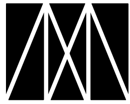

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POLICY BRIEF

Developments in Competition Policy during the Second Year of the Biden Administration

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INTRODUCTION

In 2022, the Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC) made news by announcing novel and aggressive litigation plans and policy initiatives. Despite these actions, DOJ and FTC had relatively little to show in terms of tangible enforcement results. At the same time, widely publicized congressional antitrust reform proposals that would have given the enforcement agencies new powers were not enacted. In short, the implementation of proposed antitrust policy changes remains very much in question.

KEY ANTITRUST ENFORCEMENT ACTIONS

If continuity was the name of the game in 2021, pushing boundaries was the theme of 2022. In several high-profile cases, the FTC and the DOJ put forward envelope-pushing theories of harm, and they were unsuccessful in their initial attempts in nearly all of these cases. In the remaining years of the Biden administration, there likely will be many more cases that seek to expand the reach of antitrust jurisprudentially. So let's look at a number of noteworthy cases in 2022.

Federal Trade Commission

The FTC filed or settled (or both) 13 antitrust complaints involving federal court and administrative proceedings in 2022, down from 25 complaints in 2021.[1] These cases span a wide range of economic sectors and categories of conduct, from vertical and horizontal merger cases to attempted monopolization. The FTC made it clear in 2022 that all conduct it perceives as anticompetitive will face enforcement action.

The views presented in this document do not represent official positions of the Mercatus Center or George Mason University.

Altria Group/JUUL Labs

In April 2020, the FTC began an administrative proceeding to unwind the $12.8 billion investment Altria made in its competitor JUUL.[2] In its complaint, the FTC alleged that a series of agreements between the two companies, along with the 35 percent stake that Altria took in JUUL, had the effect of lessening competition. According to the FTC, as a condition of the investment, Altria was required to exit the US market for "closed-system electronic cigarettes,"[3] effectively ceding their share of the market to the dominant firm.

On February 24, 2022, following a lengthy trial, the FTC announced the initial decision of the administrative law judge (ALJ) dismissing the antitrust complaint. Brought under a rule of reason standard, the ALJ concluded that the FTC "failed to demonstrate both the anticompetitive effects of the non-compete provision, and a reasonable probability that Altria would have competed in the e-cigarette market in the near future, through marketing a competing product independently, or through collaboration or acquisition."[4] In effect, the existence of a non-compete agreement alone is not enough to prove anticompetitive harm, and, based on the evidence presented to the ALJ, the effect of the non-compete agreement was not harmful to competition.

Illumina/GRAIL

On March 30, 2021, the FTC filed an administrative complaint and authorized a federal court lawsuit to block Illumina's $7.1 billion acquisition of GRAIL. As we wrote last year,

> [GRAIL is] a maker of a noninvasive, early-detection liquid biopsy test that can screen for up to 50 types of cancer in asymptomatic patients using DNA sequencing. Illumina is a leader in next generation sequencing platforms used to support genetic testing programs, and it created GRAIL as a separate company. Being independent enabled GRAIL to focus closely on obtaining capital and carrying out the R&D needed to develop the high-quality test. Illumina sought to reacquire GRAIL to allow the test to be scaled up, distributed, and marketed more effectively. This efficiency was designed to promote faster use of the test, which would be a major benefit to consumers, but the FTC sought to block the transaction, asserting that the transaction could subsequently harm competition in a purely theoretical future market for multicancer early detection tests.[5]

On September 1, 2022, the FTC announced the ALJ's initial decision dismissing the antitrust charges in the complaint. The ALJ concluded that the FTC "failed to prove its asserted prima facie case—that Illumina's post-acquisition ability and incentive to advantage GRAIL to the disadvantage of GRAIL's alleged rivals is likely to result in a substantial lessening of competition in the relevant market for the research, development, and commercialization of MCED tests."[6]

While this was an early win for the companies, subject to appeal by the full commission, on September 6, 2022, the European Commission released a decision prohibiting the acquisition and instructed Illumina to unwind the merger.[7] Following an in-depth investigation, the European Union (EU) competition authorities concluded that Illumina possesses both the incentive and ability to foreclose rivals should the merger be allowed to stand.[8] Illumina announced shortly after the decision that it would appeal the EU's ruling.[9]

Meta (Facebook)

