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ANTITRUST TRADE AND PRACTICE

ABA Spring Meeting Spotlight: Antitrust Enforcement Actions

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The American Bar Association held its 71st antitrust law spring meeting on March 29–31. During the event, enforcers highlighted their aggressive agendas and plans in light of their currently mixed success. This article highlights perspectives and insights from panels on antitrust enforcement in labor markets, merger guidelines, digital platforms, agency regulations, legislation, ESG issues, and criminal prosecutions under Section 2 of the Sherman Act.

Antitrust Enforcement In Labor Markets

Throughout the spring meeting, enforcers showed significant interest in the intersection of antitrust and labor. Members of several panels discussed the legality of noncompete agreements and the Federal Trade Commission's (FTC) recent proposal to ban them. On Jan. 5, 2023, the FTC unveiled its proposed rule making it illegal for employers to enter or attempt to enter into noncompetes with their workers, maintain noncompetes with workers, or represent to workers that they are subject to non-competes when the employer has "no good faith basis to believe that the worker is subject to an enforceable noncompete." (Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 5, 2023) (to be codified at 16 CFR 910); F.T.C., Non-Compete Clause Rulemaking (Jan. 5, 2023), https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking.) If adopted, the rule would apply (with limited exception) across the workforce and include both employees and independent contractors, as well as both paid and unpaid laborers. The period for public comment on the proposed noncompete rule ended on April 19, 2023, with 26,813 comments submitted. Further developments on the noncompete rule have yet to be announced.

During the panel titled "Pay Me Now or Pay Me Later," panelists discussed the intersection of labor equity and antitrust. Synda Mark (acting deputy assistant director of the Federal Trade Commission) explained that the proposed rule on noncompetes telegraphed to the world that the FTC would not tolerate anti-competitive restrictions in labor markets. According to Mark, the noncompete rulemaking proposal would prohibit noncompetes that limit

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workers' freedom to join a competing firm or start a business and become competitors themselves.

Schonette Jones Walker (chief of the Office of Maryland Attorney General's Antitrust Division) echoed Mark's sentiment that noncompetes can stifle opportunities for entrepreneurship. Walker opined that state attorneys general are often overlooked in labor cases. However, state attorneys general have their own labor enforcement tools. For example, Walker noted that Maryland banned noncompetes for workers making less than $15 per hour [or $31,200] annually. (Md. Code, Lab. & Empl. Section 3-716.)

During an enforcers panel, Gwendolyn Cooley (chair of the National Association of Attorneys General) highlighted the differences among states in their approaches to labor market issues. She contrasted, for instance, California's noncompete prohibition with Wisconsin's more permissive noncompete framework that considers the "geographic scope and time of a contract when considering the legality of a noncompete clause." (Ca. Bus. & Prof'l Code Section 16600; Wis. Stat. Section 103.465; Gwendolyn Cooley, chair of the National Association of Attorneys General and Wisconsin Assistant Attorney General for Antitrust, enforcers roundtable at the ABA spring meeting (March 31, 2023).) The FTC's proposed noncompete rule would eliminate these differences by establishing a federal rule which would "supersede any [inconsistent] state statute, regulation, order or interpretation." (F.T.C., Non-Compete Clause Rulemaking (Jan. 5, 2023), https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking.) During the enforcers panel, FTC Chair Lina Khan highlighted the economic research backing the FTC's desire to prohibit noncompetes. Khan explained that the proliferation of non-competes in the U.S. economy has caused "a significantly negative effect on competition." Khan further cited economists' calculations stating that banning noncompetes would amount to $300 billion in the pockets of workers.

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In addition to their focus on noncompetes, enforcers also highlighted investigations and prosecutions of no-poach agreements. During the "Agency Update with the U.S. Department of Justice, Antitrust Division" panel, Manish Kumar (acting DAAG) discussed *United States v. Manahe*, a jury trial that the DOJ lost just a week prior to the spring meeting. (*United States v. Manahe*, 2:22-cr-00013 (Me. Jan. 27, 2022) (indictment unavailable).) In *Manahe*, the DOJ charged four defendants, managers of home health care agencies, with "a conspiracy to suppress the wages and restrict the job mobility of essential workers" by "agreeing not to hire each other's workers." (Press Release, Department of Justice, Four Individuals Indicted on Wage Fixing and Labor Market Allocation Charges (Jan. 28, 2022).) The four defendants were acquitted of the charges. Kumar reiterated that *Manahe*, a case the DOJ lost, and *VDA*, a case that ended in a guilty plea, fines, and restitution, were both "worthy" cases to bring, and the DOJ would continue to bring these cases (Press Release, Department of Justice, Health Care Company Pleads Guilty and is Sentenced for Conspiring to Suppress Wages of School Nurses (Oct. 27, 2022).)

