

President Biden’s Executive Order on Competition: One year later

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Since President Biden issued his July 2021 Executive Order on Competition, the antitrust agencies have made broad policy statements promising more aggressive enforcement and have initiated a number of high-profile enforcement actions. Rather than establishing a record of success, the primary effect has been to create uncertainty, as the agencies struggle with institutional constraints and have yet to achieve groundbreaking victories in court. Still, the FTC and DOJ do not appear deterred.

Background on President Biden’s Executive Order on Promoting Competition in the American Economy

On July 9, 2021, President Biden issued a sweeping proclamation on competition in the American economy, asserting that there has been too much consolidation across many different economic sectors and that this consolidation has harmed workers, farmers, small businesses, startups, and consumers, and has led to vast racial, income, and wealth inequalities.¹ This Executive Order affirmed that it is a central goal of the Biden Administration to ensure that antitrust laws in the U.S. are strongly enforced. The Executive Order highlighted several particular sectors of concern (namely agriculture, information technology, healthcare and prescription drugs, telecommunications, and labor, including a focus on non-compete provisions that impact workers), but the call for stronger antitrust enforcement was economy-wide.

This Update focuses on the Federal Trade Commission’s (“FTC”) and the Department of Justice Antitrust Division’s (“DOJ”) antitrust enforcement activity over the last year under this Executive Order’s direction.²

For further details on the Executive Order, please see Davis Polk’s prior Client Update regarding issuance of the Executive Order.³

FTC and DOJ have been conducting intensive merger and conduct investigations

FTC Chair Lina Khan was sworn in on June 15, 2021 (approximately three weeks before President Biden’s Executive Order) and DOJ’s Assistant Attorney General (“AAG”) for Antitrust Jonathan Kanter was confirmed to his position on November 16, 2021. Since then, the FTC and DOJ have taken a number of steps to pursue more aggressive antitrust enforcement. Certain areas of key focus by the agencies over the last year are described below.

Reconsidering the Vertical Merger Guidelines and carefully scrutinizing vertical mergers

The FTC and DOJ both were quick to announce that they are revisiting the 2020 Vertical Merger Guidelines, as “encouraged” by the Executive Order. On September 15, 2021, the FTC withdrew its approval of the Vertical Merger Guidelines, without putting any new guidance in place for non-horizontal mergers; in particular, the FTC viewed the prior guidelines as taking a “flawed approach” towards asserted procompetitive benefits of mergers.⁴ On the same day, the DOJ announced that it is also conducting a review of the Vertical Merger Guidelines, stating it has “already identified several aspects of the guidelines that deserve close scrutiny.”⁵

Consistent with these moves, both the FTC and the DOJ appear intent on more scrutiny for and challenges of non-horizontal mergers. For example, in January 2022, the FTC voted 4-0 (i.e., across party lines) to issue a complaint to block Lockheed Martin’s vertical acquisition of Aerojet Rocketdyne, in what would have been the FTC’s first defense industry merger litigation in decades.⁶ Several weeks later, the parties abandoned the transaction, due, in part, to the FTC’s lawsuit.⁷ The DOJ’s pending litigation of UnitedHealth’s proposed acquisition of Change Healthcare and the FTC’s ongoing review of Microsoft’s proposed acquisition of Activision Blizzard will likely be important litmus tests for the agencies’ vertical enforcement.⁸

On January 18, 2022, the FTC and DOJ issued a joint notice for public comments “on how the agencies can modernize enforcement of the antitrust laws regarding mergers.”⁹ This inquiry is focused on both the 2020 Vertical Merger Guidelines and the 2010 Horizontal Merger Guidelines (which currently remain in place at both agencies). Particular areas of focus in the agencies’ request for information are the “purpose and scope of merger review[,] presumptions that certain transactions are anticompetitive[,] use of market definition in analyzing competitive effects[,] threats to potential and nascent competition[,] impact of monopsony power, including in labor markets[,] and] unique characteristics of digital markets.”¹⁰ The public comment period closed in late April, after the agencies received nearly 2,000 comments. Updated draft guidelines have not been released by the agencies, but the agencies have stated a goal of releasing new guidelines by the end of this year.