The FTC has continued to pursue its 2020 monopolization complaint against Meta (formerly Facebook). In January 2022, Judge James Boasberg of the US District Court for the District of Columbia allowed the FTC's latest amended complaint to proceed beyond the dismissal stage.[10] In Judge Boasberg's memorandum decision on the most recent complaint, the second brought by the FTC, he states:

> Although the agency may well face a tall task down the road in proving its allegations, the Court believes that it has now cleared the pleading bar and may proceed to discovery . . . the FTC has now alleged enough facts to plausibly establish that Facebook exercises monopoly power in the market for [personal social networking] services.[11]

In addition, after Meta announced its intent to acquire Within Unlimited, the FTC filed an administrative complaint against the company. Within Unlimited is a virtual reality software company that has developed Supernatural, a virtual reality fitness app that the FTC alleges competes with Meta's own internally developed fitness app. On July 27, 2022, the FTC announced that Meta is attempting to "buy its way to the top" in order to subvert the competitive process.[12] The FTC claims that Meta is using its resources to buy an already established firm instead of competing in the market, depriving consumers in the fitness virtual reality market of a potential competitor to Meta.

Alongside the administrative complaint, the FTC also filed a complaint in federal court and requested a preliminary injunction to pause the deal.[13] Interestingly, this enforcement action reportedly comes after a recommendation from the FTC staff *not* to file the complaint, which subsequently may have been overruled by the commission.[14]

Lockheed Martin/Aerojet Rocketdyne

In a now abandoned merger between Lockheed Martin and Aerojet Rocketdyne, the FTC brought an administrative complaint to block the deal on January 28, 2022. Resting its decision on both competition and national security grounds, the FTC noted:

> The deal would have resulted in higher prices and diminished quality and innovation for programs that are critical to national security. The FTC's enforcement action in this matter dovetails with the DoD report released this week recommending stronger merger oversight of the highly concentrated defense industrial base.[15]

In a relatively rare instance of unanimous and bipartisan agency action, the commission voted 4-0 to authorize the complaint.

Microsoft/Activision Blizzard

On December 8, 2022, the FTC issued a complaint to prevent the acquisition of Activision Blizzard by Microsoft.[16] Activision Blizzard is a leading video game developer and Microsoft is the manufacturer of a leading video game console. According to the FTC, this vertical merger would allow Microsoft to withhold key IP and products from rival console manufacturers, foreclosing the market for several high-revenue video games. The FTC alleges that it has reason to believe that Microsoft would have the means and motive to harm competition by raising prices for, or reducing quality of, key video games and user experience on rival consoles.

The FTC, however, is ignoring market realities. Post-merger Microsoft would hold only 10 percent of the entire video game market.[17] Sony, one of Microsoft's chief competitors, is the largest video game console provider and a major game publisher. As such, the commission's bland assertion that Microsoft would have an incentive to manipulate the pricing and degrade the quality of Activision Blizzard games by reducing access of rival console maufacturers is highly dubious.

Department of Justice

In 2022, the DOJ pursued a particularly aggressive litigation strategy that turned out to be less than fruitful. According to William Kovacic, former FTC chair and leading antitrust scholar, the DOJ is "having a bumpy time in the courts."[18] To date, the wins that the DOJ secured are few. One is a preliminary win in the Penguin Random House case, detailed below, after which the parties abandoned the transaction. Another is a criminal monopolization case, the first of its kind in decades.[19]

The losses, however, paint a more encompassing picture of the aggressive posture that the DOJ has adopted. Multiple high-profile losses, and a particularly embarrassing encounter between Assistant Attorney General (AAG) Kanter and US District Judge Philip A. Brimmer about how the DOJ plans to proceed following a second mistrial in the same case, leave commentators questioning whether the DOJ's tactics will be effective.[20]

U.S. Sugar/Imperial Sugar

In November 2021, the DOJ filed suit against U.S. Sugar and Imperial Sugar in an attempt to block a merger between the two large sugar producing and refining companies. As commentators wrote when the lawsuit was filed, the premise of the case was fundamentally misguided.[21] In filing the case, the DOJ "[sought] to preserve the important competition between U.S. Sugar and Imperial Sugar and protect the resiliency of American domestic sugar supply."[22]

However, as Judge Maryellen Noreika noted in her opinion, "the Court finds it more than curious that the Government is purportedly concerned about anticompetitive harm and increased prices in an industry where the Government itself keeps the prices high and, in many ways, controls the competition." The USDA's role in manipulating the American sugar market notwithstanding, the judge ruled that the DOJ had not met its burden under the Clayton Act to show a probable substantial lessening of competition.

