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Heard at Day One of 2022 Antitrust Law Spring Meeting

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This week, the American Bar Association's Antitrust Law Section kicked off its annual Spring Meeting in Washington, DC, which features updates from the antitrust enforcers and substantive discussions on today's most pressing antitrust issues. In this post, we share key takeaways from the first day of the Spring Meeting.

Agencies Continue to Be Hostile to M&A: Republican Federal Trade Commission (FTC) Commissioners Noah Phillips and Christine Wilson emphasized that the prevailing view under Democratic leadership at the antitrust agencies is that mergers provide no value and only carry costs.

- Progressive leadership wants to "throw sand in the gears" to prevent deals from being proposed altogether. Recent policy changes are aimed at creating uncertainty, heightening risk and raising the transaction costs of doing deals to slow the pace of M&A activity.
- Despite this, there was a precipitous drop in the number of FTC merger enforcement actions in the final year of the Trump administration (31) compared to the first year of the Biden administration (12).
- There is no indication that early termination for Hart-Scott-Rodino (HSR) pre-merger notification filings will be reinstated.
- "Close At Your Peril" letters are another tactic the agencies are using to heighten deal risk and deter parties from pursuing or consummating transactions, even though the antitrust agencies have always had the authority to investigate and challenge consummated transactions.

- Many panelists commented on the lack of transparency between agency staff and merging parties on recent transactions. If the lack of transparency persists, it may create due process issues and problems for timing agreements that merging parties typically negotiate with staff.

- The antitrust agencies are increasingly skeptical of the efficacy of structural and behavioral remedies to resolve competition concerns regarding a transaction. The Department of Justice (DOJ) Antitrust Division's Principal Deputy Assistant Attorney General Doha Mekki said merging parties should expect the DOJ to reject "risky settlements" more often and instead seek to block transactions outright. Mekki said literature has shown that many merger settlements failed to protect competition.

Increased Antitrust Litigation Is on the Horizon: DOJ officials said companies should expect an increase in antitrust litigation on both civil and criminal matters.

- The DOJ Antitrust Division has more cases in active litigation than it has had at any time in recent history. It currently has six active litigations involving civil matters and 21 ongoing litigations involving criminal matters.

- The Antitrust Division is not considering cost as a gating factor for bringing new cases. Instead, it is bringing cases where it deems necessary to uphold the law and preserve competition. The DOJ is hiring more attorneys and using shared DOJ resources to support the increased rate of litigation.

- The DOJ is also seeking faster access to the courts. Mekki indicated that in cases where potential anticompetitive harm resulting from a transaction is clear, the agency may file suit while an investigation remains pending and before merging parties have certified substantial compliance.

Updated Merger Guidelines Are Coming: Officials from both the FTC and the DOJ commented on the agencies' plan to update the 2010 Horizontal Merger Guidelines and the Vertical Merger Guidelines (following the FTC's recent withdrawal of the 2020 Vertical Merger Guidelines).

- Kathleen O'Neill, the Senior Director of Investigations and Litigation at the Antitrust Division, remarked that there is too much focus on market definition and concentration in agency merger review and that it is important for the agencies to consider direct evidence of harm from a transaction. This includes evidence of past head-to-head competition resulting in lower prices, more innovation, or higher quality; evidence that premerger coordination will worsen through a transaction (such as by eliminating a maverick); or evidence that the rationale for the transaction is aimed at eliminating competition.

- Current and former DOJ and FTC officials also commented on the need for more critical thinking regarding nascent competition and potential competition because the current guidelines often fail to capture competitive harm relating to innovation and future competition due to over-reliance on structural theories of harm.

- Some DOJ officials believed that the agencies are not ruling out the option for a single set of merger guidelines governing both horizontal and vertical mergers. O'Neill commented that the "binary framing" of transactions as either horizontal or vertical can miss the mark and fail

to capture real competition that is important but does not fit squarely within horizontal or vertical theories of harm.

- FTC Commissioners Wilson and Phillips emphasized the need for consensus building as new guidelines are promulgated to maintain credibility with the public and the judiciary.

More Is Required to Obtain Antitrust Leniency: The DOJ has made many considerable changes to its corporate leniency program regarding criminal antitrust conduct.

- Most recently, the DOJ revised the leniency program to institute a promptness requirement. Companies seeking leniency must now *promptly* self-report after discovering wrongful conduct. Richard Powers, the Antitrust Division's Deputy Assistant Attorney General for Criminal Enforcement, remarked that this change reflects the DOJ's emphasis on timely cooperation.

- Powers noted that other key changes require a leniency applicant to present a defined, conduct-specific restitution plan to receive a conditional leniency letter. The remedial measures in the plan must be appropriately tailored to prevent recidivism.

- The DOJ has updated its Frequently Asked Questions regarding the leniency program to provide more transparency and predictability through concise "plain English" guidance.

Labor Issues Will Continue to Be Investigated in Merger and Conduct Cases: The current agency leadership is very interested in exploring antitrust harm in labor markets.

- While the antitrust agencies have been assessing competitive effects of mergers on labor markets for several years, it is a high priority under the current administration. The DOJ's O'Neill remarked that harm at any level can support an enforcement action under Section 7 of the Clayton Act, while Commissioner Phillips stated that not everything that is bad for labor results from a competition problem, which is the only issue the antitrust agencies should be concerned about.

- The DOJ remains intent on pursuing both alleged agreements not to poach or hire competitors' workers and alleged wage-fixing agreements as criminal violations of the antitrust law. James Fredricks, the Chief of the Antitrust Division's Washington Criminal II Section, reiterated that the DOJ views such agreements as variations of customer allocation and price fixing. Other panelists commented that it is not well understood that such conduct constitutes illegal conduct, let alone criminal conduct, and there are many cases where restraints on labor markets are ancillary to a legitimate collaboration and have procompetitive justifications.

- Nearly all of the DOJ's current labor issue conduct cases are in the healthcare industry—though the DOJ remarked that this is merely coincidence, and the agency is not targeting the industry regarding labor issues.

- The DOJ has not obtained any guilty pleas in its labor market conduct investigations to date.

Han Cui also contributed to this article.

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