Antitrust Enforcement – Recent Developments in Higher Education

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Topics for Discussion

- **Legal Framework**
  - Scope of Federal Antitrust Laws
  - Applicability to Higher Education
  - Rule of Reason Analysis
- **Overview of Antitrust Enforcement**
  - Basics of Investigatory Process
  - DOJ Antitrust Division and Higher Education
    - Historical – Overlap Group Consent Decree and MIT Litigation
    - Contemporary – April 2018 Letters
- **Considerations for DOJ Inquiries***
  - Proactive Measures for Limiting Risk and Antitrust Exposure
  - Key Questions to Ask Before Engaging in Collaborative Conduct

** All content is based on publicly available information.*

Legal Framework: Reach of Antitrust Laws

Overview of the Sherman Act

- "Every contract, combination in the form of trust or otherwise, or conspiracy, **in restraint of trade or commerce** among the several states . . . is declared to be illegal."
  - Section 1 of the Sherman Act (15 U.S.C. §1)

- Essential elements – (1) an agreement or understanding between at least two entities that is (2) "unreasonably restrictive of competitive conditions"
  - *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911).

Substantial Criminal and Civil Penalties

- Government Enforcement (DOJ/FTC + State AGs)
  - Criminal penalties:
    - **Fines:** Up to $100 million for corporations and up to $1 million for individuals (and possibly more)
    - **Prison Sentences:** Up to 10 years per violation
  - Civil penalties:
    - Disgorgement of profits, fines, equitable relief
- Private Enforcement (students, employees, suppliers)
  - Treble damages, equitable relief, attorneys' fees, and court costs
  - Joint and several liability

Three Common Misconceptions

Misconception # 1:

All conduct by non-profit institutions is exempt from antitrust laws.

Section 1 Applies to Nonprofit Entities

- "Congress intended to strike as broadly as it could in §1 of the Sherman Act."
  - *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975)

- "There is no doubt that the sweeping language of §1 applies to nonprofit entities."
  - *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 100 n.22 (1984)

- "It is beyond debate that nonprofit organizations can be held liable under the antitrust laws."
  - *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 576 (1982)

Section 1 May Apply to Public Universities

- "The Sherman Act . . . gives no hint that it was intended to restrain state action or official action directed by a state."
  - *Parker v. Brown*, 317 U.S. 341, 351 (1943)
- Universities not *ipso facto* immune as arm of the state
- Requires showing "clearly articulated state policy" in support of anticompetitive conduct at issue
  - *Town of Hallie v. City of Eau Claire,* 471 U.S. 34 (1985)
- Remedy limited to injunctive relief, not damages
  - Local Government Antitrust Act of 1984

Three Common Misconceptions

Misconception # 2:

Antitrust laws prohibit any conduct that could be considered "anticompetitive" without qualification.

Rule of Reason vs. Per Se Liability

- Most agreements analyzed under Rule of Reason test – "slow to condemn rules adopted by professional associations as unreasonable *per se*"
  - *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986)
  - *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977)

- Certain "plainly anticompetitive" conduct is always unlawful, regardless of possible benefits, such as:
  - Price-Fixing Agreements
  - Bid Rigging
  - Allocation of Customers and/or Market
  - But certain exceptions apply: *BMI* and *NCAA* (where agreement necessary to bring product to market.)

Rule of Reason and Burden Shifting

- Plaintiff must first show **adverse anticompetitive effects** in a relevant market.
  - *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986)
- Defendant must then proffer **pro-competitive justification** and properly support it.
  - *U.S. v. Brown University et al.*, 5 F.3d 658 (3d Cir. 1993)
- Plaintiff must show there are "**substantially less restrictive alternatives**."
  - *O'Bannon v. National Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015)
- Court will weigh anticompetitive and procompetitive effects only if all three burdens met.

