

## ANTITRUST TRADE AND PRACTICE

# Antitrust Yearly Recap: Agency Scrutiny Expands in Scope and Depth

January 9, 2024

It has been a landmark year for antitrust. President Biden set the tone for a ramp-up in scrutiny in his Feb. 8 State of the Union address, as he called on Congress to target “big online platforms” through restrictive antitrust legislation. While congressional action has stalled, the Federal Trade Commission (FTC) and Department of Justice (DOJ) have heeded the president’s call, introducing major proposed reforms in antitrust enforcement policy and announcing a renewed focus in regulating key and emerging industries.

In the face of these strong headwinds, big tech enjoyed a major victory this year—a sign that perhaps the courts, at least for now, are reticent to co-sign the aggressive approach adopted by the agencies. Here’s a recap of the major events of 2023 and developments to look for in 2024.

## The FTC Proposed a Ban on Non-Competes

In the first of a series of aggressive moves by the FTC this year, it voted on Jan. 5 to issue a notice of proposed rulemaking to ban non-compete clauses in employment contracts (the Proposed Non-Compete Clause Rule). This came on the heels of the Commission’s Nov. 10, 2022, statement that it would take an expansive approach to its duties under Section 5 of the FTC Act (see “Statement of Enforcement Policy Regarding Unfair Methods of Competition Under Section 5 of the FTC Act”).

The Proposed Non-Compete Clause Rule would at once prevent employers from including non-compete clauses in



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employment contracts, as well as invalidate existing non-competes within 180 days of publication of the final rule. The proposed rule was quite expansive, as it also banned agreements that functioned as “de facto” non-competes, such as broad non-disclosure or non-solicitation agreements that effectively prohibit employees from working in the same field. In its notice, the Commission described non-competes as “exploitative” and “coercive,” resulting in serious negative externalities for employees and the economy including lower wages, suppressed competition, and reduced innovation.

The FTC held a public forum through April 19 inviting comment on the proposed rule. Unsurprisingly, given the far-reaching and extremely disruptive potential of the ban, the FTC fielded many criticisms among the 27,000 comments the rule engendered.

One popular stance among business owners (and business associations such as the U.S. Chamber of Commerce and the International Franchise Association) was that the rule would strip businesses of the ability to protect their intellectual property from departing employees. While the proposed rule does provide a narrow “sale of business”

exception for 25% owners, members, or partners, it does not provide an exception for key employees or executives who do not have an ownership stake in the target business.

But there were many supporters of the proposed ban, among them U.S. Senators Sherrod Brown and Elizabeth Warren, who advocated for the rule's potential to increase both wages and career mobility as a result of increased competition. According to FTC estimates, the proposed ban would impact 30 million Americans and increase wages by about \$300 billion nationwide.

Ultimately, the Commission has decided to delay a final vote on the proposed rule until April 2024. It remains to be seen whether the FTC makes any revisions to the proposed rule in response to comments, or forges on as planned. In any case, it is clear that antitrust enforcers intend to make waves in the labor market—the FTC has signed separate memorandums of understanding (MOUs) with the Depart-

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ment of Labor and the National Labor Relations Board in what FTC Chair Lina Khan has described as a “whole-of-government effort to protect workers from unlawful business practices.”

### **Artificial Intelligence Was in the Crosshairs**

Following the launch of ChatGPT in November 2022, businesses have begun integrating generative artificial intelligence (generative AI) into their operations. The FTC and DOJ are anticipating that generative AI will both introduce new antitrust risks and heighten existing ones. Accordingly, they have announced a stated intention to get ahead of the curve in regulating in this space.

In April 2023, the FTC, DOJ, the Equal Employment Opportunity Commission (EEOC) and the Consumer Financial Protection Bureau (CFPB) issued a joint statement reiterating that existing legal authorities and frameworks apply fully to generative AI and automated systems that incorporate it,

“just as they apply to other practices.” Rohit Chopra et al., “Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems” (Apr. 25, 2023).

In particular, FTC Chair Khan identified two key areas of concern with regard to the antitrust implications of AI technology: how AI can be used to facilitate collusion through price coordination, and how companies—specifically “large incumbent technology firms”—can entrench their market dominance by restricting smaller firms’ access to key inputs to generative AI. Lina Khan, “We Must Regulate A.I. Here’s How”, N.Y. Times Opinion (May 3, 2023).

