AntitrustConnect Blog

Can Antitrust Law Deal With Competition in Evolving Digital Industries?

John Arden (Wolters Kluwer Law & Business) · Wednesday, September 29th, 2010

Are U.S. antitrust laws suited to deal with the challenges presented by rapidly evolving digital industries?

That was the question posed at a September 16 hearing of the House Judiciary Committee's Subcommittee on the Courts and Competition Policy.

The subcommittee heard testimony from six witnesses, including a top Federal Trade Commission official, a consultant to the telecom industry, the head of a global think tank, and a research director for a consumer advocacy group.

As with many antitrust policy issues, the responses varied and depended on who was answering the question.

Market Principles, Flexibility

The first witness, FTC Bureau of Competition Director Richard Feinstein, pointed out that the antitrust laws have been successful in fostering competition for more than a century because they are rooted in fundamental market principles.

"[C]ompetition among independent firms yields lower prices, better service, more choices, and the promise of better products tomorrow; and that business conduct that unreasonably impedes competition limits economic growth," Feinstein said.

The Commission's task of preventing unreasonable exclusionary and predatory conduct by firms with monopoly power—while also making sure not to limit their incentives to innovate and compete aggressively—is more complex in the rapidly evolving digital marketplace. However, current antitrust laws and the remedies available under the Federal Trade Commission Act are flexible enough to meet the challenge, said the agency enforcer.

Feinstein highlighted two recent FTC matters to illustrate the agency's flexibility in investigating and bringing enforcement actions in high-tech markets—the recently-settled administrative action against Intel Corporation and its decision not to challenge Google's proposed acquisition of mobile advertising firm AdMob.

According to Feinstein, the Intel suit demonstrated how antitrust principles can be applied to

remedy abusive monopolistic conduct when an innovative company goes too far. The FTC challenged Intel's unfair methods of competition and unfair acts and practices designed to maintain a monopoly in the computer chip market and to create a monopoly in the graphics processing unit market.

The investigation into Google's acquisition of AdMob provided an example of the agency's ability to address rapidly changing technology markets, he said. Initially, the agency had concerns that the loss of head-to-head competition between the two leading mobile advertising networks would harm competition. However, the concerns were overshadowed by Apple's acquisition of Quattro Wireless, the third largest mobile ad network, and Apple's introduction of its own mobile advertising network as part of its iPhone applications package.

"Because of these changing circumstances, the Commission found reason to believe that Apple quickly would become a strong mobile advertising network," the FTC official explained.

Anticompetitive "Red Flags"

Ed Black, President and CEO of the Computer & Communications Industry Association (CCIA), agreed that certain aspects of high-tech markets—such as network effects, tipping points, intellectual property thickets, lock-in, and complexity—may complicate antitrust enforcement.

Black identified three "red flag" anticompetitive behaviors that threaten high tech markets:

- (1) Consumer "lock-ins," such as proprietary document formats, closed source code, and non-interoperability that effectively prevent customers from migrating to other vendors,

- (2) "Chokepoints," or markets through which consumers must pass to access an ecosystem of related products and Services, such as the Internet access and the semiconductor markets, and

- (3) The entrenchment of incumbents, or "installed-base opportunism," such as baiting consumers with an open platform, and then closing down and restricting that platform to competition.

Dynamic and Open Market

Taking a different tack was Morgan Reed, Executive Director of The Association for Competitive Technology, an organization of application developers. "Competition issues do exist," according to Reed. However, "the future of the digital marketplace looks bright for small business, so long as the marketplace remains dynamic and competitive."

"In general, our membership finds the digital marketplace to be dynamic and open, with few impediments to moving between technologies," he observed. "Instead, the challenges faced are more often connected to elements not directly tied to technology at all, but rather to regulatory uncertainty and to limited options for maximizing online advertising revenue."

"Googleopoly"

Vocal Google critic Scott Cleland, President of Precursor, LLC, submitted a 54-page testimony fulminating against the ills of "Googleopoly" and calling for Google to be prosecuted for monopolization of consumer Internet media.

According to Cleland, lax antitrust enforcement allowed dominant Google to acquire YouTube's dominant video streaming, DoubleClick's dominant display ad-serving and analytics, and AdMob's dominant mobile advertising business. These acquisitions created "an extreme global vertical media concentration."

"I recommend the Subcommittee urge the DOJ Antitrust Division to enforce the law and sue Google Inc. for monopolization of consumer Internet media—under Section 2 of the Sherman Act," Cleland concluded.

In contrast, Geoffrey A. Manne, Executive Director of the International Center for Law & Economics, warned that an aggressive approach to antitrust enforcement against Google could "yield costly interventions."

The uncertainty about whether Google's conduct is actually anticompetitive recommends caution, not aggression, in antitrust enforcement. It is prudent to give greater weight to pro-competitive explanations of business practices than the anticompetitive ones, said Manne.

Maintenance of Competition Important, Difficult

Dr. Mark Cooper, Director of Research for the Consumer Federation of American, was the last witness. He said that ensuring vigorous competition in high tech markets was "one of the most important and difficult tasks facing antitrust and competition authorities"

Vigorous competition is important because the high tech sector is vital to the economic wellbeing of the United States, he said. Ensuring such competition is difficult because the sector has a tendency to be dominated by a small number of platforms.

Cooper observed that market power inevitably resulting from the dominant position of a platform is perhaps more likely to be abused than market power in traditional industries. For instance, the dominant position can be extended to the markets for applications and services.

Thus, antitrust enforcers must ensure nondiscriminatory access to critical networks, value potential and intermodal competition, scrutinize vertical leverage, maximize consumer sovereignty and welfare gains, and demand empirical evidence underlying claims of efficiencies.

Further information about the hearing, including a video webcast and written testimonies of witnesses is available here on the House Judiciary Committee website.

Cheryl Beise, J.D., Editor of CCH Guide to Computer Law, contributed to this posting.

This entry was posted on Wednesday, September 29th, 2010 at 8:18 pm and is filed under Congress
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.