ANTITRUST/COMPETITION PRACTICE

Competing Priorities: Navigating Emerging Risks in the New Digital Age of Antitrust

Topics

Introduction	Overview of Current Enforcement Landscape & Shifting Priorities
Emerging Issues	Search Advertising & Search Term Bidding
	Algorithmic Price-Fixing
	Anticompetitive Data & Privacy Practices
	Labor Market Concerns: Non-Competes & Merger Review Questions

Current Enforcement Landscape & Shifting Priorities

WINSTON & STRAWN LLP

Executive Order on Promoting Competition

On July 9, President Biden signed an Executive Order on Promoting Competition in the American Economy to push regulators to confront market consolidation and perceived anticompetitive practices across a broad list of industries. Among other things, the Order:

- Encourages Federal Trade Commission (FTC) to issue new rules to ban or curtail non-compete agreements between employers and employees, unfair data collection and surveillance practices, and unfair practices in internet and digital markets.
- Encourages revision or adoption of antitrust guidelines relating to the intersection of antitrust and IP law, horizontal and vertical mergers, and information sharing that can facilitate wage collusion.

The Executive Order's whole-of-government approach aims to promote robust public and private enforcement of antitrust law with 72 initiatives across a dozen federal agencies.

Progressive Shift at Antitrust Agencies

Progressives Appointed to Key Positions, Signaling Heightened Antitrust Enforcement

- Lina Khan named FTC Chair; Jonathan Kanter nominated to lead DOJ's Antitrust Division; Tim Wu at NEC.

Competition Rulemaking

- FTC exploring rules on what constitutes "unfair methods of competition." In July, FTC voted to update rulemaking procedures, unlocking civil penalties and damages for violators, and setting the stage for stronger deterrence.

Enhanced FTC Act Section 5 Enforcement and Likely More Section 2 Claims by DOJ

- In July, FTC revoked a 2015 policy statement which limited its Section 5 enforcement, distancing enforcement from the consumer welfare standard and allowing pursuit of "unfair methods of competition" not prohibited by the Sherman Act.
- Kanter—nominated to head DOJ Antitrust Division—has criticized DOJ for failing to bring cases under Section 2 of the Sherman Act.

More Investigations into Priority Areas, Including Abuse of IP and Monopolization Offenses

- In September, FTC approved omnibus resolutions to allow FTC staff to issue subpoenas and CIDs more easily to facilitate investigations into certain priority areas.

Bipartisan Support for Antitrust Reform

Bad news for Big Tech: There's bipartisan agreement on antitrust reforms

32 attorneys general throw support behind bipartisan House antitrust bills

by Nihal Krishan, Technology Reporter | | September 21, 2021 11:46 AM

October 14, 2021 6:37 PM EDT Last Updated 21 hours ago

United States

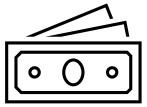
Big Tech to face another bipartisan U.S. antitrust bill

Emerging Issue No. 1: Search Advertising and Search Term Bidding

WINSTON & STRAWN LLP

What is Search Term Bidding?

Search engines sell ads that appear near “organic search” results.



Advertisers can bid on search terms. Company with highest bid and most relevant website will have its link appear to users who search those keywords.

Brands may bid on terms associated with a competitor, as a marketing tactic.

To minimize the risk of a keyword bidding war, and to preserve brand image, companies have entered agreements with other market participants to refrain from bidding on one another’s key terms.

Agreements restricting search-term bidding are a continuing topic of concern for government enforcers who will actively investigate, making these agreements **high-risk.**

Recent Government Enforcement

1-800 Contacts, Inc.
(FTC Dkt. No. 9372, Nov. 14, 2018)

- FTC alleged that 1-800 Contacts had entered agreements to prevent competitors from bidding on one another's search terms and requiring use of "negative" keywords to prevent competitors' ads from displaying when search included the other's party's trademarks.
- Under "rule of reason," the FTC found the agreements anticompetitive because they made it costlier for consumers to find and compare options, which led consumers to pay higher prices.