Booz Allen Hamilton/EverWatch

On June 29, 2022, the DOJ filed suit against Booz Allen Hamilton to block its proposed acquisition of EverWatch.[23] Booz Allen Hamilton and EverWatch compete in the market for operational modeling and simulation services to support the National Security Agency's signals intelligence data missions. Prior to the merger agreement, both firms competed head-to-head to win the next iteration of this contract. However, shortly before the proposal request was announced, Booz Allen Hamilton stated its intention to acquire EverWatch. The DOJ alleged this acquisition violated section 1 of the Sherman Act, because it reduced the incentive for either firm to compete aggressively for the contract, and section 7 of the Clayton Act, because the transaction would substantially lessen competition.

On October 12, 2022, Judge Catherine Blake declined the motion for a preliminary injunction, citing significant harm for the companies and little benefit for the public interest. Further, in an October 31 memorandum, Judge Blake pushed back against the department's market definition, noting that while it is "convenient for litigation," it does not stand up to economic analysis.[24]

Penguin Random House/Simon & Schuster

On October 31, 2022, US District Court Judge Florence Y. Pan ruled in favor of the DOJ, granting a permanent injunction to block the merger between Penguin Random House and Simon & Schuster.[25] In arguing the case, the DOJ put forward a novel theory of harm, whereby the advances of the top earning authors would be reduced should the deal proceed.[26]

Both parties, however, noted that the consumers would have benefitted from the cost-savings achieved by reducing the number of duplicate departments within the merged organization.[27]

But Judge Pan ruled that such efficiencies arguments were not permissible in this instance due to the striking of certain testimony from the defense. All told, the parties chose not to appeal the decision and subsequently abandoned the transaction following the verdict.

UnitedHealth Group/Change Healthcare

On February 24, 2022, the DOJ filed suit to block UnitedHealth Group's acquisition of Change Healthcare. Under the DOJ's horizontal theory, the newly merged entity would have both the ability and incentive to use competitively sensitive claims data to disadvantage rivals and harm competition.[28] All told, the DOJ claimed the merger would raise rivals' costs and harm innovation since the merged company would control roughly 90 percent of the market for the sale of first-pass claims editing solutions.

To remedy this market share concern, the merging parties agreed to divest Change Healthcare's first-pass claims editing business. The parties and the DOJ, however, could not agree on the legal standard to analyze the transaction. The parties put forward a whole transaction framework, where the divestiture was included in the analysis. But the DOJ rejected the analysis and concluded that the transaction absent the divestiture was the correct mode of analysis, and then followed with a separate analysis to determine whether the divestiture would be sufficient to satisfy completive concerns. The parties eventually won on this ground, the judge noting that the result is the same regardless of the chosen mode of analysis.

Under the department's separate vertical theory, the parties would have an incentive to share data between the healthcare and insurance sides of the business, and this would potentially withhold so-called integrated platforms from rival insurers. The court fully rejected these two lines of analysis, concluding that the integrated platform "product" is not a product at all but a concept.

This case presents the clearest example of the DOJ's current policy stance toward mergers: they opt to vigorously litigate cases instead of accepting remedies.[29] AAG Kanter has noted that divestitures and remedies are the exception, not the rule, and in the future there will be a greater push toward seeking injunctions to block merger activity.[30]

Broiler Chicken Probe

The DOJ's chicken price-fixing probe should have been among the easiest to win since price-fixing is a *per se* offense under the antitrust laws. However, after two mistrials and an acquittal, the DOJ was forced to drop charges against the additional executives not named in the omnibus case.[31]

Originally the case was brought against 10 former executives of Pilgrim's Pride, who settled price-fixing allegations with the DOJ in 2021. However, after the second mistrial stemming from a

hung jury, the case whittled down to five individual defendants. In the third instance, after Judge Brimmer questioned AAG Kanter about the efficacy of DOJ's case, a jury found the executives not guilty.[32] The presiding judge for the case, Judge Domenico, wrote, "the sum of the evidence offered here . . . is insufficient to prove the existence of a price-fixing and bid-rigging conspiracy."[33]

Although this high-profile loss can be seen as an embarrassment for the DOJ and AAG Kanter, the department seems to be continuing full steam ahead. In a statement regarding the DOJ's enforcement priorities, AAG Kanter said, "[the department] will not be deterred from continuing to vigilantly pursue cases,"[34] even if those cases are likely to end in failure. This parallels developments in other areas of DOJ's operations, where AAG Kanter would rather go to trial in merger cases than settle and accept competition-preserving divestitures.

