Hogan Lovells

Antitrust issues in higher education

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Two recent antitrust investigations by the U.S. Department of Justice (DOJ) into student recruitment practices highlight the agency's increased interest in higher education. These investigations are the latest in a number of antitrust matters that implicate the approach colleges, universities, and other nonprofit higher education organizations take to certain decisions about recruiting, faculty hiring, financial aid policy, and student-athlete programs. Highlighted below are some recent significant antitrust cases that fundamentally affect the business of higher education.

Student recruitment

In January 2018 the DOJ launched an investigation into whether certain provisions of the National Association for College Admission Counseling (NACAC)'s Code of Ethics and Professional Practices (CEPP) violate federal antitrust laws. The provisions forbade NACAC members to offer incentives to students who applied for early admission, to recruit students who had committed to attend other institutions, and to solicit transfer applications using a previous year's applicant pool unless a transfer inquiry was initiated by the students themselves. In April 2018 the DOJ also sent inquiries to a number of small liberal arts colleges in the northeastern United States requesting information concerning the colleges' practice of sharing information about students admitted through binding Early Decision Programs.

In response to the DOJ's investigation, in September 2019 NACAC removed certain provisions from its CEPP to address the DOJ's concerns regarding restraint of trade in college recruitment. NACAC also extended a moratorium on enforcement of its entire CEPP for up to one year while it continued to work with the DOJ to resolve any remaining concerns. On 12 December 2019 the DOJ announced that it reached a settlement with NACAC. The proposed consent decree mandates that NACAC delete the rules in its CEPP that it had agreed to remove in September. NACAC has also agreed to increase its antitrust compliance training with employees and members.[1] For more information regarding the NACAC settlement and another recent DOJ settlement related to a standard-setting organization, please see the Hogan Lovells advisory here.

These investigations highlight potential antitrust risks associated with information sharing and adherence to codes of conduct among competitors.

[1] See Press Release, DOJ, "Justice Department Files Antitrust Case and Simultaneous Settlement Requiring Elimination of Anticompetitive College Recruiting Restraints" (12 December 2019), available at https://www.justice.gov/opa/pr/justice-department-files-antitrust-case-and-simultaneous-settlement-requiring-elimination.

Faculty hiring

The DOJ has also shown interest in alleged "no-poach" hiring agreements that affect college and university faculty. In May 2019 the DOJ took the unusual step of intervening to join a settlement agreement in a case involving allegations that two major universities agreed not to compete for each other's medical faculty. The settlement provides a US$54.5 million fund for a class of medical faculty and provides the DOJ with the authority to inspect documents and interview employees to ensure that the universities refrain from using "no-poach" agreements during the next five years.

College application process

In addition to the DOJ, private litigants have sought to enforce antitrust laws against perceived anti-competitive conduct in higher education. In March 2019 The Common Application reached a settlement with CollegeNet Inc., a company that creates software to process college applications, to resolve allegations that widespread use of The Common Application limited college choice, decreased the scope of service and price competition available to student applicants, and foreclosed rivals from entry to the market for "application processing."[2] The settlement followed a Ninth Circuit Court of Appeals decision finding that CollegeNet's allegations were sufficient to state a claim for antitrust injury. Although The Common Application did not admit liability, it agreed to modify some of its challenged practices beginning with the 2019-2020 admissions cycle.

Financial aid policies

These recent antitrust developments follow the pivotal antitrust case of *United States v. Brown University*. In 1991 the DOJ filed suit against nine universities alleging that the institutions limited competition for students by sharing financial aid information and agreeing on financial aid packages to offer students. The DOJ alleged the agreement unreasonably restrained price competition for students receiving financial aid and resulted in higher family contributions.[3] The suit was ultimately resolved in December 1993 with new guidelines that allowed the institutions to agree on common principles for determining a student's financial need and to exchange financial data about specific students through a third party, but prohibited discussions or agreements concerning financial aid decisions pertinent to specific students.

Student-athletes

A discussion of antitrust developments in higher education would not be complete without mention of the much-publicized debate over the NCAA's ban on payments to student-athletes. In March 2019 a district court in California found the NCAA's ban on payment to student-athletes beyond scholarships and education-related costs violated federal antitrust laws. The judge allowed the NCAA's ban on outright payment to student-athletes, but ruled that compensation for nearly all education-related expenses was permissible. In September 2019 California passed a law that would allow NCAA student-athletes in California to sign endorsement deals and profit off of their name, image, and likeness despite NCAA rules forbidding those activities. In response to growing pressure, on 29 October 2019 the NCAA Board of Governors announced that it supports athletes' ability "to benefit from the use of their name, image, and likeness in a manner consistent with the collegiate model."[4] The Board of Governors directed each of the NCAA's three divisions to update their rules no later than January 2021 and outlined eight principles to serve as

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[2] See *Collegenet, Inc. v. The Common Application, Inc.*, complaint available at http://blogs.reuters.com/alison-frankel/files/2014/05/collegenetvcommonapp-complaint.pdf.

