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ABA's 2024 Antitrust Spring Meeting: Key Topics and Takeaways

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From April 10 to April 12, 2024, more than 4,000 antitrust professionals from around the world gathered in Washington, D.C., for the American Bar Association's 72nd annual Antitrust Spring Meeting. 2024 Antitrust Spring Meeting, American Bar Association.

This article highlights the overarching themes from the conference, including emerging technology, agency enforcement and prevailing competitive concerns.

Emerging Technology

Panel participants throughout the conference discussed competitive concerns related principally to two emerging technologies: (1) artificial intelligence and (2) big tech and digital platforms.

Artificial Intelligence

This year, Congress allocated $45 million for the Department of Justice (DOJ) and Federal Trade Commission (FTC) to invest in artificial intelligence. Jillian Rogowski, Counsel to Assistant Attorney General Jonathan Kanter, noted that the DOJ plans to use its share of these resources to upgrade its own technology and internal systems for increased efficiency and to develop an understanding of how new technology plays a role in potential antitrust violations.

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FTC Chair Lina Khan said that the FTC is using its share of these funds to create an enforcement team made up of data scientists and engineers who, through a better understanding of how firms use AI, will identify potential antitrust violations effectuated through algorithmic pricing or other AI-related tools.

Private practitioners and scholars similarly voiced their opinions that strong agency enforcement in the AI arena is necessary. In a panel entitled "Chair's Showcase – Hope or Horror: The Big AI Debate," one participant advocated for the creation of an expert administrative agency over artificial intelligence, explaining that the agencies do not have the expertise to keep up with the fast-moving technology. The panelist distinguished the development of AI from historical technological advancements like the Internet, arguing that, while the federal government, acting without a particular profit motive, began the development of the Internet, profit-motivated firms have driven AI development.

In the absence of self-regulation, the panelist opined, the government should implement additional guardrails to control the technology.

Big Tech and Digital Platforms

In a panel entitled "Regulating Digital Platforms and Ecosystems," representatives of both the DOJ and the FTC explained that the agencies worry about entrenchment and harm to competition in industries where digital platforms create network effects that make it difficult for customers to switch platforms. According to the agency panelists, Guideline 6 of the Merger Guidelines provides that mergers can harm competition when they entrench a company's industry dominance. This theory of entrenchment is similar to the monopoly maintenance theory of Section 2 of the Sherman Act. Critically, antitrust enforcers must distinguish between a firm that maintains its dominance through efficiencies, which is procompetitive, and one that maintains its dominance through entrenchment, which may be anticompetitive.

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Several pending cases, including the DOJ's lawsuits against Google, Apple and Microsoft and the FTC's lawsuits against Amazon and Meta, may provide meaningful guidance as to how the courts are likely to apply Guideline 6 to address digital platforms.

Representatives from both agencies discussed these enforcement efforts in the big tech industry. Ricardo Woolery, Attorney Advisor at the FTC, explained that enforcers are not afraid to apply customary tools to address big tech. Daniel Guarnera, DOJ Antitrust Division Section Chief of the Civil Conduct Task Force, distilled several lessons that private practitioners should learn from recent enforcement action, including the need for litigators to more effectively explain complex technologies and the strong preference for openness and transparency at trial despite parties' desire to file commercially sensitive technological information under seal.

Agency Enforcement

Nearly every panel at the conference also discussed changes in the antitrust agencies' enforcement tools over the past year, including updates to the HSR Form and the "reinvigoration" of previously underutilized enforcement tools.

Changes to the HSR Form

The DOJ and FTC are working through comments and feedback on their proposed changes to the HSR Form, which they expect to be finalized "within weeks." The agencies explained that their goal is to capture in the initial 30-day waiting period the additional information that staff deems necessary to effectively investigate the competitive effects of a proposed transaction. The agencies hope that the expanded information will enable them *quickly* and efficiently to identify transactions that are not anticompetitive and to focus on competitively problematic transactions.

Much of the discussion about the proposed HSR Form centered on the additional burden it will place on transacting companies. In the panel entitled "The PE Effect: Antitrust Scrutiny Abounds," one panelist estimated that the proposed changes would triple or quadruple the burden on parties. For example, companies would be required to provide information regarding minority investments, subsidiaries and board powers and every acquisition over the preceding ten years, regardless of its size.

In the panel entitled "How Does Merger Review Reform Impact Compliance?," panelists explained that the proposed HSR rule expands Item 4(c) custodians and requires provision of many additional documents.

The DOJ and FTC stressed that they are taking the questions and comments about the proposed Form seriously in considering its final version. While the agencies could not speak to the specific revisions that will be implemented, they noted their intention to strike an appropriate balance between thorough transparency and undue burden.

Expanded Use of Existing Toolkits and Authority

Section 5 of the FTC Act

The FTC has increased its use of Section 5 of the FTC Act over the past year to address a broader range of competitive problems, including challenging mergers that do not necessarily violate the Sherman Act.

According to Henry Liu, Director of the FTC's Bureau of Competition, parties should assume that an FTC market conduct investigation involves Section 5, in addition to Sections 1 and 2 of the Sherman Act. Liu expressed his view that the scope of Section 5 exceeds the scope of the Sherman Act. He noted that many unfair competition cases exist in a grey zone where conduct harms the competitive process through nefarious means, including, for instance, invitations to collude, but for technical reasons, including unfavorable Sherman Act case law, claims under Section 1 or 2 are less attractive. Thus, if the FTC believes the competitive process is being harmed in ways that may not rise to the level of a Sherman Act violation, the agency sees Section 5 as a viable path for addressing anticompetitive activity.