The DOJ Antitrust Division has made a concerted effort to build the expertise necessary to carry out its enforcement agenda in AI. To that end, it has implemented “Project Gretzky”—an initiative to hire data scientists and AI experts to keep enforcers up to date with recent developments in AI. In a speech given in March, DOJ Antitrust Division Chief Jonathan Kanter attributed the name of the program to legendary NHL player Wayne Gretzky, reflecting the DOJ’s strategy of “skating to where the puck is going.” Ashley Gold, “DOJ has eyes on AI, antitrust chief tells SXSW crowd”, Axios (March 13, 2023).

In other words, the agency is seeking to anticipate potential antitrust issues raised by AI and head them off rather than enforce through after-the-fact litigation.

Antitrust practitioners advising businesses on AI integration should continue to stay up to date on trends in enforcement in this space, as regulators will surely be staying active through the next several years to keep up with emerging use cases for generative AI.

### **Microsoft and Activision Shook Off Regulators To Finalize \$68.7B Deal.\***

Microsoft first announced its intent to buy Activision Blizzard in January 2022; and after almost 20 months of jousting with both foreign and domestic antitrust enforcers, the deal finally closed on Oct. 13, 2023 in one of the largest consumer tech deals in decades.

Domestically, the deal was met with intense scrutiny from the outset, with U.S. Senators Elizabeth Warren, Bernie Sanders, Sheldon Whitehouse and Cory Booker raising concerns that the bargaining power of workers in employment negotiations against the parties will be significantly weakened. Warren, et al., “Letter to FTC re Activision Microsoft Deal” (March 31, 2022). The FTC filed an administra-

tive complaint to block the acquisition in December 2022, citing multiple theories that the merger would potentially harm Activision Blizzard's customers and that Microsoft would control too much of the gaming industry. Stated points of emphasis were cloud gaming and the potential exclusivity to Microsoft's Xbox console of certain bestselling games.

On June 12, 2023, the FTC requested a temporary restraining order and a preliminary injunction to block the merger. Judge Jacqueline Scott Corley of the U.S. District for the Northern District of California granted the TRO, and a hearing on the preliminary injunction was held from June 22 to June 30.

At the preliminary injunction hearing, the FTC focused much of its argument on the anti-competitive effects of console exclusivity. The FTC argued that, if the deal were consummated, the bestselling Call of Duty video game series and other Activision-exclusive content would fall under the exclusive control of Microsoft. The merging parties rebutted this point by showing that even if Microsoft retracted its stated position that it would not make Call of Duty exclusive, Sony's PlayStation would still have a commanding lead in the console market. The FTC also made the related argument that Call of Duty would be used to drive Game Pass membership, and would thus inflict significant harm to competitors like Sony.

Ultimately, the FTC's arguments did not persuade Judge Corley and she denied the preliminary injunction on July 11. The court found that although Microsoft had the ability to make Call of Duty an Xbox exclusive, it lacked the financial incentive to do so; rather, the facts indicated that Microsoft would be likely to make Call of Duty accessible to more consumers by making it available to play on any console through cloud gaming. The FTC thus could not prove a likelihood of substantial harm to competition. Additionally, Microsoft had committed to continue making Call of Duty available on PlayStation and for the first time on Nintendo Switch—a factor that helped the merger's case.

After Microsoft made a series of commitments to license Activision's cloud streaming rights post-closing, the European Commission approved the transaction. Likewise, the United Kingdom Competition and Markets Authority (CMA) finally approved the deal despite initial concerns after Activision sold its cloud streaming rights to Ubisoft. The parties formally closed the transaction on Oct. 13.

The litigation is still pending, however. The FTC has appealed the denial of the preliminary injunction to the U.S. Court of Appeals for the Ninth Circuit, and continues to challenge the merger in its administrative proceeding.

### **The Agencies Released Revamped Merger Guidelines**

The FTC and the DOJ Antitrust Division together released a draft update of the Merger Guidelines, last overhauled in 2010. After months of receiving comments and hosting public forums, they unveiled a final version of the Guidelines on the morning of Dec. 18.

Since taking office, FTC Chair Khan had been open and upfront about her agenda to apply greater pressure on large firms expanding through mergers and acquisitions. Recognizing that the economic landscape is far different today than it was thirteen years ago, she stated in the joint press release: "With these draft Merger Guidelines, we are updating our enforcement manual to reflect the realities of how firms do business in the modern economy." Federal Trade Commission, "FTC and DOJ Seek Comment on Draft Merger Guidelines" (July 19, 2023).