Increase in the frequency and intensity of merger reviews

Over the past year, parties undergoing merger reviews in front of the FTC and DOJ have witnessed the change in the agencies’ enforcement posture. The agencies are considering more novel and more aggressive theories than contemplated in previous administrations. This has resulted in the issuance of Second Requests in some transactions where we would ordinarily have expected the agencies to close the investigation during the initial HSR waiting period. Facing resource constraints, the agencies have gotten creative in staffing some of these reviews. At the FTC, for example, Second Requests have been staffed with only one lawyer and one economist (while a typical Second Request would usually have much larger teams of lawyers and economists), and the FTC has begun asking attorneys from its Consumer Protection and Policy Planning offices to review mergers (frequently a new role for these lawyers).¹¹

The agencies have also been pressing parties for more stringent requirements during the merger review. In particular, they are seeking more government-friendly Second Request timing agreements, which require the merging parties give the agencies substantial time to evaluate a merger following compliance with a Second Request. The HSR Act itself provides that the agencies only have 30 days following compliance with a Second Request to decide whether to sue to block a transaction. For many years, the agencies have required parties to agree to a longer post-compliance waiting period (e.g., 60 days) in order to obtain other “concessions” regarding the burden of a Second Request. The FTC has now begun requiring a 120-day post-compliance waiting period, up from the suggested 60-day to 90-day period in the FTC’s publicly available model timing agreement.¹² The DOJ, for its part, has begun asserting a “non-negotiable” 150-day post-complaint discovery period.¹³ These longer periods appear intended to give the agencies more time to prepare for litigation to block deals.

Heightened scrutiny of consummated transactions

The DOJ and FTC have not only been conducting more exhaustive reviews of pending mergers, but they have also flexed their muscles with respect to consummated transactions. The Executive Order endorsed this approach, noting that “this order reaffirms that the United States retains the authority to challenge transactions whose previous consummation was in violation of the [antitrust laws].”¹⁴ During the Trump Administration, the FTC challenged Facebook’s (now Meta’s) acquisitions of Instagram and WhatsApp from 2012 and 2014, respectively. Other post-consummation challenges are expected. There have also been reports that the FTC is actively investigating violations of past merger consent decrees, potentially with the aim of unwinding the previously cleared merger.¹⁵

In this vein, the agencies have been issuing “close at your own risk” letters to merging parties in non-challenged and non-remedy transactions that remind the parties that the agencies retain the authority to challenge mergers after they have closed and that expiration of an HSR waiting period does not constitute approval of the deal by the agencies.¹⁶

Increased focus on labor issues in both merger and conduct cases

The Executive Order asserted that recent industry consolidation has resulted in stagnation of wages for workers as well as a growing divide in income and wealth equality—a problem that antitrust should seek to correct. Outside of this directive, the agencies generally have taken the view that prior enforcement of the antitrust laws was too lax and that the narrow focus on more traditional antitrust harms (such as higher prices, reduced output, or lower quality) has been too narrow. This has led to a more intense focus on labor and wage considerations in both merger and conduct investigations.

On the merger front, for example, the DOJ has challenged Penguin Random House’s proposed acquisition of Simon & Schuster on the ground that the deal would supposedly reduce competition for publishing rights and suppress compensation paid to authors.¹⁷ The FTC has also had several recent high profile investigations and settlements of labor organizations, including the Board of Dental Examiners of Alabama and the Louisiana Real Estate Appraisers Board.

