CLIENT ALERT

House Antitrust Subcommittee Examines Monopoly Power and Considers Calls for More Aggressive Enforcement

Apr.07.2021

On March 18, the House Subcommittee on Antitrust, Commercial, and Administrative Law held its third investigative hearing this year, entitled, "Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power." The hearing underscored increasing calls from some lawmakers, law enforcers, and judges to rethink the nation's recent approach to competition law and policy in favor of more extensive government intervention.

The hearing follows two prior hearings, the first on February 25, concerning the effect of barriers to entry and the conduct of "gatekeepers" on tech industry competition, and the second on March 12, addressing dominant firms' effect on journalism and the free press. These hearings follow a 16-month bi-partisan investigation into the state of competition in digital markets, including whether dominant firms engaged in anticompetitive conduct and whether legislative reforms are necessary to address these issues. That investigation culminated in a 450-page report by the House Subcommittee's majority staff that proposed a vast overhaul of antitrust law and enforcement.

The March 18 hearing witnesses were Rebecca Kelly Slaughter, Acting Chair of the Federal Trade Commission (FTC), Noah Phillips, FTC Commissioner, the Honorable Diane P. Wood, U.S. Court of Appeals for the Seventh Circuit, Philip Weiser, Colorado Attorney General, Doug Peterson, Nebraska Attorney General, and Dr. Mike Walker, Chief Economic Adviser for the United Kingdom Competition and Markets Authority.

Key Observations

Judge Wood Suggests an Invigorated Approach to Exclusionary Practices

Judge Diane Wood's remarks focused on what she believes is an inappropriate limitation of the antitrust laws to address only consumer welfare—as a result of the "Chicago School's" constrained definition of consumer welfare and courts' overly-narrow reading of the scope of the antitrust laws—to the exclusion of the effects on competitors of "unfair methods of competition" by dominant firms. Judge Wood emphasized her concern that such methods – including "input foreclosure and customer foreclosure," refusals to deal with rivals, and "predatory strategies" such as predatory pricing and input stockpiling – are not sufficiently deterred by the current approach of the agencies and courts.

Judge Wood's testimony suggests she believes that under-deterrence of exclusionary conduct is attributable to 1) "prosecutorial discretion on the part of both the Antitrust Division and the Federal Trade Commission"; 2) judicial emphasis on the consumer welfare standard and refusal to consider exclusionary effects when deciding antitrust cases; and 3) Congress's failure (so far) to clarify the antitrust laws to require a different form or level of scrutiny for cases involving such conduct. She recommended that Congress consider imposing new prohibitions on certain types of conduct by firms with market power, "such as exclusion flowing from government action, patent abuse, or bottleneck monopolies." She also suggested that changing the penalties associated with the antitrust laws might deter bad behavior. Judge Wood rejected the idea of criminal penalties for Sherman Act Section 2

violations, and noted the difficulties associated with injunctive relief aimed at prohibiting specific business conduct, but raised the option of arming the antitrust agencies with the ability to seek civil fines or disgorgement of monopolistic profits.

Some – But Not All – Law Enforcement Witnesses Argued for More Aggressive Antitrust Enforcement

The testimony of two Federal Trade Commissioners and two state antitrust enforcers illustrated that the approach of these enforcers remains divided along party lines – but that Democrats view concentration as an increasingly severe problem in need of a stronger enforcement approach:

