



ENFORCEMENT OUTLOOK SERIES - ANTITRUST IN THE EU AND US: ENFORCEMENT TRENDS AND RISK MITIGATION STRATEGIES

NICOLE CASTLE

JUSTIN MURPHY

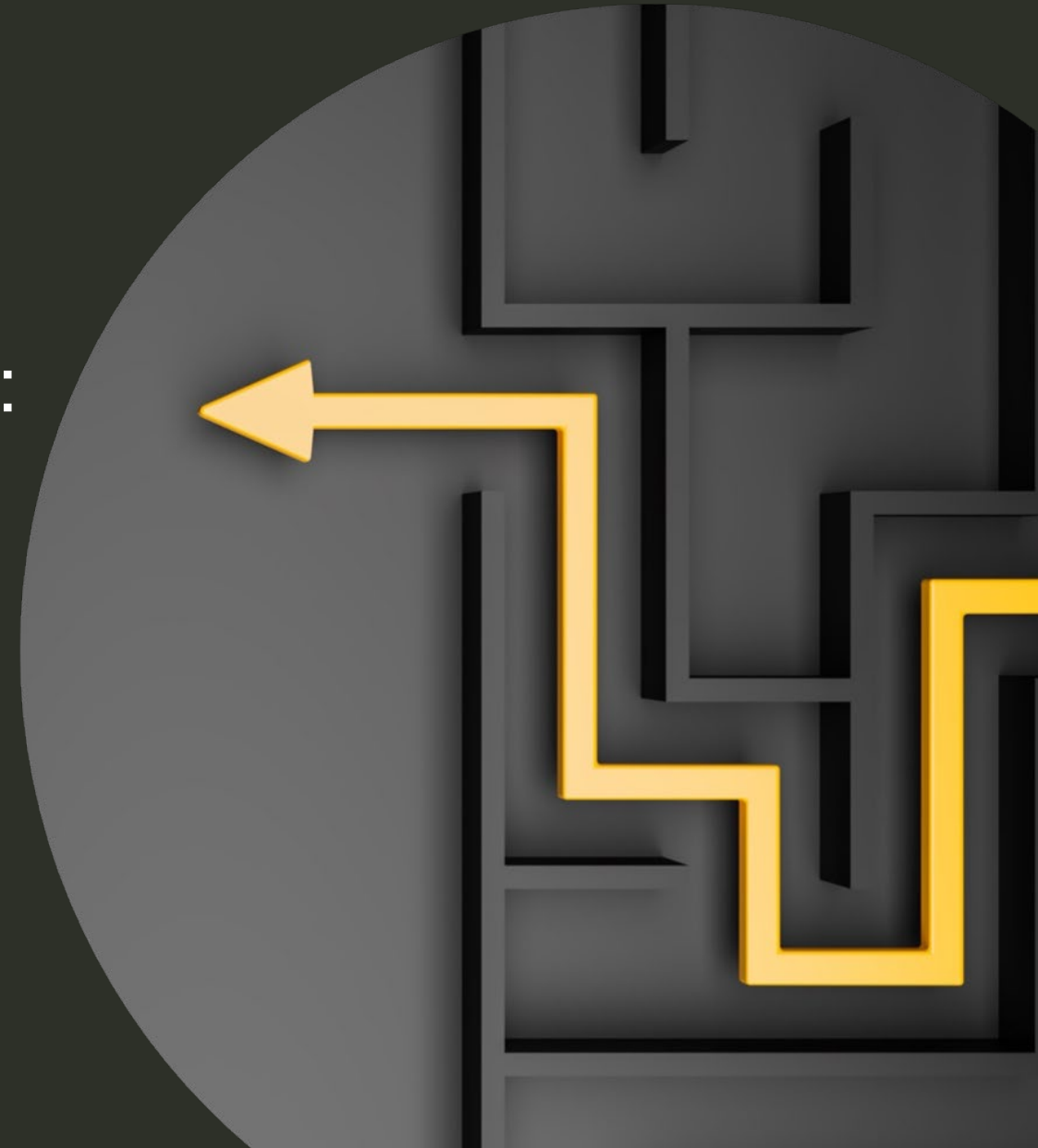
PAUL THOMPSON

HENDRIK VIAENE

**McDermott
Will & Emery**

September 28, 2022

mwe.com



YOUR SPEAKERS



NICOLE CASTLE

Partner | New York



JUSTIN MURPHY

Partner | Washington, DC



PAUL THOMPSON

Partner | Washington, DC



HENDRIK VIAENE

Partner | Brussels

AGENDA

- Why This Time is Different
- DOJ and EU enforcement trends
 - Labor Markets
 - Consumer Products
 - Section 2
 - Challenges to DOJ/FTC Mergers and Tech Sector
 - EU focus on Digital, Pharma & Energy and new reforms
- New Corporate Criminal Enforcement Policies
- What's Next



WHY THIS TIME IS DIFFERENT

WHAT'S DIFFERENT

The Approach

- More aggressive enforcers
- Trying new, untested, theories
- Looking to change conduct
 - Through public statements/guidance
 - Investigations
 - Indictments/court fillings
 - Congress, if needed

The Results?