Labor has also been a central focus recently of the DOJ’s criminal enforcement. In 2021 alone, the DOJ brought four sets of criminal indictments for no-poach and wage-fixing agreements. The DOJ has so far been unsuccessful in these litigations, however, experiencing a series of losses (described further below). Thus far, the DOJ has not been deterred from continuing to pursue alleged criminal activity. Other criminal cases in these areas remain ongoing, which will serve as important litmus tests for the DOJ, and the DOJ has stated that it has a large number of criminal investigations in process or before grand juries.¹⁸

The uptick in antitrust scrutiny has not been matched with successful outcomes, but there are no signs thus far that that the agencies are likely to be deterred going forward

In terms of merger reviews, policy statements and investigations have not yet translated into a noticeable uptick in the number of challenges. To mark the anniversary of the executive order, the FTC released a press release noting that “[f]rom June 2021 to June 2022 the FTC took twenty-six enforcement actions, and two additional abandonments for deals facing likely challenges.”¹⁹ This marks almost no appreciable difference from the last fiscal year of the Trump Presidency (October 1, 2019 through September 30, 2020), where the FTC brought twenty-eight merger enforcement challenges.²⁰ A similar press release from the DOJ does not quantify the number of challenges,²¹ but by our count, the DOJ has taken 13 enforcement actions from June 2021 to June 2022,²² but only four challenges in the more than eight

months since AAG Kanter was confirmed.²³ For comparison, in the last fiscal year of the Trump Presidency, the DOJ brought ten merger enforcement challenges.²⁴

This enforcement activity is in the context of a record number of merger filings—in fiscal year 2021 there were 3,644 filings, almost double the previous annual record under the current statutory thresholds. As a result, if measured as a *percentage* of notified transactions, enforcement activity appears to have *actually fallen* to historically low levels.

At the same time, the agencies appear less willing to enter into consent decrees, favoring litigation instead. AAG Kanter has gone on the record as stating that “when the division concludes that a merger is likely to lessen competition, in most situations we should seek a simple injunction to block the transaction” because “[i]t is the surest way to preserve competition.”²⁵ Consistent with that view, since AAG Kanter was confirmed, the DOJ has not settled a single merger case. Other than one abandoned transaction,²⁶ the DOJ’s preference for litigation has not yet produced results, though major trials are either underway or set to begin in the coming months, including trials relating to Penguin Random House’s acquisition of Simon & Schuster and UnitedHealth’s acquisition of Change Healthcare—both of which began on August 1.

At the FTC, the preference for litigation over settlement has been less absolute, with 9 consent decrees in the last 12 months.²⁷ This includes two consent decrees with private equity firm JAB Consumer Partners for acquisitions in the veterinary space despite vows by Chair Khan to “go after [private equity] in a more muscular way.”²⁸ At the same time, the FTC has also expressed skepticisms of settlements: “We’re going to be focusing our resources on litigating, rather than on settling.”²⁹ The FTC also touted that it was “litigating (at one point) three vertical merger challenges at the same time, something that is unprecedented in modern antitrust history.”³⁰ In addition, the FTC recently sued to block Meta’s proposed acquisition of Within Unlimited³¹—reportedly despite a recommendation by FTC staff against bringing the case.³²

Moreover, it has also been reported that certain transactions the FTC did not challenge due to a 2-2 party deadlock—a deadlock now broken by the May 16, 2022 confirmation of Alvaro Bedoya—may now receive another look, such as Amazon’s acquisition of MGM.³³ Similarly, the recent challenge to Meta’s proposed acquisition of Within was decided by a party vote—this time a 3-2 vote. We expect to see more challenges brought along this sort of party-line split.³⁴

With respect to criminal enforcement, the DOJ has to date been largely unsuccessful in securing guilty verdicts. For example, the DOJ has not received any guilty verdicts in its recent string of no-poach and price fixing trials—going 0 for 33 in criminal antitrust counts. In a DOJ criminal challenge to an alleged conspiracy to fix chicken prices, the first trial resulted in a mistrial in December 2021; the second trial resulted in a mistrial in March 2022; and the third trial resulted in an acquittal of all defendants in July 2022. In a no-poach case, a jury acquitted kidney dialysis company DaVita and its former CEO on all counts.

Despite this dearth of success, the DOJ appears undeterred. After the *DaVita* verdict, AAG Kanter said “we’re going to continue to bring the cases—we’re not backing down,”³⁵ and after the not guilty verdict in the chicken trial stated “we will continue to vigorously enforce the antitrust laws ... We will not be deterred from continuing to vigilantly pursue cases to protect the American people and our markets.”³⁶ The DOJ will try again this fall in prosecuting another group of individuals in a second chicken price-fixing criminal case.

