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FTC Hearing Reconsiders the Consumer Welfare Standard and Labor Markets

Second FTC hearing on Competition and Consumer Protection in the 21st Century features calls for the Commission to look beyond consumer welfare.

On September 21, 2018, the Federal Trade Commission (FTC, or the Commission) held the second hearing in its series of Hearings on Competition and Consumer Protection in the 21st Century. The Commission followed up on its first hearing by inviting comment on whether the FTC's regulatory approach is in need of new objectives and/or applications to address today's technology-driven economy. Hearing #2 focused on whether antitrust and consumer protection policy should seek to maximize something other than consumer welfare, while also exploring specific issues arising from "monopsony" or "buyer power" (particularly in labor markets). The FTC is expected to hold several more hearings lasting up to 18 additional days.

Latham & Watkins is monitoring and sharing periodic insights on the FTC Hearings, with a focus on significant statements from regulators, hints about where the FTC's enforcement priorities lie, and key points of disagreement among antitrust and consumer protection influencers. For prior analysis of the FTC hearings, please visit Latham's library of Thought Leadership.

Hearing #2's Big Idea: Looking Beyond Consumer Welfare

In 1978, former US Solicitor General Robert Bork wrote, "Consumer welfare is the only legitimate goal of antitrust" — a sentiment that has more or less formed the core of antitrust policy in the US for the past several decades. Joseph E. Stiglitz, Columbia University Professor and Nobel Laureate in Economics, opened FTC Hearing #2 with a call to abandon this touchstone in favor of a broader consideration set. More specifically, he argued that the focus of antitrust on the "competitive equilibrium model … will not serve the purpose of ensuring a competitive marketplace ... very well."

The competitive equilibrium model is based on the understanding that the interaction of profit-maximizing producers and utility-maximizing consumers in competitive markets with freely determined prices will arrive at an equilibrium price. Under this model, antitrust harm is often measured by looking at consumer surplus — the difference between the total amount that consumers are willing and able to pay for a good or service, and the total amount they do pay. Stated differently, using consumer surplus to assess whether an antitrust harm occurred focuses the analysis primarily on the perceived welfare of, or the quality-adjusted price paid by, consumers. Moving away from consumer surplus could mean accounting for things beyond the benefit to consumers, such as the impact of a particular transaction or allegedly anticompetitive activity on producers, variety in a market, labor, privacy, and other factors.

In practice, a move away from the consumer welfare standard could also open avenues for enforcement in areas not currently reached by the antitrust laws. It could also make it harder to predict which activities are likely to trigger regulatory scrutiny. Some speakers, including former FTC Chairman William E. Kovacic, urged caution, invoking Phillip Areeda and Donald Turner, saying that the regulatory framework "has to be administrable, especially in a judicial system in which cases are tried before juries, generalists judges, where notions of intent, multi-factor tests, are likely to lead you astray."

Key Remarks

Hearing #2 focused on the state of US antitrust law, the consumer welfare standard, and monopsony and buyer power. Key remarks from regulators, stakeholders, and FTC influencers that best encapsulate the issues discussed during Hearing #2 include the following:

- ***"At the #FTCHearings, @RKSlaughter rightly notes that if the @FTC concludes these hearings by patting ourselves on the back for a job well done, we will have failed."*** Rohit Chopra, FTC Commissioner

During the hearing, FTC Commissioner Rohit Chopra tweeted his support of his fellow Commissioner Rebecca Kelly Slaughter's opening remarks. Slaughter noted the need for a "critical rethink of what we do, how we do it, and what we should do differently or better to advance the FTC's mission of promoting competition and protecting consumers." After stating that the hearings are "not a project of reaffirming our current policies or practices," Slaughter identified several areas for FTC focus, including cryptocurrencies, data throttling, online marketing, FinTech, and data portability. She also called for attention to the intersection of competition and privacy and the implication of mergers involving two companies that "each control substantial consumer data." For instance, she asked the audience to "consider … the consequences for consumers when limited competition means there is no meaningful choice about whether to patronize a company that may not prioritize user privacy."

However, other speakers at the hearing were more inclined to think that the FTC already has the tools it needs to address issues, including those related to big data. Debbie Feinstein, former Director of the Bureau of Competition at the FTC, remarked, "We know how to deal with privacy issues quite well … Unless there is some barrier to entry that I'm missing I really struggle to see why that's a competition issue. On big data, I just don't see the difference between big data and little data in terms of most of the competition issues. … I just think the tools are there, we just need to figure out where the cases are that actually require us to take action. Kovacic agreed, arguing, "[T]he FTC has all the tools [it needs]." Robert Willig, Professor of Economics and Public Affairs Emeritus at the Woodrow Wilson School and the Economics Department of Princeton University, similarly expressed, "[W]e should use the tools we already have." The FTC has several additional days of hearings planed on the use of big data, data algorithms, and privacy to consider these issues in further depth.

- ***"Labor market concentration is real, and it's associated with lower wages. . . . Going forward, it should be a priority area for the Agencies."*** Sandeep Vaheesan, Open Markets Institute Policy Counsel

The third panel of the day concerned monopsony and buyer power. Monopsony describes the inverse of a monopoly, in which a single firm constitutes the vast majority of demand for a good or service and, as a result, pays less for that good or service than it would in a competitive market. The classic example of monopsony is the employer in a company town. Monopsony and buyer power present a challenge in antitrust analysis, however, because lower prices paid to labor or for inputs can translate to lower downstream consumer prices, increased output, and even increased innovation. Measured on a consumer welfare basis, buyer power can have procompetitive benefits.

However, Sandeep Vaheesan, Policy Counsel at the Open Markets Institute, argued that the FTC should reallocate resources to investigate mergers with buyer-side implications, including those vis-à-vis labor markets. For instance, he encouraged increased scrutiny of buyer-side mergers and argued that "enforcers should expressly reject the idea that squeezing workers and suppliers through enhanced buyer power somehow redeems otherwise anticompetitive buyer-sider mergers." Peter Carstensen, Professor of Law Emeritus at the University of Wisconsin School of Law and former Department of Justice Antitrust Division attorney, echoed those calls. He said that the agencies "haven't done much" in this area, but should look at how buyers of labor potentially suppress labor markets. Mary Coleman, former Deputy Director for Antitrust in the FTC's Bureau of Economics, cautioned against such moves, saying, "The concept that we should ignore efficiencies in antitrust and merger analysis is astounding . . . the whole point of antitrust is to encourage efficient markets, so to ignore efficiencies [would be misguided]."

Increased scrutiny over concentrations of buyer power could mean that the FTC looks more closely, and critically, at gig economy firms, labor-intensive industries with relatively few players, and mergers with significant input cost efficiencies.

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