LATHAM&WATKINS

Client Alert Commentary

Latham & Watkins Antitrust & Competition; Intellectual Property Litigation; and Data Privacy & Security Practices

October 22, 2018 | Number 2397

FTC Hearing Considers Collusive, Exclusionary, and Predatory Conduct on Digital Platforms

Third FTC hearing on Competition and Consumer Protection in the 21st Century considers calls for additional scrutiny in multi-sided digital platform industries.

On October 15, 16, and 17, 2018, the Federal Trade Commission (FTC, or the Commission) held the third hearing in its series of Hearings on Competition and Consumer Protection in the 21st Century. During this three-day event, the FTC invited comment on whether competition policy should evolve in light of criticism from some antitrust experts and observers that the current regulatory framework is insufficient to address growing market power in multi-sided digital platforms. Panelists also discussed antitrust issues related to labor markets and acquisitions of nascent competitors.

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 #3's Big Idea: Zeroing In on Digital Platforms

Recently appointed FTC Commissioner Rohit Chopra opened FTC Hearing #3 by noting the significant economic and social benefits of digital marketplaces and multi-sided platforms. He cautioned, however, that the emergence of mass data collection and monetization — what he called "surveillance capitalism" — has created new consumer protection and competition issues that require serious examination. The FTC must "engage in analytically rigorous examination of data surveillance and monetization techniques," Chopra said, "as well as an analytically rigorous assessment of the regulations and restraints imposed by today's digital marketplaces." Several other panelists echoed his views throughout the day.

Chopra noted that digital market places are different from traditional marketplaces. "These marketplaces may not operate like they did in history or how we learned about them in economics textbooks," Chopra said, "and if we do not understand them we are in big trouble." In particular, Chopra was suspicious of the vast collection and monetization of buyer and seller data. He observed that this data is often unrelated to marketplace participation, and consumers and businesses are often completely unaware that the data is being collected. Chopra posed three questions to guide further investigation into these issues:

- What are digital marketplaces and how do they compare to other marketplaces?
- What are the implications of mass data collection in these marketplaces?
- How do existing rules promote or destroy the competitive process in these markets?

"Without this information about how our digital economy is governed by some of the largest companies and operators, we won't know if our marketplaces are working or if they may be broken down," Chopra said.

Key Remarks

Hearing #3 focused on three principal areas:

- The identification and analysis of collusive, exclusionary, and predatory conduct by digital and technology-based platform businesses
- The antitrust framework for evaluating acquisitions of potential or nascent competitors in digital marketplaces
- The antitrust evaluation of labor markets

In addition to Commissioner Chopra's remarks detailed above, key comments from regulators, stakeholders, and FTC influencers that best encapsulate the issues discussed during Hearing #3 include the following:

- ***After the* Amex *decision, "the definitional issue [of whether a firm is a platform] will be front and center."*** Howard Shelanski, Georgetown University Law Center

Dr. Shelanski and other speakers on the panel "The Current Economic Understanding of Multi-Sided Platforms" remarked that the recent Supreme Court case *Ohio v. American Express Company* (*Amex*) would lead to "tons of defendants" claiming they are a platform "because the fundamental burden on the plaintiff hinges on whether or not the court decides that we are dealing with a transactional platform with significant cross-network effects." Many panelists cautioned that this is problematic because there are platform and multi-sided aspects to almost any business. Dr. Shelanski therefore called on fellow economists to "get a jump on" giving guidance to courts "on what constitutes a strong [cross-]network effect."

Eric Citron of Goldstein & Russel reflected similar sentiments when he said "The *Amex* decision is more or less economically illiterate," and "Almost all uses of the *Amex* decision are likely to be misuses." He accused the Supreme Court of not understanding why economists care about market power, and called on economists to "relentlessly shame judges into understanding the economics underlying antitrust" as they had 60 years ago.

Other speakers on various panels, however, thought these concerns were overblown. They observed that whether a business is a platform is quite clear in the usual case, and the *Amex* decision is likely to reduce false positives and false negatives.

