
September 24, 2018

Federal Trade Commission Begins Hearings on Competition and Consumer Protection in the 21st Century

On September 13, 2018 the Federal Trade Commission (“FTC”) opened a series of hearings on Competition and Consumer Protection with a full day of panel discussions held at Georgetown University Law Center. The Commission then held the second of its hearings on September 21, at the FTC’s offices in Constitution Center in Washington, DC.

FTC Chairman Joseph Simons, a former Paul, Weiss partner, began the hearings with an opening address identifying two major challenges to “[t]he broad antitrust consensus that has existed within the antitrust community, in relatively stable form for the last twenty -five years:” (1) economic evidence suggesting that markets in the U.S. are “grow[ing] more concentrated and less competitive;” and (2) calls from some quarters to expand the goals of antitrust law “beyond consumer welfare” to address such things as “[i]nequality, labor issues, and excessive political power.” In his remarks, Simons stressed that a goal of these hearings was to make sure that the FTC was involved in discussions about these challenges and to make sure “policy and enforcement decisions [are] based on the best evidence and analysis.”

The first day of hearings then continued with several panels. Those panels addressed the following topics:

- **The current landscape of competition enforcement and consumer protection:** The Panel opened with remarks on the status of economic research into concentration and competition, which were followed by a discussion on the status of the FTC’s enforcement of competition and consumer protection in the digital age. All of the panelists praised the FTC’s bipartisan efforts to protect consumers and expressed appreciation for the hearings providing an opportunity for stakeholders to engage with the FTC.
- **A review of data suggesting the U.S. economy has become more concentrated in the last two decades:** Two of the panelists—Jonathan Baker of the American University College of Law and Steven Berry of the Yale Department of Economics—focused their remarks on the economic evidence that concentration has risen in the U.S. economy, stressing that antitrust analysis should focus on concentration’s impact on competition and prices. Fiona Scott Morton, of the Yale School of Management discussed the fact that consumers seemed to face fewer choices in many consumer-facing industries and were therefore acutely aware of the rise in concentration. And former FTC commissioner Joshua D. Wright (now at the Antonin Scalia Law School at George Mason University) argued that concentration may be the outcome of competition, as more

efficient competitors gain increased market shares, and expressed an interest in further economic research to understand that effects of concentration.

- **Regulation of consumer data:** The discussion centered on how the FTC can protect consumers' data while allowing consumers to retain options and the market to operate efficiently. The panelists, who included FTC Commissioner Maureen K. Ohlhausen, pointed out that so-called "Privacy Policies" on many websites were better understood as data usage policies, and that consumers are not usually aware of their contents. David Vladeck of the Georgetown University Law Center pointed out that these policies are often take it or leave it propositions where a consumer either agrees to the policy or does not use the product. Panelists also discussed the potential impact of the European Union's passage of the General Data Protection Regulation (GDPR) and how the FTC, along with other agencies, can protect consumers online.

The second day of hearings began with remarks from FTC Commissioner Rebecca Slaughter, who called for a "a critical rethink of what we do, how we do it, and what we should do differently or better to advance the FTC's mission of promoting competition and protecting consumers," adding "[i]t is simply not plausible that a meaningful self-examination will lead to the conclusion that nothing should change." She expressed her view that the two enforcement missions of the FTC – competition and consumer protection – are becoming less distinct from each other, noting that "[w]e are seeing more and more mergers and conduct matters" implicating issues such as consumer data. She asked: "what are the privacy and security implications of" a merger which would combine significant consumer datasets? She also raised questions about how consumer protection policy might affect competition policy, asking: "how could effective data portability help facilitate entry and competition while sufficiently protecting privacy?" and "Will new privacy regulations have the unintended consequence of stifling innovation and entrenching incumbents?"

Following Commissioner Slaughter's opening statement, Nobel Prize-winning economist Joseph Stiglitz and former FTC Chairman William Kovacic delivered their own remarks. Prof. Stiglitz argued that the U.S. has a monopoly problem that has grown increasingly worse, the consumer welfare standard is misguided, and new approaches are necessary to determine market power. Prof. Kovacic, on the other hand, argued against some common criticisms of modern antitrust doctrine and emphasized that any new doctrines must be, first and foremost, administrable by the courts. Their remarks were followed by panels addressing the following topics:

- **The State of U.S. Antitrust Law:** Several panelists spread over two sessions discussed several topics relating the current state of U.S. antitrust law, including: the role of error costs and administrability considerations in forming policy; the merits of FTC rule-making vs. adjudicative processes; the Supreme Court's recent decision in *Ohio v. American Express*; standard essential patents and intellectual property more generally; mergers involving digital platforms; the implications of consumer protection and privacy considerations for antitrust enforcement; and the agencies' handling of vertical mergers and vertical restraints.

- **Monopsony & Buyer Power:** Peter Cartensen of the University of Wisconsin Law School opened with a presentation arguing for a greater focus on monopsony and buyer-side effects, including a presumption against mergers that result in buyers controlling more than 20% of a supply market. The rest of the panel then joined to discuss monopsony issues more generally, including whether such effects are addressable under the currently prevailing consumer welfare standard.

Key Takeaways

These first two hearings represent the beginning of a large undertaking by the FTC to engage with stakeholders on the future of competition and consumer protection enforcement in a modern economy. Over the next few months, the FTC plans to hold an additional 18 days of hearings, which will play an important role in informing the Commission and setting its enforcement agenda over the next few years. These hearings reflect a growing policy debate regarding antitrust enforcement, and they could result in meaningful changes to enforcement policy and an uptick in enforcement.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Joseph J. Bial
+1-202-223-7318
jbial@paulweiss.com

Andrew J. Forman
+1-202-223-7319
aforman@paulweiss.com

Jonathan S. Kanter
+1-202-223-7317
jkanter@paulweiss.com

William B. Michael
+1-212-373-3648
wmichael@paulweiss.com

Charles F. (Rick) Rule
+1-202-223-7320
rrule@paulweiss.com

Aidan Synnott
+1-212-373-3213
asynnott@paulweiss.com

Associates Brandon Kressin and Patrick Greco and Practice Management Attorney Mark R. Laramie contributed to this client alert.