Other key losses for the department include a loss against DaVita in a criminal no-poach and no-solicit case[35] and a first-of-its-kind criminal wage-fixing case against Neeraj Jindal and John Rogers, operators of a physical therapy staffing company.[36]

Criminal Antitrust Division: Section 2 Cases

The only recent win for the department's criminal antitrust division is the section 2 monopolization plea bargain acquired against a Montana small business owner.[37] On October 31, 2022, Nathan Nephi Zito pled guilty to criminal monopolization charges for his conduct in monopolizing the market for government highway sealing services contracts in Montana and Wyoming. Zito's firm was one of two competitors that bid on these contracts in four states, and he proposed the division of businesses along state lines, whereby each firm would become the only bidder in those states.

Had Zito been successful in convincing the other firm to enter into such an agreement, this case would have been a clear violation of section 1 of the Sherman Act, which involves agreements between parties to restrain trade. However, the charges in this case involved section 2 attempted monopolization, because he was unsuccessful.

Further, while his action clearly violated the spirit of the antitrust statutes, the Sherman Act does not specifically outlaw anticompetitive solicitation. Zito's intent may have been to reduce or eliminate competition, but the argument that he had a substantial likelihood of creating a monopoly is up for debate.

Continuing the trend of section 2 prosecutions is the case against Martinez et al. On December 6, 2022, the DOJ announced criminal charges against 12 individuals as part of an 11-year price-fixing and market-allocation conspiracy.[38] The defendants are alleged to have implemented price-fixing agreements and created a central "pool" to collect and divide the earnings among themselves. The business in this case was to facilitate the movement of goods from the United States through

Mexico, and then finally to Central America for resale in local markets. The services provided include the shipping of goods as well as completing customs and import paperwork, paying fees, and ensuring quick processing by the Mexican government.

It is clear the defendands violated section 1 by agreeing to restrain trade through price-fixing, a *per se* offence under the antitrust laws. But the DOJ is also pursuing a section 2 claim against them, alleging that beginning in 2013 the cartel, led by Martinez and his associates, used "threats and acts of violence" to maintain their price-fixing conspiracy and deter new market entry, thereby allowing the cartel to form and maintain a monopoly in this market.[39]

KEY ADMINISTRATION POLICY INITIATIVES

White House

Over 18 months have passed since President Biden released an executive order (EO) on competition. The EO issues many competition-related directives to federal agencies and highlights four explicit goals that have direct ramifications for antitrust enforcers:[40]

1. Toughen antitrust assessments of mergers.
2. Increase economic mobility by limiting non-compete agreements.
3. Reduce the power and influence of large platform companies.
4. Intervene in healthcare by lowering the price of pharmaceuticals.

Federal Trade Commission

On July 11, 2022, commemorating the first anniversary of the "whole of government" approach to competition, the FTC laid out the steps it has taken to advance the goals set forward in the EO.[41] Key among the accomplishments the FTC chose to highlight is increased merger enforcement in a range of sectors. During the first year of the competition mandate, the FTC reports that it pursued 26 enforcement actions and had two deals that were abandoned following the report of a request for additional information after the original merger filing, which is the first step the FTC generally takes when preparing to bring a complaint against a merger.

Additionally, the FTC highlighted the policy statement released on October 25, 2021, requiring firms that have been found to have violated antitrust laws previously to seek prior approval for all future mergers. The commission also focused on workers and small businesses through merger enforcement orders in three cases, where non-compete provisions were present and of concern.

