BATES WHITE
ECONOMIC CONSULTING

2022 HAL WHITE ANTITRUST CONFERENCE

Summary of panel discussions and keynote transcript

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On June 23, Bates White hosted its annual Hal White Antitrust Conference, bringing together a distinguished group of antitrust practitioners, academics, and enforcers to hear two panels covering topics at the frontiers of antitrust enforcement. The first panel discussed antitrust policy and labor markets, while the second focused on practical paths forward for antitrust reform. A summary of the discussions can be found below.[1]

I. PANEL 1: ANTITRUST POLICY AND LABOR MARKETS

I.A. Summary

The first panel at the conference discussed antitrust and labor markets. Experts on the panel included Renata Hesse, Partner at Sullivan & Cromwell; Jeffrey Kessler, Partner at Winston & Strawn; Gail Levine, Partner at Mayer Brown; and Megan Lewis, Assistant Chief of the Washington Criminal II Section at the US Department of Justice. Anna Meyendorff, a Partner at Bates White, moderated the panel.

Over the past few years there has been significant interest in the competitive conditions of labor markets as reflected in White House initiatives, agency enforcement actions and private litigation. This interest can be divided into two broad categories: the first relates to potential anticompetitive conduct in labor markets, such as no-poaching or wage-fixing agreements between horizontal competitors for labor; the second relates to how mergers may be affecting employers' monopsony power over employees.

These interests are reflected in a recently proposed class of Uber and Lyft drivers that has sued the companies for price-fixing of ride fares, preventing drivers from offering lower fares on the platform that pays them the most competitive compensation. Key points raised by the panel follow.

I.B. Anticompetitive behavior in the labor market

The panelists agreed that both the Federal Trade Commission (FTC) and the US Department of Justice (DOJ) have been investigating monopsony claims for many years and rejected the notion that such investigations signal a change of policy. While monopsony claims constitute a smaller portion of agency action than does traditional monopoly enforcement, investigations of monopsony concerns have been initiated even as part of a merger review (such as the proposed Penguin Random House–Simon & Schuster merger, which includes a monopsony claim). The panelists discussed the challenges of simultaneously investigating product market and labor market effects. For example, a product market for books may be nationwide, but a labor market for authors may be more narrow (a city) or more broad (worldwide).

Labor market issues are especially likely to be of concern where the labor market is highly specialized and has high costs of entry (for example, the nursing profession, where an advanced degree is required). The panelists considered the likelihood of the government contesting a merger based solely on labor market concerns and where no competitive concerns in the product market exist. For example, workers might be harmed if the two largest employers in a small town merge, even if the two firms are not horizontal competitors in any product market.

[1] Views expressed by panelists represented their personal perspectives and not the views of any institutions. This summary does not attribute views to any individual panelist or other participants.

Starting in 2016, the DOJ has been prosecuting no-poaching agreements between employers as per se criminal violations of antitrust law. The panel addressed the impact of the DaVita verdict, in which the CEO of DaVita Inc. was acquitted of entering into a conspiracy with other healthcare companies to suppress wages of certain employees. Some on the panel thought that the DOJ would be hampered in prosecuting such cases going forward, given that the judge instructed the jury to consider whether the alleged conspirators had the intent of allocating the market. Others on the panel saw no evidence that the agency would refrain from prosecuting crimes related to anticompetitive behavior in the labor market.

I.C. Providing HR guidance to clients on labor practices

The panelists further discussed providing HR guidance to their clients in the face of both criminal and civil investigations related to labor practices. Several described the challenge of explaining to HR professionals that their conduct could violate federal antitrust law. The DOJ's and FTC's 2016 "Antitrust Guidance for Human Resource Professionals" lays the groundwork for criminal prosecution of antitrust violations stemming from wage-fixing or no-poaching agreements. A panelist commented that the guidelines have held up well despite the possibility of forthcoming updates. Several panelists agreed that, while the HR guidelines did not change the antitrust laws, they were helpful in providing guidance to firms on the types of issues that antitrust authorities consider.

In the context of the HR guidelines, the panelists discussed the types of business conduct that might and might not qualify under the ancillary restraints doctrine, which allows for restraint of trade that promotes the procompetitive attributes and competitive success of a legitimate collaboration between two commercial entities. The panelists also discussed the interaction between merger efficiencies and labor issues. There was disagreement about whether releasing labor that becomes redundant after a merger should be considered an efficiency in assessing the competitive effects of a merger.

I.D. Labor and antitrust issues in sports and entertainment industries

Labor and antitrust issues intersect in interesting ways in the sports and entertainment industries. Panelists discussed several cases in these sectors, including those implicating the NCAA. They cited both the "statutory exemption" to prosecution under antitrust law that is granted to labor organizing activities such as unions and the "non-statutory exemption" to prosecution under antitrust laws that courts have granted to union-employer agreements. According to one panelist, the non-statutory exemption has been interpreted as shielding an employer from the consequences of anticompetitive labor behavior if it occurs in the presence of a unionized work force. The panelist pointed to instances in professional sports of an employer pressuring players to remain in a union for this very reason and further noted that these exemptions likely only relate to unions comprised of employees of a firm, whereas independent contractors may not be exempt. In other words, the Uber and Lyft drivers who are attempting to unionize may find themselves under antitrust scrutiny.