- Acting FTC Chair Slaughter stressed the need for more aggressive strategies; despite record levels of enforcement during "the FTC's very busy year in 2020," the Chair expressed her belief that many of the Commission's enforcement actions "reflect transactions or conduct that never should have left the boardroom." She believes the Commission should go beyond slam-dunk fact patterns and "be bold in bringing cases where success in the courts is not guaranteed," specifically suggesting a more assertive stance on pharmaceutical mergers, vertical mergers, and anticompetitive conduct in the pharma and tech industries. She called for expanded use of Section 5 of the FTC Act to pursue "the anticompetitive use of market power that might not rise to the level of gaining or maintaining monopoly power," and suggested the Commission might return to the practice of rulemakings to address particular problem areas, such as "unfair and anticompetitive non-compete provisions in employment contracts." She concluded by suggesting that Congress might address what she regards as overly permissive antitrust jurisprudence by passing legislation shifting the burden of proof to the parties in merger cases and modifying the "rule of reason" in Section 5 cases, which she believes has "led to an extremely limited application of the antitrust laws."
- Commissioner Phillips defended the current state of antitrust enforcement and the law. He affirmed his belief that "[t]he antitrust laws are written broadly on purpose" and argued that the antitrust agencies effectively use them to deter anticompetitive transactions and conduct today. He cautioned against the "unintended consequences" of the imposition of new standards by statute, citing the Robinson-Patman Act as an example of a law that failed to protect small businesses and harmed consumers, and warning that "government intervention . . . too often . . . just gets in the way."
- State Attorneys General Phillip Weiser (D-Colo.) and Doug Peterson (R-Neb.) agreed with one another on "the need for robust state enforcement" such as the current state cases against tech platform companies, and on little else. AG Weiser delivered an extensive critique of the dominance of "Chicago School" thinking in federal antitrust jurisprudence, suggesting it has led to blanket under-enforcement of the antitrust laws, and that new legislation based on "empirical evidence and rigorous economic analysis" might reverse this trend. AG Peterson disagreed, citing "the Sherman Act's effectiveness" and concern over "how comprehensive changes to antitrust law will impact the broader economy." Both testifying AGs noted their particular interest in considering antitrust enforcement approaches to industries important to their states (aviation in Colorado; agricultural inputs in Nebraska).

Industry-Specific Intervention in the UK

The CMA's Dr. Walker told the Subcommittee that current approaches to antitrust law are ill-suited to competition issues specific to "large digital platforms." While Dr. Walker favors continued enforcement via unilateral conduct cases like those brought by the CMA against Google and Apple, he believes the persistence of dominance in the tech industry shows that traditional enforcement takes too long and cannot adequately address powerful network effects and the rise of tech

"ecosystems" that protect high market shares across multiple related markets. He also noted that antitrust and privacy regulation may work at cross-purposes, in some cases providing an excuse for tech firms to use their extensive data positions to expand their dominance while declining to share it with others. He proposed that one solution may be the establishment of sector-specific regulation; the UK's new Digital Markets Unit will address "entrenched market power" residing in "firm[s] with a strategic position which means that the effects of its market power are widespread and significant." Covered firms would face "a firm-specific code of conduct," "procompetitive interventions designed to encourage new entry and innovation," and "enhanced merger scrutiny," measures Dr. Walker characterized as "not some form of traditional rate of return or price regulation." Dr. Walker concluded by suggesting that he agrees with other witnesses who believe that global regulators have erred on the side of non-intervention because of concerns about antitrust overdeterrence, and called for "regulatory consistency between the US, Europe, and others . . . both to protect consumers and create greater consistency for the platforms."

Important Takeaways

This latest hearing, and the preceding hearings and investigation, are further evidence of growing demand among Congressional Democrats for more robust antitrust enforcement regarding dominant companies' conduct and proposed mergers, both in technology sectors and beyond. Testimony suggests that voices favoring a significant realignment toward government interventions are growing louder, across all three branches of government.

In Congress, Antitrust Subcommittee Chairman Cicilline announced that he will introduce approximately ten bills in May aimed at reigning in anticompetitive conduct. In the Senate, Senator Klobuchar (D-MN), Chair of the Senate Antitrust Subcommittee, introduced comprehensive antitrust reform legislation in February. Some Republican House members and Senators weighed in to suggest that they also welcome certain types of increased scrutiny of large technology platforms, but focused primarily on content moderation practices that they see as discriminating against conservative content.

Arguably, increased intervention by the Executive Branch is already underway. The Biden Administration has unequivocally indicated that it plans to take a stronger enforcement approach to address competition in digital markets. Recently, the Biden Administration nominated Lina Khan to the FTC and named Tim Wu to the National Economic Council. Both are seen as fierce critics of "big tech," and are likely to provide further momentum to Congress' continuing inquiries and proposed changes to both antitrust law and enforcement policy. And at the end of March, the FTC filed its first suit in decades challenging a vertical merger between Illumina and GRAIL, alleging harm to a market in which the neither the acquired firm or anyone else has launched a product on the market.

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