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Antitrust Enforcement Trends in the Digital Economy

Ryan K. Quillian and Lauren Willard*

In this article, the authors explain that U.S. government antitrust enforcers continue to train their sights on large technology companies.

In recent years, there has been increasing antitrust scrutiny around the world of large technology companies. The increased attention on competition in the digital economy started outside of the United States. Since 2019, however, the U.S. antitrust enforcers—the U.S. Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ) as well as numerous state attorneys general—have closely scrutinized and brought enforcement actions against some of the largest tech companies.

This article provides an overview of the recent competition enforcement trends, specifically:

1. Key topics at issue in many tech investigations;
2. The increased focus on competition in labor markets; and
3. The FTC's new, expansive interpretation of Section 5 of the FTC Act.

In view of this uncertain landscape, tech companies should stay on top of these enforcement trends and potential risks they face.

Key Topics at Issue in Investigations of Tech Companies

Investigations of technology companies follow similar principles to investigations in other industries, but there are some concepts that the antitrust authorities have been considering more closely in the context of the tech industry.

First is the concept of "gatekeepers," which the government agencies have used to describe any entity that sits between users and suppliers/merchants. The agencies have shown a particular interest in large intermediaries and have expressed concern that

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certain intermediaries may be able use their position to increase fees, obtain restrictive terms, and extend their position in the marketplace. At the same time, intermediaries in the tech industry have generated significant benefits, including by lowering transaction costs, helping sellers and customers to more easily find each other, and enabling new business models and innovations.

Another concept that sometimes arises in tech investigations related to intermediaries is "zero-price" products, where a company makes its products or services free to certain users and makes money either through different products, different consumers (like advertisers), or at a different point in time. The notion of "free" products is not unique to the tech industry. Ad-supported media—including radio, broadcast television, and newspapers—existed long before the rise of the digital economy.

Nevertheless, the agencies are currently grappling with how to define relevant markets and measure competitive harm in the absence of price competition. For example, the traditional test applied by enforces to define relevant markets that looks at a small but significant and non-transitory increase in price (or SSNIP) does not directly translate to zero-priced goods. Similarly, alleged non-price harms to consumers are often harder to prove than an increase in price.

The agencies have also stated that they plan to closely scrutinize mergers in industries that may appear competitive but in which a significant player is emerging. And they have advocated for stricter standards when reviewing mergers and acquisitions by large companies. The agencies have been mostly unsuccessful in litigating these types of future or potential competition cases (e.g., *Steris/Synergy* and *Meta/Within*), but they nevertheless seemed focused on large companies buying smaller targets, sometimes referring to the transactions as acquisitions of "nascent competitive threats." Regardless of their relative lack of success in court, the agencies' ongoing effort to limit the ability of large tech companies to buy smaller companies may have adverse effects, such as stifling innovation by restricting the exit options for startups that depend on acquisitions for funding and growth and/or preventing the combination of complementary assets and expertise.

Finally, another recent trend is an effort to include traditional consumer protection concerns in the context of FTC antitrust investigations. Chair Lina Khan has made clear that she wants to

apply an integrated approach to cases, rules, research, and other policy tools. This means that staff will likely be looking for evidence of both types of violations as they conduct their investigations—more so than they have in the past. However, the FTC may meet stiff resistance if it seeks to combine the two types of analysis in court actions given the many decades of judicial precedent that has treated them separately.

Antitrust and Labor Mobility

Promoting competition in the labor markets is a current focus for enforcers globally and particularly in the United States. The Biden administration has made addressing competition in the labor market a top priority, as demonstrated by its July 2021 Executive Order on Promoting Competition in the American Economy and as seen by recent enforcement actions and policy statements at both the FTC and DOJ. While this is not an enforcement trend specific to the digital economy, it is a top priority for this current administration and thus an important compliance area for technology companies.

DOJ's Criminal No-Poach Approach

One example of increased antitrust enforcement in the labor markets is that the DOJ has started to investigate horizontal agreements among competitors to fix the wages of their employees or to refrain from hiring each other's employees as potential criminal violations of the antitrust laws. The DOJ has argued that these types of agreements are akin to price-fixing or market-allocation agreements concerning products that the DOJ has historically treated as per se criminal violations. In 2016, the FTC and DOJ issued joint antitrust guidelines for human resource professionals previewing that the DOJ would start treating such naked wage-fixing and no-hire agreements criminally going forward. And the DOJ brought its first criminal indictment for a wage-fixing agreement in December 2020.

