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Antitrust Hot Topics: Increased Enforcement Activity in Recent Years

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Epic v. Google

01

Epic v. Google: Overview

On August 13, 2020, Epic Games filed nearly identical lawsuits against Apple and Google, alleging that they violated the Sherman Act and state antitrust laws with (1) monopolies of their respective app stores and corresponding in-app payment systems, (2) unreasonable restraints of trade, and (3) a tie between each app store and its in-app payment system.

- Apple prevailed on almost all of Epic's claims in a bench trial before Judge Yvonne Gonzalez Rogers in 2021.
- The Epic-Google case went to a jury trial in November 2023, with the jury rendering a verdict for Epic on all counts, four hours after closing arguments.

Epic v. Google: Settlements with States and Class

Before the *Google Play* trial began, attorneys general for 39 states and a consumer class reached a settlement requiring Google to:

- Make a $700 million payment
- Allow developers increased flexibility in distribution, pricing, and billing
- Reduce restrictions on OEMs relating to app distribution
- Maintain functionalities for 3P app stores and reduce friction for sideloading
- Allow developers increased flexibility in marketing and communications
- Implement compliance program

Epic v. Google:
Trial – Epic's Case

Epic's case emphasized:

(1) Google blocks competing distribution channels on Android or bribes would-be competitors to stop them from competing;

(2) Google extracts more value from developers than it provides; and

(3) Google deliberately and systematically failed to preserve relevant internal company chats and abused attorney-client privilege to shield documents from discovery.

Epic v. Google: Trial – Google's Response

Google tried to overcome Epic's narrative by emphasizing:

(1) The numerous avenues for game and app distribution, including competition with Apple;

(2) The benefits Google Play provides to developers and users; and

(3) Epic's deliberate violation of Google's policies in launching an Epic direct payment system through "Project Liberty."

Epic v. Google: Verdict

Four hours after closing statements, the jury returned a unanimous verdict in favor of Epic on all counts, making the following findings:

- (1) Google has monopoly power in the markets for Android app distribution and in-app billing solutions, (2) Google's conduct in those markets was anticompetitive, and (3) Epic was injured by Google's conduct.
- The jury also found an illegal tie between the Google Play store and Google Play Billing.

Epic v. Google: What's Next?

- Judge Donato will ultimately issue a remedy decision.
- Epic has indicated it will seek an injunction requiring Google to open the Play Store and Android operating system to allow an independent Epic store and Epic's own billing system, while eliminating anti-steering requirements.

While the verdict is specific to Google and not binding on future cases, it may invite additional claims against Google, Apple, and other platform operators.

Pricing Algorithms

02

Department of Justice

"Where competitors adopt the same pricing algorithms, our concern is only heightened. *Several studies have shown that these algorithms can lead to tacit or express collusion in the marketplace, potentially resulting in higher prices, or at a minimum, a softening of competition*."

– Doha Mekki, Principal Deputy Assistant Attorney General of the Antitrust Division (February 2, 2023)

Senate Subcommittee on Competition Policy, Antitrust, and Consumer Rights

"Algorithms … have the potential to create or exacerbate competition problems [and] can expand the number of industries in which price-fixing can occur."

– Senator Klobuchar, The Impact of Algorithms on Competition and Consumer Rights (December 13, 2023)

Federal Trade Commission

"Just as the antitrust laws do not allow competitors to exchange competitively sensitive information directly in an effort to stabilize or control industry pricing, they also prohibit using an intermediary to facilitate the exchange of confidential business information. Let's just change the terms of the hypothetical slightly to understand why. Everywhere the word 'algorithm' appears, please just insert the words 'a guy named Bob'. ***Is it ok for a guy named Bob to collect confidential price strategy information from all the participants in a market, and then tell everybody how they should price? If it isn't ok for a guy named Bob to do it, then it probably isn't ok for an algorithm to do it either.***"