As for civil conduct enforcement, neither agency has had a major litigated victory in last several years, and the current blockbuster enforcement actions against Facebook and Google were commenced under the Trump Administration.

Nonetheless, all signs suggest that the FTC and DOJ will continue to litigate aggressively. For the FTC, the recent swearing in of a third Democratic Commissioner gives Democrats a majority to pursue cases with newer theories of harm and expand existing case law, and the DOJ has expressly stated it intends to continue litigating cases with increased vigor.

Key takeaways

The FTC and DOJ have taken aggressive stances in both merger and conduct investigations, increasing their scrutiny of these matters, the range of issues they will consider for anticompetitive harms, and their willingness to litigate, emboldened by President Biden's Executive Order on Competition. So far, however, the main effect has been to introduce uncertainty: the agencies have not yet established a clear track record of successfully challenging allegedly anticompetitive mergers and conduct, creating a divide between rhetoric and reality. In this context, we expect that private parties may be more inclined to litigate against the agencies and "try their luck" in court.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Sheila R. Adams James
+1 212 450 3160
sheila.adams@davispolk.com

D. Jarrett Arp
+1 202 962 7150
jarrett.arp@davispolk.com

Arthur J. Burke
+1 212 450 4352
+1 650 752 2005
arthur.burke@davispolk.com

Cody Donald
+1 202 962 7189
cody.donald@davispolk.com

Ronan P. Harty
+1 212 450 4870
ronan.harty@davispolk.com

Nathan Kiratzis
+1 212 450 4157
nathan.kiratzis@davispolk.com

Benjamin M. Miller
+1 202 962 7133
benjamin.miller@davispolk.com

Suzanne Munck af Rosenschold
+1 202 962 7146
suzanne.munck@davispolk.com

Howard Shelanski
+1 202 962 7060
howard.shelanski@davispolk.com

Jesse Solomon
+1 202 962 7138
jesse.solomon@davispolk.com

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- ¹ Exec. Order No. 14036, 86 FR 36987 (Jul 9, 2021) (Executive Order on Promoting Competition in the American Economy), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.
- ² Other Executive agencies have also taken steps described in the Executive Order. For example, the Department of Agriculture has opened several broad inquiries into various levels of the food supply chain for the stated purpose of considering appropriate rulemakings aimed at promoting competition and innovation.
- ³ Davis Polk, *President Biden signs Executive Order on promoting competition* (July 12, 2021), <https://www.davispolk.com/insights/client-update/president-biden-signs-executive-order-promoting-competition>.
- ⁴ Press Release, Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary (Sept. 15, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary>.
- ⁵ Press Release, Justice Department Issues Statement on the Vertical Merger Guidelines (Sept. 15, 2021), <https://www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines>.
- ⁶ Press Release, FTC Sues to Block Lockheed Martin Corporation's \$4.4 Billion Vertical Acquisition of Aerojet Rocketdyne Holdings Inc. (Jan. 25, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/01/ftc-sues-block-lockheed-martin-corporations-44-billion-vertical-acquisition-aerojet-rocketdyne>.
- ⁷ Alyssa Aquino, *Lockheed Abandons \$4.4B Aerojet Deal Amid FTC Suit*, Law360 (Feb. 14, 2022), <https://www.law360.com/articles/1464746/lockheed-abandons-4-4b-aerojet-deal-amid-ftc-suit>.

