CPI's North America Column Presents:

Spotlight on the Federal Trade Commission's Hearings on Competition and Consumer Protection

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Introduction

The Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century at George Mason University's Scalia Law School featured a discussion on the antitrust framework for evaluating acquisitions of potential or nascent competitors in digital marketplaces. Speakers addressed issues such as determination of the appropriate framework for evaluating these acquisitions, whether current antitrust law is sufficient for developing challenges, and what pragmatic approaches antitrust enforcement agencies could consider in evaluating whether there was anticompetitive harm.

The Current Framework of Analysis

The first panel focused on the current framework for evaluating mergers between incumbents and nascent competitors, and how that framework fits within the current law and merger guidelines. Opening remarks delivered by Susan Athey and Paul T. Denis introduced this issue. Speaking from her experience as the Economics of Technology Professor at Stanford Graduate School of Business, Athey grounded the issue in basic platform economics: incumbents may be incentivized to block new startups while new startups seek to disrupt the incumbents; however, resource-abundant incumbents may have clear advantages in raising barriers to entry and making it harder for low-cost entry into the market. Additionally, platforms often cross over and expand into different markets: Amazon initially started as a search platform, but then acquired more users and became an advertising and search platform to rival Google. Denis, a partner at Dechert, spoke on the current legal framework, stating that concerns of nascent and potential competition are pervasive in US antitrust merger law and well-embodied in the current legal framework. However, Denis stated that while guidelines and analytical frameworks are generally purported to be burden-free, there has been a "decided reluctance to recognize or fully credit nascent competitors as market forces" that can be relied upon to ensure continued competitive performance in markets. He suggested for agencies to impose burdens of proof in a more symmetric way to credit nascent competitors as a market participant similar to their treatment as market forces in traditional horizontal merger analysis. Denis also called for greater retrospective analysis of consummated mergers in order to evaluate harm to nascent competition.

Lina Khan, a fellow at Columbia Law School and author of "Amazon's Antitrust Paradox", asserted that enforcement agencies should closely watch conduct by dominant platforms while noting the growing divide in the current antitrust community on whether these dominant platforms are using their dominance already in ways that undermine competition. Khan asserted that a competitive and healthy market is only possible if "tomorrow's innovators are not blocked by today's incumbents." As additional measures to enhance enforcement, Khan proposed for agencies to issue second requests for mergers that do not traditionally trigger regulatory scrutiny but which involve the acquisition of a nascent firm. For example, Khan highlighted Facebook's acquisition of Onavo—a mobile analytics platform that tracked market share and active usage of apps—and argued that antitrust agencies should have taken a closer look, especially because Facebook's acquisition of Onavo allowed it to gather data on its users to monitor competitors such as Snapchat and other startups that could potentially

develop into real competitors. Khan agreed with Denis that more merger retrospectives were needed and also noted that there is precedent that agencies can refer to, such as the FTC's challenge of Mallinckrodt ADR's acquisition of assets of Novartis under Section 2 on the theory that the acquisition was a defensive move to extinguish a nascent competitive threat to its monopoly; the resulting settlement involved licenses to third parties in order to develop the relevant Novartis assets and alleviate the harm to competition. Khan concluded with an observation that antitrust thinking was "haunted by the fear of false positives", but should be "rebalanced with more comfort with false positives with the recognition that often times that's necessary to prevent false negatives."

John M. Newman, assistant professor at the University of Memphis Cecil C. Humphreys School of Law, took an opposing view, noting that the current antitrust framework "is not totally broken." Newman admitted that there were potential voids in the current regime—particularly in zero price markets—and called for a focus on mergers where competition for consumer's attention was at the core of the merger. Newman pushed back on the idea that these issues concerning digital platforms were entirely novel, and suggested that enforcement agencies already looked at harm to innovation in the Zillow-Trulia merger. He also noted that while market definition is difficult to measure due to the lack of price points found in traditional mergers, agencies could look at evidence such as investor statements and A-B testing by digital firms to help define relevant markets. Williams Rogerson, the Charles E. and Emma H. Morrison Professor of Economics at Northwestern University, with respect to the question of platform dominance, noted how concerns may be overstated and highlighted how firms like Uber face competition from rivals and consumers are able to conduct real-time price comparison. Willard Tom, a partner at Morgan, Lewis & Bockius, also expressed support for the current framework. Tom stated that the currently available "toolbox" for analyzing potential anticompetitive harm are already sufficient, as they currently address both dynamic and static harms and efficiencies, and that attempts to expand the current framework will result in "squishier" tools with inconsistent analysis and incorrect results.

Are the Agencies Getting it Right?