There has, however, been a mixed record of success. The DOJ lost three of its criminal labor cases at trial based on the facts, although the courts have recognized that there could be criminal

liability for wage-fixing and no-hire agreements. The DOJ is continuing to bring criminal labor antitrust indictments, so it remains to be seen how successful this enforcement push will be. The aggressive stance by the antitrust enforcers and the prospect of criminal liability, however, means that employers need to be particularly cautious with respect to any horizontal labor restrictions.

FTC's Proposed Rule Banning Non-Competes

Another area in which the U.S. antitrust agencies have become more active in the labor market is in the context of non-compete clauses contained in vertical agreements between employers and employees.

On January 5, by a 3-1 vote, the FTC proposed a new rule that—if enacted and upheld by the courts—would make it illegal for an employer to include a non-compete clause in an employment agreement with any worker.[1] The rule would have broad-based reach across the U.S. economy, applying to any employer (i.e., any entity or person that hires or contracts with a worker to work for a person)[2] and any worker (i.e., any natural person who works, whether paid or unpaid, for an employer, including independent contractors).

The three-member majority of commissioners justified the proposed ban by asserting that the imposition of non-compete clauses is "a widespread and often exploitative practice that suppresses wages, hampers innovation, and blocks entrepreneurs from starting new businesses."[3] They argued that a blanket ban is warranted because, "in the aggregate, employers' use of noncompetes undermines competition across markets in ways that are harmful to workers and consumers and warrant a prohibition."

Commissioner Christine S. Wilson issued a lengthy dissenting statement that makes three primary arguments.[4]

First, the rule "represents a radical departure from hundreds of years of legal precedent that employs a fact-specific inquiry into whether a non-compete clause is unreasonable in duration and scope, given the business justification for the restriction."

Second, this "radical departure" is unjustified because the FTC lacks clear evidence or enforcement experience to support the rule.

Finally, Commissioner Wilson identifies three ways that the rule is "vulnerable to meritorious challenges":

> (1) the Commission lacks authority to engage in "unfair methods of competition" rulemaking, (2) the major questions doctrine addressed in *West Virginia v. EPA* applies, and the Commission lacks clear Congressional authorization to undertake this initiative; and (3) assuming the agency does possess the authority to engage in this rulemaking, it is an impermissible delegation of legislative authority under the non-delegation doctrine, particularly because the Commission has replaced the consumer welfare standard with one of multiple goals.

As Commissioner Wilson's dissent highlights, there is considerable debate about the extent of the FTC's authority to promulgate rules regarding unfair methods of competition, a point which any legal challenge to the final rule is likely to raise. The dissent also points to the 1963 decision by the U.S. Court of Appeals for the Seventh Circuit in *Snap-On Tools*, which likely will be relevant to any challenge to the proposed rule. In interpreting Section 5 of the FTC Act—the same provision that the majority uses as the basis for its proposed rule—the Seventh Circuit held that "[r]estrictive [non-compete] clauses . . . are legal unless they are unreasonable as to time or geographic scope" and do not constitute "per se violation[s] of the antitrust laws."[5] That holding clearly conflicts with the FTC's proposed rule and was not referenced in the Commission's notice of proposed rulemaking.

The public comment period for the proposed rule expired on April 19, 2023, and the FTC is currently in the process of reviewing the 27,000+ comments it received. News reports suggest that the FTC will not vote on the final version of the rule until April 2024.[6] The rule would nominally take effect 180 days after the publication of the final version; however, the substance of any rule that the FTC adopts and the FTC's legal authority to promulgate it will likely be challenged.

The federal antitrust agencies are pursuing an aggressive enforcement strategy against restrictions on labor mobility. Companies should be cautious and consult antitrust counsel when considering whether to use non-compete clauses in employment contracts. Even though the FTC's rule is not in effect yet and federal courts have held that non-compete provisions can be valid and justified when they are reasonably tailored to protect legitimate business interests, the FTC has recently brought enforcement actions against

companies for maintaining non-competes that may have passed muster under judicial review.

