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10TH BILL KOVACIC ANTITRUST SALON

IN-PERSON MONDAY, SEPT. 12TH 2022 - THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

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PROGRAM

12:00 am WELCOME & LUNCH

1:00 pm
WELCOME REMARKS

William Kovacic | Professor, The George Washington University Law School, Washington D.C.

1:15 pm
OPENING DISCUSSION

Avery GARDINER | Chief Counsel for competition and tech policy to Senator Amy Klobuchar, Senate Judiciary Committee, Washington D.C.

William KOVACIC | Professor, The George Washington University Law School, Washington D.C.

2:00 pm
MERGER CONTROL: NEW CHALLENGES AHEAD

Bill BAER | Visiting Fellow, The Brookings Institution, Washington D.C.

Michael KADES | Deputy Assistant Attorney General for the Antitrust Division, U.S. Department of Justice, Antitrust Division, Washington D.C.

Aviv NEVO | George A. Weiss and Lydia Bravo Weiss University Professor, Professor of Economics and Marketing, The Wharton School and Department of Economics, University of Pennsylvania, Philadelphia

John NEWMAN | Deputy Director, FTC, Washington D.C.

Bernard A. NIGRO Jr. | Partner, Fried Frank, Washington D.C.

Moderator: Koren WONG-ERVIN | Partner, Axinn, Washington D.C.

3:30 pm COFFEE BREAK

3:45 pm
LABOR MARKETS: WHERE ARE THE ANTITRUST CONCERNS ?

Rosa ABRANTES-METZ | PhD and Principal Co-Chair, The Brattle Group, New York

Benjamin HARRIS | Assistant Secretary for Economic Policy, U.S. Department of Treasury, Arlington

Anna MEYENDORFF | Partner, Bates White, Washington D.C.

Diana L. MOSS | President, American Antitrust Institute, Washington D.C.

Maureen OHLHAUSEN | Partner, Baker Botts, Washington D.C.

Andrew SCHUPANITZ | Trial Attorney for the Antitrust Division, U.S. Department of Justice, San Francisco

Moderator: Alexander OKULIAR | Co-chair Global Antitrust Law, Morrison & Foerster, Washington D.C.

5:15 pm
ANTITRUST AND PRIVATE EQUITY IN THE BIDEN ADMINISTRATION

Laura ALEXANDER | Vice President of Policy, American Antitrust Institute, Washington D.C.

Sabrina HOWELL | Associate Professor of Finance, NYU Stern, New York

Bilal SAYYED | Senior Competition Counsel, Techfreedom, Washington D.C.

Moderator: Jack E. PACE | Partner, White & Case, New York

PANEL 2

LABOR MARKETS: WHERE ARE THE ANTITRUST CONCERNS?

Alexander Okuliar moderated the discussion
Co-chair Global Antitrust Law
Morrison & Foerster LLP
Washington D.C.

Labor has been a key focus for the Biden Administration including, in particular, using the antitrust laws to address perceived harms and inequities in the labor markets. On the one hand, it is difficult to see the need for such an application of the antitrust laws, since unemployment has fallen significantly, and job openings are even more numerous than the number of unemployed. On the other hand, you will likely hear from several panellists today that the numbers do not tell the whole story. The AAG said in a speech that the "monopsony power of employers in labor markets tends to depress wages, erode the quality of life, and make it difficult for workers to switch jobs".

Benjamin Harris
Assistant Secretary for Economic Policy
U. S. Department of Treasury
Washington D.C.

There has been an evolution in the thinking of economists. For a long time, economists considered that a perfectly competitive labor market was the rule. However, recent empirical work has begun to suggest that labor markets are not as competitive as we thought. In a perfectly competitive economy, firms cannot influence wages. In contrast, in a traditional monopsony situation, firms can lower wages, but this will lead to less employment.

In a report, the Treasury Department found that, on average, the lack of competition in the labor market has led to wages that are 15 to 25 percent below the competitive level. Economists have looked for different reasons why wages are stagnating. For some, it is because of stalled returns to education. For others, wages were stagnant because of the rise of Chinese manufacturing, which was creating trade pressure by employing cheaper workers. Finally, others argued that the stagnation was due to the decline in the rate of unionization.