1-800 Contacts, Inc. v. FTC
(2d Cir. June 11, 2021)

- Second Circuit overturned decision, rejecting the FTC's conclusion that the settlement agreements were "inherently suspect," and finding that the agreements had "cognizable procompetitive justifications."
- The court acknowledged in a footnote its concern that 1-800 Contacts required competitors to use negative keywords, but determined that the court did not need to reach a decision on that issue at this time.

Private Suits Also on the Rise

Thompson et al v. 1-800 Contacts, Inc.,

2:16-cv-01183 (D.Utah)

- Following FTC investigation, consumers alleged 1-800 Contacts and other online contact retailers inflated prices for contact lenses by entering into bidding agreements.
- 1-800 Contacts settled for **$15.1 million** after Utah court denied motion to dismiss.

Tichy v. Hyatt Hotels Corp.

1:18-cv-01959 (N.D. Ill.)

- Class action alleged hotel chains and online travel agencies conspired to stop using certain branded keyword search advertising, increasing costs for booking hotel rooms.
- Illinois court denied Hyatt Hotels' motion to dismiss.
- In July 2021, the defendants entered into a confidential settlement agreement with the named plaintiffs, solely in their individual capacities, without releasing or binding class members.

Private Suits Encourage More Investigations

TravelPass Grp., LLC v. Caesars Entm't Corp.,

5:18-cv-00153 (E.D. Tex.)

- Travel agencies sued leading hotel chain providers including Hilton, Marriott, and Hyatt in 2018 for agreeing not to bid on competitors' branded keywords.
- Trial currently scheduled for October 25, 2021.
- Following the TravelPass complaint, in 2019, the Utah AG filed a confidentiality agreement in a state court proceeding pursuant to a civil investigative demand indicating that it, and a number of other state attorneys general, were investigating an alleged conspiracy among hotel chains and online travel agencies to enter a group boycott to eliminate competition for keyword internet bidding.

Best Practice Tips to Minimize Risk

- **Evaluate the purpose and competitive effect** of any agreement concerning keyword search terms.
  - Explicitly enumerate procompetitive justifications for any agreement (e.g., protecting trademarks).
- **Avoid "negative" search term agreements** that ensure that your website will not appear in a search for a competitor's selected word or phrase, and vice versa.

Takeaway: Such agreements increase exposure to both enforcement actions and private treble damage suits.

Emerging Issue No. 2: Algorithmic Price-Fixing

WINSTON & STRAWN LLP

With the increasing sophistication of algorithms and artificial intelligence, antitrust liability can arise from conduct outside of the smoke-filled rooms traditionally associated with cartels.

Algorithms as a Pathway to Collusion

Nearly every industry—from travel to advertisements on social networking sites—implements algorithms and data aggregation to help optimize prices and increase sales.

The use of an algorithm may confer liability under the antitrust laws where it **invites or facilitates collusion.**

Algorithms as an Intermediary to Collusion

Meyer v. Kalanick

- In 2016, an Uber user sued the company's founder—who later moved to join Uber—for the use of surge pricing. Plaintiff's argument—which survived a motion to dismiss before being remanded to arbitration—was that independent drivers used the app's dynamic pricing algorithm to collude under Section 1 with no ability to depart from the algorithm's price. The arbitrator ultimately ruled in Uber's favor.

U.S. v. Topkins & U.S. v. Trod, Ltd.

- DOJ prosecuted art merchants who agreed—in person—to use an algorithm to set their prices on Amazon.
- While these cases featured direct human agreement on a course of conduct, the algorithm they implemented arguably acted as an intermediary to set prices the parties later utilized.

Takeaway: Enforcers are beginning to focus on algorithmic pricing's use and competitive effects.

