Paul | Weiss

2023 OUTLOOK

The State of U.S. Antitrust Enforcement at the Beginning of 2023

Paul, Weiss, Rifkind, Wharton & Garrison LLP

January 12, 2023

The State of U.S. Antitrust Enforcement at the Beginning of 2023

- 2022 was an active year for the U.S. federal antitrust enforcement agencies. There were important developments in all key areas of the agencies' remit, from merger enforcement to civil conduct cases to criminal prosecutions.

- 2023 may prove to be one of the most consequential for antitrust enforcement in the Biden administration, with the anticipated release of new merger guidelines and several cases set for trial.

Mergers

The Antitrust Division of the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) are soon set to release draft revised **merger guidelines**. These new guidelines would replace the agencies' Horizontal Merger Guidelines, which have been in place in their present form since 2010, and the Vertical Merger Guidelines, which were adopted by the agencies in 2020. (The FTC, for its part, rescinded those guidelines in September 2021.) New merger guidelines have the potential to bring more transparency to how the agencies conduct merger reviews, but their ultimate impact will depend on whether courts agree with theories of competitive harm asserted by the agencies in merger challenges. Merger guidelines are not binding on the federal courts and do not change the law, but in the past they have been cited as persuasive authority by courts. The agencies called for public comment in connection with their review of merger guidelines last year, and it is likely that the draft new guidelines will be subject to public comment after they are published.

There were several significant merger enforcement developments last year. In late January, Jonathan Kanter, the assistant attorney general in charge of the DOJ Antitrust Division, signaled that the DOJ may be more willing to litigate and less willing to settle merger cases. Indeed, last year the DOJ had a busy merger litigation docket and has not agreed to a divestiture settlement subject to Tunney Act judicial approval since late 2021. However, in July, in a case related to the acquisition of Sanderson Farms by Continental Grain and Cargill, the DOJ agreed to a consent decree prohibiting the sharing of competitively sensitive information about the compensation of poultry processing plant workers. The consent decree also contains provisions regarding arrangements with chicken growers. The DOJ's willingness to litigate has so far resulted in a mixed record: the agency lost three merger trials in 2022 and won one.

In the **UnitedHealth-Change Healthcare** case, the government raised both horizontal and vertical concerns and objected to the parties' proposed divestiture to a private equity firm as a remedy to address an alleged horizontal competitive overlap for health insurance claims editing. The court ruled against the DOJ on both theories. Significantly, the court found that the proposed divestiture would preserve competition for claims editing, demonstrating that a "fix-it-first" strategy can work in a merger challenge and a private equity fund can be an acceptable divestiture buyer. This is so despite the agencies' increased skepticism towards private equity. The court also rejected the DOJ's vertical theories of harm relating to UnitedHealth's access to rival insurers' data and alleged incentives to withhold certain products from rivals. The government's failure to prove a vertical theory of competitive harm is notable in light of the agencies' increased attention to vertical deals in recent years.

The DOJ also lost its challenge to the **U.S. Sugar-Imperial Sugar** deal, a case in which the DOJ asserted a horizontal theory of harm. Here, the court found that the government failed to prove that its alleged market was a proper antitrust market. Not long

after the ruling in that case, a different court rejected the DOJ's request to enjoin **Booz Allen's acquisition of EverWatch**, again finding fault with the DOJ's proposed market definition. The DOJ has appealed its losses in the UnitedHealth-Change Healthcare and U.S. Sugar matters.

The DOJ won its challenge to the **Penguin Random House-Simon & Schuster** merger. There, the DOJ's theory was that the merger would harm authors, particularly authors of "top-selling" books, by diminishing competition for book advances. In siding with the DOJ, the court found that the deal may substantially lessen competition in a market for the U.S. publishing rights to anticipated top-selling books. This is a particularly significant win for the DOJ given the current administration's focus on labor issues. In addition to this win, several deals were abandoned after they were challenged by the DOJ.

