Federal and state enforcers highlighted an ambitious agenda at the 2023 ABA Antitrust Spring Meeting. From criminal no-solicitation, no-poach, wage-fixing, and monopolization cases to a more aggressive merger strategy, this Update discusses 10 takeaways that companies should have on their radars.

1. **Criminal enforcement of no-poach, no-hire, and wage-fixing agreements.** The U.S. Department of Justice, Antitrust Division (DOJ) has been busy investigating and litigating cases that affect workers. Deputy Assistant Attorney General (DAAG) Manish Kumar stated that these cases "are about protecting the economic freedom of individuals to sell their labor into a competitive market and therefore earn a livelihood." Addressing both successful and unsuccessful litigation results, DAAG Kumar avowed that these cases are "worthy, and we are going to continue to bring them."
2. **Criminalization of monopolization.** Enforcers sent a clear signal that they intend to bring more criminal cases for monopolization under Section 2 of the Sherman Act. Last year, the DOJ brought its first such

case in decades when it charged a defendant with attempted monopolization of the market for highway crack sealing projects that prevent water, sand, and dirt from damaging road surfaces. This is an important reminder that even an invitation to collude can be prosecuted criminally.

3. **More aggressive merger enforcement strategy.** Leadership at both the DOJ and Federal Trade Commission (FTC) expressed concern that fear of overenforcement has led to underenforcement of the antitrust laws, especially regarding mergers and acquisitions. They contend that, too often, divestiture and other remedies have been insufficient to preserve competition in markets impacted by mergers and acquisitions.
4. **Increased interest in vertical deals.** Both agencies are increasingly focused on mergers that involve vertical relationships and adjacent markets, particularly in technology and digital industries. While the agencies have not had much success in challenging vertical mergers, one should expect the agencies to attempt to block acquisitions that raise vertical concerns.
5. **Concern over industry rollups.** The agencies are paying close attention to roll-up strategies where private equity firms or strategic buyers consolidate the market through a series of acquisitions. The DOJ and FTC are exploring creative ways to better monitor and enforce potentially anticompetitive rollups, including monopolization theories under Section 2 of the Sherman Act. One tool that the FTC has used to catch rollups is requiring prior notice and approval requirements of future transactions (of any size in the relevant market) in its consent orders.
6. **"Systematic" enforcement of interlocking directorates.** AAG Jonathan Kanter highlighted the DOJ's increased efforts to enforce the prohibition on interlocking directorates under Section 8 of the Clayton Act, which he claimed has never seen "systematic" enforcement "until now." He noted that roughly 15 directors had stepped down from boards of competing companies in response to DOJ inquiries into interlocks and that there are around 20 open investigations into Section 8 violations. Several of these interlocks involve representatives from private equity companies. While not settled by the courts, the DOJ has adopted the "deputization theory," which finds an unlawful interlock where an entity, such as a private equity firm, has appointed agents or representatives to the board of competing companies. This is the case regardless of whether the same individual serves on both boards.
7. **Price discrimination is being heavily scrutinized.** The FTC is keen to pursue price discrimination cases under the Robinson-Patman Act (RPA), which it has seldom used since the 1980s. RPA prohibits charging different prices or offering different promotional allowances to competing retailers of commodities. Antitrust concerns arise when some resellers are given an edge in the market that has nothing to do with their superior efficiency or service. A violation can occur when a company (1) sells the same goods (2) at roughly the same time (3) to two competing customers (4) for different prices, and (5) this price differential creates a competitive injury. Discrimination in promotional allowances (such as marketing support) may also be a violation. Importantly, the buyer can be liable along with the seller if the buyer knowingly induces and receives discriminatory pricing or promotional allowances. Commissioner Alvaro M. Bedoya indicated that the RPA "is a democratically enacted law, it remains a good law . . . If you think the law shouldn't be enforced, the burden is on you to prove why." Chair Lina Khan suggested that RPA cases are coming, and Commissioner Bedoya warned that the FTC is strongly considering buyer liability.
8. **Information-sharing safeguards no longer apply.** The DOJ indicated that prior guidance on information sharing no longer "makes sense" in a world where it is easy to leverage big data and machine learning. Because aggregated data can be disaggregated, aggregation isn't necessarily a safeguard against anticompetitive conduct. The same is true of sharing information through third parties. Three key questions companies should consider are: what information is being shared, how is it used, and what is the impact on output, price, and competition?
9. **Unfair competition cases are coming.** The FTC is poised to bring cases under Section 5 of the FTC Act. It has taken the position that Section 5 could reach conduct that falls short of a Sherman Act violation where it is coercive, exploitative, collusive, abusive, deceptive, predatory, or involves the use of economic power of a similar nature. Whether these efforts will be successful remains to be seen, but this is clearly a

high priority for the agency.

10. **Whole-of-government approach.** Channeling President Biden's call for a whole-of-government approach in his Executive Order on Promoting Competition in the American Economy, enforcers from the DOJ and FTC touted increased coordination on competition issues with other agencies, including the Federal Communications Commission, U.S. Department of Defense, and Federal Aviation Administration. This is an important reminder that the DOJ and FTC are not the only governmental entities with competition mandates. Antitrust enforcers predicted that we would see more action from sister agencies on competition issues in the coming years.

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