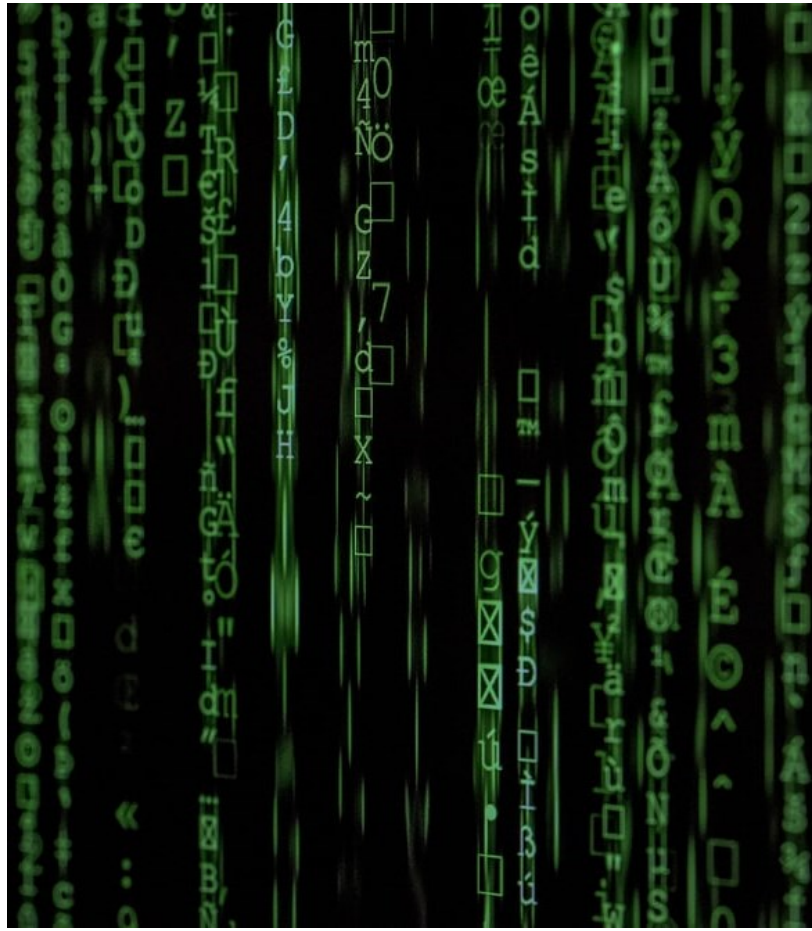
Algorithms as Signaling

- Signaling: unilateral communication regarding a competitively-sensitive topic likely to be heard and understood by a competitor.
  - E.g., announcing strict adherence to use of a particular pricing software or pricing outputs derived from such software.
- Mere announcement is unlikely to violate antitrust laws, absent additional evidence of competitor matching price or acting without legitimate business justifications.

