Antitrust Update

Practical Guidance for Navigating Evolving Risks

KATRINA ROBSON

WILLKIE FARR & GALLAGHER LLP

Executive Order on Promoting Competition in the Whole-of Government Competition Policy American Economy By the authority vested in me as President by the Constitution and the laws of the United Industries under scrutiny Issues in the spotlight States of America, and in order to promote the interests of American workers, businesses, and consumers, it is hereby ordered as follows: Labor markets Excessive concentration Section I. Policy • Agricultural markets A fair, open, and competitive marketplace has long been a cornerstone of the American conomy, while excessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers. Abuses of market power • Internet platform industries Monopoly • Healthcare markets The American promise of a broad and sustained prosperity depends on an open and competitive commercian promise of a torona and manufactor prospecting or productions on an option and competitive cocomous. For workers, a competitive commarketplace creates more high-quality jobs and the economic freedom to switch jobs or negotiate a higher wage. For small businesses and farmers, it creates more choices among suppliers and major buyers, leading to more take-home • Insurance Monopsony • Hospitals income, which they can reinvest in their enterprises. For entrepreneurs, it provides space to experiment, innovate, and pursue the new ideas that have for centuries powered the America economy and improved our quality of life. And for consumers, it means more choices, better Prescription drugs service, and lower prices. • Beer, wine, and spirits markets Robust competition is critical to preserving America's role as the world's leading economy. Yet over the last several decades, as industries have consolidated, competition has weakened in too many markets, denying Americans the benefits of an open economy and widening racial, • Real estate income, and wealth inequality. Federal Government inaction has contributed to these problems, with workers, farmers, small businesses, and consumers paying the price. Consolidation has increased the power of corporate employers, making it harder for workers to bargain for higher wages and better work conditions. Powerful companies require • Repair markets • Airlines workers to sign non-compete agreements that restrict their ability to change jobs. And, while many occupational licenses are critical to increasing wages for workers and especially workers of color, some overly restrictive occupational licensing requirements can impede workers' Communications (e.g., broadband & spectrum) • Rail industry ability to find jobs and to move between States. Consolidation in the agricultural industry is making it too hard for small family farms to survive. Farmers are squeezed between concentrated market power in the agricultural input industries – seed, fertilizer, feed, and equipment suppliers – and concentrated market power Defense industrial base Consumer financial data

Memorandum of Understanding among the Department of Justice, he Board of Governors of the Federal Reserve Syst the Federal Deposit Insurance Corporation, and the Office of the Comproller of the Currency Department Executive Order 14036 on

the Office of the Comptroller of the Currency Regarding Executive Order 14036 on Promoting Competition in the American Economy

A. Encentive Order 14056 on Permoting Computinics in the American Economy, dated Judy 9, 2021, concernages the United Stars Attempt Concern. In consultation with the Chairmann of the Heedran Diposition Stars Attempt Concern. (Floar), and the Chairmanne of the Federal Diposition Iteration (FDEC), and the Computing of the Computing Stars Attempt Concern (FDEC), and the Computing Stars Attempt Concerns (FDEC), and the Stark Holding Compary Act of 1956 (Public Law 84-511, 70 Star. 133, 12 U.S.C. 1816c) and 18162(5). "To facilitate the scientification conserptioned by the U.S.C. 1816c) and 18162(5)." To facilitate the scientification concernse prime of the Attempt Atte

II. Non-Public Information

- A. When one of the Agencies provides Non-Public Information pursuant to this MOU to one, some or all of the other Agencies (hereafter stuck Agency providing reach information shall be designated a "Providing Agency" and any such Agency or Agencies receiving such information shall be designated a "Receiving Agency", the Receiving Agency shall presume the information so provided to be confidential Non-Public Information, and will maintain the confidentialisty of such Information in an eventue within the terms of this MOU, unless and wall the Providing Agency designates otherwise in writing.
- B. For purposes of this MOU, "Non-Public Information" means any information shared pursuant to this MOU, including any confidential supervision yinformation of the Board, pursuant to 112 C.F.R. Part 261, Subpart C, non-public OCC: information pursuant to the 2 C.J.R. Part 309, Such Non-Public Information includes the information itself, in any form (including writes, ond or electronic), and any document to the extent it contains such information. Non-Public Information does not include information that a Providing Agency has designated as public information.

Enforcement Agencies

DEPARTMENT OF JUSTICE

FEDERAL TRADE COMMISSION

Department of the Treasury

Department of Agriculture

Department of Health and Human Services

Office of Inspector General

Department of Labor

National Labor Relations Board

Department of Transportation

Federal Reserve System

Securities and Exchange Commission

Federal Deposit Insurance Corporation

Office of the Comptroller of the Currency

Federal Communications Commission

Federal Maritime Commission

Commodity Futures Trading commission

Federal Energy Regulatory Commission

Consumer Financial Production Bureau

Surface Transportation Board

So what have they done?

Expanded interpretation of Section 5 of the FTC Act

Proposed a rule to ban non-competes

Announced intent to seek criminal penalties for monopolization

Withdrawn safe harbors for information exchanges

Resurgence of Robinson-Patman Act

Focused in on private equity

Aggressive merger enforcement agenda

- Hart-Scott-Rodino violations
- Divestitures
- · Active slate of cases

Section 5's "Incipient Violation"

1914 STATUTE

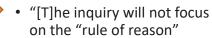
Prohibits "unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce"

2015 POLICY

- "Consumer" welfare
- Rule of reason
- Challenged conduct "must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications"

2022 POLICY

• "Consumers, workers or other market participants"



 "Instead" stop "unfair methods of competition in their incipiency based on their tendency to harm competitive conditions"

Microsoft/Activision Acquisition

Vertical transaction challenged by FTC

Content foreclosure/raising rivals' costs

Section 5 claim

- "mergers, acquisitions or joint ventures that have the tendency to ripen into violations of the antitrust laws..."
- "mergers or acquisitions of a potential or nascent competitor that may tend to lessen current or future competition. . ."

Takeover blocked by UK antitrust authority on April 26th; still under EU scrutiny

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the <u>UT Law CLE eLibrary (utcle.org/elibrary)</u>

Title search: Antitrust Update: Practical Guidance for Navigating Evolving Risks

First appeared as part of the conference materials for the 45th Annual Corporate Counsel Institute session "Antitrust Update: Practical Guidance for Navigating Evolving Risks"