

Hearings on Competition and Consumer Protection in the 21st Century: Opening Session

September 14, 2018

The Federal Trade Commission's ("FTC") Hearings on Competition and Consumer Protection kicked off yesterday. FTC Chairman Joseph Simons opened the hearings, noting two major challenges in competition law: First, the U.S. economy appears to be growing more consolidated and less competitive, even as economics-driven enforcement may be leading to less vigorous enforcement by antitrust agencies. Second, some are challenging the nature of antitrust law itself and are urging the enforcement agencies to consider other policy goals besides competition, such as job protection or equality. In addressing these challenges, Simons stressed the importance of bipartisan, fact-based policymaking. He hearkened back to similar hearings held in 1995 under then-Chairman Robert Pitofsky, and he expressed the hope that by engaging a broad range of stakeholders, the current hearings would help develop a consensus on how new enforcement challenges should be addressed and on what initiatives the Commission should prioritize.

The day's first panel addressed the current landscape of competition and consumer protection law and policy. Panelists included Timothy Muris, FTC Chairman under George W. Bush; Jason Furman, Chairman of the Council of Economic Advisors under President Obama; and Jim Rill, Assistant Attorney General of Antitrust at DOJ under President George H.W. Bush. The panelists united over appreciation for the bipartisanship that the FTC has displayed in recent years and expressed general agreement with Chairman Simons' call for rigorous, non-ideological enforcement. But the panelists diverged on whether increasing concentration across industries meant a new approach to antitrust enforcement is needed. With respect to consumer protection, of particular note was a call by David Vladeck (a former director of the FTC Bureau of Consumer Protection) for a study of data flows and collection by large technology firms. Vladeck proposed a study under section 6(b) of the FTC Act, which would allow the FTC to conduct an industry-wide survey backed by broad subpoena power.

The second panel, made up of economists, focused on whether the U.S. economy has become more concentrated and less competitive in recent decades. Although the panelists agreed that many industries have grown more concentrated and that legitimate concerns exist about market power, they disagreed on how the problem should be addressed. Fiona Scott Morton of Yale University called for more vigorous enforcement, noting: "Consumers are all looking around—at airlines, beer, hospitals, tech—and realizing their experience is one of less competition." Jonathan Baker, former chief economist at both the FTC and the Federal Communications Commission, agreed with the call for more vigorous enforcement and highlighted concerns about common ownership, a situation in which portfolio investors may own stakes in competing companies in concentrated industries. In contrast, Joshua Wright, a former FTC Commissioner, argued that the current state of understanding among economists justified additional investment in research rather than in increased enforcement.

The third panel focused on data protection. The moderator, the FTC's James Cooper, suggested that the Commission still has "no agreed upon framework for analysis" of data privacy issues and that this is an increasingly prominent problem in light of high-profile data breaches, the Cambridge Analytica scandal, and the European Union's adoption of its General Data Protection Regulation ("GDPR"). Panelists included FTC Commissioner Maureen Ohlhausen; privacy scholar Daniel Solove; and David Vladeck and Howard Beales, both former Directors of the FTC's Bureau of Consumer Protection. The panelists aptly demonstrated the lack of consensus on how the FTC should approach data privacy, as they disagreed on what constitutes harm in the context of data privacy violations and the relevance of data privacy policies. The panelists did agree, however, that Congress was unlikely to provide clarity on the issue in

the near future. There was also agreement among most panelists that the restrictions imposed in Europe by the GDPR would be inappropriate in the United States. The panelists also addressed the challenges posed by algorithmic decision-making, which can be immensely beneficial to consumers but can also pose risks to consumers.

Closing remarks were delivered by Howard Shelanski, a Davis Polk partner who led the Office of Information and Regulatory Affairs (OIRA) under President Obama and the Bureau of Economics at the FTC. He stressed that the hearings were critical for the FTC because agencies must be transparent and accountable to maintain public trust and confidence. He added that the organizers of the hearings had made a deliberate effort to invite panelists representing “the outer boundaries” of viewpoints on antitrust law and consumer protection in recognition of the unprecedented debate that is currently taking place over antitrust policy and that he considered such invitations to be critical to the fulfillment of the Commission’s responsibility to the public and to its continued relevance. He added that “the FTC has always been an agency that cannot stand still or rest too comfortably.”

The FTC plans to hold 19 additional hearings on competition and consumer protection topics over the next several months. The next set of panels, on September 21, will address the state of U.S. antitrust law, as well as mergers and monopsony power.

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