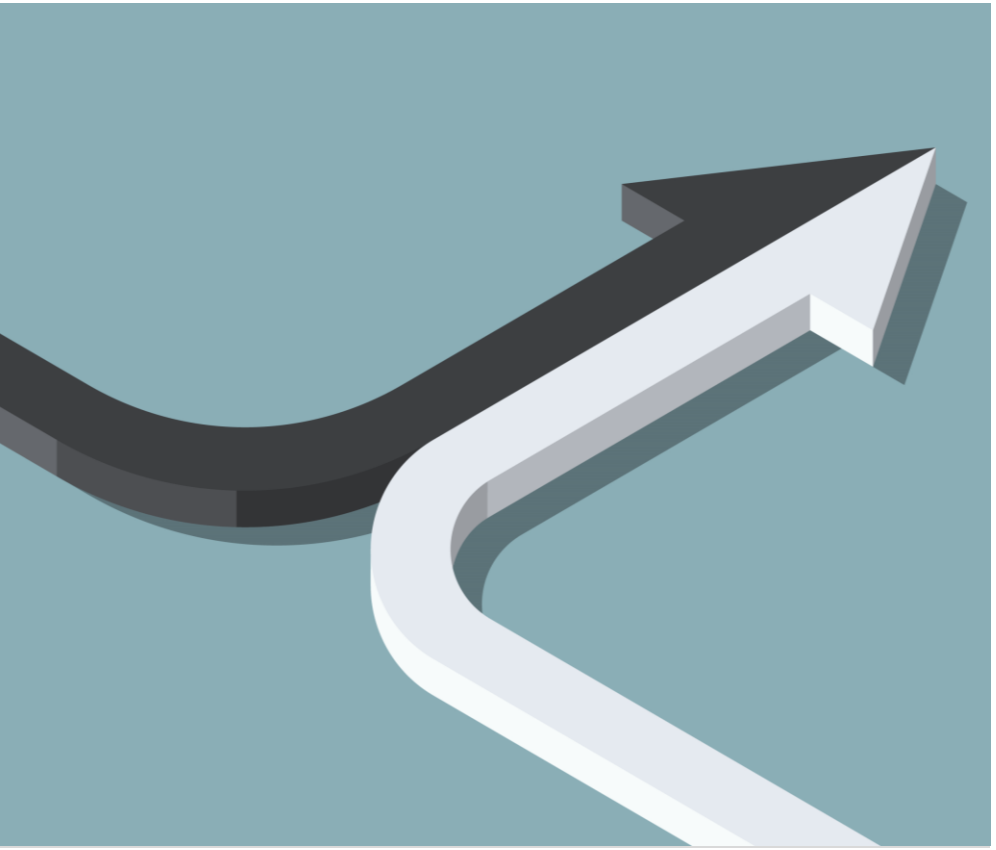
Best practice: Avoid acting in any manner that might support a conclusion of accepting or following any competitor signal related to algorithmic pricing.

Algorithms as Conscious Parallelism

- Rise of the internet and immediate access to electronic information makes it easier for competitors to mimic or match each other's pricing movements without any direct agreement.
- The mere fact that competitors knowingly adopt the same pricing tool or that these tools result in parallel pricing may not be sufficient to confer liability standing alone.
- However, the presence of "plus factors" might persuade a court that parallel conduct was instead the result of collusion.
  - Direct communication between competitors
  - Increased price stratification
  - Reductions in output without legitimate explanations



Algorithms Can Achieve Collusive Outcomes in Different Ways



A firm adopts a pricing algorithm and relies on interdependence of competitor pricing to achieve uniform conscious parallelism.

A firm uses a pricing algorithm as a tool to intermediate or effectuate an agreement amongst human competitors.

A firm adopts a pricing algorithm that then, without human input, actively communicates with competitors' pricing algorithms to arrive at uniform, supra-competitive cartel pricing.

E.g.: A $23 million textbook for sale on Amazon because of two accidentally interdependent algorithms (one set to discount slightly off the highest priced competitor and the other set to price at a premium above the next highest competitor).

Such consequences, even if unintentional, could potentially lead to antitrust scrutiny.

Best Practices to Reduce Risk

Work with IT to understand your technology.

- Important for in-house counsel to understand the tech to identify risks.
- Learn how data are being captured, searched, and used; what the tech does and why.

- Train IT in antitrust so people working with data or writing code are aware of potential antitrust risks and what is permitted versus unlawful.

- Spend time at the outset to ensure technology is designed with antitrust compliance in mind before anticompetitive conduct is programmed in and hard to redesign.

Emerging Issue No. 3: Anticompetitive Data and Privacy Practices

WINSTON & STRAWN LLP

> It is also the policy of my Administration to enforce the antitrust laws to meet the challenges posed by new industries and technologies, including the rise of the dominant Internet platforms, especially as they stem from serial mergers, the acquisition of nascent competitors, the **aggregation of data**, unfair competition in **attention markets**, the **surveillance of users**, and the **presence of network effects**.

