which it views as per se illegal under Sherman Act Section 1. Although the government had brought conspiracy charges, the jury ultimately found *Jindal* guilty of only a single count of obstruction and acquitted him and his co-defendant of all antitrust charges.

Despite the string of losses in the poultry and no-poach cases, the DOJ showed no signs of slowing down. AAG Kanter reaffirmed in public statements that the DOJ remains committed to bringing criminal labor-market cases. The DOJ suffered a second acquittal in its criminal no-poach case against dialysis provider DaVita before finally securing a guilty plea from staffing company VDA in October. See *United States v. Hee et al.*, No. 2:21-cr-00098 (D. Nev. March 30, 2021). Although the absolute amount of the criminal fine imposed on VDA—$62,000—seems small, it constitutes nearly 30% of the company's total volume of commerce, a significant increase over federal guidelines that typically recommend

KAREN HOFFMAN LENT *and* KENNETH SCHWARTZ *are partners at Skadden, Arps, Slate, Meagher & Flom. Law clerk* ANGELA CHANG *assisted in the preparation of this article.*

fines of 20% with modifications based on the company's culpability. Whether the DOJ will be able to adjust its litigation strategy to achieve more success in future labor market antitrust cases remains to be seen.

Revival of Section 2 Criminal Prosecutions. Both AAG Kanter and Deputy AAG Richard Powers have also repeatedly stated in public remarks that the Division will not hesitate to use its prosecutorial discretion to bring criminal charges under Sherman Act Section 2. In line with its warnings, the DOJ announced in October that it had secured a Section 2 criminal guilty plea—the first criminal monopolization case in over 40 years. See *U.S. v. Zito*, 1:22-cr-22113 (D. Mont. Sep. 19, 2022). The *Zito* case, which involved an invitation to collude that historically would have been prosecuted only civilly, appeared at first to signal a shift in DOJ charging policy. But a closer look at the facts of the case—involving a blatant attempt at market allocation with clear evidence through a whistleblower, and potentially a separate violation of wire fraud statutes—suggested that *Zito* may have merely implicated the same type of Section 1 harm that the DOJ has always targeted in its criminal prosecutions but could not pursue here due to the absence of an actual agreement between competitors.

In December, the DOJ announced a second criminal monopolization case—the unsealing of an 11-count indictment for conspiracy to monopolize the transmigrante industry. See *U.S. v. Martinez et al.*, 4:22-cr-00560 (S.D.T.X. Nov. 9, 2022). The indictment charges 12 individuals in a long-running and multi-faceted conspiracy to fix prices, allocate markets, and eliminate competition through use of violence, threats, intimidation, and extortion. In addition to the "horrific violence and threats of violence" involved in this case, the defendants also allegedly agreed to fix prices and establish a central entity to collect and divide revenues—anti-competitive conduct that has long been established and prosecuted as criminal.

FTC Majority Foreshadows Rulemaking and Policy Changes

Earlier this year, the Senate voted to confirm Alvaro Bedoya to the Federal Trade Commission, giving Chair Lina Khan the 3-2 Democratic majority needed to pursue her aggressive enforcement agenda. Prior to Bedoya's confirmation in May, the role had been unfilled since October 2021, creating a 2-2 deadlock that prevented the agency from engaging in rulemaking and merger challenges, two priorities Chair Khan has previously articulated. Despite the deadlock, the FTC—jointly with the DOJ Antitrust Division—issued at the beginning of the year a request for public comments to overhaul the merger guidelines. With a majority now in place, the agency is likely to adopt more progressive merger guidelines with a vote along party lines. Expected changes include a greater focus on potential competition and innovation, a shift away from the historical approach towards a consumer welfare standard, and lowering burdens and thresholds for enforcement generally.

