

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2022

PHILADELPHIA, OCTOBER 19, 2022

ALM.

Movement Led by the FTC Chair to Rein in Big Tech May Impact Businesses, Consumers

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Antitrust claims against the dominant Big Tech companies can seem academic and theoretical, but the results may have a substantial, real-world impact on businesses and consumers nationally and worldwide.

There is, of course, no question that the Big Tech giants are both huge and powerful. Amazon has tight control over the terms and conditions (including the infrastructure) under which businesses worldwide sell on its platform, Google and Meta (the company formerly known as Facebook) together account for nearly half of all digital advertising, and Meta obviously also has a massive share of the market for personal networking. Simply put, e-commerce is Big Tech's world; consumers and other businesses just live in it.

Given that landscape, it is unsurprising that legislators and

antitrust regulators alike have tried for years to rein in the power of Big Tech, but they have had limited success.

One powerful regulator has a new approach.

Lina Khan, the chair of the U.S. Federal Trade Commission, wants to change the way the U.S. antitrust laws are interpreted, giving Silicon Valley tremendous agita and other businesses cautious optimism. Khan seeks to redefine the "harm to competition" component of U.S. antitrust law. In the last few decades, most antitrust decisions have focused on increased prices, decreased output, and reduced consumer welfare as the injuries that U.S. antitrust law seeks to prevent. A new school of thought calls for a broader view of these harms: instead of focusing just on consumers and the short-term effects on prices and output, proponents



Neil Schur of Anderson Kill.

Courtesy photo

want to examine harms to rival companies, customers, suppliers, producers, and the health of the market as a whole.

This shift in antitrust doctrine could result in a significant change in the results of regulators' efforts to reduce the power of tech giants such as Google, Facebook, Apple, Microsoft and even Amazon (which has largely dodged any real antitrust bullets to date).

Khan is a leader of this approach, which she and others call the "New Brandeis Movement," as an homage to U.S. Supreme Court Justice Louis

Brandeis, who targeted the railroad, steel and oil industries more than a century ago. Others derisively call the new movement “hipster antitrust,” though this label seems like an oxymoron, since many antitrust lawyers (including this author) are frankly not so hip.

Regardless of the name, however, Khan and the other advocates of this new perspective contend that the narrow focus on consumer welfare gives Big Tech giants a free pass, since many of them do not charge anything for their products and instead rely on advertising revenues. How could Google, Facebook or many other tech companies ever violate U.S. federal antitrust law if the harm is measured in price increases? Perhaps, the New Brandeisians contend, the harm to competition manifests itself in more complicated and nuanced ways that the current doctrine is overlooking. Current antitrust law, they argue, may also be ignoring that Big Tech companies have created the web’s dominant platforms (e.g., for shopping or social networking) and then compete on those very same platforms, giving themselves an unfair advantage and harming competition.

Khan has been pressing these points in various ways for at least five years. In 2017, while still at Yale Law School, she published an important paper titled “Amazon’s Antitrust Paradox,” arguing that the way antitrust laws are currently interpreted fails to account for the online retail giant’s dominance. “The potential harms to competition posed by Amazon’s dominance,” she wrote, “are not cognizable if we assess competition primarily through price and output. Focusing on these metrics instead blinds us to the potential hazards.” She then identified several such harms, including predatory pricing, acquisition of rivals, creation of entry barriers, and exploitation of purchasing data, all of which may be overlooked if one focuses solely on price increase and output reduction.

Since then, she has been singing the same tune (targeting Amazon and other Big Tech companies) to anyone who will listen, and people are listening.

In 2019 and 2020, Khan served as counsel to the U.S. House of Representatives subcommittee on antitrust, commercial and administrative law’s investigation that concluded Big Tech

companies are abusing their massive power. As the subcommittee’s October 2020 majority report explained: “These Big Tech firms typically run the marketplace while also competing in it—a position that enables them to write one set of rules for others, while they play by another, or to engage in a form of their own private quasi regulation that is unaccountable to anyone but themselves.”

The report called for a modernization of the antitrust laws, more rigorous enforcement by the FTC and Department of Justice, and robust oversight of the antitrust laws and increased market concentration. The work of the subcommittee arguably led to the introduction in the House of Representatives of a package of bipartisan antitrust bills targeting tech companies. One of those bills, the American Innovation and Choice Online Act (AICOA) would ban Big Tech companies like Google, Apple, Amazon and Meta from “self-preferencing” or favoring their own services in an anticompetitive manner. Senator Amy Klobuchar introduced a new version of companion legislation in the Senate in May, but it has not been put to a vote.

Since June 2021, when Khan was sworn in as FTC chair, she has advocated for a broader interpretation of the antitrust laws and harm to competition.

After a court dismissed the FTC's case against Facebook (filed at the end of the Trump administration), the FTC under Khan filed an amended complaint in August 2021, adding more detailed factual support for its market share allegations and accusing Facebook of pursuing monopoly by squelching competitors such as Instagram and WhatsApp in a "buy or bury" scheme. The FTC alleged that Facebook was harming competition by eliminating nascent threats (most notably Instagram and WhatsApp), excluding competition and reducing quality. Facebook again moved to dismiss, but in January, the court denied Facebook's motion in large part and permitted discovery to proceed. See *FTC v. Facebook*, No. 20-3590 (D.D.C. Jan. 11, 2022). Importantly, the court held that although the FTC could not allege harm in the "archetypal form of increased consumer prices," given that Facebook, Instagram and WhatsApp provide their products free of

charge, the FTC had identified "a host of other harms" such as "a decrease in service quality, lack of innovation, decreased privacy and data protection, excessive advertisements and decreased choice and control with regard to ads, and a general lack of consumer choice in the market for such services."

While it is too early to know whether Khan and the FTC will ultimately prevail in changing courts' interpretations (or even in forcing Facebook's divestiture of Instagram and WhatsApp), the Facebook case's significance may lie in its recognition of the FTC's proposed broader scope of harm to competition. Of course, a decision applying this approach could be anomalous or reversed on appeal, but it may usher in a new era of thinking about harm to competition, enabling regulators and private enforcers to establish antitrust violations even when there is no price increase or other harm to consumer welfare.

This potentially seismic shift in antitrust law would be a game changer in the United States if it happens, particularly in merger review. And, in practical, real-world terms, the possible effect on businesses of all sizes (and

ultimately, consumers) is difficult to overstate, given the pervasive power of the Big Tech behemoths in today's economy. Khan, meanwhile, has continued to push aggressive claims against Big Tech, including an effort to block Meta's takeover of a virtual reality app, Within Unlimited. Recently, the FTC removed some allegations that Meta competed directly with Within but has not dropped its bid to block the merger. Stay tuned ...

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