In the six months between when Chair Lina Khan was appointed to the commission in June 2021 and the end of the year, the FTC reversed course in a few key areas, including the *2020 Vertical*

Merger Guidelines and the *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* (*Section 5 Statement*). A new version of the merger guidelines is due to release soon, but the recently released *2022 Section 5 Statement* represents a marked departure from past commission practice. The policy laid out in the statement seeks to extend the enforcement of section 5 of the FTC Act far beyond the commission's statutory mandate. On January 5, 2023, the commission issued a Notice of Proposed Rulemaking (NPR) on Non-Compete Clauses.[42]

Section 5 Statement

The *Section 5 Statement* is slated to provide guidance as to the scope and scale of the FTC's unfair methods of competition (UMC) authority.[43] In a prior incarnation of this statement, released in a bi-partisan manner in 2015, the FTC "sought to apply its stand-alone section 5 authority to promote consumer welfare using a 'rule of reason' framework, generally only in cases where other antitrust statutes (the Sherman Antitrust Act of 1890 and the Clayton Antitrust Act of 1914) were insufficient to address the threat of competitive harm."[44]

The new version of the *Section 5 Statement*, released on November 10, 2022, lays out a framework whereby the commission's section 5 enforcement efforts will be divorced from the rule of reason and pro-consumer welfare priorities of the recent past. This change represents a dramatic shift in policy and extends far beyond anything that the FTC has undertaken in the past. The commission also explicitly dismisses the need for any economic evidence showing harm, rejects relevant precedent that defines the bounds of its section 5 authority, and misrepresents the legislative history of section 5. In her dissent, Commissioner Wilson points out that the statement "announces that the Commission has the authority summarily to condemn essentially any business conduct it finds distasteful."[45] In short, the new *Section 5 Statement* generates substantial and detrimental uncertainty regarding the FTC's UMC enforcement intentions.

Merger Guidelines

As we noted last year in our discussion of the revocation of the *2020 Vertical Merger Guidelines*, until new guidelines are announced there will be no presumption of efficiencies for any merger, vertical or otherwise.[46] Commonly, reduction in transactions costs, reduced overhead, and finding efficient business synergies are acceptable efficiency justifications for merging parties because these practices save consumers money.

However, there are some indications as to the direction the FTC and the DOJ will take in constructing the new merger guidelines. On January 18, 2022, both jointly issued a *Request for Information on Merger Enforcement*,[47] setting forth 91 sets of questions organized under 15 headings. The accompanying statement released by the FTC made clear that the weakening of competition

in the economy due to an under enforcement of "illegal mergers" is the key impetus behind the push for the new guidelines.[48] This anti-efficiency stance fundamentally disregards the relevant experience that was created during the promulgation of the *2020 Vertical Merger Guidelines*, and it is reflected in the cases brought by the FTC and DOJ in 2022.

Furthermore, the *Request for Information on Merger Enforcement* mirrors this merger-skeptical tone and ignores the antitrust scholarship that outlines the potentially large benefits of mergers for the economy. Not only are there numerous efficiency implications that stem from mergers (e.g., cost-based efficiencies and elimination of double marginalization,[49] among others), but the combination of complementary assets also allows for large innovation-inducing synergies. Mergers can also help companies complete the research and development cycle, giving highly innovative companies the opportunity to bring their cutting-edge research to market.

Data Privacy ANPR

The FTC's Advanced Notice of Proposed Rulemaking (ANPR) on Commercial Surveillance and Data Privacy,[50] released on August 22, 2022, lays out several questions and regulatory priorities to guide the commission in issuing rules around data privacy for consumers. The tone of the ANPR leads many to believe that any rules and remedies associated with this version of the document have very little chance of withstanding judicial scrutiny.[51] Fundamentally, any rule (or set of rules addressing "unfair acts or practices") is bound by the cost-benefit analysis set forth in section 5(n) of the FTC Act. The FTC will have to carefully define and analyze the specific harms and remedies that are addressed by the rule to determine the relevant balance of burdens placed on businesses and consumers.

The language of the ANPR is, in its current state, sufficiently ill-defined, leading not only to a high likelihood of failing judicial scrutiny but a definite lack of clarity for the business community. More than the policy statements and guidelines discussed above, any rule that the FTC promulgates must provide significant certainty for the business community, so that business owners, employees, and consumers alike know which conduct is specifically outlawed. Without a meaningful understanding of the rules, businesses will be unwilling to increase investment and innovate, and they may even leave the market entirely if there is sufficient confusion about the bounds of the rules.

Any rulemaking pursued following this ANPR would fall under the FTC's consumer protection authority, not its competition authority. Nonetheless, there are numerous competition-related implications associated with any such rulemaking endeavors. Overly onerous regulations placed on businesses, such as seen in EU privacy regulation (the GDPR),[52] will allow large, sufficiently capitalized businesses to withstand FTC scrutiny. Those businesses are able to spend the resources

to comply with the new rules and diversify their business plans to maintain profitability without the now-illegal conduct.