The draft update contained 13 broad guidelines that articulated the agencies' agenda. Central to this modernization approach is the agencies' prioritization of serial acquisitions, or "roll-ups"—a trend in which firms establish a "longer horizon with respect to strategic acquisitions in markets" which might lead to either monopolizing or tipping the market. Conversation, "FTC's Shaoul Sussman Discusses Draft Merger Guidelines with Skadden", Law.com (Sept. 14, 2023). This was addressed in Guideline 8, which identified trends toward concentration as an independent basis for scrutiny.

Additionally, enforcers reiterated in public workshops that the focus will continue to be on consumers despite speculation that the focus would shift to "little guy producers." Enforcers will try to get courts on board with a longer time-frame for consumer harm than the courts have traditionally been willing to consider. "DOJ & FTC Public Workshop on the Department of Justice and Federal Trade Commission 2023 Draft Merger Guidelines" (Nov. 3, 2023).

Perhaps most importantly, Guideline 1 would dramatically lower the threshold of market concentration for identifying deals that may raise concerns and be considered unlawful. And lastly, Guideline 13 would serve as a catchall warning that the agencies will scrutinize any scenario in which the

facts suggest that a merger would “substantially lessen” competition, and not just the scenarios contemplated in Guidelines 1-12.

After 30,000 comments from stakeholders, the finalized guidelines retained many elements of the draft released in July. However, there were some important changes from the drafts as well.

For starters, the final version has only eleven guidelines as opposed to the thirteen in the drafts. Guideline 7 (formerly Guideline 8) downgrades “trend towards consolidation” from being an independent basis for scrutiny to merely one “important factor in understanding the risks to competition presented by a merger.” Merger Guidelines [2023], U.S. Department of Justice and the Federal Trade Commission. Additionally, Guideline 13 was removed and replaced with an unenumerated caveat that these guidelines are not an exhaustive list of all the ways mergers can present a risk to competition and, in turn, invite antitrust scrutiny. Brian Koe-

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nig, “Final Merger Guidelines Soften Tack on Concentrating Sectors” (Dec. 18, 2023).

The guidelines also include a list of economic and evidentiary tools that enforcers will use to evaluate deals, likely in response to many comments noting that the draft guidelines had greatly diminished the role of economic evidence in the merger review process.

The goal, as expressed by FTC Chair Khan and Attorney General Merrick Garland, is a transparent enforcement regime that will protect the American public and give ample notice to firms so as to prevent costly second requests.

Time will tell how these guidelines will impact contemplated transactions and the agencies’ ability to challenge

them. In the meantime, firms with large deals on the horizon should expect to be heavily scrutinized.

### **Developments To Look for in 2024**

Three potentially hugely consequential suits against tech giants remain pending, ensuring that big tech will continue near the forefront of antitrust issues in 2024. *United States v. Google*, in which the DOJ and 49 states allege that Google had unlawfully monopolized the general search market, wrapped up trial in November and is scheduled for closing arguments in May 2024. The FTC’s lawsuits against both Meta and Amazon remain on the dockets as well. As these cases develop, the courts will reveal how keen they are to follow the FTC’s and DOJ’s aggressive enforcement agenda against big tech.

Deal makers over the next year may also need to contend with the reformed Hart-Scott-Rodino (HSR) filing requirements. If adopted, the revamped HSR requirements will force companies to allocate significantly more time and cost to the HSR form preparation process; the agencies estimate that the time to prepare an HSR filing under the new rules would average 144 hours, a significant jump from the current average of 37 hours. Adding to the uncertainty is the instability that comes with a potential administration change in 2024. Commentators suspect that a new administration would dial back from the aggressive policy shift that occurred during the Biden administration.

Finally, observers can expect more enforcement in the labor markets, as there are now mechanisms in place for the FTC to act in tandem with labor agencies such as the Department of Labor or the National Labor Relations Board. Benjamin Dryden and Richard Flannery, “Behind Antitrust Enforcers’ 2023 Labor And Employment Push”, Law360 (Dec. 19, 2023). If the FTC finds a potential labor law violation in an antitrust merger investigation, it may now share that information with those agencies as appropriate, and vice versa.

*\*Skadden represented the Activision side of the merger.*