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What We Heard At The FTC Hearings: Day 1

By **Barry Reingold, Janis Kestenbaum and Michael Bleicher** (September 18, 2018, 2:16 PM EDT)

On Sept. 13, the Federal Trade Commission began its "Hearings on Competition and Consumer Protection in the 21st Century." In his opening remarks, FTC Chairman Joseph Simons explained that the hearings would address two critical questions: (1) Should the FTC (and courts) in antitrust matters consider the challenged conduct's effects on factors outside the traditional consumer welfare standard (for example, employment, small business and community development concerns)? (2) How should the FTC ensure effective consumer protection in an economy increasingly dominated by advanced technologies?


Barry Reingold

In this first of a series on the FTC's multipart hearings, we offer some key takeaways from the initial hearing.

Session 1: Current Landscape of Competition and Consumer Protection Law and Policy


Janis Kestenbaum

Jason Furman (Harvard Kennedy School) observed that over the past 20 years the U.S. economy has experienced lower productivity growth and increased income inequality. At a macroeconomic level, the economy has demonstrated less dynamism — that is, less new business creation, less investment by existing firms, and less job switching by employees. At the same time, he said that at a microeconomic level, many industries have become highly concentrated and are characterized by high profits and returns to capital, far more so than in the EU (for example, airlines, beer, telecommunications services). Are these factors related — does the increase in concentration materially contribute to reduced economic dynamism?


Michael Bleicher

Timothy Muris (Sidley Austin LLP) stated that the FTC's antitrust policy should remain focused on consumer welfare. Its consumer protection program should enforce reasonable consumer contractual expectations. Populist economic agendas, which typically address issues outside the protection of consumer interests, are ill advised.

James Rill (Baker Botts LLP) discussed the important role played by international antitrust enforcement organizations like the International Competition Network and recommended that U.S. antitrust enforcement agencies push harder with their foreign counterparts to promote consistent outcomes in multijurisdiction merger investigations.

Alysa Hutnik (Kelley Drye & Warren LLP) opined that most companies are motivated to do the right thing. She advocated for straightforward laws that do not pick winners or losers, clear regulatory guidance and strong self-regulation.

Janet McDavid (Hogan Lovells) agreed with Muris that a populist antitrust agenda was ill-advised because it would make client counseling much more difficult.

In David Vladeck's (Georgetown Law) view, the FTC faces three main challenges: ensuring it has the

technical expertise to address emerging technologies; addressing the potential of algorithmic decision-making for disparate treatment of consumers based on impermissible considerations; and enforcement challenges from the diffusion of the app developer marketplace, outdated statutes, and limited civil penalty authority.

The participants addressed the use (and misuse) of Herfindahl-Hirschman Index numbers in competition analysis, and whether thresholds in the 2010 Horizontal Merger Guidelines should be lowered. There was general agreement the HHI numbers provide a useful screen but are not a substitute for in-depth competitive effects analysis, with particular attention to the number of significant competitors and the views of commercial customers. As a practical matter, HHI numbers are an invitation to the parties to provide the agency evidence to perform its competitive effects analysis.

The panel also addressed whether the United States has lost its leadership role in global antitrust enforcement. Members noted that nations with newer antitrust enforcement regimes are largely following the EU's more activist, administrative (rather than judicial) enforcement model. Jim Rill noted that the United States is still the prime motivator for other countries to adopt antitrust enforcement programs and is playing a leading role promoting the adoption of fair and consistent procedural protections for companies under investigation.

The panel was also asked whether it was possible to adopt a defined antitrust policy about the acquisition by dominant technology firms of very small or nascent competitors. Should they be blocked? Or permitted to take place and evaluated after the transaction's competitive effects become known? The panelists agreed that enforcement in such cases should turn on the competitive ecosystem in which a transaction occurs, and not the parties' market shares. In many cases waiting would make sense.

The panel also discussed the nature of informational injury that the FTC can address. Muris and Vladeck agreed that the agency can address subjective, noneconomic injuries. While Vladeck had found some commissioners to object to that notion, Muris explained that the FTC's "Unfairness Policy Statement" should be construed to enable the FTC to address nonmonetary harm.

Session 2: Has the U.S. Economy Become More Concentrated and Less Competitive? A Review of the Data

Jonathan Baker (American University Washington College of Law) observed that in many sectors of the U.S. economy, concentration and market power (taking into account price and nonprice dimensions) have increased markedly over the past 10 years. He attributed it to several factors, including insufficient antitrust enforcement, increased equity ownership of rival firms by diversified financial investors, increased use of governmental processes to limit competition (for example patents and professional licensure laws), and the rise of dominant information technology platforms, many of which show strong network effects. The economic data shows these increases in concentration and market power are not explained primarily by scale economies or first mover/early adopter advantages.