Panelists also mentioned related potential litigation surrounding LIV, the controversial new Saudi golf league. To discourage defection, the PGA has announced a policy of banning players who participate in an LIV event from competing in its tour. This policy is under legal scrutiny, as golfers are independent contractors rather than employees of the PGA and therefore should not be barred from activities conducted outside of their PGA contract.

The session wrapped up with questions from the audience. As a follow-up to a question regarding the role of economists in cases focused on labor markets, the panel agreed that criminal no-poaching cases require little, if any, economic analysis. In contrast, civil cases focused on anti-competitive harm require an understanding of properly defined product and labor markets, which may differ from each other in scope and geography.

II. PANEL 2: PRACTICAL PATHS FORWARD FOR ANTITRUST REFORM

II.A. Summary

The second panel at the conference discussed practical paths forward for antitrust reform. The panelists included Laura Alexander, Vice President of Policy at the American Antitrust Institute; D. Bruce Hoffman, Partner at Cleary Gottlieb Steen & Hamilton; Amanda Wait, Partner at Norton Rose Fulbright; and Joshua D. Wright, Professor and Executive Director of the Global Antitrust Institute at the George Mason University Antonin Scalia Law School. Nitin Dua, a Partner at Bates White, moderated the discussion.

Calls for antitrust reform gained steam around 2019. The antecedents for it seem to be, among other things, economic literature showing the rise of corporate profits and a decline in labor's share of national income, as well as the oversized presence of large technology firms in everyday life, which was heightened during the pandemic. In response, a number of bills have been put forward in both the US House of Representatives and the Senate. President Biden has prioritized antitrust enforcement in public statements and chosen antitrust leadership at the DOJ and the FTC that echo the calls for reform.

II.B. Is antitrust reform needed?

One of the panelists noted that, among other things, the unchecked growth of big tech firms and the role of big platforms as gatekeepers has necessitated antitrust reform. There was, however, limited agreement on this point. Panelists expressed disagreement with the premises for the pro-reform argument itself, supported by a claim that, when examined at the local level, corporate concentration has gone down. The government's nearly 90% win-rate on antitrust cases was also cited as evidence that the agencies already have the necessary tools to promote competition. However, in spite of their differences on the premises, most panelists seemed to agree that reform aimed at bolstering Section 2 of the Sherman Act and its enforcement could enhance public welfare overall.

They discussed three approaches to reform: legislative, rulemaking, and guidelines.

II.B.1. Legislative approach to reform

On the legislative front, one panelist provided a summary of various laws that focus on specific competition concerns across various industries. The summary highlighted several issues in the tech industry, such as tipping, network effects, and the use of private data. While the panelists didn't agree on the need for legislation, they did agree that, if legislation does get enacted, it should not be designed to target specific firms. The panelists also generally agreed that legislation focused on providing agencies with more resources to enforce existing antitrust laws can be helpful.

II.B.2. Rulemaking approach to reform

Regarding the rulemaking approach as a tool to reform and/or enforce antitrust laws, the panelists expressed largely consistent views. Multiple panelists cited recent policies, such as the FTC's reinstatement of prior approval[2] and "close at your own peril" letters, to argue against what may appear as constantly changing antitrust policies that could lead to an uncertain business environment. Panelists agreed that it behooves the agencies to clarify where the line is drawn so that antitrust attorneys can advise their clients with greater precision.

[2] Federal Trade Commission, "FTC to Restrict Future Acquisitions for Firms That Pursue Anticompetitive Mergers," press release, October 25, 2021, https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive-mergers.

II.B.3. Guideline approach to reform

The panelists took somewhat divergent views on the need for a revision of the Merger Guidelines. They expressed concerns about dropping or radically updating the 2010 Horizontal Merger Guidelines that the courts have found persuasive and have shown deference to in their decision making.

Panelists largely agreed on specific cases in which additional guidance will be helpful in the revised guidelines, such as in vertical mergers (given that the agencies have withdrawn the 2020 Vertical Merger Guidelines), digital markets, and labor market impact of mergers.

Finally, panelists expressed broad agreement that while guidelines are valuable for setting expectations, they do not change the law.

III. KEYNOTE SPEECH BY DAVID LAWRENCE, ANTITRUST DIVISION POLICY DIRECTOR, US DEPARTMENT OF JUSTICE

The conference concluded with a keynote speech by US Department of Justice Antitrust Division Policy Director David Lawrence. The full transcript of his speech "Evaluating Antitrust's Assumptions" is available at https://www.justice.gov/opa/speech/antitrust-division-policy-director-david-lawrence-delivers-keynote-hal-white-antitrust.

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