On April 28, 2023, the DOJ's effort to prosecute no-poach agreements was further frustrated when Judge Victor A. Bolden of the U.S. District Court for the District of Connecticut granted the defendants' motion for judgment of acquittal in a "high-profile" aerospace industry no-poach case (Bryan Koenig and Nadia Dreid, DOJ's Latest, Biggest No-Poach Trial Thrown Out, Law360, April 28, 2023, at 1.)

The DOJ had charged six defendants with a conspiracy in restraint of trade, alleging that the defendants conspired to "restrict the hiring and recruiting of engineers and other skilled-labor employees" among six companies. (Ruling and Order on Defs.' Mot. for J. of Acquittal at 2, *Patel et al*., No. 3:21-cr-220(VAB) (D. Conn. 2023).) The DOJ's argument was ultimately unsuccessful, with Bolden holding that "no reasonable juror could conclude that there was a "cessation of 'meaningful competition' in the allocated market.""

The focus on labor during the spring meeting extended beyond hiring and noncompetes to spotlight labor and mergers. During the enforcers roundtable panel, Kanter highlighted the DOJ's successful effort to block the Penguin Random House and Simon Schuster merger using a theory of monopsony. Kanter noted that this case was the "first litigated merger victory at the antitrust division since 2017" and that the DOJ "essentially" employed "a labor theory," arguing that many professional writers depend on advances to research and write their books. More aggressive merger litigation, generally and within the labor context, will likely continue because, as Kanter noted during the enforcers roundtable, "on the merger front, there is no success greater … than deterrence."

New Merger Guidelines

On Jan. 18, 2022, the FTC and DOJ announced their plan to update their merger guidelines. (Press Release, Federal Trade Commission, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022).) The agencies solicited public comments on whether specific horizontal and vertical guidance, concentration thresholds and metrics, market definition analysis, and potential and nascent competitor language required updating. In a nod to their increased focus on labor markets, the agencies also sought input on buyer power and "labor market effects of mergers." Additionally, the agencies requested comment on how to capture the unique features of digital markets.

Reflecting on the merger guidelines during the spring meeting, FTC Chair Khan noted that the draft would capture market realities attuned to modern times. While not providing a definitive timeline, Khan stated that the agencies would be able to share a draft of their guidelines "in short order." During the Agency Update with the DOJ Antitrust Division, DOJ Management echoed the sentiment that guidelines are an evolving instrument. Michael Kades (DAAG) specifically focused on the DOJ's guidelines as a tool for conveying policy, noting that "guidelines don't change the law." Maggie Goodlander (DAAG) explained that while courts may consult the agency guidelines, they are "ultimately … going to look to the same sources that [the agencies] look to" when drafting their guidance. Goodlander highlighted three key priorities of the merger guidelines' revision process: adherence to the law; a focus on market realities and relevant market participants including workers, small businesses, consumers, and farmers; and democratization of antitrust enforcement through increased avenues of citizen reporting and feedback.

Agency Enforcement of Digital Platforms

This year's spring meeting panels also focused on the regulation of digital platforms. Thomas Kramler (Head of Unit, Antitrust: E-Commerce & the Data Economy, DG Competition, for the European Commission) noted that the European Commission's Digital Markets Act (DMA) provided a new ex-ante regulatory tool. The DMA designates certain large online platforms as "gatekeepers" and establishes a set of requirements to which the gatekeepers must adhere "to ensure fair and open digital markets." (Press Release, European Commission, Digital Markets Act: rules for digital gatekeepers to ensure open markets enter into force (Oct. 31, 2022).) Kramler highlighted the utility of the DMA in the European Commission's current cases against Apple, Google

and Meta. He also noted that ex-ante regulation and legislation are important for protecting consumers and businesses.

During a panel on "Artificial Intelligence, Privacy, and Competition," panelists noted that the scope of privacy has changed with the development of Artificial Intelligence. With these changes come new needs and opportunities for regulatory response. A panelist highlighted the White House "Blueprint for an AI Bill of Rights." This blueprint outlines five principles: safe and effective systems; algorithmic discrimination protections: data privacy; notice and explanation; and Human Alternatives, Considerations and Fallbacks. (White House Office of Science and Technology Policy, Blueprint for an AI Bill of Rights–Making Automated Systems Work for the American People 5–7 (October 2022).) In addition to laying out the principles prescribed under this Bill of Rights, the document highlights tangible ideas for realizing these principles. Notably, this blueprint is not a policy statement. Rather it is a "national values statement and toolkit" that may be used to build protections into policy. (White House Office of Science and Technology Policy, What is the Blueprint for an AI Bill of Rights? (October 2022), https://www.whitehouse.gov/ostp/ai-bill-of-rights/what-is-the-blueprint-for-an-ai-bill-of-rights/.)

