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September 17, 2018 | Number 2377

FTC Opens Doors and Minds to New Approaches for Competition and Consumer Protection in the 21st Century

Commission kicks off 20 days of hearings to consider whether changes in the economy and new technologies require adjustments to enforcement priorities and policy.

Over the course of the next few months, the Federal Trade Commission (FTC) will hold a series of hearings (20 days in total) on "[Competition and Consumer Protection in the 21st Century](#)." The hearings will cover a wide range of topics that may be of particular interest to companies in rapidly evolving industries, including technology, telecommunications, social media, and the gig economy, among others.

According to the FTC, the purpose of the hearings is to consider whether "changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection law, enforcement priorities, and policy."

Latham & Watkins will be monitoring and sharing periodic insights on the 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.

Hearing #1's Big Idea: Open Mindedness

FTC Chairman Joseph Simons opened the [first hearing](#) on Thursday, September 13, by [expressing](#) that "*the broad antitrust consensus that has existed within the antitrust community, in relatively stable form for the last twenty-five years, is being challenged ... I approach all of these issues with a very open mind, and I am very much willing to be influenced by what we hear throughout this process.*"

Whether it is called "populist antitrust," "hipster antitrust," or "neo-Brandeisian antitrust," the calls for a sea change in the underpinnings and application of antitrust and consumer protection law and policy may be reaching a crescendo in Washington, D.C. By launching this series of hearings on the broad topic of Competition and Consumer Protection in the 21st Century, the FTC signals a willingness to step back from its more incremental approach to policy and to take seriously broader complaints that the framework itself is not working. This undertaking comes against the backdrop of similar reexamination efforts underway in Europe, with Germany leading the charge. "It is important that the antitrust enforcement agencies be at the forefront in thinking about these issues, not bystanders to this debate," Simons noted.

Whether the hearings will lead to large, small, or any adjustments in the FTC's regulatory approach remains to be seen. For now, it is noteworthy that ideas and critiques that previously resided outside or at

the fringes of the Commission's sphere of influence will have a direct line into the agency for over 100 hours of hearings.

Soundbites

Hearing #1 covered a wide range of hot topics, including the current landscape of competition and consumer protection law and policy, market concentration and competition in the US economy, and the regulation of consumer data. Key remarks from regulators, stakeholders, and FTC influencers that best encapsulate the issues discussed during Hearing #1 include the following:

- ***“The economic evidence has been accumulating ... that shows that market power has been growing for decades.”*** Jonathan Baker, Former Director of the FTC Bureau of Economics and FCC Chief Economist

Dr. Baker and several other panelists expressed views that the current antitrust regulatory scheme is not doing enough to curb abuses by large firms or the causes and consequences of increasing concentration. During the afternoon panel [“Has the US Economy Become More Concentrated and Less Competitive: A Review of the Data,”](#) Dr. Baker presented nine factors that he believes have reduced competitiveness in the US economy, including “the rise of dominant information technology platforms,” and “insufficient deterrence of anticompetitive mergers.” Former Chairman of the Council of Economic Advisers in the Obama administration Jason Furman presented a [macroeconomic analysis](#) correlating increased industry concentration to greater market power and slower productivity, and called for a broader pro-competition agenda. Former Deputy Assistant Attorney General for Economics at the Antitrust Division of the US DOJ Fiona Scott Morton echoed calls for more vigorous enforcement, and a parallel increase in enforcement resources. Shortly after the hearing she tweeted: “#FTChearings discussing how difficult it is to enforce and all the activities we should be doing and new problems caused tech and how GDP is growing ... If you want to police all of GDP you have to have resources to keep up with it. These hearings indicate a strong social interest in effective enforcement. Together that clearly indicates a need for more people enforcing.”

- ***“Do you think that in privacy enforcement there needs to be a bigger stick than what we have now?”*** James Cooper, Deputy Director for Economic Analysis in the FTC Bureau of Consumer Protection

In the wake of the GDPR roll out in Europe, and an increasing divide between Europe and the US in consumer data and privacy regulation, Cooper signaled that the FTC has an interest in considering whether it needs new tools or should take a different approach. For instance, he asked [panelists](#) — including a current FTC Commissioner (Maureen Ohlhausen) and two former directors of the FTC Bureau of Consumer Protection (David Vladeck and Howard Beales) — whether the Commission's authority under Section 5 of the FTC Act, which gives the agency authority to take action against “unfair methods of competition” and “unfair or deceptive acts or practices,” should reach uses of artificial intelligence to discriminate among consumers (e.g., for setting lending terms). Cooper also questioned whether the FTC's ability to seek civil penalties for data abuse ought to expand. While the panelists did not near consensus on most points, e.g., there was vigorous disagreement on whether privacy policy notices ought to be longer or shorter, it is certain that there is more to come and an openness to new approaches at the agency.

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