Newsflash: FTC Hearings 5, 6 and 7 on Competition and Consumer Protection in the 21st Century

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Through the first two weeks of November, the FTC convened the fifth, sixth and seventh of its Hearings on Competition and Consumer Protection in the 21st Century. Over six days, the presentations and discussions organized by the FTC covered (1) vertical merger analysis and the role of the "consumer welfare standard" in modern U.S. antitrust law; (2) privacy, big data, and competition; and (3) algorithms, artificial intelligence, and predictive analytics.

Hearing 5: Vertical Merger Analysis; the Role of the Consumer Welfare Standard in U.S. Antitrust Law

On November 1, the FTC tackled vertical merger analysis. While a variety of perspectives was presented throughout the day, prominent speakers, including Professor Steven Salop of the Georgetown University Law Center, argued in favor of a more aggressive agency scrutiny of vertical mergers. Practitioners generally agreed that the FTC should update its vertical merger guidelines, and that any new guidance should focus on well-established economic principles and be more streamlined than the guidance currently in place. Shortly after the hearing, the FTC and the Antitrust Division announced that they would jointly revise the current vertical merger guidelines, which had not been updated since 1984.

With respect to the "consumer welfare standard" of antitrust analysis, which typically balances pro-competitive benefits against anticompetitive harm, panelists generally agreed that consumer welfare is a useful benchmark in evaluating transactions, but disagreed on the precise meaning of the standard in practice. However, Gene Kimmelman, President and CEO of Public Knowledge and former staffer in the DOJ Antitrust Division, was met with broad agreement when he discussed the importance of the FTC's engaging in a dialogue with the public, explaining its standards and choices and engaging with their concerns.

Hearing 6: Privacy, Big Data, and Competition

For Hearing 6 on November 6, 7 and 8, the FTC tackled issues of privacy, big data, and competition. The first day of the hearing began with brief opening remarks by former FTC Director of the Bureau of Economics, Jonathan Baker, who discussed two recent changes in the market: (1) increased competition due to globalization and (2) the growing importance and pace of technological change, particularly in information technology. These changes were addressed throughout the three days of hearings, and provided background for the other FTC panels.

Of particular note was a session regarding the business effects of Big Data. Seven panelists, including in-house advisors from MasterCard, Pfizer, and Garmin, as well as representatives of industry trade associations and academia, presented individually their thoughts on Big Data in the marketplace. Most notably, Liz Heier, Director of Global Data Privacy at Garmin, stated that her company's perspective is that the consumer owns his or her data, and permits Garmin to use it to enhance the consumer's experience. Other speakers, like Morgan Reed of the App Association, focused instead on the benefits Big Data presents to consumers, and appeared to caution against interfering with these positive uses of Data through additional regulation.

Hearing 6 concluded with a panel on the perspectives of three former enforcers: Bill Baer, former DOJ Acting AG/Assistant AG and FTC Director of the Bureau of Competition; Julie Brill, former FTC Commissioner; and Maureen K. Ohlhausen, former FTC Commissioner/Acting Chairman. Though the panelists disagreed on the extent to which regulation should be used to address privacy and competition concerns relating to data, there was broad consensus that some regulation is both necessary and desirable, and that while there may be effects on competition with any regulation, these must be balanced against the benefits to consumers.

Hearing 7: Algorithms, Artificial Intelligence, and Predictive Analytics

On November 13 and 14, the FTC turned its focus to the ethical, social, and competitive implications of algorithms, artificial intelligence, and predictive analytics. Of particular note were the remarks of Bruce Hoffman, Director of the Bureau of Competition, delivered at the opening of the second day of the hearing. Hoffman acknowledged that there is substantial uncertainty over the net consumer and competitive effect from the use of algorithms and suggested caution before implementing aggressive regulation prior to further research. However, he noted that the FTC may need to update its approach to merger review and antitrust enforcement to account for advances in AI and machine learning due to a number of emerging challenges, including questions regarding whether algorithms can autonomously collude with one another, cement market power, or simply allow firms to reach oligopolistic outcomes more quickly.

Key takeaways from the first day's panels covered a variety of the challenges that AI poses: Rumman Chowdhury of Accenture emphasized that issues of bias in AI can't be solved by technical fixes, and that the feedback loop that occurs when our responses to the outputs of algorithms create new inputs that result in our insulation. Naomi Lefkovitz of NIST emphasized the need to integrate elements like privacy-enhancing tools at the outset when engineers are building AI protocols, and the use of risk management models to better assess the question of the likelihood that circumstances would cause an event adverse to the user.

In a keynote address, Jennifer Wortman Vaughan of Microsoft highlighted different ways that bias can enter into systems of machine learning. In particular, she stressed that problems are often embedded in the data that companies choose to use or the assumptions they make about the world, as opposed to the coding of the algorithm itself. She also noted that bias can enter the system at every level of the machine-learning pipeline. She emphasized that there are no silver-bullet solutions to issues of bias in machine learning, and that the best solution is to involve a diverse set of stakeholders in the design process, take responsibility for mistakes when they occur, and understand the limits to the algorithmic solutions around fairness.

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