The FTC also had an active merger enforcement docket, also with mixed results. In September, in a loss in its home court, the FTC's administrative law judge ruled against the FTC in its challenge to **Illumina's acquisition of Grail**. Here, the FTC asserted a vertical theory of harm. It alleged that because Grail's and its competitors' cancer screening tests run on sequencing platforms supplied by Illumina, the deal would allow Illumina to harm Grail's competitors by restricting access to Illumina's sequencing platform. The judge determined that FTC complaint counsel failed to prove its prima facie case. (Shortly after the FTC decision was announced, the deal was prohibited by the European Commission. The administrative law judge's opinion is currently on appeal at the FTC.) The FTC stopped several hospital deals, which were abandoned in the face of FTC opposition. Earlier in the year, the administrative law judge dismissed a complaint against **Altria Group and JUUL Labs** alleging that the companies violated antitrust laws by agreeing that Altria would make a minority investment in JUUL, exit the e-cigarette market and restrict its future competition with JUUL. The judge found that complaint counsel failed to prove the existence of the exit agreement and also failed to prove that the non-compete agreement unreasonably restrained or was likely substantially to harm competition. This decision is also on appeal.

Unlike the DOJ, the FTC continues to enter into consent orders to resolve merger cases. Some of these consent orders have become more onerous, however, after the implementation of the FTC's policy to include **"prior approval" provisions**. Of particular note, in a matter involving the private equity sponsored acquisition of veterinary clinics, the FTC's consent order includes broad provisions requiring the acquirer to receive prior approval for future acquisitions of clinics within 25 miles of an existing owned clinic anywhere in California or Texas. The order also requires prior notice of future acquisitions of clinics within 25 miles of an existing owned clinic anywhere in the United States. Another type of prior approval provision that has become increasingly common generally requires purchasers of divestiture assets to seek the FTC's agreement before selling those assets.

The agencies' losses have not deterred them from aggressively pursuing merger cases. In August 2022, the FTC sued to block **Meta Platforms's acquisition of Within**, a virtual reality studio, alleging that the deal could lessen perceived and actual potential competition in a purported market for VR dedicated fitness apps. In December 2022, the FTC sued to block **Microsoft's acquisition of Activision**, alleging that the deal could harm competition because Microsoft could and would withhold video game content from rival gaming consoles. If these challenges are successful, the agencies may be emboldened to challenge future deals using similar theories. Additionally, the DOJ has a pending case seeking to block **Assa Abloy's acquisition of the hardware and home improvement division of Spectrum Brands**. After the DOJ filed suit, but before trial, Assa Abloy announced it would divest certain businesses in an effort to address competitive concerns. An important issue before the court in that case is whether the court should take into account the effect of these proposed divestitures in determining if the government meets its burden of proof to establish a prima facie case that the deal may be substantially to lessen competition. A different judge (in the UnitedHealth-Change Healthcare case) determined that courts should take proposed divestitures into account.

Interlocking Directorates

Last year, the DOJ gave significant attention to **interlocking directorates**. In general, Section 8 of the Clayton Act prohibits a person from simultaneously serving on the board or as an officer of two competing corporations unless the criteria for de minimis exceptions are met. Historically, when the DOJ became aware of a potential Section 8 issue (typically during review of a proposed transaction), the matter was often resolved by the director resigning from a board. In certain instances, the DOJ issued a public statement about the matter. In October 2022, the DOJ announced that a number of individuals resigned from

corporate boards "in response to concerns by the Antitrust Division that their roles violated the Clayton Act's prohibition on interlocking directorates." We expect the DOJ to continue to focus on issues relating to interlocking directorates.

Conduct Cases

The agencies' pending conduct cases are also moving forward. **Google** recently moved for summary judgment in the case brought against it by the DOJ and a coalition of state attorneys general alleging that Google has maintained monopolies in general search services, search advertising and general search text advertising. The trial in that case is currently set to begin in September 2023. In the FTC's case against **Meta Platforms** alleging monopolization of personal social networking services, much of the coming year will be taken up by fact and expert discovery, according to the court's scheduling order. Last September, the FTC filed a new conduct case in which it is alleging that **Syngenta and Corteva** have used "loyalty discount programs" to maintain monopolies in markets for crop protection products.

Last November, the FTC released a new enforcement policy, which significantly expanded the range of conduct that the FTC considers to be covered by Section 5 of the FTC Act, which outlaws "unfair methods of competition." The policy statement listed serial mergers, "practices that facilitate tacit coordination," "parallel exclusionary conduct that may cause aggregate harm" and "fraudulent and inequitable practices that undermine the standard-setting process or that interfere with the Patent Office's full examination of patent applications," among other things, as examples of conduct that the FTC now asserts may fall under Section 5. Going forward, we may see the FTC seek to bring **"unfair competition" enforcement proceedings** asserting some of the significantly broadened theories of harm set forth in that policy.