Steven Berry (Yale University) agreed that sectors of the economy are characterized by high product markups over production costs, generating persistently high returns on investment. The open question is why entry has not eroded those returns. The returns may reflect lower costs enjoyed by dominant sellers, or increases in product quality over time, which justify higher prices. Such product improvements may increase barriers to entry by requiring entrants to incur large fixed costs (like building a large multi-warehouse distribution network, instead of a single warehouse).

Joshua Wright (George Mason University Antonin Scalia Law School) cautioned not to consider concentration data in the aggregate or an industry sectoral basis. Rather, look at a properly defined relevant market. Concentration may be high because of not enough competition, or too much competition, which has winnowed out smaller and weaker firms. It is important to acquire and review the relevant data before you set enforcement policy.

Fiona Scott Morton (Yale School of Management) noted the importance of distinguishing between competition and concentration. In determining whether a firm faces effective competition, markups over production costs are probably the best economic indicator. Persistently high markups suggest a

lack of effective competition, regardless of degree of concentration. She also noted that, contrary to common belief, economic analysis does not necessarily lead to less antitrust enforcement. Properly done, it may lead to more.

The panel was asked whether there has been an increase in market power and, if so, was that a bad thing? In Wright's view, market power is a problem if it reflects reduced competition. In many cases the enforcement agencies will need improved data and analytical tools to determine if that is the case. Morton disagreed, stating that the current enforcement guidelines and related analytical tools are workable. The panelists agreed the key issue is the duration of market power, not simply its existence.

The panelists discussed the large percentage of corporate profits in the United States enjoyed by a small number of very large technology firms. Is this a problem? Morton observed that in markets with strong network effects, a "winner take all" outcome will be the rule, not the exception. We should not be surprised to see market share splits of 90-10, rather than 60-40. Where competition is "for the market" (not within the market) incumbent market shares do not tell us much. In such cases competition takes the form of incumbent responses to entry by new or nascent rivals. The panel agreed that the history and rate of entry and exit is a useful tool in such cases and that enforcement policymakers should spend more time thinking about potential competition theories.

Session 3: The Regulation of Consumer Data

Howard Beales (George Washington University School of Business), FTC Commissioner Maureen Ohlhausen, Daniel Solove (George Washington University Law School), and Vladeck were asked by James Cooper (deputy director for economic analysis at the FTC) about wide-ranging issues concerning the current state of FTC privacy regulation and its future direction.

Panelists offered competing visions of the type of informational injury that the FTC had addressed, and should address, via enforcement action. Ohlhausen categorized cognizable privacy injuries as (1) failure to respect consumer sovereignty through deception; (2) harms to financial, health or safety interests; and (3) unwarranted intrusions, such as into the home. While reputational injury has been present in some FTC cases, Ohlhausen explained that it had never been the sole harm in any FTC case. Solove emphasized that many FTC cases targeted conduct that deviated from consumer expectations whether or not they arose directly from a business' statements. Beales, by contrast, opined that only the consequences of data use mattered far more than consumer expectations about such use. He explained that it is impractical to convey to consumers all secondary uses of data, some of which may be unknown to a business when it initially collects the data, and thus the FTC should focus on whether data was used in a harmful way. Such harms could be subjective but only if the conduct were "highly offensive to a reasonable person" — the common law tort standard in many states.

As for algorithmic decision-making and machine learning, Vladeck reasoned that the FTC's unfairness authority empowered it to prosecute disparate treatment resulting from reliance on impermissible factors where there is an element of "intentionality." At the same time, he predicted that the FTC would face practical challenges in rooting out such conduct. Beales and Ohlhausen, by contrast, were more optimistic that algorithms were likely to be less biased than human decision making. They reasoned that if firms bear some risk if their automated decisions are incorrect — because it would cause them to turn away profitable customers — they would be less likely to utilize algorithms that had an impermissible discriminatory impact. But, even if they did, other firms would step in to satisfy the unmet consumer demand. Solove disagreed; he suggested that while a firm using a flawed algorithm might turn away a small amount of (potentially troublesome) business, the consumer who unjustly loses the opportunity to gain access altogether to the product is harmed to a far greater extent.

As for the current and future states of regulation in the United States, Ohlhausen, Beales and Vladeck praised the FTC's heavy reliance on flexible case-by-case ex post enforcement rather than prescriptive, ex ante regulation. Vladeck analogized the EU General Data Protection Regulation to the Napoleonic Code, and while he lauded many of the intentions behind it, he said the GDPR's approach was a poor fit for the U.S. legal regime.
As for what the future holds, Solove and Vladeck agreed that Congress was unlikely to enact privacy

legislation in the near or medium term, even in the wake of the California Consumer Privacy Act.

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