October 10, 2018

News from Senate Antitrust Enforcement Oversight Hearing

On October 3, 2018, Federal Trade Commission Chairman Joseph J. Simons and Assistant Attorney General in charge of the Department of Justice Antitrust Division Makan Delrahim testified at an antitrust enforcement oversight hearing held by the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Senate Judiciary Committee. Here we describe several significant takeaways from their testimony.

"Big Tech Platforms" with Market Power a Priority for FTC

In response to a question from Sen. Amy Klobuchar (D-MN), ranking member of the subcommittee, "about the FTC's ongoing efforts to protect consumers from potential anticompetitive behavior and conduct by dominant online platforms," Chairman Simons testified that "without commenting on any specific company," a "priority" of the FTC is to look for antitrust concerns "where there's likely to be potential significant market power," including certain "big tech platforms." AAG Delrahim testified that competitive issues related to technology platforms is an area that the Antitrust Division "continue[s] to study."

Labor Markets Continue to Be of Interest to DOJ and FTC

Both Chairman Simons and AAG Delrahim testified that labor-related issues are considered in merger investigations, with Chairman Simons noting that FTC staff have been told "that they are supposed to look for potential effects on the labor market with every merger they review." Further, continuing a line of statements about the DOJ's keen interest in policing "no-poach" agreements among employers to refrain from recruiting each other's employees, AAG Delrahim informed the Senate subcommittee that the DOJ actively searches for evidence of such agreements when conducting merger investigations. He also noted that the DOJ has several ongoing investigations in this area, "some of which are criminal."

Pharmaceutical Pay-for-Delay Continues to Be Priority for FTC

In response to a question from Sen. Klobuchar, Chairman Simons testified that the FTC will continue to bring actions against the unlawful delay of entry of generic pharmaceuticals into the market where warranted, and that the FTC is "absolutely" on the lookout for cases where biosimilar medical products are being unlawfully delayed from entry into the market.

Diverging Views at FTC and DOJ on Standard Essential Patent Licensing Issues

Testimony of Chairman Simons and AAG Delrahim in response to several questions from subcommittee chairman Sen. Mike Lee (R-UT) further evidences a difference of opinion between the two top U.S. antitrust enforcers about whether patent holders' refusal to license a patent on so-called "fair, reasonable and non-discriminatory" (FRAND) terms in connection with the setting of a technology standard – *i.e.*, "hold-up" – can be an antitrust violation. Chairman Simons testified that "you can have an antitrust issue for a hold-up and an antitrust issue for a hold-out," and "we should pay attention to both [of] those potential problems. We should not discriminate between them." That is, Simons sees the potential for antitrust issues arising both where a patent holder "holds up" the adoption and implementation of a technology standard by refusing to license its intellectual property for use in the standard on FRAND terms and where technology implementers agree among themselves to "hold out" for licensing terms less favorable to a patent holder. By contrast, AAG Delrahim testified that while he agreed that there may be potential antitrust issues surrounding "hold-out," he does not see "hold-up" as an antitrust issue where a patent holder unilaterally refuses to license its patent on FRAND terms. This testimony – and the difference it reflects – is in line with the officials' earlier public statements on the issue.[1]

FTC Commissioners Have Differing Views on Use of Section 5 of FTC Act

Section 5 of the Federal Trade Commission Act grants the FTC power to prevent "unfair methods of competition," but does not define what unfair methods of competition are. Most of the FTC's competition enforcement is conducted under other substantive antitrust laws such as the Sherman Act and the Clayton Act, but there has long been debate over whether the FTC should use "standalone" authority under Section 5 to regulate competition not otherwise covered by the other antitrust laws.[2] Recently FTC Commissioner Rohit Chopra advocated that the FTC should consider promulgating rules defining "unfair methods of competition" in certain areas instead of relying on adjudicatory proceedings, as is current FTC practice.[3] At the Senate hearing, Chairman Simons testified that he was "not optimistic" that using section 5 in this regard would be fruitful. Instead, Simons suggested that the "overwhelming majority of what the FTC does is covered by the other antitrust statutes." He further suggested that there are several benefits of relying on adjudicatory processes – rather than FTC rulemaking – to further the FTC's

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1 *See, e.g.*, Prepared Remarks of Chairman Joseph Simons, Georgetown Law Global Antitrust Symposium (Sept. 25, 2018); Makan Delrahim, Antitrust Law & Patent Licensing in the New Wild West (Sept. 18, 2018).

2 The FTC's current enforcement principles state that "the Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice." Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act.

3 *See* Comment of Fed. Trade Comm'r Rohit Chopra, Hearing #1 on Competition and Consumer Protection in the 21st Century (Sept. 6, 2018).

mission, including litigation-party advocacy and "the opportunity to have multiple courts" analyze and reach conclusions on challenged conduct.

DOJ Consent Decree Policy

In an effort to make consent decrees "more enforceable and less regulatory," the Antitrust Division is now including in its consent decrees provisions allowing the Division to "establish a violation of a consent decree by a preponderance of the evidence (rather than the more exacting clear and convincing evidence standard), thereby using the same standard in a decree violation lawsuit that applies to proving liability in a civil antitrust case in the first instance." The Division is also "establishing a new Office of Decree Enforcement . . . to dedicate Division personnel to ensuring proactive enforcement of consent decrees."[4]

DOJ Involvement in Private Litigation

AAG Delrahim noted that the Antitrust Division has "initiated a proactive *amicus* program in the [appellate] courts" and has filed five statements of interest in cases at the district court level this year. Delrahim earlier spoke about the DOJ's specific eagerness to share its views in litigation where a patent holder is alleged to have committed an antitrust violation by "failing to license a standard-essential patent on FRAND [fair, reasonable and non-discriminatory] terms, or by making a 'deceptive' FRAND commitment in order to win incorporation into a standard."[5] As mentioned above, the DOJ has expressed the policy view that such actions generally should not give rise to antitrust liability, though they may serve as the basis for a contract-based challenge.

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4 Statement of Assistant Attorney General Makan Delrahim Before the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights (Oct. 3, 2018).

5 Makan Delrahim, Antitrust Law & Patent Licensing in the New Wild West (Sept. 18, 2018).

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:

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