Are the FTC and DOJ Losing Antitrust Battles but Gaining Ground?

Skadden

04 / 20 / 23

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Tara L. Reinhart
Partner / Washington, D.C.
202.371.7630
tara.reinhart@skadden.com

David P. Wales
Partner / Washington, D.C.
202.371.7190
david.wales@skadden.com

Andrew J. Shanahan
Associate / New York
212.735.2996
andrew.shanahan@skadden.com

This article was published in the April 2023 issue of *Insights*.

One Manhattan West
New York, NY 10001
212.735.3000

Key Points

- Despite a low success rate in a number of recent cases, the FTC and the DOJ's Antitrust Division have secured rulings that may help in future enforcement actions.
- Several courts have now ruled that wage-fixing and no-poach agreements can be prosecuted criminally under Section 1 of the Sherman Act.
- A district court recently held that it may suffice for the government to show in an actual potential competition merger case that the acquirer had the wherewithal to enter the market, not necessarily that it intended to do so.

The Department of Justice (DOJ) Antitrust Division — for the third time in the span of a year — recently failed to convince a jury that alleged agreements to fix or stabilize labor markets should be punished criminally. It was the latest example of a streak of unsuccessful court cases the DOJ and the Federal Trade Commission (FTC) have brought forth. Meanwhile, on the deal side, under the current administration, the agencies have lost five of the seven merger challenges they have litigated.

Despite the losses and the real risk of creating defendant-friendly precedent, the agencies are using such challenges to try to develop government-friendly case law that they would rely on in future cases to expand their enforcement reach.

No-Poach and Wage-Fixing Cases

We see this strategy in the DOJ's failed attempts to obtain guilty verdicts against defendants accused of participating in no-poach or wage-fixing agreements. When the DOJ brought its first such case in December 2020, no court had ever ruled whether such conduct could be prosecuted criminally.

Since then, through litigation of motions to dismiss indictments, the DOJ has established a consistent set of holdings across four district courts in four circuits that no-poach and wage-fixing agreements can be prosecuted criminally under Section 1 of the Sherman Act and are subject to the same range of potential fines and prison sentences as hardcore price-fixing.

With these legal victories, we expect that in the future, DOJ may routinely bring criminal charges in certain no-poach cases rather than pursuing civil prosecutions.

The *Meta-Within* Ruling on 'Actual Potential Competition' Theory

On the deal side, the agencies may also be making similar incremental headway with at least one case. Despite losing the case, the FTC secured a favorable ruling in *Meta-Within* where the district court held it may suffice for the government to show in an actual potential competition case that an acquirer had the ability and incentive to enter a target's market even if there is no evidence that it had made actual plans or intended to do so before agreeing to buy the target.

In January 2023, the FTC was unsuccessful in its attempt to block Meta Platforms Inc.'s acquisition of Within Unlimited Inc., a developer of virtual reality (VR) fitness applications. The FTC lost a motion for preliminary injunction in the U.S. District Court for the Northern District of California after a seven-day evidentiary hearing. The FTC declined to appeal, and a parallel case pending before an FTC administrative law judge seeking a permanent injunction was voluntarily dismissed a few weeks after the district court's ruling.

The FTC brought the case under the "actual potential competition" theory of harm, alleging that Meta had the capabilities and incentives to develop into an actual competitor for VR fitness applications and had considered doing so. According to the FTC, Meta chose to buy its way into the market instead of entering as a new competitor itself.

Development of the Actual Potential Competition Theory

Actual potential competition is a rarely presented theory that has succeeded just once, back in 1981. But in recent years, enforcers have identified it as a "tool in the toolkit" to address antitrust in the digital age — in particular, to challenge large technology platforms' acquisitions in adjacent markets. (European competition regulators have adopted similar approaches in reviewing takeovers of upstart technology companies. See our *2023 Insights* article "US and EU Regulators Increase Scrutiny of Vertical Mergers.")