[3] See *United States v. Brown University*, complaint available at https://www.justice.gov/atr/case-document/file/489921/download.

[4] See Press Release, NCAA, "Board of Governors starts process to enhance name, image and likeness opportunities" (29 October 2019), available at http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities.

guidelines in the rule-making process, including maintenance of a clear distinction between collegiate and professional opportunities, prohibition on compensation for athletic performance or participation, protection of the recruiting environment, and reaffirmation that student-athletes are not employees of the university.

Commercial dealings

Colleges and universities should be aware that commercial activity connected to the operation of their institution must comply[5] with the same federal antitrust laws that govern the commercial activity of for-profit businesses and corporations. In November 2019 the DOJ announced a new "strike force" focused on investigating and prosecuting antitrust violations by government contractors. Private litigation actions have also been brought against colleges and universities alleging the monopolization of textbook sales[6] and anti-competitive behavior related to allowing school meal plans to be redeemed at an on-campus convenience store.[7] Even though an institution may not operate on a for-profit basis, if it engages in commercial activity that may have anti-competitive effects, the institution may be vulnerable to lawsuits alleging antitrust law violations.

Information sharing

Formal and informal associations and conferences provide opportunities for administrators of colleges and universities to share information among each other related to a number of common issues in higher education. Although sharing information among institutions with common goals and priorities is a widespread practice and not high-risk in many circumstances, such activity could present antitrust issues in certain situations. While regulators have not issued antitrust guidance specific to higher education associations, the Federal Trade Commission (FTC) and the DOJ have issued antitrust guidance with respect to health care providers that can serve as a resource for trade associations and professional organizations in other industries to determine what conduct may violate the antitrust laws.[8]

Administrators sharing information among other colleges and universities should be guided by the following principles: (1) information sharing is safer when information is gathered and managed by a third party; (2) sharing of data less than three months old presents more significant antitrust risk; and (3) shared data should be aggregated so that the identity of any individual participant cannot be determined. As a recommended best practice for de-identification, data sharing and aggregation should involve at least five participants with no participant accounting for more than 25 percent (on a weighted basis) of the reported statistic.

Conclusion and best practices

Enforcement of the federal antitrust laws by government regulators and private litigants can have a significant impact on the operations of colleges and universities. As the DOJ's recent

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[5] Jurisprudence addressing whether public universities should be protected by the State Action Doctrine (which provides state and municipal authorities immunity from antitrust lawsuits if the disputed activity is the result of a clearly articulated and affirmatively expressed state legislative policy) varies across jurisdictions. The standard for proving that anti-competitive action conforms to a clearly articulated state policy is difficult to satisfy, and it should not be presumed that a public university will be granted immunity by the courts merely on the basis of being a state-funded institution.

[6] See *Sunshine Books, Ltd. v. Temple University* (plaintiff was a vendor of used college textbooks and alleged that the university bookstore was engaging in a predatory pricing scheme to monopolize the sale of undergraduate textbooks).

[7] See *Campus Center Discount Den v. Miami University* (plaintiff was a local convenience store and alleged that the university was engaging in anti-competitive conduct by allowing students to use their meal plan to shop at an on-campus convenience store).

[8] The *Statements of Antitrust Enforcement Policy in Health Care* describes a "safety zone" for information shared through "data exchanges (1) that are gathered and managed by a third party (like a trade association); (2) involve data more than three months old; and (3) involve at least five participants, where no individual participant accounts for more than 25 percent on a weighted basis of the statistic reported, and the data is aggregated such that it would not be possible to identify the data of any particular participant." Available at https://www.ftc.gov/system/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf.

investigations show, it is important that institutions be aware of the antitrust risks that can arise in connection with the business of higher education. For example:

- Agreements with competing institutions regarding student recruitment, financial aid policies, and faculty hiring may be closely monitored by government regulators for potential anti-competitive effects.
- Information sharing among institutions at trade association meetings or other industry events should comply with the DOJ/FTC guidelines discussed above.
- Commercial dealings related to the operation of a college or university may be targeted by private litigants under the antitrust laws regardless of whether the commercial activity is related to a for-profit business objective.

Experienced antitrust counsel can help you navigate the relevant laws and work with you to establish safeguards to minimize risk of antitrust scrutiny.

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