- Executive Order Promoting Competition in the American Economy, July 9, 2021

Convergence of Data Privacy and Antitrust

- Companies that hold and use data—particularly digital platforms—are perennial favorites of FTC data privacy enforcement, and of a strict European data protection regime.
  - Germany's Federal Cartel Office in 2019 fused data protection & antitrust rationales in its crackdown on Facebook's harvesting & processing of data from third-party sites.
- Expansion of data privacy laws across the U.S. plus renewed regulatory and political will to enforce U.S. antitrust laws suggests regulators (and plaintiffs' bar) will start testing novel theories of competitive harm that unite antitrust and data privacy.

> "We will spend more time on the overlap between data privacy and competition. . . . [V]iolation of consumer protection laws may be enabled by market power, and consumer protection violations, in turn, can have a detrimental effect on competition. Companies may gain market share through deceptive reassurances on privacy."

Best Practices to Minimize Risk

Design **with consumer privacy** in mind. Employ **purpose limitation** and data **minimization**.

Maintain a contemporaneous record of the use and objectives of relevant databases.

Consider whether competitors have **access to comparable data** they need to offer comparable products or services.

Make **accurate representations** about collection & use

- Increase transparency for consumers regarding data collection or usage terms and abide by those terms.
- Do not share data across business units or with preferred outside companies without express consent, as that could be perceived as using power in the one market to tilt the competitive playing field in a related market.

Re-examine privacy policies and provide training to include employees gathering, contracting, and using data or related algorithms.

Emerging Issue No. 4: Competition in Labor Markets

- New Focus on Non-Compete Provisions
- Labor Considerations in Merger Reviews

WINSTON & STRAWN LLP

Importantly, **criminal prosecution of labor market conspiracies** is the tip of the spear; the Division's focus on labor markets extends beyond its cartel program. The Division is also committed to using its **civil authority** to detect, investigate, and challenge anticompetitive **non-compete agreements**, **mergers** that create or enhance monopsony power in labor markets, the unilateral exercise of **monopsony** power, and **information sharing** by employers.

- Acting AAG Richard A. Powers of the Antitrust Division, Remarks at Fordham's 48th Annual Conference on International Antitrust Law and Policy, Oct. 1, 2021

Executive Order on Promoting Competition: Non-Compete Clauses

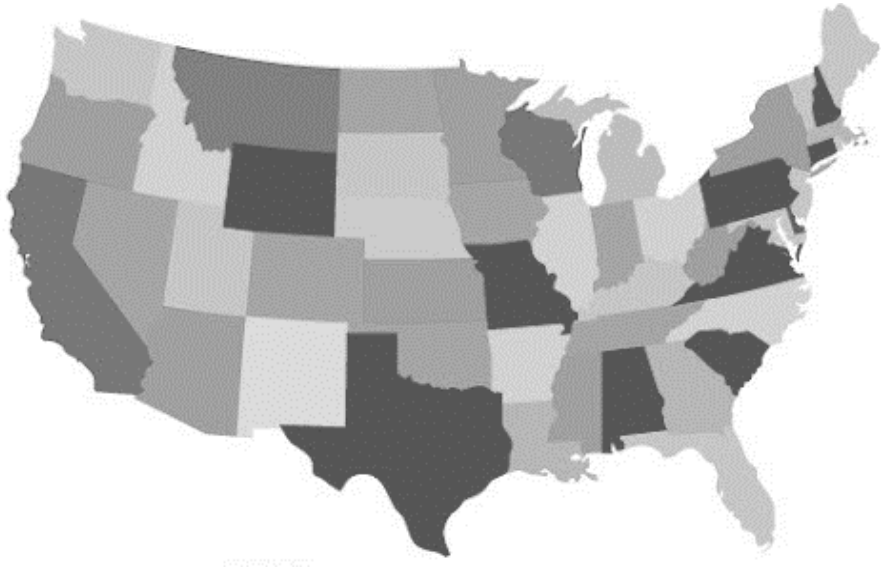
The Executive Order takes aim at **non-compete clauses**, which the Fact Sheet asserts are used by companies to "stifle competition."

