Spotting the Risk, Reaping Rewards: Avoiding Increased Antitrust Scrutiny

Katie Reilly and Natalie West*

Abstract: *A decade ago, few lawyers across the country spent significant time thinking about antitrust law. But, since then, there has been an onslaught of antitrust attacks on businesses and executives across all sectors of the economy. Enforcement efforts have skyrocketed following President Biden's July 2021 executive order directing a "whole of government" crackdown on competition abuses—and the trend shows no sign of letting up. Today, no matter the industry or the size of the business, everyone needs to understand these risks and have strategies to minimize them. This article will walk through the top antitrust risks of the moment and conclude with strategies on how to avoid not only violations but also bad optics that increase exposure.*

Background

Labor and Employment

In 2016, the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) jointly issued guidance for human resources professionals, warning everyone that, for the first time, they were going to start criminally prosecuting businesses that engage in wage-fixing, non-solicitation, and no-poaching agreements.

The DOJ has since delivered on that promise, filing numerous criminal cases against businesses and individuals for engaging in no-poaching and wage-fixing agreements. But they haven't yet convinced a jury to convict defendants under this theory.

Last year, the DOJ lost in a Texas wage-fixing case against health care staffing agencies and lost again in a Colorado no-poach case

Journal of Emerging Issues in Litigation / Fall 2023, Vol. 3, No. 4, pp. 381–387.

ISSN 2835-5040 (print) /ISSN 2835-5059 (online).

against DaVita and its high-profile CEO, Kent Thiry. In March 2023, the DOJ failed when a jury acquitted home health executives accused of wage-fixing. And in April, the DOJ suffered another setback when a Connecticut court granted six individual defendants' motion for judgment of acquittal in a no-poach case in the aerospace industry.

However, the DOJ did achieve its first success with a guilty plea by a Nevada nurse staffing company, and federal regulators are definitely not giving up.

Meanwhile, the FTC has taken aim at noncompete agreements, proposing a rule that would prohibit them as unfair methods of competition under Section 5 of the Federal Trade Commission Act. The FTC already sued several companies under the same theory and secured proposed consent decrees. Piling on, the DOJ filed a statement of interest in a state court suit, arguing that under certain circumstances, noncompetes may constitute per se illegal horizontal agreements.

States are taking action against noncompetes as well. Colorado has even criminalized the use of noncompetes that violate Colorado law.

There are still ways to thread the needle to use noncompetes and other restrictions to protect legitimate business interests, but companies need to be careful. Right now, executives should consult counsel before using noncompetes and related agreements, regardless of location.

Information Exchanges

Information sharing by competitors happens frequently and often for legitimate, pro-competitive reasons, including through trade associations or data consultants.

Historically, businesses could avoid trouble by following safe harbor guidelines issued by the FTC and DOJ. They stated that sharing information was considered safe if it reflected these criteria:

- the sharing was conducted by a third party,
- the information was more than three months old, and
- the information came from multiple participants and was presented as aggregated, anonymized data.

But in recent years, information exchanges have carried significant risk, as they have been a primary focus for regulators and plaintiffs' attorneys. In February, the FTC and DOJ withdrew their safe harbor guidance and, instead of issuing new guidance identifying a "safety zone," the DOJ announced plans to take a case-by-case approach to policing information sharing.

The risks of information-sharing arrangements are significant. In 2022, poultry processors agreed to pay $84 million and implement a 10-year monitoring and compliance program after the DOJ accused them of using a third-party data firm to exchange wage and benefit information about their labor force to drive down compensation.

Pricing Algorithms

A key reason the FTC and DOJ pulled back on their safe harbors for information exchanges stemmed from what has become another hot area: competitors' use of pricing algorithms.

Uber was hit with a class action alleging a price-fixing conspiracy with its independent contractor drivers because Uber requires its drivers to use pricing algorithms. The case survived Uber's motion to dismiss, but the company ultimately won in arbitration.

RealPage Inc. (a software company that provides apartment owners and operators with revenue management software solutions) and approximately 60 of RealPage's customers are facing dozens of class actions that are consolidated as multidistrict litigation in Tennessee.[1] The complaints contend that RealPage and the apartment owners and operators conspired to fix lease prices by using a pricing algorithm in RealPage's software that allegedly incorporates competitors' pricing and occupancy data. Lawmakers have called on the DOJ to investigate RealPage, and the DOJ has reportedly opened an antitrust investigation.

ESG Initiatives

With the serious challenges facing society, players in the same industries have recently come together to advance goals about

climate change and sustainability, among other environmental, social, and corporate governance (ESG) issues. In Europe, some are working to pull back antitrust rules so businesses collaborating to address climate change won't run afoul of the law.

But in the United States, there is no free pass from antitrust scrutiny for ESG. The DOJ under the Trump administration launched an investigation of California carmakers who agreed to emissions standards that were more stringent than the federal standard. The investigation was dropped, but this could happen again, depending on how political winds shift. Similarly, some state attorneys general are banding together to challenge coordinated ESG initiatives.