Less Restrictive Alternatives

- Asks whether the collaborative conduct in question is "reasonably necessary" to achieve procompetitive justification
  - "less" does not mean *least*

- DOJ focus on alternatives that are (1) practical, rather than theoretical, and (2) significantly less restrictive
  - Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000)

Three Common Misconceptions

Misconception #3:

Social welfare benefits count as procompetitive justifications.

What are pro-competitive justifications?

- Improvement in the **quality** of a product or service that enhances demand
  - *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 114-15 (1984)

- Reduced **price** or increased **output** through efficiency gains

- Widening **consumer choice**

What are NOT pro-competitive justifications?

- Social welfare/public benefits apart from competition are **not** cognizable.
  - *See e.g.*, *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978)
- Cannot stem from economic self-interest of participants
- Cannot challenge whether competition itself is reasonable
  - Avoiding "ruinous" competition is not a defense

Historical Enforcement of Antitrust Laws in Higher Education

Key Players in Antitrust Enforcement

- Department of Justice, Antitrust Division
  - Civil and criminal enforcement
- Federal Trade Commission (FTC)
  - Section 5 of the FTC Act – "unfair methods of competition"
- State Attorneys General
  - Increasingly active in certain areas
- Private Plaintiffs
  - Section 4 of the Clayton Act grants individuals right to bring suit
  - Jung (2004): class action lawsuit by medical students challenging National Resident Matching Program

Prior Antitrust Enforcement Against Academic Institutions (Early Cases)

- Commercial vs. Non-Commercial Distinction
  - Section 1 applies to "restraint of trade or commerce"
  - Third Circuit in *Overlap* litigation found that "**financial assistance** to students is part and parcel of the process of setting tuition and thus a commercial transaction."

- Examples of Activity Outside Scope of Sherman Act
  - Accreditation activities
    - *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools, Inc.*, 432 F.3d 650 (D.C. Cir. 1970)
  - Academic admissions criteria
    - *Selman v. Harvard Medical School*, 494 F. Supp. 603 (S.D.N.Y. 1980)
    - *Donnelly v. Boston College*, 558 F.2d 634 (1st Cir. 1977)

Overlap Group Cases (Background)

- Ivy League schools and MIT agreed to ban merit scholarships; "fix" financial aid formulas for determining family contribution
- Goal was to allow students to make decision based on the fit of the institution, rather than costs
- Colleges argue these rules led available aid to be focused on students who needed the aid the most, thus allowing more students to attend
- DOJ sued, claiming this practice was horizontal price-fixing

Overlap Group Cases (Decisions)

- District Court held that the agreements "created a horizontal restraint which . . . eliminat[ed] students' ability to consider price differences when choosing a school and by depriving students of the ability to receive financial incentives which competition between those schools may have generated."
  - *United States v. Brown University et al.*, 805 F. Supp. 288 (E.D. Pa. 1992)

- Thus, district court applied "quick look" analysis.

- Third Circuit remanded, holding that a full blown rule of reason analysis was required. DOJ would have to show on remand that the consequence of the price fixing was that price was higher or output lower than it otherwise would have been.

Third Circuit Analysis

- Court found that the agreements were a "price-fixing mechanism impeding the ordinary function of the free market."
  - *United States v. Brown University et al.*, 5 F.3d 658 (3d Cir. 1993)

- Nonetheless, Court held that if agreements served to broaden "socio-economic sphere" of student body, that would enhance competition.

- Court recognized that "nature of higher education" supported use of full blown rule of reason analysis, but did not by itself immunize the conduct.

- Court rejected justification that by removing price competition, agreements channeled competition into other areas.