According to him, wage transparency is an underappreciated part of the competition story. There is an asymmetry of information. Employers know everything about a particular market whereas workers have less information. Workers should have more information to participate in a competitive labor market. During the pandemic, there were high quit rates that are characterizing the labor market right now, and business leaders were attributing that to the fact that workers have better information now. They have LinkedIn and can have some information.


Diana Moss
President
American Antitrust Institute
Washington D.C.

In terms of the appropriate use of antitrust, it is important to consider it in the context of other policy tool. Anti-competitive concerns in labor involve coordinated effects like wage-fixing and vertical issues such as non-compete restrictions, or non-poaching agreements. Most antitrust labor issues have focused on explicit agreements that suppress competition. We are just beginning to see the agencies raise concerns about labor in the merger context. This includes the Penguin-Simon Schuster case where the U.S. DOJ defined relevant markets around labor.

Other new developments in antitrust around labor include how "information exchanges" may facilitate anticompetitive coordination among purchasers of labor (e.g., the poultry processing case). It will be important to watch how digital information platforms are operated in markets where they could facilitate oligopsonistic coordination that can harm labor. This is especially true in markets that show high concentration in upstream labor input markets, and also downstream output markets.

The U.S. antitrust agencies should think about providing some guidance on when they will consider information exchanges to be problematic. This include how exchanges are structured and the types of information that are exchanged.

Rosa Abrantes-Metz
Ph.D. and Principal Co-Chair
The Brattle Group
New York

There is a continuum between a non-compete agreement between an employee and an employer, which could be beneficial to both. A pro-competitive non-compete agreement where the employee's bargaining power at the time of the contract negotiation is increased, as the employee requires a higher salary in exchange for a decrease in mobility and/or alternative work options even if for a limited time. On the other side, the employer may be able to capture more/better returns on his investment in human capital using such an agreement, reducing the likelihood of free riding by a competitor). But at the other extreme, there are plain wage-fixing agreement among competitors. These require different approaches, and we should not try and fit them all within the same framework.

It is difficult to determine whether no-poach agreements reduce wages, even when the relevant market has been appropriately defined. There is inherent heterogeneity of jobs and workers, leading to an important role of idiosyncrasies in wage determination. Another reason for potential heterogeneous damages is that only some workers would have benefited from the outside option and not others (so the former would be damaged, but not necessarily the latter) – how could these be reliably identified? The value of that option is different across people – how could this be quantified? Some employees exercise the option for non-pecuniary reasons (perhaps a competitor has an easier commute for the worker). Other employees may have benefited very different amounts if they were to have been able move to a competitor. Therefore, wages vary with the potential impact of such agreements. For example, more productive individuals are likely to benefit more from outside offers, so they may be more harmed by no poach agreements. But productivity may be difficult to measure individually. It is challenging to establish benchmark wages: as wages vary with productivity which in turn varies with skills, qualifications, years of experience at the job, different time periods and locations, and other factors. Furthermore, compensation packages can differ significantly (per skilled worker, company, time) and include not only wages, but also bonuses, commissions, company profit sharing, company stock and stock options. These different components of pay can make it challenging to compare compensation among employees in the same firm, even more so comparing pay across employees of different firms. It may be even harder to implement a formulaic

approach to damages for higher skilled labor when the individual idiosyncrasies can be very large.

I also note that it is important to distinguish labor and final output markets, and how these interact. Particularly in the context of concerted conduct, when there are allegations on the exercise of monopsony power in a labor market, does it have to be shown that consumers of the alleged monopsonist product suffered antitrust harm? And how (if) do we balance competitive effects in the labor and final output markets?

Maureen Ohlhausen

Partner
Baker Botts LLP
Washington D.C.

The FTC has two basic sources of authority: unfair methods of competition and unfair and deceptive acts or practices. Congress has given the FTC clear authority to promulgate rules under its unfair and deceptive acts or practices authority. Conversely, Congress has not made any pronouncement regarding the FTC's authority to promulgate rules on unfair methods of competition. Concerning rulemaking on non-competes, if the FTC were to argue that it is an unfair practice to impose a non-compete agreement on a worker, it could attempt to promulgate a rule if it uses its authority over unfair and deceptive acts or practices. However, it will face significant challenges if it decides to promulgate a rule under its unfair method of competition authority on this issue. An unfair act is now defined in the statute. It is an act or practice that causes or is likely to cause substantial harm that cannot reasonably be avoided by consumers and that is not offset by countervailing benefits to competitors or consumers. The FTC will therefore have to meet this test.