In the 1970s, the U.S. Supreme Court twice declined to validate actual potential competition as a legally cognizable theory, first in *U.S. v. Falstaff Brewing* and then in *U.S. v. Marine Bancorporation*. In each instance, the Court declined because the government had failed to prove the facts necessary to satisfy the theory — namely, that the acquirer had available feasible means to enter the market, other than through acquisition, and incentives to do so; and that those means had a reasonable probability of deconcentrating the market or producing other pro-competitive effects.

The few courts that have addressed the theory since the 1970s have considered both **objective evidence** of the capacity of a company to enter the market and **subjective evidence** of its plans to do so absent an acquisition.

In *Yamaha Motor v. FTC* in 1981 — the lone case where the government has prevailed on the theory — the U.S. Court of Appeals for the Eighth Circuit upheld the FTC's determination through its administrative trial process that a joint venture between Japanese outboard motor maker Yamaha and U.S. manufacturer Brunswick prevented Yamaha from entering the U.S. market *de novo*, which would have increased the number of competitors.

The court reviewed in detail the evidence of Yamaha's plans to enter the market and Brunswick's intention to expand its own U.S. business before the joint venture preempted the plans of both. The court held that the record supported the FTC's conclusion that the *Marine Bancorporation* preconditions for application of the actual potential competition theory had been met.

More recently, in 2015, the FTC lost in a case where it argued that Steris Corporation's acquisition of U.K.-based Synergy Health prevented Synergy from entering the U.S. market for medical device sterilization services. In its opinion, the U.S. District Court for the Northern District of Ohio detailed evidence of Synergy's plans to enter the U.S. market: It had shopped for real estate for five U.S. plant sites, entered into a costly contract for equipment to operate the plants, courted customers to try to pre-load the new plants with business, and, in a U.K. financial disclosure, announced its plans to enter the U.S. market.

Nevertheless, the court found entry unlikely based on Synergy's inability to generate U.S. customer contracts and on a predicted low rate of return on investment that would have made it hard to justify the capital costs of entry. In other words, notwithstanding ample evidence of Synergy's subjective intent to enter the U.S. market, the government's case failed because the FTC did not satisfy the objective evidence branch of the actual potential competition doctrine.

The Potential Significance of the *Meta-Within* Decision

Before considering the evidence, the court in *Meta-Within* addressed the FTC's assertion "that it may meet its burden using solely objective evidence regarding Meta's 'overall size, resources, capability, and motivation.'" The defendants pushed back, arguing that subjective evidence of Meta's lack of plans to enter *de novo* must be considered.

The court resolved this question by first reviewing the objective evidence and, only after finding it insufficient to satisfy the *Marine Bancorporation* standard, turning to the subjective facts. Relying on Justice Thurgood Marshall's concurrence in *Falstaff Brewing* in 1973, the district court wrote that not every case of actual potential competition "will require consideration of a potential entrant's actual and subjective plans for entry." Instead, consideration of plans for entry is only required where the objective evidence of a firm's capabilities and incentives to enter is "weak or inconclusive."

To put it plainly, the *Meta-Within* decision may strengthen the government's hand the next time it brings an actual potential competition case. If the next court to address the theory applies the reasoning of *Meta-Within*, then the government could meet the legal standard simply with proof of capabilities and incentives to enter, even when a company made no plans and took no steps to enter the market *de novo*.

Are the FTC and DOJ Losing Antitrust Battles but Gaining Ground?

Takeaways

In light of the favorable legal holdings they have established, we expect the agencies to continue to bring cases that would expand the scope of their enforcement powers, even if they do not always prevail. FTC Chair Lina Khan confirmed as much when discussing *Meta-Within* at an FTC and DOJ event on March 27, 2023. Chair Khan went so far as to say that the potential reward of pro-government case law is worth the competing risk of making bad law. She said the FTC will continue to bring risky cases, because the FTC is focused on the cost of **not** bringing such cases — being left with "stale" legal doctrine to enforce the antitrust laws in the new economy.