Overlap Consent Decrees

- The 8 Ivy League Schools entered into (now-expired) consent decrees that, *inter alia*, precluded the schools from:
  - Agreeing on family contribution/needs analysis formula
  - Agreeing to ban merit scholarships
  - Agreeing on student's financial aid package/sharing package with another college

Statutory Exemption

- Congress passed a narrow statutory exemption in 1992
  - Amended and extended through 2022 by Need-Based Educational Aid Act of 2015
- Antitrust exemption seemingly limited to institutions at which all students admitted are admitted on a need-blind basis
  - GAO report (2006) found use of exemption did not significantly affect affordability or likelihood of enrollment
- Qualifying institutions were permitted to agree to:
  - Award financial aid on the basis of need
  - "Use common principles of analysis" for determining aid, so long as individual analysis conducted per applicant
  - Use of a common-aid form, so long as schools can use additional data

Other Antitrust Actions in Higher Education

- American Bar Association (1995): civil complaint filed alleging anticompetitive law school accreditation standards
  - Resulted in DOJ consent decree governing process
- Meeting of the Council of Independent Colleges (2013): investigation into discussions on tuition discounting and improving financial aid
  - Closed investigation within months after preservation letters issued
- National Association for College Admission Counseling (2017): reported investigation into code of ethics

Current DOJ Inquiries: Understanding the Process and Substantive Considerations

DOJ Process – Initial Investigation

- Traditionally, initial step of sending document preservation letter
- Followed by requests for documents and/or Civil Investigative Demands to targeted entities and third parties
- After some preliminary information gathering, government may proceed to informal witness interviews or formal depositions
- Scope of investigation narrowing over time

DOJ Process – Beyond Investigation

- Subjects have opportunities to present arguments to DOJ staff.
  - Must be supported with evidence, such as normal course business documents
  - Economics typically play heavy role; expert retention is common
- Staff will make recommendations to Front Office, who will ultimately decide whether to pursue relief.
  - Often afforded additional opportunity to present case to Front Office before decision is made
- If DOJ finds sufficient basis for violations, litigation or settlement are its only options.
  - No "regulatory" authority

April 2018 DOJ Letters

- Document preservation letters issued to several institutions starting in April 2018
- Focus reportedly on "potential agreement between colleges relating to their early decision practices"
- Recipients chiefly private, selective colleges
- Purported interest in practice of sharing of information about prospective students accepted in early-decision process
- Broad request covering external communications with other colleges and internal documents (*e.g.*, admissions records)

Parallels to Prior and Current Enforcement Priorities

- Legacy of *Overlap Group* litigation
  - Any hint of "agreement" between "competitors" could trigger interest
- Concurrent activity involving civil rights and higher education
  - ongoing DOJ investigation and private litigation about treatment of Asian-American applicants
- Recent enforcement trends beyond higher education
  - "No-poach" cases
  - Standard-setting bodies

Limiting Exposure to Antitrust Liability

- Compliance training for any individuals who collaborate with other institutions, not just admissions staff and senior officials
  - DOJ may look to how discussions are framed to assess intent

- Seeking antitrust review before signing onto codes of conduct or agreements
  - Prior attempted appeals to government for immunity to end binding early decision programs (*Noerr-Pennington*)
    - Business review letter reportedly filed in 2002
    - Legislation introduced in Senate in 2003

- Keep information sharing, if any, at a high level, rather than student specific
  - DOJ/FTC Antitrust Guidance for Human Resource Professionals (Oct. 2016)

Key Considerations for Joint Activities

- **Who needs to be involved?**
  - Who are the other members? Peer institutions?
  - Does it require agreement between my institutions and others?

- **Why do we need this arrangement?**
  - Is the rationale pro-competitive? Or merely advancing social welfare goals?
  - Can my institution reasonably use a different approach to achieve the same goal?

- **What would be the impact?**
  - Would the arrangement affect the way my institution competes (for students, faculty, grants, etc.)?
  - Is there data or other evidence to support the proffered pro-competitive justifications?

Conclusions

- Institutions of higher education are not shielded from the antitrust laws.
- Antitrust analysis is highly fact dependent and varies considerably based on the nature of the conduct in question.
  - Commercial vs. Non-Commercial
  - Pro-Competitive vs. Social Welfare
- The government investigatory process can be navigated to minimize cost and burden.
  - Key to Understand Motives and Intent
  - Documentation is Essential

Questions?

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