- The team is in place!
- More investigations and indictments than ever!
- Not afraid to bring marginal cases and go to trial
- Working with Congress
- If at first you don't succeed . . .



PUSHING AGGRESSIVE LEGAL THEORIES

- **Criminal:**

- Criminal Section 2 monopolization cases *after 50 years*
- Indicted 20 cases since November 2021, most since 1980s
 - Labor markets criminal cases
 - *Three trials* in the chickens' case
- New approach to corporate compliance/individual accountability

- **Civil**

- Most active litigations in decades
- New guidance on mergers forthcoming
- More merger challenges, and more losses for the government

AGGRESSIVE RHETORIC

“This is a kind of tyranny that the antitrust laws in the United States were designed to prevent”

“Companies considering mergers that may harm competition should know that the Antitrust Division will not back down from a fight so long as that threat remains”

Expanding DOJ’s litigation “capacity will be critical in best positioning the division to bring righteous, but challenging, cases . . .”

“Vigorous enforcement of the Sherman Act has never been more important and relevant. . . . In short, we are not slowing down”

FOLLOW THE MONEY



HISTORIC BUDGET INCREASES FOR DOJ

FY22 –\$16.7MM
increase to \$202MM

FY23 – requested
additional **\$88 million**

- > 100 new attorneys
- > 100 new paralegals and other staff
- 25 positions to modernize Division's Information Technology

EU FOCUS ON ANTITRUST ENFORCEMENT

- EU – Strategic and Management Plans
- Aggressive focus on Digital, Pharma, and Energy matters, particularly Abuse of Dominance
- *“In 2022, the Commission will continue to expand its proactive ex-officio strategy to pursue a rigorous cartel and antitrust enforcement in all sectors”*





DOJ AND EU ENFORCEMENT TRENDS

LABOR MARKETS: DOJ'S VIEW

Wage Fixing

Naked agreement with a horizontal competitor to fix employee wages, benefits, or other forms of compensation

No Hire

Naked agreement with a horizontal competitor to not hire each others' employees

Non-Solicit

Naked agreement with a horizontal competitor to not hire each others' employees

LABOR MARKETS: RESULTS

Early Results

- DOJ theories rejected by judges and juries
 - *U.S. v. Jindal* (first alleged wage fixing criminal trial) acquitted on all Sherman Act conduct
 - *U.S. v. DaVita, Inc. and Thiry* (first alleged criminal non-solicit trial) acquitted on all counts. Court found that typical *per se* approach was not appropriate
- *U.S. v. Hee and VDA OC, LLC* (alleged wage fixing and no hire agreements). VDA expressed intention to enter plea of guilty to charged Sherman Act conspiracy – would be first criminal conviction of labor market antitrust violation

Undeterred Aggressive Approach

- DOJ's aggressive posture remains despite losses – includes variety of industries and sectors
- Emboldened by motion to dismiss decisions
- Aggressive view of what horizontal competitor means in the labor markets
- New MOU with National Labor Relations Board

LABOR MARKETS: THE EUROPEAN PERSPECTIVE

- EC: No poach agreements can create a cartel and will be the subject of new focus for the Commission
- “[T]he promise not to hire certain people can effectively be a promise not to innovate, or not to enter a new market . . . the more we focus on...familiar cartels, the more companies will look for other ways to collude. And for deterrence to work, we need to show that when they do, we'll be waiting for them.”
- Recent uptick in national investigations across sectors; dawn raids, whistleblowing and leniency applications all being employed
- Margrethe Vestager, Executive Vice-President DG Comp



CONSUMER PRODUCTS

- Consumer products or “kitchen table issues for American families” remain priority for DOJ
- Broiler Chickens investigation and prosecutions
 - Mistrials in December 2021 and March 2022
 - DOJ summoned by court to explain pursuit of third trial
 - Remaining defendants acquitted after third trial in July 2022
- Remaining charged cases
 - DOJ dismissed two of four individuals
 - DOJ dismissed remaining charged companies

SHERMAN ACT SEC. 2: RETURN TO THE PAST

- Section 2 focuses on conduct by one firm or company with significant market power
- Division has not criminally prosecuted a Section 2 case *in approximately 50 years*

IMPENDING SECTION 2 CRIMINAL CASES

- “The Division’s plan to bring criminal cases for breaches of Section 2 is more than just “an academic exercise.”
- “The Division is actively investigating conduct in several sectors of the economy.”
- “But the Division is not planning to provide guidance regarding what criminal enforcement of a Section 2 claim may look like because “there’s ample case law out there to help inform those who have concerns or questions.”