Moreover, the Commission has already demonstrated its willingness to take an expansive view on its own enforcement authority, notwithstanding prevailing, yet dated, case law to the contrary. On November 10th, the FTC issued a policy statement detailing its new approach to policing "unfair methods of competition" under Section 5 of the FTC Act, which has been widely viewed by progressive leaders as insufficient. The Commission had previously declared, back in 2015, that it would apply the Sherman Act "rule of reason" test to limit its Section 5 enforcement. The new statement removes that restriction, allowing for broader interpretation of what constitutes unfair competition, and renews the agency's commitment to protecting markets through both enforcement and rulemaking while leaving business without practical guidance.

Merger Challenges On the Rise

Consistent with their efforts to overhaul the merger guidelines, U.S. antitrust agencies under the Biden administration have ramped up merger enforcement and expressed skepticism about the effectiveness of settlements, preferring to seek to block mergers they believe are problematic rather than remedy them. In doing so, the agencies advanced novel theories that struggled to gain traction in the courts, which contributed to a series of losses in the fall. First, an administrative law judge dismissed the FTC's complaint against Illumina's vertical acquisition of GRAIL, finding that Illumina did not have an incentive to harm GRAIL's competitors. See *In the Matter of Illumina, Inc. and Grail*, FTC Docket No. 9401 (Sep. 9, 2022) (Initial Decision). Illumina publicly pledged to charge the same fees and make GRAIL's research and development available to competitors—a promise that the ALJ found persuasive in concluding that the FTC failed to prove its theory of vertical foreclosure. The move was similar to AT&T's unilateral commitment, in its successful bid to acquire Time Warner in 2018, that it would to arbitrate fee disputes. In light of the demonstrated successes thus far, such public statements may become the standard playbook for responding to vertical challenges in the future. The European Commission seemed to be more receptive to the FTC's theories, albeit in a nonpublic decision.

Meanwhile, FTC staff is appealing the ALJ's decision to the full Commission.

A federal district court subsequently rejected the DOJ's attempt to block UnitedHealth's acquisition of Change Healthcare. The DOJ's suit was based on both horizontal and vertical theories: (1) that the deal would combine two competitors in the market for first-pass claims editing software, resulting in UnitedHealth having more than 90% market share; (2) that UnitedHealth would gain access to and misuse rival health insurers' competitively sensitive information; and (3) that UnitedHealth would foreclose rivals' access to any innovations in electronic data interchange from Change. In response to horizontal concerns raised, UnitedHealth agreed to divest Change's competing claims-editing business to TPG, a private equity firm. The parties also argued that the court should evaluate the entire transaction, including the divestiture, as a whole. The court found that the proposed remedy would address any horizontal concerns and rejected the vertical theories, finding that UnitedHealth had no business incentive to engage in the alleged actions and doing so would severely damage its reputation. *U.S. v. UnitedHealth Group & Change Healthcare*, 1:22-cv-0481, *54 (D.D.C. Sep. 19, 2022). Not only did the government fail to prove a vertical theory of competitive harm yet again, but this case also demonstrates that, where the government alleges horizontal concerns, divestiture can be an effective "fix-it-first" strategy.

Shortly thereafter, another federal district court dismissed the DOJ's suit to block U.S. Sugar Corp's acquisition of Imperial Sugar, holding that the DOJ failed to prove that the transaction would substantially lessen competition for the supply of refined sugar in the southeastern United States. The judge rejected the DOJ's proposed product and geographic markets as too narrow, finding that DOJ's claims "ignore[d] the commercial realities that exist in the U.S. with regard to sugar supply" and did not sufficiently account for the U.S. Department of Agriculture's "intimate involvement" with the industry. *U.S. v. U.S. Sugar Corp. et al.*, 21-cv-1644, *34, *55 (D. Del. Sept. 23, 2022).

A few weeks later, the DOJ sought unsuccessfully to obtain an injunction against Booz Allen Hamilton in its deal to acquire competitor EverWatch. The judge rejected the government's definition of a relevant market as a single contract where the parties were the only bidders. Additionally, the court found that Booz Allen has strong incentives to maintain a competitive bid because of other work with the NSA and highlighted that the NSA can only reward a contract if it determines the bid is "fair and reasonable." In late December, after its second attempt to obtain an injunction was also denied, the DOJ dismissed its case against Booz Allen, which went on to close the deal.