On April 23, 2024, the FTC announced its final rule banning future non-compete agreements and rendering most existing non-compete agreements unenforceable.

Hannah Garden-Monheit, Director of the FTC's Office of Policy Planning, added that the agency's use of unfairness claims under Section 5 represents a revitalization of existing authority, rather than a completely new shift or addition to the agency's powers.

Khan explained that recent case law permits the FTC to pursue invasion of privacy crimes under Section 5 without having to show second- or third-order harm. Khan emphasized that the FTC will continue to protect sensitive health, geolocation and browsing data, asserting her view, echoed by FTC personnel in different discussions, that there should be a default presumption against selling and sharing this sensitive data unless a consumer explicitly authorizes it.

Section 8 of the Clayton Act

In the "Agency Update with the U.S. Department of Justice, Antitrust Division" panel, Deputy Assistant AG Andrew Forman discussed the agency's recent uptick in enforcement efforts under Section 8 of the Clayton Act. Section 8, which precludes interlocking directorates between competing firms, is predicated on the understanding that interlocking directors create a conduit for sharing sensitive competitive information. Forman said that, while Section 8 enforcement was historically an "ad hoc" process at the DOJ, AAG Kanter has encouraged the Division to take a more systematic approach to addressing interlocking directorates.

Specifically, the agency's proactive assessment of potential Section 8 violations has resulted in the prevention of interlocking directorates in twenty-four companies and the DOJ's participation in several additional active investigations. The Division plans to continue its focus on this area of antitrust law this year.

Prevailing Competitive Concerns

Certain enforcement priorities have been evident over the past year and were emphasized as continued concerns for the agencies moving forward, including competition in labor markets and the interplay between private equity and health care.

Labor: Non-compete and No-Poach Agreements

Competition in labor markets continues to sound a dominant theme with the federal enforcement agencies.

On April 23, 2024, the FTC announced its final rule banning future non-compete agreements and rendering most existing non-compete agreements unenforceable. The FTC's authority to write competition rules has been challenged and litigation is currently pending in federal court. At the time of the conference, the FTC was still reviewing more than 26,000 public comments on its proposed non-compete rule, more than 25,000 of which the FTC stated supported a ban on noncompete agreements to some degree. This support came from workers across the earnings spectrum.

Garden-Monheit told her audience that the FTC estimates that the rule banning non-compete agreements will increase workers' wages by billions of dollars. And, according to Aviv Nero, Director of the FTC's Bureau of Economics, the ban on non-compete agreements will stimulate the most productive matching between workers and jobs, benefiting workers and the economy at large.

In a panel entitled "Poaching No-Poach Agreements: Global Approaches," panelists discussed the DOJ views that no-poach agreements constitute market allocation and that wage-fixing constitutes price-fixing. Recent no-poaching cases have survived motions to dismiss and, according to the DOJ, those decisions validate the DOJ's enforcement views. Thus, the DOJ plans to continue to pursue these cases.

On the one hand, where sufficient evidence of an agreement between competitors to restrict wages exists, the agencies may pursue a criminal indictment. On the other hand, the DOJ will more likely challenge no-poaching agreement in civil cases.

Further evidence of the enforcement agencies' focus on labor markets is revealed in the proposed revisions to the HSR Form, which would require the parties to report transactions and to submit information of past OSHA violations as part of their initial filing.

Private Equity and Health Care

Finally, agency enforcement officials and private practitioners disagreed on the level of competitive concern that private equity (PE) involvement in healthcare should warrant.

According to FTC and DOJ representatives, PE transactions generate issues under Guideline 2 of the new Merger Guidelines, which addresses serial acquisitions, and Guideline 7 of those guidelines, which addresses trends toward consolidation. These panelists stressed that in assessing a single PE-related deal, it is important to consider historical transactions along with the broader market realities motivating each deal.

Liu explained that empirical literature and data show that PE-operated provider facilities are associated with higher costs and lower care. While the agency does not categorically condemn PE involvement in health care, Liu said that it is concerned about problematic practices that have arisen in the industry.

The agency has alleged in *FTC v. U.S. Anesthesia Partners* that small, incremental transactions over a period of time can give a health care practice significant market power and allow it to increase prices. Because of the successive and non-reportable nature of these transactions, Liu noted that the breaking point tends to be unclear, particularly as it pertains to remedies and in deciding which transactions need to be undone to restore competition.

Overall, the agencies reiterated their use of a "whole of government approach" to ensure that competition is not harmed by PE involvement in the healthcare industry. They emphasized in multiple panels that this approach includes both the FTC and DOJ collaborating with the Department of Health & Human Services to launch cross-government inquiries.

Private practitioners were less worried about PE transactions in the healthcare industry, and expressed concern that the public and enforcement entities have created a misleading narrative about their impact on healthcare. These panelists opined that public skepticism, driven by a general concern about the PE strategy of short-term investments, has generated undue skepticism among enforcers.

Participants in the panel on "The PE Effect: Antitrust Scrutiny Abounds" pointed to expert evidence supporting the benefits that PE investment has had in the health care space. These panelists urged enforcers to better consider the complexity of the health care industry before assuming that PE rollups will harm competition. To the extent that the agencies perceive harm to consumers, these participants suggested that perhaps such harm might be better addressed by health care policy, rather than antitrust law.