This conference highlighted the energized, yet distinct views surrounding antitrust related to mergers, allegedly anticompetitive conduct, legislation, technology, labor and sustainability.

Congressional Attention on Antitrust

During the "Has Antitrust Legislative Moment Already Passed?" panel, the panelists debated the relevance and potential of new antitrust laws in Congress. One panelist opined that the renewed, and oftentimes bi-partisan, support for antitrust laws stems from the public's belief that the current antitrust laws are ineffective. While certain large pieces of antitrust legislation failed in the 117th Congress, the attention and commitment to antitrust should not be discounted. Another panelist argued, however, that while there may be bipartisan interest in promoting antitrust legislation, there is no such bipartisan agreement as to the content of the legislation.

This point of debate among panelists highlights the uncertainty that faces a new Congress with respect to the passage of key antitrust bills. At the start of the 118th Congress, the Judiciary Committee elevated Kentucky Representative, Thomas Massie, to the Chair of the Subcommittee on the Administrative State, Regulatory Reform, and Antitrust. (Emily Birnbaum and Maria Curi, Big Tech Antitrust Push in Congress is Blunted by GOP-Led House, Bloomberg Law, January 27, 2023, at 1.) The former ranking member of the subcommittee, Colorado Rep. Ken Buck, had been a staunch proponent of updating antitrust regulation of Big Tech platforms. According to Bloomberg, the appointment of Massie to the subcommittee chairmanship was a "snub" to Buck and a "signal that the Judiciary Committee … will shift its focus away from legislation aimed at curbing the power of the largest tech companies." (Id.) Both the American Innovation and Choice Online Act and the Open Apps Market Act failed in the 117th Congress. A panelist noted that both bills had significant lobbying against their passage. As a result, he assumed that these bills would have a difficult time getting passed in future Congressional sessions. It remains to be seen how new or recurrent antitrust bills will fare in the 118th Congress.

The panelists highlighted the antitrust legislation that successfully passed in the last Congressional session. The State Venue Act gave state attorneys general the same right as the United States to select their venue in federal antitrust cases. (Mike Lee, Lee's Antitrust Venue Act Passes Senate (June 16, 2022), https://tinyurl.com/mr2kur3a). One panelist

explained that the State Venue Act ensured that states would not dedicate resources to investigating and pursuing a case, only to have it removed to a distant jurisdiction. Congress also passed the Merger Filing Fee Modernization Act and the Foreign Merger Subsidiary Disclosure Act. These acts adjusted the merger filing fees and issued requirements for parties to disclose "any subsidy received from a foreign entity of concern." (Consolidated Appropriations Act, 2023, H.R.2617, 117th Cong. Div. GG Section 101, 202, 301 (2023).) Two panelists expressed the view that the Foreign Merger Subsidiary Disclosure Act was motivated by China's attempted expansions via technological investment around the world.

Panelists advocated differing approaches regarding the U.S. response to Europe's tech platform regulation. On the one hand, some argued that the U.S. could wait and observe the effect of European regulation. Others argued that waiting to take action on tech could result in the U.S. being left behind and subject to rules it did not craft.

Antitrust Implications of ESG Initiatives

During the "ESG Initiatives: Curbing Emissions or Competition" panel, panelists discussed the antitrust risks corporations face when highlighting and promoting environmental, societal and governance (ESG) goals.

Maria Jaspers (director, Cartels Directorate, DG Competition for European Commission) explained that European ESG is often focused on climate, but it can extend beyond this focus. Jaspers noted that cartel enforcers scrutinize ESG conduct to understand if ESG is being used as a pretext to raise prices or collude in anticompetitive ways. The EU recently released a draft of its revised horizontal guidelines which include a discussion of ESG. (European Commission, Communication from the Commission–Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (Draft) (Mar. 1, 2022).) From these guidelines, Jasper noted, the EU laid out restrictions on ESG agreements and justifications, discussed instances in which they are justified, and highlighted what safe harbor provisions exist regarding ESG.

