Senate Hearing Highlights Antitrust Hazards In PGA-LIV Deal

By **Henry Hauser, Marisa Ball and Nathanael Andrews** (July 31, 2023)

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On July 11, the U.S. Senate Homeland Security and Governmental Affairs Committee spent several hours **questioning** PGA Tour Inc. senior leadership on their proposed deal with LIV Golf Inc.

The hearing covered a range of topics, from the future of golf to Saudi Arabia's influence in the U.S. Concurrently, a 250-page dossier of related documents was released to the public. This article analyzes key antitrust issues arising from the Senate session and dossier.

Did the PGA Need a Handicap to Compete With LIV?

Toward the start of the hearing, PGA Chief Operating Officer Ron Price testified that the deal with LIV was necessary to address an existential threat to the PGA's very survival. He noted that LIV is financed by the Saudi Public Investment Fund, which has little to no expectation of financial return from its investment in professional golf. Price then complained that competing against LIV for players was not a fair fight.

In antitrust terms, Price was articulating a predatory purchasing theory of competitive harm to justify the deal with LIV. Under this theory, LIV paid players more than a competitive market would bear in order to drive the PGA out of business, corner the market for elite professional golfers and ultimately recoup any losses by paying players lower than competitive wages once the PGA left the market.

Under the 1993 U.S. Supreme Court case Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., this theory would require the PGA to show "a dangerous probability" of LIV recouping its investment in the inflated compensation.[1]

Predatory pricing claims are rarely successful given this high standard, and predatory purchasing theories are even rarer. Further, it is unlikely that allegations of predatory purchasing by one party to an agreement would count against the anticompetitive effects of a deal.

To the contrary, stopping LIV's aggressive player compensation strategy could be viewed as an anti-competitive effect of the agreement, at least from a labor market perspective.

No Free-Riding on the Golf Cart

Price also characterized the deal as preventing LIV from free-riding off the "work and platform" of the collective membership of the PGA. Those following the PGA-LIV litigation will recall that preventing economic free-riding was a core justification for two of the PGA regulations that LIV challenged.

The first was the Conflicting Events Regulation, which prohibits members from participating in "any other golf tournament or event" in North America during a week in which a PGA

event is scheduled, with such events scheduled "almost every week of the year."

The second was the Media Rights Regulation, which bars members from appearing in any golf program apart from PGA-approved tournaments, shown on any media of any type "anywhere in the world," without the express written approval of the PGA commissioner.

Notably, the Supreme Court has referenced the prevention of free-riding to justify several types of vertical restraints of trade, including:

- Exclusive dealing;
- Territorial allocations, in Continental Television Inc. v. GTE Sylvania Inc. in 1977;[2]
- Resale price maintenance, in Leegin Creative Leather Products Inc. v. PSKS Inc. in 2007;[3] and
- Anti-steering provisions, in Ohio v. American Express Co. in 2018.[4]

But merely invoking this term is not enough to establish a defense. Rather, a party must show how the challenged restraint actually enhances competition, likely between sellers of different brands. Whether the PGA could do that here was an open question and likely would have been viewed as a litigation risk.

A Friend in Ron Johnson

The overwhelming majority of senators from both sides of the aisle were clearly skeptical of the deal, but the PGA appeared to have an ally in Sen. Ron Johnson, R-Wisc.

Johnson opined that without a deal, LIV would continue to poach elite golfers until no players remained with the PGA. Johnson took a much more permissive view of the deal than his colleagues, opining that they should give the PGA and LIV "space to negotiate something."

He further argued that "motivations are pure" on both sides and offering LIV a "seat at the table" might be the only option given its massive funding and aggressive recruitment strategy.

No Search for Alternate Funding

Not convinced that an alliance with LIV was the only way for the PGA to thrive, Sen. Richard Blumenthal, D-Conn., pressed Price on whether the PGA had sought other funding sources. This line of questioning helped illuminate whether there was another path for the PGA to fund its litigation against LIV and still compete for elite golf talent.

Price responded that the PGA discussed alternate funding in a general sense but did not proceed far down this road. Blumenthal was less than satisfied with Price's response.

This is significant because some courts, including the Supreme Court in NCAA v. Alston in 2021,[5] condemn agreements that restrain trade if a "substantially less restrictive alternative ... would achieve the same procompetitive effect." Failure to explore alternate funding could present a headache for the PGA and LIV if their deal were challenged.

Antitrust Gone Topsy-Turvy?

Criticizing the Supreme Court's unanimous 2019 decision in NCAA v. Alston, which struck down the NCAA's ban on education-related payments to student athletes, Sen. Rand Paul, R-Ken., blasted antitrust laws as "topsy-turvy."

He asserted that antitrust should not apply to associations, including the NCAA and the PGA. This minority view runs counter to copious case law and is unlikely to gain traction.

Dossier Sheds Light on Framework Agreement

During the Senate hearing, the majority staff of the Permanent Subcommittee on Investigations released a lengthy dossier of emails, WhatsApp messages, a PowerPoint deck, promotional materials, and draft and final framework agreements that led to the PGA-LIV deal.

Notably, the dossier includes a presentation titled "The Best of Both Worlds," which sketches out the foundational principles and objectives of a PGA-LIV alliance. Some of these statements could exacerbate antitrust concerns, while others may suggest procompetitive benefits.

For example, the parties agree to "harmonize the complementary scheduling of PGA/LIV events throughout the season." The document later indicates that LIV events will not "compete with the Majors, PGA Elevated events, and international team events."

Both provisions could be viewed as enhancing efficiency and boosting the appeal of professional golf events for fans, broadcasters and sponsors by ensuring that the best golfers in the world are competing head-to-head on the same course at the same time. On the other hand, this could also be seen as an agreement to curtail supply or reduce output by eliminating competing or conflicting events.

PGA-LIV Drop Nonsolicitation Clause

The PGA-LIV dossier also contains several drafts of the five-page framework agreement between the PGA and Saudi Arabia's Public Investment Fund. As structured, the framework agreement merely sets the stage for negotiation of a future definitive agreement by the end of the year or later if agreed by both parties.

Only two substantive provisions would survive if they don't eventually reach a definitive agreement. First, the parties "voluntarily dismiss with prejudice any pending litigation" related to the dispute between LIV and the PGA.

In other words, if the deal falls through, the parties cannot simply resume their legal battle. This suggests that the parties have great confidence in their agreement, less-than-great confidence in their lawsuits or both.

Second, the parties agreed to stop soliciting or recruiting players "who are members of the other's tour or organization." However, the PGA and LIV agreed to remove this nonsolicitation clause after the U.S. Department of Justice Antitrust Division raised concerns.

This move is entirely consistent with the Biden administration's focus on labor market harm.

Indeed, the DOJ has been highly active in investigating and litigating no-solicitation, no-poach and wage-fixing cases both under Section 1 of the Sherman Act and as part of merger review under Section 7 of the Clayton Act.

On to the Next Hole?

The course to complete this deal is peppered with bunkers and water hazards. The parties must negotiate a definitive agreement to replace the framework agreement by the end of the year, determine whether a filing with the DOJ and Federal Trade Commission is required under the Hart-Scott-Rodino Act, and possibly obtain regulatory clearance.

That could easily take months, if not longer. With the PGA's 2024 season starting in early January, the parties have their work cut out for them.

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[1] 509 U.S. 209, 224 (1993).

[2] 433 U.S. 36 (1977).

[3] 551 U.S. 877 (2007).

[4] 138 S. Ct. 2274 (2018).

[5] 141 S. Ct. 2141 (2021).