The bottom line is this: in the United States, at least, don't expect special treatment for joint ESG initiatives, and depending on what state you are in, these initiatives can be even riskier than other types of competitor collaborations.

Mergers and Interlocking Directorates

While horizontal mergers have long drawn regulators' attention to prevent the merged company from achieving monopoly status, both the FTC and DOJ have shown an increased interest in vertical mergers and vertical theories of competitive harm. New merger guidelines are expected later this year, but in the meantime, the Biden administration continues to aggressively challenge deals. The DOJ has experienced a string of recent losses in this area, but again, the targeted companies had to absorb the litigation costs.

Even past mergers are being scrutinized, with regulators and plaintiffs' lawyers challenging the current effects of transactions conducted many years ago. Deals that withstood scrutiny at the time—such as the LiveNation/Ticketmaster merger or Facebook's acquisition of WhatsApp and Instagram—are now perceived to have created too much market power.

The heightened scrutiny of how competitively sensitive information is exchanged is also touching board personnel. The DOJ is targeting interlocking directorates, where the same person sits on the boards of competing companies, for independent investigation rather than just as a by-product of merger review.

With limited exceptions, a company cannot appoint an individual to sit on its board who is also the director or officer of a competing company. Such an interlock is prohibited by the Clayton Act and may create exposure for a Section 1 conspiracy claim. Given the difficulty of tracking competitors and potential rivals, companies need to regularly monitor and revisit that analysis.

Price Discrimination

Price discrimination and the Robinson-Patman Act is a complex area of antitrust law that has not received much attention for many decades. Yet in 2022, the FTC announced not only that it is reviving Robinson-Patman Act enforcement but also that it would use Section 5 of the FTC Act to challenge unfair pricing—even when it does not technically violate the Robinson-Patman Act. The FTC is currently investigating both Pepsi and Coca-Cola for potential price discrimination in the soft drink market.

Companies (and their attorneys) cannot ignore Robinson-Patman anymore. It needs to be on their radar, particularly for manufacturers or other companies selling goods to resellers.

Renewed Criminal Enforcement

Just as the DOJ has started pursuing criminal prosecution regarding labor-related agreements that may violate antitrust laws, it has expanded criminal enforcement to Section 2 monopolization and attempted monopolization claims—an area that hadn't seen criminal prosecutions since the 1970s.

Last year the DOJ secured[2] a criminal indictment and guilty plea from a Montana executive of a paving and asphalt contractor. He was alleged to have attempted to monopolize the market for highway crack-sealing services in several states by proposing a market allocation deal in which his company would bid on work in Montana and Wyoming, and a competitor would bid on work in South Dakota and Nebraska. The competitor rejected the offer but reported the executive to the federal government. The executive

was sentenced[3] to three years of probation, six months of home confinement and a $27,000 fine.

This development shows the DOJ will go so far as to prosecute an entirely unsuccessful effort by a relatively small business.

Best Practices

The increase in aggressive antitrust enforcement has certainly received significant attention. For the moment, juries are not rewarding the prosecutors. That said, even an unsuccessful government investigation is itself costly and can motivate plaintiffs' lawyers. Best practices involve not only following the law but also maintaining solid optics to avoid the need for an expensive, if ultimately successful, defense.

Awareness is the most important factor. Companies need to know what to look for, then seek antitrust advice as needed. Here are some items for an antitrust checklist:

- examine employment agreements for antitrust risk;
- avoid discussions with competitors about employment-related issues;
- carefully review information-sharing policies and conduct a legal analysis before sharing competitively sensitive information—particularly with competitors;
- train employees—particularly those who attend trade association meetings or otherwise interact with competitors—how to spot and avoid risk;
- if a company has market power, it should analyze pricing efforts to assess price discrimination risk;
- regularly monitor board positions to review if there is any competitive overlap, and revisit the definition of potential rivals based on new business lines and market shifts; and
- expect heightened scrutiny in targeted areas, including labor markets and employment practices, ESG initiatives, information exchanges, and pricing algorithms.

Finally, companies will want to consider consulting with antitrust counsel to develop a detailed training and compliance program that enables them to stay updated, as these risks shift often.

Notes

* Katie Reilly (reilly@wtotrial.com) and Natalie West (west@wtotrial.com) represent clients in complex commercial litigation, including antitrust matters and class actions in highly regulated industries. At Wheeler Trigg O'Donnell LLP, they have successfully represented antitrust clients in matters involving allegations of monopolization, conspiracy, price fixing, exclusive dealing, and other competition-related disputes, including trade secrets and noncompete actions.

1. Wheeler Trigg O'Donnell represents one of the apartment owners in this multidistrict litigation.

2. https://www.justice.gov/opa/pr/executive-pleads-guilty-criminal-attempted-monopolization.

3. https://www.justice.gov/usao-mt/pr/former-construction-company-president-sentenced-attempting-monopolize-highway.