DRAMATIC POLICY AND PROCESS CHANGES DESIGNED TO DISCOURAGE M&A

- Suspension of early termination
- “Close at your own risk” letters
- Trend towards rejecting settlements
- Implementation of new prior approval / prior notice policy for settlements
- Inclusion of additional topics in Second Requests and more hurdles to modifying Second Requests
- Increased emphasis on filing requirements and gun-jumping concerns
- Focus on Clayton Act Section 8 interlocking directorate cases
- “Major revision” to Merger Guidelines expected by year-end

ANTITRUST ENFORCERS LITIGATING MORE THAN EVER

- Since January 2021, the FTC/DOJ have filed lawsuits or threatened suit to block 19 transactions
 - Of those 19, 12 were abandoned and 7 are in various stages of litigation
 - Of the 12 abandoned
 - 4 were abandoned pre-suit but before the issuance of a complaint
 - 8 were abandoned after issuance of a complaint

TECHNOLOGY/DIGITAL MARKETS

- “There is perhaps no more consequential topic in antitrust enforcement today than digital markets.”
- Division is actively investigating Big Tech industry
- Google DOJ complaint
- Division endorsement of legislation aimed at digital companies
 - “The Department views the rise of dominant platforms as presenting a threat to open markets and competition . . .”
- European Commission also active
 - Commission fined Google €4.34 billion for abuse of dominance
- “This is a kind of tyranny that the antitrust laws in the United States were designed to prevent.”



EU LEGISLATIVE REFORMS

- Revised “vertical” and “horizontal” rules
- Merger control: Art. 22 Guidance; draft revised Merger Implementing Regulation; draft revised Notice on Simplified Procedure
- Regulation on foreign subsidies distorting the internal market
- Digital Markets Act (+ Digital Services Act)



EU ENFORCEMENT FOCUS AND ACTIVITY

- Cartel enforcement on rise
- Abuse of dominance and merger control
 - Flood of abuse of dominance cases at EC (and national) level in relation to digital sector
 - Abuse of dominance cases also in pharma sector (excessive pricing, misuse of patent system, disparagement, ...)
 - Antitrust enforcement in energy sector in cartels (car emissions, ethanol) and abuse of dominance





NEW DOJ CORPORATE CRIMINAL ENFORCEMENT AND COMPLIANCE POLICIES

REVAMPING OF CORPORATE CRIMINAL ENFORCEMENT POLICIES

Leniency

Every DOJ component that prosecutes corporate crime must develop program to incentivize voluntary self-disclosure

“On the clock”

Companies seeking cooperation credit need to come forward and disclose important evidence to the DOJ quickly

Compensation clawback

DOJ to formally encourage companies to hold in escrow or claw back compensation from employees responsible for wrongdoing

NEW POLICIES HAVE CONTINUED EMPHASIS ON COMPLIANCE

- DOJ taking hard look at compliance programs
- Emphasis on early self-reporting further incentivizes companies to have strong compliance programs to identify and address misconduct before DOJ does
- Consider executive compensation in compliance program
- Expect resolutions that support policies



WHAT YOU CAN DO NOW

Cost-effective opportunity to prepare or examine compliance program in line with DOJ guidance

Ensure compliance program is well-designed. Risk assessments, policies & procedures, training, and reporting

Ensure program is adequately resourced and empowered

Ensure the program works in practice. Improvement, testing, review, timely investigations and remediation

WHAT YOU CAN DO NOW: DATA ANALYTICS

- DOJ has “started to lean in” to using data analytics more than in the past, and it’s being used in investigations, to identify potential subjects, and to evaluate compliance
- DOJ now expects companies to analyze and track its own data
 - Compliance officers need to have access to the right data and the technical tools to evaluate it
 - Data analytics will be particularly valuable in risk assessments, monitoring, and audits
 - Consider use of AI-assisted tools



WHAT'S NEXT

WHAT'S NEXT – EU

- EC broadening its powers
- Significant number of legislative reforms undertaken in the last few years
- Rigorous enforcement in all sectors but particular focus in digital, pharma & energy
- EC and national authorities pushing the boundaries with novel theories of harm – courts often side with the regulators



WHAT'S NEXT – U.S.

- Section 2 criminal charges
- Additional labor market criminal charges
- Corporate resolutions that provide more guidance on criminal enforcement and compliance policies
- New merger guidelines
- Continued challenges to transactions



THANK YOU / QUESTIONS?

mwe.com

This material is for general information purposes only and should not be construed as legal advice or any other advice on any specific facts or circumstances. No one should act or refrain from acting based upon any information herein without seeking professional legal advice. McDermott Will & Emery* (McDermott) makes no warranties, representations, or claims of any kind concerning the content herein. McDermott and the contributing presenters or authors expressly disclaim all liability to any person in respect of the consequences of anything done or not done in reliance upon the use of contents included herein. *For a complete list of McDermott entities visit mwe.com/legalnotices.

©2021 McDermott Will & Emery. All rights reserved. Any use of these materials including reproduction, modification, distribution or republication, without the prior written consent of McDermott is strictly prohibited. This may be considered attorney advertising. Prior results do not guarantee a similar outcome.