- The Order encourages the FTC "to exercise the FTC's statutory **rulemaking authority** under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."
- Former FTC Commissioner Rohit Chopra has argued in favor of using FTC rulemaking rather than relying on case-by-case adjudication.
- The Order does not address whether or how to address legitimate concerns of employers, e.g., protecting trade secrets and proprietary information.

> Roughly half of private-sector businesses require at least some employees to enter non-compete agreements, affecting some 36 to 60 million workers.
>
> – FACT SHEET: Executive Order on Promoting Competition in the American Economy, July 9, 2021.

Federal v. State Law on Non-Compete Clauses

- Non-compete clauses have traditionally been addressed at the state level and individual state laws vary widely across the country. Half of the states currently have laws regulating non-compete agreements, and three states ban them outright.
- North Dakota,[1] Illinois,[2] and California[3] have among the strictest laws against non-compete clauses in employment contracts. Washington, D.C.'s[4] ban will likely be enforceable in April 2022.
- Missouri,[5] Arkansas,[6] Georgia,[7] and Idaho[8] have among the most permissive laws regarding non-compete clauses in employment contracts.



1 N.D.C.C. § 9-08-06
2 820 ILCS 90/1 to 90/10
3 Cal. Bus. & Prof. Code § 16600
4 DC Code §§ 32-581.01 to 32-581.05
5 28 Mo. Stat. Ann. § 431.202
6 AR Code 4-75-101
7 OCGA §§ 13-8-50-59.
8 Idaho Code §§ 44-2701-2704

Any interaction between potential FTC rulemaking and state laws could lead to significant future litigation. Companies should be aware of increasing risk associated with non-competes at the state and federal levels.

Top Exposure Reducing Steps

1. Stay abreast of state laws—which are evolving—and any federal rulemaking efforts.
   - As part of the rulemaking process, companies and associations may submit comments
2. Update non-compete policies: evaluate potentially **overbroad** contracts & consider **revising**.
3. Restrictions must be **necessary and narrowly tailored** to achieve a **procompetitive purpose**.
   - E.g., access to sensitive, proprietary trade secrets or sensitive IP; significant investment in talent
4. Document procompetitive justifications and include them in the **broader contract**.
5. Consider for which employees non-competes are **necessary**.
   - Restrictions on low wage earners are disfavored.
6. Ensure restrictions are reasonably **limited** in **duration** and **geographic scope**.
7. Train **HR team and executives involved in recruitment** while **soliciting feedback** regarding monitoring and risks.

> I have instructed staff to investigate potentially **unlawful mergers or conduct that harm workers**. Although antitrust law in recent decades generally has neglected monopsony concerns and harms to workers, we must scrutinize **mergers that may substantially lessen competition in labor markets**. As part of this effort, the FTC will work with the Department of Justice to update the agencies' merger guidelines, looking to provide guidance on **how to analyze a merger's impact on labor markets**.

- Ltr. from FTC Chair Khan to House Antitrust Subcommittee, Sept. 28, 2021

Tips for Merger Reviews

- Due diligence should focus on areas of heightened risk, including employment contracts and labor practices.
- Engage early with regulators when negotiating deals & expect heightened scrutiny, potentially longer time period to close, increased likelihood of Second Requests, and sweeping inquiries into a broader range of issues.
- Expect greater deal scrutiny focused particularly on ordinary course documentary evidence.
  - Be mindful of document creation & interactions with customers & competitors. Consider the antitrust implications of how they may negatively affect the ability to enter into strategic transactions.
  - Adopt document creation guidelines. Ensure businesspeople & outside advisers are aware of them, striving to conduct business and deal activities as if they will be reviewed by a government agency.