- Maureen K. Ohlhausen, Acting Chairman, U.S. Federal Trade Commission, *Should We Fear The Things That Go Beep In the Night? Some Initial Thoughts on the Intersection of Antitrust Law and Algorithmic Pricing* (May 23, 2017)

In Re: Realpage, Inc., Rental Software Antitrust Litigation

- Software that provides price recommendations to lessors of multifamily and student housing
- Two consolidated MDL complaints – putative multifamily and student classes
- Plaintiffs' theory:
  - Lessors feed nonpublic data into the software, knowing other users are doing the same
  - Lessors "delegate" pricing authority to RealPage
  - RealPage monitors compliance
  - Lessors accept somewhere in the range of 80-90% of recommendations
- Plaintiffs *don't* allege:
  - That lessors know what recommendations competitors are getting
  - Direct communications/agreement among lessors
  - That the software passes on any nonpublic data to lessors

Enforcer Interest

- DOJ files a statement of interest in the MDL, arguing for application of the per se rule
- DC Attorney General files a civil complaint in DC Superior, alleging per se price fixing
- Congress asks for information, urges investigations

RealPage MTD Ruling

- Plaintiffs theory is not “the straightforward form of horizontal price-fixing conspiracy for which courts apply the *per se* standard”
  - No allegations of direct agreement or communications among Lessors
  - Allegation of “delegation” of authority implausible in light of acceptance rate allegations
  - No allegations of discipline/punishment for deviation
  - Rule of reason applies

Gibson v. MGM Resorts Int'l, Case No. 2:23-cv-00140 (D. Nev.)

- Plaintiffs allege that hotels accepted approximately 90% of recommendations
- "In sum, the Court cannot plausibly infer from the allegations in the Complaint that Hotel Operators are required to accept the recommendations provided by a particular software pricing algorithm.This is a fatal deficiency in the Complaint as currently drafted, as without an agreement to accept the elevated prices recommended by the pricing algorithm, there is no agreement that could either support Plaintiffs' theory or otherwise make out a Sherman Act violation given the other allegations in the Complaint."

What can Bob do?

Criminal Antitrust Enforcement

03

Criminal Antitrust Enforcement: Overview

- The U.S. Department of Justice Antitrust Division ("DOJ") prosecutes certain violations of federal antitrust law criminally. These are often referred to as "cartel" offenses and include:
    - **Collusion** (including price fixing, bid rigging, and market allocation agreements);
    - Anticompetive conduct in **labor markets** (such as wage fixing and no-poach agreements);
    - **Monopolization**.
- The Antitrust Division's Corporate **Leniency Program** offers certain benefits to the first company to report cartel activity and meet the Program's eligibility requirements. The benefits of this program include no prosecution/sanction against the company that discloses the cartel activity or its employees.

Criminal Antitrust Enforcement: Trends

- DOJ's cartel enforcement activity has continued to be at historically low levels.
- Although it imposed greater fines in Fiscal Year 2023 than in 2021 and 2022 ($267 million), it prosecuted fewer companies and individuals in 2023 than in prior years. See https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts.
- DOJ has faced challenges identifying and prosecuting large international and domestic cartels in recent years. It also has struggled to attract participants to its Leniency Program.
- Not withstanding the string of high-profile losses DOJ has faced in recent prosecutions, it also has taken steps to expand the scope of antitrust violations it prosecutes criminally.

Criminal Antitrust Enforcement: Priorities

- In recent years, including 2023, DOJ has focused in particular on several areas:
  - **Labor-market offenses**, such as agreements not to hire or recruit other companies' employees (often referred to as "no-poach" agreements) and wage-fixing agreements.
  - **Collusion relating to government contracts**, through DOJ's Procurement Collusion Strike Force (PCSF).
  - Alleged violations of Section 2 of the Sherman Act, which prohibits **monopolization** and **attempted monopolization**. In April 2022, DOJ announced that it would start pursuing these offenses criminally.
  - Use of **pricing algorithms** and other **AI tools** that could lead to explicit or tacit collusion.