Most speakers agreed with the sentiment expressed by Dr. Catherine Tucker from MIT that antitrust practitioners "shouldn't do this silly thing where we look at firms and say that's a platform, that's not a

platform." What matters, Tucker explained, is whether "platform issues are important in this particular case" to the antitrust analysis and the outcomes of the firm and the market. There was rough consensus on the panel that triggering the new defenses the Supreme Court facilitated in *Amex* merely because there is a two-sided nature to a defendant's business would be a mistake.

- ***"We must view data as currency."*** Roger McNamee, Elevation Partners

Several panelists drew distinctions between transactional platforms like eBay versus those that trade services for consumer data like Google and Facebook. Roger McNamee suggested that the latter should face more intense antitrust scrutiny because multisided platforms that trade data for services "use data to create barriers to entry for competitors, barriers to exit for consumers, and to undermine business models of content suppliers." Further, McNamee said "the current antitrust model" provides these companies "a safe harbor because consumers do not pay for their services with currency."

Other panelists pushed back. Dr. Steven Tadelis from the Hass School of Business at UC Berkeley asserted "Understanding the ease of entry and multi-homing is critical to understanding the strength of competition in these markets." "If you're concerned about a certain anticompetitive behavior," Tadelis said, "you need to have a theory of harm, and if your theory of harm is this looks big; big makes me feel uncomfortable; and something therefore needs to be done; that's a problem."

- ***"History tells us that the levels of enforcement [against acquisitions of nascent competitors] is pretty low."*** Diana Moss, American Antitrust Institute (AAI)

In a panel discussing whether current levels of enforcement in markets involving nascent competition are appropriate, Moss pointed to AAI data that tracked more than 700 acquisitions the AAI characterized as "nascent acquisitions" (*i.e.*, transactions in which a player acquires a new or growing competitor). Moss added that the FTC and the DOJ have challenged only 2.5% of the 700 plus acquisitions. Moss argued that agencies should be especially wary of a class of transactions in which a dominant platform acquires a nascent competitor when the platform itself already has the nascent competitor's functionalities. In these situations, Moss remarked that enforcers should focus on innovation theories of harm and ask how these acquisitions affect incentives to innovate.

Panelist Sally Hubbard of The Capitol Forum echoed Moss' calls for increased scrutiny. Hubbard cautioned that enforcers "should not be distracted by promises of short term consumer-welfare enhancements, because what benefits consumers, is competition." She also noted that the usual tools antitrust enforcers are used to relying on — "prices, market shares, market definitions" — are not reliable when looking at acquisitions of tech platforms because digital markets are "very fluid." Thus, Hubbard took the position that enforcers should look beyond just price effects because "Low prices are not the goal … competition is the goal."

Whether the FTC will amend its enforcement priorities or processes in response to calls like those from Moss and Hubbard remains to be seen. For now, the FTC's willingness to provide a forum for critiques in this series of hearings is instructive.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Kelly Smith Fayne
kelly.fayne@lw.com
+1.415.646.7897
San Francisco

Joshua N. Holian
joshua.holian@lw.com
+32.2.788.6080
Brussels

Hanno F. Kaiser
hanno.kaiser@lw.com
+1.415.395.8856
San Francisco

Amanda P. Reeves
amanda.reeves@lw.com
+1.202.637.2183
Washington, D.C.

Cameron J. Clark
cameron.clark@lw.com
+1.415.395.8053
San Francisco

Christopher J. Bower
christopher.bower@lw.com
+1.415.395.8893
San Francisco

Michael H. Rubin
michael.rubin@lw.com
+1.415.395.8154
San Francisco

Karen E. Silverman
karen.silverman@lw.com
+1.415.395.8232
San Francisco

Cindy Guan
cindy.guan@lw.com
+1.415.395.8078
San Francisco

You Might Also Be Interested In

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

FTC Hearing Reconsiders the Consumer Welfare Standard and Labor Markets

GDPR Resource Center

Annual HSR Threshold Adjustments Announced

Global Merger Regimes™ App

We've Got Washington Covered