- ⁸ As also “encouraged” by the Executive Order, the FTC and DOJ announced on January 18, 2022 a joint inquiry to modernize the 2010 Horizontal Merger Guidelines. Press Release, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers>.
- ⁹ U.S. Dep’t. of Justice and Fed. Trade Comm’n, Request for Information on Merger Enforcement (Jan. 18, 2022), available at <https://www.regulations.gov/document/FTC-2022-0003-0001>.
- ¹⁰ Press Release, Justice Department and Federal Trade Commission Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-strengthen-enforcement-against-illegal>.
- ¹¹ Much of this aggressiveness appears to be driven by FTC and DOJ leadership, and not so much by staff. Rather, staff appear more frequently to be citing Front Office leadership as the source of any particular inquiry, viewpoint, objection, or the like. (According to reports, the FTC’s challenge to the Meta / Within merger, described below, may be an example of this.) This sends a clear signal that the FTC and DOJ leadership have taken the Executive Order’s directives to heart and are taking an increasingly tough stance.
- ¹² Federal Trade Commission, FTC Model Timing Agreement (Feb. 27, 2019), https://www.ftc.gov/system/files/attachments/merger-review/ftc_model_timing_agreement_2-27-19_0.pdf.
- ¹³ The DOJ’s model timing agreement also includes a 90-day post-Second Request compliance waiting period. U.S. Department of Justice, Antitrust Division, DOJ Model Timing Agreement (Sept. 2020).
- ¹⁴ See Exec. Order No. 14036, *supra* note 1.
- ¹⁵ See, e.g., Josh Sisco and Lee Hudson, *FTC turns up the heat on Trump-era defense merger*, Politico (July 22, 2022), <https://www.politico.com/news/2022/07/22/ftc-turns-up-the-heat-on-trump-era-defense-merger-00047452>.
- ¹⁶ Holly Vedova, Bureau of Competition, Federal Trade Commission, *Adjusting merger review to deal with the surge in merger filings* (Aug. 3, 2021), <https://www.ftc.gov/enforcement/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings>; see also Davis Polk, *FTC to issue “Warning Letters” that deals remain subject to antitrust review post-closing* (Aug. 5, 2021), <https://www.davispolk.com/insights/client-update/ftc-issue-warning-letters-deals-remain-subject-antitrust-review-post-closing>.
- ¹⁷ Press Release, Justice Department Sues to Block Penguin Random House’s Acquisition of Rival Publisher Simon & Schuster (Nov. 2, 2021), <https://www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon>.
- ¹⁸ The DOJ has also threatened to bring Section 2 (monopolization) cases criminally, something that has not been done in decades.
- ¹⁹ Press Release, FTC Marks One-Year Anniversary of Government-Wide initiative to Promote Competition in the American Economy (July 11, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-marks-one-year-anniversary-government-wide-initiative-promote-competition-american-economy>.
- ²⁰ Davis Polk, *FTC and DOJ release FY 2020 HSR Annual Report* (Nov. 12, 2021), <https://www.davispolk.com/insights/client-update/ftc-and-doj-release-fy-2020-hsr-annual-report>.
- ²¹ Press Release, Justice Department Celebrates the One-Year Anniversary of the Executive Order on Competition (July 11, 2022), <https://www.justice.gov/opa/pr/justice-department-celebrates-one-year-anniversary-executive-order-competition>.
- ²² (1) *U.S. v. Grupo Verzatec S.A. de C.V., et al.*; (2) *U.S. and Plaintiff States v. UnitedHealth Group, Inc. and Change Healthcare Inc.*; (3) *U.S. v. United States Sugar Corporation, et al.*; (4) *U.S. v. S&P Global Inc., et al.*; (5) *U.S. v. Lactalis and The Kraft Heinz Company*; (6) *U.S. v. Bertelsmann SE & CO. KGaA, et al.* [*Penguin Random House LLC’s bid to buy Simon & Schuster*]; (7) *U.S. v. Neenah Enterprises, Inc., U.S. Holdings, Inc., and U.S. Foundry and Manufacturing Corporation*; (8) *U.S. v. Wienerberger AG, et al.*; (9) *U.S. and Plaintiff States v. American Airlines Group Inc. and JetBlue Airways Corporation*; (10) *U.S. v. Gray Television, Inc. and Quincy Media, Inc.*; (11) *U.S. v. Danfoss A/S and Eaton Corporation Plc*; (12) *U.S. v. Aon plc and Willis Towers Watson plc*; and (13) *U.S. v. Zen-Noh Grain Corp. and Bunge North America, Inc.*
- ²³ (1) *U.S. v. Booz Allen Hamilton Holdings Corp, et al.*; (2) *U.S. v. Grupo Verzatec S.A. de C.V., et al.*; (3) *U.S. and Plaintiff States v. UnitedHealth Group, Inc. and Change Healthcare Inc.*; and (4) *U.S. v. United States Sugar Corporation, et al.*
- ²⁴ Davis Polk, *supra* note 20.
- ²⁵ Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york>; see also Davis Polk, *Antitrust*