Criminal Antitrust Enforcement: Labor Market Prosecutions

- In October 2016, DOJ announced that it would prosecute certain agreements in the HR area criminally, including no-poach and wage-fixing agreements. DOJ only brought its first criminal prosecution in this area in 2020.
- Since then, DOJ's criminal prosecution of labor market offenses has faced particular challenges and 2023 was no exception.
    - ***United States v Manahe*** (D. Me. 2023): DOJ had criminally charged four home healthcare agency managers for wage-fixing and agreements not to recruit or hire each other's employees during the COVID-19 pandemic. A federal jury acquitted the defendants.

Criminal Antitrust Enforcement: Labor Market Prosecutions

- Since then, DOJ's criminal prosecution of labor market offenses has faced particular challenges and 2023 was no exception.
  - *United States v Patel* (D. Conn. 2023): DOJ prosecuted aerospace companies for allegedly entering no-poach agreements to restrict the hiring and recruiting of engineers and other skilled-labor employees. The Court granted defendants' motion for a judgment of acquittal, dismissing the charges before they could go to a jury.
  - *United States v. Surgical Care Affiliates LLC* (N.D. Tex. 2023): DOJ had criminally charged SCA, a company that owns and operates outpatient surgical facilities, for allegedly conspiring with competitors not to solicit each other's senior-level employees. In November 2023, DOJ voluntarily dismissed the indictment.

Revised Merger Guidelines

HSR Form Change: Overview

On June 27, FTC, with concurrence from DOJ, announced proposed changes to the Premerger Notification and Report Form

- Implements changes required by Merger Filing Fee Modernization Act of 2022
- Substantially increases the number of documents and amount of information to be included with HSR filing
- First major change to HSR form since program began in 1978
- Subject to comment period which ended on September 27, 2023
  - Timing for final rule uncertain but new rules could go into effect in 1Q2024
  - Formal legal challenges also likely

HSR Form Change: Selected Key Changes

- Expansion of item 4 material to include *draft* analyses/reports regarding transaction and to include deal team leads as item 4 custodians
- Production of ordinary course business plans dating back one year
- Disclosure of sales data, customer categories, and top 10 customer contact information for overlapping products/services
- Narrative descriptions of horizontal overlaps and supply relationships
- Identification of all prior acquisitions in past ten years in any overlapping products/services
- Information regarding labor law violations and employee classifications
- More burdensome—but still possible—to file HSR on LOI or IOI

Revised Merger Guidelines: Overview

On December 18, DOJ and FTC jointly released updated Merger Guidelines

- The Merger Guidelines describe how Agencies analyze the competitive impact of proposed transactions
- DOJ and FTC withdrew prior merger guidance in September 2021
- The revisions reflect current antitrust enforcement policy and agency thinking on competition analysis of proposed mergers and other combinations
- The Guidelines are not binding on courts—expect courts to diverge from the Guidelines, especially when they contradict precedent

Revised Merger Guidelines: Summary of Changes

The revisions reflect significant departure from prior agency thinking on merger analysis:

- Lower market share and concentration thresholds necessary to trigger the structural presumption that a transaction is anticompetitive
- Movement away from market definition as starting point to an effects-based approach
- Close scrutiny of transactions that may eliminate potential competition
- New framework for analyzing transactions involving platforms (companies that bring together two or more groups who benefit from each others' participation)

Revised Merger Guidelines: Summary of Changes (cont'd).

- Analyzing combinations that may potentially harm rivals of the merging parties in non-horizontal or non-vertical contexts
- Attention to serial "roll-up" or "bolt-on" acquisitions
- Increased scrutiny of the effect of transactions on competition for workers or labor markets
- Framework for analyzing whether transactions create or ehance monopsony effects (i.e. buyer power)


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