Small businesses, however, may face significant costs to enter the market. Many of the same regulations apply regardless of the size of the business, so startups and small businesses will feel a disproportionate impact of any rule and will face an uphill battle when attempting to compete against large, established firms. It is in this way that regulations and rules, embodying bright-line policies that do not take into consideration anything other than raw conduct, can effectively stamp out competition and lead to incumbent firms cementing their place in the economy.

FTC Gig Economy Policy Statement

On September 15, 2022, the FTC announced a new policy statement aimed at cracking down on companies that take advantage of gig workers.[53] According to the IRS, the gig economy consists of workers who earn income providing "on-demand work, services, or goods."[54] The FTC wants to ensure that, regardless of classification, those workers face a fair working environment. The FTC is interested in "deception about pay and hours, unfair contract terms, anticompetitive wage fixing, and [anticompetitive] coordination between gig economy companies."[55] Specifically, the FTC has outlined six areas for reform and enforcement:

1. Misrepresentations about the nature of gig work
2. Diminished bargaining power
3. Concentrated markets
4. Accountability for claims and conduct about costs and benefits of gig work
5. Unlawful practices and constraints placed on workers
6. Unfair methods of competition that harm gig workers

Although the goal of protecting gig workers may be noble, the thrust of this initiative is misguided.[56] The policy statement makes grand claims about the harms that workers face in the gig economy, but it does nothing to provide evidence that these so-called harmful acts are occurring or look to understand a rational business justification for the alleged harmful actions. The FTC fails to note that the mere existence of a power imbalance between workers and the gig-work companies does not violate American antitrust or consumer protection law unless it is accompanied by a conduct that is anticompetitive or unfair and deceptive.

Additionally, the FTC ignores the positive benefits the gig-work companies offer to both workers and consumers.[57] By discounting the benefits and highlighting only the (alleged) harms, the FTC risks undoing many of the benefits that the gig economy conferred on consumers and workers in the past decade. If the FTC wishes to proceed down this path, there is a high likelihood that

investment and innovation in gig-work companies will decline, eliminating job opportunities for the very workers that the FTC is attempting to protect.

NPR on Non-Compete Clauses

The FTC issued an NPR on Non-Compete Clauses on January 5, 2023. The FTC states that "the proposed rule would, among other things, provide that it is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; to maintain with a worker a non-compete clause; or, under certain circumstances, to represent to a worker that the worker is subject to a non-compete clause."[58] This NPR would be promulgated pursuant to the FTC's rulemaking authority under section 6(g) of the FTC Act. As such, any final rule flowing from the NPR would likely be struck down in court as beyond the FTC's authority.[59] Furthermore, even if it were upheld, such a final rule would generate serious economic policy concerns.[60] Regrettably, the NPR likely will impose business uncertainty costs on the private sector until its legal status is definitively ruled upon.

Department of Justice

SEP Licensing Policy Statement

The DOJ's draft policy statement regarding standard essential patents (SEP) and fair, reasonable, and nondiscriminatory (F/RAND) licensing created a large stir in the intellectual property and antitrust community. We wrote last year,

> In the draft [statement, released on December 6], the DOJ revises a previous statement discussing the remedies for the infringement of SEPs that are subject to F/RAND licensing commitments, and it outlines what demonstrates good-faith negotiation in this context. This draft is a response to the EO's call to revisit a 2019 statement outlining an approach to SEP licensing known as the New Madison Approach (NMA). Under the NMA, remedies for SEP patent infringements featured a property rule framework that allowed for the full consideration of injunctive relief, as opposed to a liability rule that features only damages. A damages-only framework tends to undervalue innovation and dismisses the dynamic nature of SEPs in the innovation economy.
>
> This new draft reverses the NMA and notes that SEP holders should generally not be able to seek injunctive relief if they have made a F/RAND commitment. Although it addresses the idea that the interests of both SEP holders and implementers need to be adequately addressed and balanced, it pays little emphasis to the importance of strong patent protection. This approach effectively tips the scales in favor of implementers and against developers of patented standardized technologies.[61] (citations omitted)

In a surprise development, on June 8, 2022, the DOJ, along with the US Patent and Trademark Office and the National Institute of Standards and Technology, withdrew the draft policy statement *and* declined to put forward a new statement replacing the withdrawn 2019 version. The abandonment of the draft policy statement is a particularly good move for patent holders since the patent-skeptical tone, at least explicitly, has been removed. However, the "future remains murky for SEP holders."[62] The DOJ will now "review conduct by SEP holders on a case-by-case basis to determine if either party ([SEP holders or implementers]) is engaging in practices that result in the anticompetitive use of market power or abusive processes that harm competition."[63]

What this means for patent holders is uncertain. While the 2019 policy statement strikes a different balance (placing SEP holders and implementers on a level playing field), this policy implicitly gives implementers a leg up. This is because the federal courts very rarely grant injunctive relief for an SEP subject to a F/RAND commitment, and thus the only remedy, absent any policy guidance to the contrary, is damages.