- agencies signal intensified scrutiny of proposed mergers* (Apr. 18, 2022), <https://www.davispolk.com/insights/client-update/antitrust-agencies-signal-intensified-scrutiny-proposed-mergers>.
- ²⁶ Press Release, Department of Justice, *Verzatec Abandons Proposed Acquisition of Crane Composites Following Justice Department Suit to Block* (May 26, 2022), <https://www.justice.gov/opa/pr/verzatec-abandons-proposed-acquisition-crane-composites-following-justice-department-suit>.
- ²⁷ *JAB Consumer Partners/VIPW/Ethos Veterinary Health; ARKO/GPM Investments; JAB Consumer Partners/National Veterinary Associates/SAGE Veterinary Partners; Buckeye/Magellan; Medtronic/Intersect; American Securities Partners/Ferro; Hikma Pharmaceuticals/Custopharm; EnCap/EP Energy; and ANI/Novitium*.
- ²⁸ Stefania Palma, *Lina Khan vows 'muscular' US antitrust approach on private equity deals*, *Financial Times* (June 9, 2022), <https://www.ft.com/content/ef9e4ce8-ab9a-45b3-ad91-7877f0e1c797>.
- ²⁹ Ceilia King, *Lina Khan, a Big Tech Critic, Tries Answering Her Own Detractors*, *The New York Times* (June 9, 2022), <https://www.nytimes.com/2022/06/09/technology/lina-khan-ftc.html>.
- ³⁰ Press Release, FTC Marks One-Year Anniversary of Government-Wide initiative to Promote Competition in the American Economy (July 11, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-marks-one-year-anniversary-government-wide-initiative-promote-competition-american-economy>.
- ³¹ Press Release, Federal Trade Commission, *FTC Seeks to Block Virtual Reality Giant Meta's Acquisition of Popular App Creator Within* (July 27, 2022), <https://www.justice.gov/opa/pr/verzatec-abandons-proposed-acquisition-crane-composites-following-justice-department-suit>.
- ³² Leah Nylen, *FTC's Khan Overruled Staff to Sue Meta Over VR App Deal*, *Bloomberg* (July 29, 2022), <https://www.bloomberg.com/news/articles/2022-07-29/ftc-s-khan-overruled-staff-to-sue-meta-over-virtual-reality-deal>.
- ³³ See Leah Nylen, *U.S. antitrust enforcers won't challenge Amazon's MGM deal, dashing hopes of monopoly critics*, *Politico* (Mar. 17, 2022), <https://www.politico.com/news/2022/03/17/u-s-antitrust-enforcers-amazons-mgm-deal-00018252>.
- ³⁴ Republican Commissioner Noah Phillips has announced that he intends to step down from the Commission later this fall, giving the Democrats a 3-1 majority. Commissioner Phillips has been a relatively vocal critic of certain Democratic initiatives at the FTC. His departure may remove another constraint on FTC aggressiveness.
- ³⁵ Mike Scarcella, *After DOJ antitrust losses in employment trials, defense lawyers urge 'rethink'*, *Reuters* (Apr. 22, 2022), <https://www.reuters.com/legal/litigation/after-doj-antitrust-losses-employment-trials-defense-lawyers-urge-rethink-2022-04-22/>.
- ³⁶ Bob Van Voris, *Chicken-Industry Executives Found Not Guilty of Price-Fixing*, *Bloomberg* (July 7, 2022), <https://www.bloomberg.com/news/articles/2022-07-07/chicken-industry-executives-found-not-guilty-of-price-fixing>.