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Despite these losses, AAG Kanter has reaffirmed that the DOJ will "continue to bring cases" and "will not back down." The agencies have had a few successes in merger challenges this past year, and are continuing to actively pursue cases to block deals, particularly those it views as problematic vertical mergers. In the DOJ's only win at trial, a federal judge blocked Penguin Random House's proposed acquisition of Simon & Schuster, finding that the merger would result in "concerningly high" market concentration and is "likely to substantially lessen competition in the market for the publishing rights to anticipated top-selling books." *U.S. v. Bertelsmann SE & Co. KGaA et al.*, 21-cv-2886, *79-80 (D.D.C. Nov. 7, 2022). Beyond this one litigated win, agency opposition also led to a number of abandoned deals, including Lockheed Martin's proposed acquisition of Aerojet, as well as the proposed Nvidia-ARM, Verzatec-Crane, and CIMC-Maersk transactions. Pending cases to watch include the DOJ's suit against the American Airlines-JetBlue partnership, an alliance to sell each other's seats on select routes, which the government has labeled a de facto merger with extensive output coordination.

Earlier this year, the FTC voted 3-2 to block Meta's acquisition of VR app developer Within Unlimited. In doing so, the FTC relied on a theory of potential competition, alleging that Meta is a potential entrant in the VR fitness app market with a reasonable probability of building a competing app and arguing that the mere possibility of Meta's entry has likely influenced competition in the virtual reality dedicated fitness app market. Just a few weeks ago, the FTC also filed suit to challenge Microsoft's $68.7 billion proposed acquisition of video game developer Activision Blizzard, alleging that the deal is an anticompetitive vertical merger that would allow Microsoft to deny rivals access to gaming content and subscription services. Following the announcement strategy used by AT&T and Illumina, Microsoft has publicly promised

to keep valuable gaming content available to rival consoles.

Big Tech Still Under Fire

Facebook/Meta. In addition to the active merger challenge, the FTC still has a pending monopolization case against Meta. Although it was later amended, the case was originally filed in 2020 in parallel with a suit brought by 48 states and territories. The complaint in that case alleges that Facebook lawfully maintained its monopoly through a series of acquisitions, including Instagram and Whatsapp. *FTC v. Facebook*, 20:cv-03590 (D.D.C. Jan. 13, 2021) (amended, redacted complaint). Although a trial may not happen for a while in that case, the outcome of the merger challenge could provide an early indication of how effectively the FTC's democratic majority will be able to pursue Chair Khan's aggressive enforcement goals. The states' case against Facebook was dismissed in late 2021, due to timing issues, but is now pending on appeal.

Google. Federal and state governments continue to actively pursue and investigate various antitrust claims against Google. The DOJ has a pending Section 2 case—initially filed towards the end of 2020—claiming that Google has monopolized search engine services by excluding competitors. *U.S. & Plaintiff States v. Google*, 20-cv-03010 (D.D.C. Oct. 20, 2020). A similar suit was filed by a number of State AGs around the same time, along with two other antitrust suits against Google. The first complaint alleges multiple causes of action relating to Google's advertising technology, and the second alleges tying and other claims based on Google's operation of its Play Store and in-app billing services. See *In re Google Digital Advertising Antitrust Litigation*, 21-cv-6841 (S.D.N.Y. Sept. 13, 2022) (denying Google's motion to dismiss monopolization, attempted monopolization, and tying counts); *States v. Google*, 21-cv-05227 (N.D. Cal. July 7, 2021) (complaint). These cases are awaiting discovery and trial, respectively. Moreover, it was reported earlier this year that DOJ is investigating Google Maps and whether its bundling with other Google software raises antitrust concerns.

In addition to the pending big tech litigation, potentially transformative policy changes may be coming down the pipeline as the DOJ is currently revising its Antitrust Division Manual, Merger Remedies Manual, and Model Process and Timing Agreement, and is also working with the FTC to revamp the Merger Guidelines.

Developments To Look For in 2023

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