The second panel featured discussion on nascent competition within the context of investigation and litigation. Daniel Sokol, Senior Of-Counsel at Wilson Sonsini Goodrich & Rosati and University Term Professor of Law at the University of Florida Levin College of Law, opined that the current antitrust framework was adequate and that traditional economics can be applied to nascent competition in digital markets. This view was echoed by John Yun, Associate Professor of Law at George Mason University Antonin Scalia Law School, who noted that the existing framework, with its focus on consumer welfare, adequately reflected dynamic efficiencies and harms, but may need to be adjusted for greater symmetry when weighing against static efficiencies and harms. To this latter point, Diana Moss, President of the American Antitrust Institute and Sally Hubbard, Senior Editor with The Capitol Forum, expressed different views. Moss emphasized that levels of enforcement are too low, and that enforcers are using an incorrect lens by applying an "asymmetric, unbalanced implementation of the consumer welfare standard." Similarly, Hubbard expressed skepticism with the consumer welfare standard, opining that price effects shouldn't be the end-all consideration, as it is competition more broadly—not simply lower prices—that will maximize consumer

protection in the long term. Jonathan S. Kanter, partner and co-chair of the Antitrust Group at Paul, Weiss, Rifkind, Wharton & Garrison, also emphasized the potential need for change, observing that the discussion had become tied up in formalistic distinctions and may be missing the mark. Kanter opined that traditional approaches—anchoring the discussion in economics—may not apply in a multidimensional age, analogizing the current approach to "viewing 4K TV through an 11-inch TV set". Kanter recognized that there may be "paralysis due to the fear of false positives", with more time being spent on defending the tools and not enough time spent on rethinking them, and called for a better way to look at the dynamic nature of competition.

With respect to merger analysis, panelists differed in evaluating past enforcement actions. Moss noted that it's difficult to ascertain the net benefits or harms of past enforcement actions because there are only limited retrospective analyses. In particular, Moss noted the difficulties in evaluating conglomerate mergers *ex post*, where parties fall within different and broader markets. In such cases, Moss stressed that market definition shouldn't be step one in every analysis, but that direct evidence of potential competitive harm should be evaluated first when possible. In response, John Yun highlighted how the Facebook-Instagram merger and the resulting boom in Instagram's users from 50 million to 1 billion, and cautioned how it's difficult in general to determine the effect of the merger by looking at the counterfactual. Hubbard, commenting on the same transaction, noted that Facebook's enormously high $1 billion bid for Instagram itself raised a red flag, and that harms from these transactions are not likely to be obvious given the fluidity of the parties across different markets.

The Practitioner's Perspective

The third panel focused on how antitrust agencies should enforce antitrust law in acquisitions involving nascent or potential competitors. The panelists were split on the issue of whether agencies can apply traditional tools of analysis to adequately address competitive harms arising from acquisitions of nascent competitors. Scott Sher, a partner at Wilson Sonsini, noted that the same analysis used in traditional mergers can be applied; looking at Facebook-Instagram, Sher noted that applying traditional merger analysis, the merger was a defensive move by Facebook, and even applying retrospective analysis, it is difficult to determine why Instagram increased so rapidly, and what—if any—effect Facebook's acquisition may have had. Debbie Feinstein, former Director of the FTC's Bureau of Competition and now partner and head of the Global Antitrust group at Arnold & Porter, noted that the difference in terminology in the discussion of nascent competition is irrelevant, prioritizing a look to the actual competition effects. Echoing Sher's perspective that the current framework is sufficient to analyze such cases, Feinstein pointed to former cases involving harm to innovation such as Genzyme-Novazyme; Feinstein noted that in such cases, agencies applied traditional merger analysis and were able to adequately address issues analogous to the proposed harms to competition presented by nascent or potential competitors and the agencies' treatment of potential competitors.

Other panelists disagreed as to whether our current tools are adequate. Andrea Agathoklis Murino, partner and co-chair of Goodwin's Antitrust and Competition Law practice, highlighted how new and emerging markets with nascent competitors can be fickle and upended quickly,

and that evaluation of competitive harm requires communication and learning from experts in the industry. Richard Parker, a partner at Gibson, Dunn & Crutcher, agreed that additional help was needed, noting that antitrust experts should follow the approach of an investor looking at companies in the market and rely on experts with a keen understanding of the competitive balance in developing industries. Additionally, practitioners noted the difficulty in evaluating the competitive harm in these non-traditional markets and highlighted the difference between theory and practice. Raymond A. Jacobsen, Jr., a partner and global head of the antitrust practice at McDermott Will & Emery, agreed with the call for greater information, noting that from a practical perspective in evaluating the market, firms acquiring nascent competitors presumably have a greater understanding of emerging developments in industry. Similarly, David Gelfand, partner at Cleary Gottlieb Steen & Hamilton, pointed to the dearth of case law on point, and agreed with panelists that additional considerations beyond price may still be evidence of anticompetitive harm.

Conclusion

While each panel featured a wide spectrum of perspectives on the efficacy of the current antitrust framework for evaluating nascent competition, there were several areas of consensus as well. In the first panel, there was a general agreement regarding a greater need for retrospective analysis that would help enforcers identify where mergers ultimately should or should not have been cleared. Panelists agreed that there were specific situations that enforcers could look to—such as the Novartis challenge and settlement and other cases involving harm to innovation—that would inform future cases. Similarly, most panelists from the second panel showed at least some interest in the FTC having high-level experts in different technological fields. While there was disagreement about how to practically implement or introduce these experts, there was agreement that enforcers would undeniably benefit from knowing much more about emerging markets in order to properly understand potential competition concerns. This notion was echoed by panelists in the last panel which touched on the relative novelty and unpredictability of new markets in technology and the need for greater guidance from experts in the industry.

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