During her tenure as Chair at the FTC, one of her initiatives was to look at the regulatory barriers to entry posed by occupational licensing through the Economic Liberty Task Force specifically looking at the issue of occupational licensing and the limits that it has on worker mobility. There has been huge growth in occupational licensing, it used to be infrequent and now it is very frequent. It is often just a straight-out state regulation, which is immune from challenge under the antitrust laws.

Anna Meyendorff

Partner
Bates White LLP
Washington D.C.

With regard to any new policy on non-competes, it is important that the FTC carefully consider all the potential pro-competitive and even worker-specific benefits of such contractual agreements, and balance these with any wage suppression effects.

With regard to potential anti-competitive impact on labor markets in litigation and merger contexts, it is best to focus on the specific markets at issues and come up with very concrete evidence of harm. First, it is important to get market definition right. Sometimes there is confusion between product markets and labor markets. According to Dr. Meyendorff, an improper market definition can be very costly for a case. For example, workers in poultry processing plants may also be employable in pork processing plants or in industries outside meat processing altogether. An imprecise definition of a labor market will not be helpful to a proposed class of workers. Second, market characteristics matter. A very specialized workforce may have fewer outside options because its members already invested in a certain profession. It may also have a lot of market power because the demand for the services in this profession is higher than supply and barriers to entry exist. Finally, worker mobility matters, and can be discerned through empirical investigation.

When assessing the economic impact of mergers, economists must also consider pass-through. In the merger context, workers are also consumers. Therefore, it is important to know if purported merger efficiencies (including in labor use) will benefit consumers through lower prices. This investigation is complicated by

the fact that the merger may decrease price competition, which itself may have an impact on the degree of pass-through of cost savings.

Andrew Schupanitz

Trial Attorney for the Antitrust Division
U.S. Department of Justice
San Francisco

State court judges have a role to play concerning non-compete agreements as these are generally local and governed by state law. Thus, the question arises as to what approach should be taken where such agreements are concerned, and whether some elements and tools could be brought to bear in this case.

The Antitrust Division of the DoJ and the FTC jointly announced that the agencies would revise the Guidelines, which currently do not explicitly address labor market issues. One of the main objectives of these revisions is to ensure that agencies' merger investigations fully account for relevant harms to workers and labor market competition. Agencies take this revision seriously by taking initiatives. For example, in the official Request for Information (RFI), the agencies sought comments on how to revise the Guidelines to take into account the effects of mergers on labor markets. Moreover, these initiatives are in line with AAG Kanter's goal of making antitrust more transparent and more accessible to the broader public as well as to all stakeholders such as citizens and companies.

According to him, there are parallels between the labor market and other harms. There is no generalization, each decision is going to depend on the facts of the case. A merger may harm workers without harming consumers directly, in particular when the product market is highly competitive, and the associated labor market is highly concentrated. At a broad level, the Sherman Act prohibits harm against workers, just as it protects consumers.

The *Beck v. Pickert* statement of interest that has been filed by the DOJ demonstrates how consolidation can amplify the anti-competitive effects potentially of non-compete covenants, including those that are entered into before the consolidation. The medical group Pickert controlled about 70 percent of the market. The DOJ focused on the post-employment non-compete covenants between the doctors and Pickert.

Anticompetitive conduct in labor markets remains a priority for criminal enforcement at the Antitrust Division. It is reflected in the workload. The DoJ has worked closely with the FTC on labor issues, including the 2026 HR Guidance. This cooperation will continue with the Merger Guideline and even more. Recently, the DOJ had its first two trials in labor market cases. One is about a wage-fixing case, which resulted in a split verdict, where the jury acquitted on the wage-fixing charges but convicted one of the defendants on an obstruction of justice charge. The other is about a no-poach agreement case that resulted in an acquittal. It is important to keep in mind that the two courts that presided over these trials affirmed that labor market cartels are criminal. It comes from those cases with key legal rulings: agreements between employers to fix wages are price-fixing agreements; and agreements between employers not to solicit or not to hire each other's employees, no-poach agreements, are market allocation agreements. ■