Indeed, on January 4, the FTC announced that it agreed to proposed consent orders with three companies requiring them to eliminate non-compete clauses in their contracts with employees. The FTC alleged that the non-compete clauses at issue were unfair methods of competition. According to the FTC, the orders "prohibit the companies and, where applicable, their individual owners from enforcing, threatening to enforce, or imposing non-competes against any relevant employees," among other things. Because the companies agreed to settle with the FTC, it remains to be seen whether and in what circumstances a court would ultimately agree that employee non-compete clauses are unfair methods of competition.

Non-compete clauses were a focus of President Biden's 2021 Executive Order on Promoting Competition in the American Economy, which encouraged the FTC to issue rules "to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility." On January 5, 2023, the FTC proposed a **rule to ban employer-worker non-compete clauses**, and to require employers to rescind existing non-compete agreements and actively inform workers subject to such agreements that they are no longer in effect. The rule proposal is subject to a public comment period and is likely to attract legal challenges to the FTC's authority to issue the rule. If finalized in its current form, the rule would displace many less restrictive state laws and result in a fundamental change in federal antitrust law that for decades has required a fact-specific analysis into the effects of non-compete agreements. This would result in a significant shift for many employers. In addition, in a filing in February of last year in a case to which it was not a party, the DOJ indicated that it considers certain types of employer-employee non-compete agreements to be per se unlawful when they are between employers and employees who could compete with one another.

Criminal Enforcement

In April 2022, a jury acquitted a company charged with criminal labor market allocation by entering into **employee non-solicitation agreements**. A day after that verdict, another jury acquitted two individuals of criminal **wage-fixing** charges. Both of these cases were the first of their kind. Despite these outcomes, the head of the DOJ Antitrust Division said that the DOJ is "not backing down" from bringing criminal antitrust cases in the labor area. Indeed, another criminal labor market allocation case is set for trial this year. In mid-2022, a jury acquitted several individuals that the DOJ accused of engaging in **broiler chicken price fixing and bid rigging**. These acquittals came after two prior trials where the juries failed to reach a verdict.

On the policy front, last April the DOJ updated its **leniency policy**, which allows organizations to avoid criminal antitrust prosecution in certain circumstances, and published a revised set of Frequently Asked Questions (FAQs). The updated policy

added prompt reporting and compliance program improvement requirements to the list of conditions that an organization must meet in order to qualify for leniency, and the FAQs moved up timing for providing a plan for restitution to potential victims. Also, in an announcement that gained significant attention within the antitrust bar, the head of the Antitrust Division said that the DOJ would consider bringing **criminal monopolization cases**. Section 2 of the Sherman Act makes monopolization a felony, but the DOJ long declined to bring criminal Section 2 cases. This changed in October 2022, when the DOJ announced that an individual pleaded guilty to "attempting to monopolize the market for highway crack-sealing services in Montana and Wyoming." Then, in December, the DOJ charged 12 individuals with "conspiracy to monopolize the transmigrante forwarding industry" in a Texas border region. According to the DOJ, the defendants "monopolized an industry through horrific violence and threats of violence." This case will be interesting to watch, particularly to see how the court handles the criminal monopolization charges. The indictment also contains price fixing, extortion and money laundering counts.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Justin Anderson
+1-202-223-7321
janderson@paulweiss.com

Robert A. Atkins
+1-212-373-3183
ratkins@paulweiss.com

Joseph J. Bial
+1-202-223-7318
jbial@paulweiss.com

Meredith R. Dearborn
+ 1 650-208-2788
mdearborn@paulweiss.com

Andrew C. Finch
+1 212-373-3417
afinch@paulweiss.com

William A. Isaacson
+1 202-223-7313
wisaacson@paulweiss.com

William B. Michael
+1-212-373-3648
wmichael@paulweiss.com

Jacqueline P. Rubin
+1-212-373-3056
jrubin@paulweiss.com

Joshua H. Soven
+1-202-223-7482
jsoven@paulweiss.com

Aidan Synnott
+1 212-373-3213
asynnott@paulweiss.com

Brette Tannenbaum
+1 212-373-3852
btannenbaum@paulweiss.com

Marta P. Kelly
+1 212-373-3625
mkelly@paulweiss.com

Jared P. Nagley
+1-212-373-3114
jnagley@paulweiss.com

Yuni Yan Sobel
+1 212-373-3480
ysobel@paulweiss.com

Practice Management Attorney Mark R. Laramie contributed to this Client Memorandum.