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ANTITRUST TRADE AND PRACTICE

Expert Analysis

New Antitrust Regulators and New Markets

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As technology advances and the economy changes, our understanding of definable markets, industries and products also evolves. Regulators today must grapple with two-sided markets and "big data," concepts not nearly as prominent just a decade ago. The advance of these concepts begs the question: Are the current approaches to antitrust review effective in protecting competition in these new markets? The heads of both U.S. regulatory authorities recently took up this question, yet reached different results.

FTC Open to Change

The Federal Trade Commission's (FTC) new chairman, Joseph Simons, recently announced that the FTC will conduct several hearings in the fall to determine whether developments in areas such as privacy, big data and large technology platforms warrant changing the agency's approach to these "hot-button" antitrust issues. Simons noted that the hearings are in response to "important and significant" questions that have been posed in light of technological advances and changes in the economy. The project, "Hearings on Competition and Consumer Protection in the 21st Century," is largely modeled after a similar series of hearings conducted in 1995, under former chairman Robert Pitofsky.

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Simons' goal for the project is to encourage discussion around key issues and either confirm that the FTC's current approach is the most effective, or develop a new one. Although the hearings will not focus on a particular industry, Simons said that technology platforms like Google and Amazon are an area of interest due to their size. While many large, successful companies have rightfully earned their success, size can be an indication of significant market power and potential for illegal behavior. The FTC is particularly interested in comments on how it can evaluate potential predatory and exclusionary conduct by such companies. In addition to the proposed topics, Simons hopes to discuss whether the FTC has untapped authority it could use to better promote competition and protect consumers.

Consumer Welfare Standard

While the FTC has responded to critics of its current antitrust approach by scheduling these hearings, the DOJ sees no need to revisit its rules. Just one day after Simons announced the Hearings on

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Competition, Makan Delrahim, the U.S. Department of Justice's antitrust chief, said that he believes antitrust enforcers can "keep pace with" these technological advancements by using the consumer welfare standard to evaluate proposed transactions. Delrahim believes that consumers are and will continue to reveal what they value in new, developing markets and that regulators can rely on these preferences to understand how to analyze a transaction or other conduct.

Delrahim has criticized recent Democratic legislation intended to allow for increased enforcement of antitrust laws. The bills, introduced by Senator Amy Klobuchar, would make it easier for mergers to be challenged under the Clayton Act and give the federal antitrust agencies more tools to scrutinize merger remedies. Delrahim fears that increased enforcement would allow for a "self-defeating exercise of prosecutorial subjectivity" in which prosecutors could potentially insert their own political or moral judgment into the enforcement process and subject the Antitrust Division to allegations of partisanship. The consumer welfare standard, however, in Delrahim's view, provides an objective framework necessary to protect competition and address the challenges of an evolving, digital market. [Thus, despite the DOJ's recent loss in *AT&T*, Delrahim reaffirmed the agency's confidence in its current standards.]

Redefining the Components Of Competition

Although the goal of promoting competition has not changed, the components of competition are continually evolving. Two-sided markets, pricing algorithms, "big data" and privacy have been, and will undoubtedly continue to be, issues that antitrust regulators must confront.

Perhaps one issue at the forefront of most antitrust practitioners' minds, given the recent Supreme Court decsion in *Ohio v. American Express*, is two-sided markets. A two-sided market is a market in which a service is provided to two different parties (in the case of *American Express*, the store merchant and the credit card holder) through an intermediary (the American Express platform) which enables a transaction between the parties (the use of the credit card). Because the two parties are interrelated, it creates a network effect: The value of the network to one group depends on the number of participants in the other. App platforms, HMOs, dating websites, Uber, AirBNB and Facebook are all examples of two-sided markets.

In *American Express*, the Supreme Court held that although American Express' use of anti-steering provisions with its merchants had the anticompetitive effect of keeping merchant fees high, they also had the effect of creating competitive rewards programs for cardholders. Due to the network reality of two-sided markets, actions with anticompetitive effects on one side may be justified by procompetitive effects on the other. It is unclear whether this ruling will apply more broadly to other two-sided markets or just those that are transaction-based like credit card platforms. But the list of businesses with a two-sided market model is growing, and it appears likely antitrust regulators will encounter them in court again. Delrahim voiced his agreement with the court's decision, noting that the current DOJ administration did not join the states in applying for certiorari and was not a party to the litigation.

Technological advances have complicated one of the most obvious forms of anticompetitive behavior: price fixing. In order for competitors to engage in price fixing, they must actually agree to fix prices, but more frequently, companies are relying on computers and pricing algorithms to set and change product prices. Using this technique, computers are constantly taking in data and analyzing it according to a complicated formula (algorithm) and then pricing

a product against this data. In this way, no human action is involved, but the algorithms are capable of changing product prices according to competitors' prices, including in response to discounts and promotions. Some argue that this disincentivizes competitors from offering discounts, for they will be matched or undercut almost immediately. Under this rationale, as more companies use pricing algorithms, the closer prices will converge, thus eliminating a key component of competition and reducing choices for consumers. Although the DOJ successfully prosecuted David Topkins for algorithm-enhanced price-fixing in 2015, as algorithms become "smarter," it will become increasingly more difficult to identify the human involvement in such tacit schemes.

Another "hot topic" and one that the FTC intends to address, is "big data." Companies like Google and Amazon, with access to vast amounts of data, present unique issues. On the one hand, these companies are innovating and finding ways to be more efficient and deliver better products to consumers. Yet, on the other hand, having access to such incredible volumes of data can give them significant competitive advantages like quick entry into new markets and highly targeted consumer ads. At some point, the barriers to entry may become too high to encourage new entrants. Similarly, business combinations between competitors who own large sets of data may pose a risk that the combined entity will deny others access to the data and foreclose competition.

Over the past several years, the European Commission (EC) has closely scrutinized mergers involving big data. The EC's increased focus on this and related issues is further supported by the implementation of the General Data Protection Regulation in May 2018. Presumably, the EC will continue to focus and develop its regulations in response to changing markets and may influence U.S. regulators.

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Often coupled with big data is the issue of privacy. In today's internet-based society, consumers are obligated to share personal information on a daily basis. Because gathering and owning customer data is a near necessity for any business, a new way for competitors to differentiate themselves is for them to offer better protection of customers' personal information. In this way, privacy has arguably become an asset that companies can commoditize and compete over. Delrahim has identified privacy as an emerging asset and has acknowledged that this may be creating a "fundamental change in the marketplace." How regulatory authorities and courts will analyze anticompetitive behavior with regard to such "fundamental change" and new products like privacy, remains to be seen.

Conclusion

Though market dynamics have been rapidly evolving, U.S. antitrust regulatory approaches have yet to change in response. The FTC hearings in the fall will provide an opportunity to consider whether change is needed, and although Delrahim feels the DOJ's consumer welfare standard is malleable enough for today's society, he too is hoping to learn from the FTC's upcoming series.