What this means for patent holders and implementers alike is that the DOJ will be forced to look at the facts of the case and not presuppose an outcome based on the stance taken in a policy statement. While a predetermined stance is not necessarily a bad thing, especially if the incentives have been thoroughly thought out and are generalizable to a wide range of cases, case-by-case analysis ideally will lead to the best outcome for all parties involved.

Criminal Leniency

In contrast with the relatively positive development regarding SEP licensing, the DOJ took a decidedly backward-looking tact regarding its criminal leniency program. On April 4, 2022, the DOJ released revisions to its criminal leniency policy regarding antitrust violations, with a "promptness" requirement.[64] Going forward, a company must self-report violations and remediate any resulting harm in a prompt amount of time; promptness, however, is left undefined.

While it is too soon to determine the effect that this policy will have on the market, the number of firms willing to self-report has declined in recent years. Between 2015 and 2020, the number of firms that applied for criminal antitrust leniency dropped by over 68 percent.[65] By increasing the burden on applicants and opening up firms to increased risk of both public and private litigation, the number of firms that apply in the future will likely continue to fall.

Criminal Section 2 Enforcement

In reversing decades of its enforcement behavior, the DOJ has indicated that it will seek to bring criminal Sherman Act monopolization cases. On March 2, 2022, Deputy Assistant Attorney General Richard Powers noted that there is ample case law to inform the public about the bounds of

criminal monopolization enforcement under section 2 of the Sherman Act.[66] But he neglected to note that the most recent criminal monopolization enforcement action, before the Montana small business owner's plea previously discusssed, was over 40 years ago.

During the intermediate time, many things have changed. The DOJ has directed criminal Sherman Act prosecutions at *per se* violations, such as price-fixing, bid rigging, and market division cartel conduct. Modern economic reasoning in antitrust analysis has been thoroughly developed. What's more, while there is ample precedent to guide courts in analyzing section 1 price-fixing and market division violations, there is no clear rule as to what constitutes criminal monopolization behavior.

Further, very recently, the DOJ has had an abysmal track record in prosecuting even criminal section 1 cases where the precedent is clear. Should DOJ go to trial with section 2 cases, it will face an uphill battle. As such, DOJ's new emphasis on criminal section 2 cases raises substantial questions.

Merger Remedy Reform

One of the consequential policy shifts in the department comes from its aggressive antimerger posture, as alluded to earlier. Following a speech before the New York State Bar Association Antitrust Section, AAG Kanter outlined a shift for the DOJ, whereby the department will vigorously pursue injunctive relief in merger cases and expressly reject most merger remedies.[67] Going forward, merging parties will be advised to follow a "fix-it-first" strategy; that is, they should pursue divestments or other structural remedies before filing to merge. This, theoretically at least, could smooth the merger review process and reduce litigation risk.

However, in practice, the divestiture sought in the UnitedHealth case was deemed insufficient by the department but subsequently upheld by the courts. So even when divestitures are announced in advance and appear to be sufficient under current jurisprudence to address competitive concerns, the department may still choose to litigate instead of attempting to reach a mutually beneficial settlement.

CONCLUSION

In 2022, the DOJ and the FTC highlighted plans to pursue far more aggressive merger and nonmerger antitrust litigation, based on theories that go beyond mainstream antitrust thinking. However, their results, stemming from cases that by and large comported with traditional antitrust enforcement theory, have been poor, calling into question their ability to achieve future litigation success. The FTC's new policy statements and proposed rules, including the one issued at the beginning of 2023, likewise stray beyond traditional categories, and its future actions may be viewed dubiously by reviewing courts. Therefore, the DOJ and the FTC should reflect on the

likely judicial reception of new joint merger guidelines before releasing a draft that substantially departs from existing merger analysis norms.

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