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Reflecting on Self-Reflection: FTC Discusses Merger Retrospectives and Global Coordination

Latest hearings on Competition and Consumer Protection in the 21st Century consider the FTC's historical record and global context.

On April 12, 2019, the Federal Trade Commission (FTC) held the 13th installment in its series of at least 14 scheduled hearings on [Competition and Consumer Protection in the 21st Century](#). This hearing focused on what the FTC may be able to learn from conducting merger retrospectives: studies of what happens to competition after mergers close, are blocked, or are modified through divestitures or behavioral consent decrees. This hearing followed on the heels of another hearing in the series that considered the FTC's role within global competition regulatory regimes. With both hearings, participating commissioners and staff signaled continuing interest in finding ways for the FTC to refine and (for some) expand its tools for curbing competitive harm in the 21st century economy.

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 #13's Big Idea: Merger Retrospectives With Prospective Impact

Advocating for the FTC to invest in conducting merger retrospectives, both FTC Chairman Joseph J. Simons and FTC Commissioner Rebecca Kelly Slaughter identified ways that the studies could strengthen the agency's regulatory effectiveness.

In his [opening remarks](#), Simons noted that "merger retrospective studies can be an important asset in persuading courts to block anticompetitive mergers." He explained that merger retrospectives have been critical to righting the agency's antitrust enforcement policies. For example, after analyzing a string of government losses in hospital merger cases in the 1990s, the FTC undertook empirical economic studies that ultimately demonstrated the anticompetitive effects of certain hospital mergers and became critical to subsequent challenges.

Slaughter discussed in [her remarks](#) the value of using retrospectives to "improve upon our predictions and to correct erroneous decisions that resulted in competitive harm." She also went a step further to suggest the use of merger retrospectives for "further enforcement action — such as unwinding a

consummated merger or challenging anticompetitive conduct — [when] necessary to protect and restore competition.”

Key Remarks

- ***“[If] we make clear at the time a vertical transaction is cleared that it will be the subject of a future retrospective review, that may have the benefit of a disciplining effect on the merged firm.”*** Rebecca Kelly Slaughter, FTC Commissioner

Through her remarks, Slaughter indicated that merger retrospectives may be used as a tool to actively monitor parties to cleared transactions. By putting parties on notice that the FTC will be analyzing the competitive effects of a merger (as opposed to the nebulous threat that an antitrust agency can always re-emerge to regulate anticompetitive behavior), Slaughter suggested that parties may be more incentivized to make good on promises to lower prices, increase quality for customers, or realize efficiencies. Panelists also discussed other possibilities to keep merging firms aware of the FTC’s retrospective goals and, importantly, how the FTC can obtain data to make economic studies possible — beyond the data collected during the investigation or consent process. Angelike A. Mina of the FTC’s Bureau of Competition [highlighted](#) the use of the FTC’s 6(b) subpoena authority to collect data and responses to defined interrogatories from companies in industries in which parties have merged (including, but not limited to, the merging parties). Professor Nancy Rose of the Massachusetts Institute of Technology Department of Economics [advocated](#) for including provisions in consent decrees and structural divestitures that require the parties to submit data to allow for continued monitoring over time.

- ***“That our methods of analysis make sense in theory is important, but if they do not enable us to make reliable predictions in practice, what good are they?”*** Joseph J. Simons, FTC Chairman

Several panelists and speakers, including Simons, [agreed](#) that merger retrospectives can be used to test and improve the tools that antitrust agencies employ to analyze potentially anticompetitive mergers. The central question is, do these tools reliably predict merger outcomes, or do they result in too many false positives or negatives? While antitrust agencies once were largely limited to drafting predictive inferences on the basis of market shares and measures of concentration, econometricians have developed increasingly sophisticated merger simulation and other modeling techniques that are designed to predict the likely consequences of horizontal and vertical combinations. Merger retrospectives could help the FTC and others assess whether these techniques are as accurate as they are complex. Moreover, regardless of the increased sophistication for certain types of modeling, Professor Jeff Prince of Indiana University’s Kelley School of Business [noted](#) that retrospective merger findings for non-price outcomes remains mixed, and hearing participants stressed the need to further develop measures to test for factors like quality and innovation, instead of just price.

Hearing #11’s Big Idea: Regulating Competition Is an Increasingly Global Exercise

The 11th hearing was titled “The FTC’s Role in a Changing World,” and the overwhelming consensus among panelists — who included current and former competition regulators from Canada, Zambia, the European Commission, the UK, Australia, Kenya, Brazil, France, Portugal, Argentina, Nigeria, Singapore, and Hong Kong — was that global coordination is increasingly critical to effective competition policy. As businesses and the technology they use are increasingly global in scope, companies should expect that competition regulators are taking cues from one another and working with one another on enforcement matters.

Key Remarks

- ***Unless agencies are “revisiting the adequacy of [their] framework every five years at a minimum [they’re] missing a good game and probably not doing [their] job properly.”*** William E. Kovacic, former FTC Chairman and Professor of Law at George Washington University Law School

Former FTC Chairmen William E. Kovacic [introduced](#) the international theme of the conference by tracing the “major ways in which the world competition policy, data protection and consumer protection have changed” over the last several decades. He then lauded the “dramatic increase in the number of cross border alliances, [and] international networks to promote the development [and] improvement of competition law to set international standards, to promote the conversation.” Kovacic further noted that “agencies have engaged in a remarkable process of innovation and adjustment” in the face of technological and market changes, but cautioned that “public institutions entrusted with [the] oversight” of innovative market actors “be no less inventive or dynamic” than the market actors themselves. More broadly, he highlighted the importance of competition regulators regularly recalibrating their framework, “because the array of changes in the world today dictate those changes.”

- ***“[S]uch conduct threatens to create an appearance to the public that, rather than focusing on consumers and competition, enforcers are reacting to, and seeking to one-up, one another. This perception could undermine globally enforcers’ efforts to protect competition and consumer welfare.”*** Noah Joshua Phillips, FTC Commissioner

FTC Commissioner Noah Joshua Phillips began the second day of the hearing by [highlighting](#) the value of the FTC, considering its actions within a global context. He said, “[t]he world is globalized, and the global emphasis on competition and consumer protection issues we see now underscores the need for us to consider not only how our enforcement efforts affect domestic policy and behavior, but also the international ramifications of these decisions.” He went on to encourage coordination with competition agencies around the world in merger and conduct investigations, and to caution that excessive deviations in outcomes could undermine the credibility of competition agencies worldwide: “While some differences between outcomes across jurisdictions are to be expected, unwarranted inconsistencies — for instance, where deviations are not justified by clearly established rules or traditions — can raise serious concerns. And they can call into question the validity of such efforts not only in the jurisdiction at issue, but in others, as well.” He identified, in particular, a concern that “actions (or alleged failures) of jurisdictions globally, and allegations that various jurisdictions are employing competition laws not to foster competition” but to “to protect national champions” or “vindicate other values.” In light of this, Phillips said that the “US has an important role to play in preventing the misuses or the coopting of competition laws.”

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