GEORGE MASTORIS

Partner, New York
+1 (212) 294-4623
gmastoris@winston.com

George Mastoris is an accomplished litigator who represents a broad array of companies involved in high-stakes and high-profile civil and criminal litigations, arbitrations, and appeals. George has served as lead counsel in price-fixing and monopolization cases, government investigations and enforcement actions, RICO actions, and complex commercial litigation. George currently represents a major financial institution in connection with four antitrust class actions pending in the S.D.N.Y., as well as one of the world's largest insurers in a number of high-profile litigations throughout the country. More generally, he represents both plaintiffs and defendants in an array of industries, including financial institutions, technology companies, manufacturing concerns, insurers, retailers, and private equity firms. George also regularly counsels clients in connection with regulatory and compliance issues relating to antitrust and financial technology. George has been recognized as a "Rising Star" by New York Metro Super Lawyers for five years running and a "2019 Technology Law Trailblazer" by the *National Law Journal* for his litigation and regulatory work in the Blockchain and digital assets space.

MOLLY DONOVAN

Partner, New York
+1 (212) 294-4692
mmdonovan@winston.com

In addition to criminal antitrust work, Molly Donovan has focused much of her practice on coordinating the defense of companies facing class action and individual plaintiff cases involving no-poach, wage-fixing, market allocation, bid-rigging and price-fixing allegations, from the motion to dismiss phase through trial. Recently, Molly represented a company concerning allegations of group boycott hub-and-spoke conduct that went to trial, a company facing no-poach class litigation in the E.D.N.Y., and she has provided plaintiff-side advice regarding the pursuit of federal and state claims involving monopolization-related claims. She regularly counsels clients regarding antitrust risks involved in employment and labor situations, sales of businesses, and other legitimate business dealings with actual and prospective competitors.

SOFIA ARGUELLO

Partner, New York
+1 (212) 294-5304
sarguello@winston.com

Sofia Arguello focuses her practice on civil antitrust litigation, international cartel investigations led by enforcement agencies around the world, white collar criminal defense, and corporate internal investigations focusing on anti-corruption and Foreign Corrupt Practices Act (FCPA) compliance issues. Sofia has acted as plaintiffs' and defense counsel in antitrust cases involving monopolization, price-fixing, price discrimination, group boycotts, and other restraints of trade. She has also defended clients in criminal investigations brought by the DOJ and international competition authorities.

PATRICK OPDYKE

Associate, New York
+1 212-294-6615
POpdyke@winston.com

Patrick has experience representing major U.S. and multinational corporations in litigation and government investigations involving a wide array of federal and state antitrust issues, including monopolization, price fixing, wage fixing, no-poach agreements, tying, price discrimination, unfair competition, anticompetitive product redesign, and mixed issues of antitrust and intellectual property law relating to Fair, Reasonable, and Non-Discriminatory (FRAND) obligations, standard-setting, patent licensing, and patent misuse. Patrick has represented and counseled clients in a variety of industries, including in high-tech; IoT; wireless connectivity (2G, 3G, 4G); semiconductors; computer products; patent aggregation and licensing; pharmaceuticals; steel products and fabrication; food products and distribution; and financial services.

Winston’s Antitrust/Competition Practice

Winston & Strawn’s global antitrust/competition attorneys help clients resolve their most complex problems. Our team offers a full range of services, including advice and representation related to all aspects of global cartel defense, civil and criminal litigation, government investigations, mergers and acquisitions, and regulatory counseling and compliance.

We have decades of experience representing major corporations in both government and private antitrust litigation. We routinely represent clients in their most complex disputes, often coordinating defenses across jurisdictions with parallel government investigations. We have handled cases ranging from market-division and price- and wage-fixing to output-restriction conspiracies to antitrust claims stemming from Lanham Act and unfair-trade-practice issues. We represent plaintiffs and defendants in private antitrust litigation.

This team is **“widely recognized for its expertise and success. In the specialized arena of antitrust law, companies must have a reliable partner that is adept at performing the critical fact-intensive analysis and communicating a strong position.”**

***THE LEGAL 500 US* 2021 – CLIENT QUOTE**

2020 Antitrust Firm of the Year

BENCHMARK LITIGATION US

100+

GLOBAL ANTITRUST AND COMPETITION ATTORNEYS

WINSTON
&STRAWN
LLP