FTC's Expansive Interpretation of Section 5

Another area that has the potential to impact tech antitrust investigations and cases going forward is the FTC's expansive interpretation of its authority under Section 5 of the FTC Act.

In November 2022, the FTC issued a policy statement that purports to dramatically expand the scope of what the agency considers "unfair methods of competition" under Section 5 of the FTC Act, 15 U.S.C. § 45.[7] This represents an aggressive and unprecedented interpretation of the agency's authority and indicates that the FTC plans to use rulemaking and enforcement actions to police a broad set of conduct beyond the scope of the antitrust laws (i.e., beyond the Sherman Act and the Clayton Act).

The policy statement lays out two elements to a Section 5 violation: (1) the conduct must be a method of competition (2) that is unfair. Most of the action will be around the second prong—unfairness—which the policy statement defines as conduct that goes "beyond competition on the merits." To determine whether the alleged conduct is fair or unfair, the FTC will evaluate two criteria on a sliding scale (i.e., the more evidence of one, the less the FTC believes that there is need for evidence of the other):

> Criterion 1: "[T]he conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature [and i]t may also be otherwise restrictive or exclusionary . . . ."
>
> Criterion 2: "[T]he conduct must tend to negatively affect competitive conditions . . . ."

In a break from past practice, the FTC announced that it will not evaluate these two criteria pursuant to a traditional antitrust rule-of-reason analysis. For example, the FTC claims that it does not need to define a relevant market, provide evidence of market power, or show actual harm to competition. Instead, the FTC will focus its inquiry on whether the conduct "has a tendency to generate negative consequences . . . ." The FTC's stated goal is to "stop[ ] unfair methods of competition in their incipiency based on their tendency to harm competitive conditions."

The policy statement provides a "non-exclusive set of examples of conduct that have been found to violate Section 5" and puts them into three categories:

1. Practices that violate the Sherman Act and/or Clayton Act;
2. Conduct that amounts to an "incipient violation of the antitrust laws"; and
3. Conduct that violates "the spirit of the antitrust laws."

Although cognizable business justifications are discussed in the policy statement, it is not clear how much weight the FTC will afford them. In particular, the policy statement indicates that a company cannot justify "facially unfair conduct" by showing "some pecuniary benefits." Even where the company presents evidence of cognizable business justification, the analysis of whether those justifications outweigh any harm will not be quantitative because the harms stemming from unfair methods of competition are frequently qualitative and/or not quantifiable.

Commissioner Christine Wilson voted against issuing the policy statement and wrote a dissent.[8] Her primary concern is that the policy statement does not provide any meaningful guidance to businesses as to what actually constitutes an unfair method of competition and instead "announces that the Commission has the authority summarily to condemn essentially any business conduct it finds distasteful."

Key Considerations for Technology Companies

The government antitrust enforcers continue to train their sights on technology companies, particularly those that they view as significant. That focus, combined with the agencies' newly expanded view of their own authority, means that potential antitrust issues can arise frequently.

Notes

* The authors, partners in Covington & Burling LLP, may be contacted at rquillian@cov.com and lwillard@cov.com, respectively.

1. Press Release, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition, Fed. Trade Comm'n (Jan. 5, 2023),

https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition?utm_source=govdelivery.

2. The only employers that are exempt from the proposed ban, according to the notice of proposed rulemaking, are those over which the FTC does not have jurisdiction under the FTC Act, including certain banks, savings and loan institutions, federal credit unions, common carriers, air carriers and foreign air carriers, and persons subject to the Packers and Stockyards Act of 1921, as well as most non-profits.

3. FTC Noncompete Press Release, *supra* note 1.

4. Christine S. Wilson, Dissenting Statement Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule, FTC File No. P201200-1 (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf.

5. *See* Snap-On Tools Corp. v. Fed. Trade Comm'n, 321 F.2d 825, 837 (7th Cir. 1963).

6. *See* Dan Papscun, FTC Expected to Vote in 2024 on Rule to Ban Noncompete Clauses, Bloomberg Law News (May 11, 2023), https://news.bloomberglaw.com/antitrust/ftc-expected-to-vote-in-2024-on-rule-to-ban-noncompete-clauses.

7. Federal Trade Commission, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, FTC File No. P221202 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

8. Christine S. Wilson, Dissenting Statement Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act," FTC File No. P221202 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmt.pdf.