From the U.S. perspective, ESG is complex. Kathleen Konopka (deputy attorney general/senior advisor for competition policy for the D.C. Office of the Attorney General) noted that federal antitrust enforcers do not consider ESG outcomes to be a justification for anticompetitive mergers. Konopka suggested that it is unlikely ESG will be viewed as an efficiency in merger analysis because it is not a proper offset for reductions in competition. During the enforcers panel, in response to a question about guidelines for ESG and sustainability agreements, FTC Chair Khan noted that the tools and directives of the FTC may not be sufficient to solve all kinds of policy issues. When firms go to the FTC with a proposed merger that raises competition concerns but has sustainability and ESG benefits, the FTC does not waver on its requirement to analyze the deals through the lens of competition. Khan highlighted that "ESG commitments or other types of sustainability commitments are not key to [the FTC's] inquiry."

Adding to the uncertainty around ESG in the United States, Konopka highlighted the political divide among states with respect to ESG metrics. Speaking on the Enforcers Panel, Gwendolyn Cooley (Wisconsin Assistant AG for Antitrust and Chair of the NAAG Multistate Antitrust Task Force) echoed the sentiment regarding diverging ESG opinions among the states. Certain states view ESG as a disservice—particularly to state pensions. However, other states recognize the potential of ESG and believe that the failure to consider ESG does a disservice to shareholders.

Konopka suggested that the political divergence on ESG policy could cause a chilling effect on ESG initiatives.

In light of the uncertain legal environment regarding ESG, panelists provided conservative guidance

on counseling clients in this area. The panel noted that it is preferable to have unilateral decision-making with business justifications for ESG decisions. Moreover, it is helpful to articulate and document procompetitive justifications for actions. Finally, panelists agreed that clearer guidelines and boundaries for ESG would be beneficial.

Criminal Prosecutions Under Sherman Act Section 2

In a panel titled "Criminally Minded: Section 2 Prosecutions Advancing," panelists explained the history of criminal Sherman Act Section 2 cases. Specifically, Sherman Act Section 2 cases primarily occurred in the 1940s and 1950s. Prior to last year's resurgence, criminal prosecutions under Section 2 had petered out since the 1970s. The gap in criminal prosecutions from 1970 to 2022 may have existed because enforcers felt that they did not need to bring Section 2 criminal cases. Now, however, the DOJ has chosen to employ the broad array of tools in its toolbelt.

Jacklin Lem (assistant chief, San Francisco Office, U.S. Department of Justice, Antitrust Division) highlighted two ongoing Section 2 cases, *United States v. Zito* and *United States v. Martinez*. In *Zito*, the defendant, a paving and asphalt contractor, invited a competitor to conspire with him to divide geographic markets for their services. (Press Release, Department of Justice, Executive Pleads Guilty to Criminal Attempted Monopolization (Oct. 31, 2022).) The DOJ charged the defendant with attempted monopolization under Section 2. In *Martinez*, the DOJ alleged that the defendants conspired to monopolize the market for vehicle shipments from the U.S. to Mexico in violation of Sherman Act Sections 1 and 2. (Press Release, Department of Justice, Criminal Charges Unsealed Against 12 Individuals in Wide-Ranging Scheme to Monopolize Transmigrante Industry and Extort Competitors Near U.S.-Mexico Border (Dec. 6, 2022).) The defendants allegedly threatened, extorted and engaged in physical violence against individuals in service of their conspiracy.

Lem advised individuals seeking guidance on Sherman Act Section 2 criminal prosecutions to look to past and current enforcement actions and to the case law. But panelists pushed back on the idea that looking at past actions could dictate future guidance. They noted that the facts and evidence needed for Section 2 cases differs widely. Therefore, it is reasonable for the defense bar to seek guidance from the DOJ. In a panel titled "New Enforcement Landscape's Impact on Compliance," James Fredricks (chief Criminal II Section, DOJ Antitrust Division) acknowledged the concerns about how the DOJ draws lines between criminal and civil enforcement. However, he was unwilling to create a safe harbor for anyone because that would go against the agency's case-by-case determinations. Fredricks further noted that if people do not know where the line is, they are more inclined to stay far away from it.

Conclusion

There were approximately 3,300 attendees at the 2023 ABA Spring Meeting (ABA Antitrust Law Section plans blockbuster Spring Meeting March 29-31 in D.C., ABA (Mar. 15, 2023), https://www.americanbar.org/news/abanews/aba-news-archives/2023/03/antitrust-law-spring-meeting/.) Attendees included government officials, private attorneys, in-house counsel, economists, academics, judges, organization leaders and businesspeople. This conference highlighted the energized, yet distinct views surrounding antitrust related to mergers, allegedly anticompetitive conduct, legislation, technology, labor and sustainability.