

CLIENT ALERT

The FTC's Sharpened Focus on Antitrust Enforcement Against Big Tech, Internet, and Social Media

APRIL 11, 2018

A potentially significant shift in antitrust enforcement related to big tech, internet, and social media companies has been signaled by recent testimony of the incoming nominees likely to lead the Federal Trade Commission ("FTC").

For example, Joseph Simons, President Trump's nominee for chairman of the FTC, testified last month at his confirmation hearing before the U.S. Senate Commerce, Science, and Transportation Committee, suggesting that the FTC may take a more vigorous approach to enforcement actions against tech companies, particularly in the Internet and social media space. Simons, a veteran director of the FTC's Bureau of Competition under the Bush Administration, is widely expected to be appointed chairman in the near future.

Simons was asked to respond to two questions reflecting concerns that big tech and social media should be subject to more antitrust scrutiny. His first response noted that big is sometimes good and sometimes bad, generally tracking monopolization law to say that the FTC should enforce the antitrust laws and attack conduct by companies that are "big and influential" and that use inappropriate or anticompetitive means "to get big or stay big" (i.e., to gain or maintain monopoly power).

In response to Senator Cruz's concern about the unprecedented size, scope, and power of big tech companies, however, Simons described enforcing the antitrust laws against such companies as being akin to the reason why Jesse James robbed banks, in that it was "where the money is." Simons added that the "place most likely to have antitrust problems is places that have market power" so "those are the places you want to look the most" and that "if some anticompetitive conduct is occurring there, that is where you get a big bang for the buck by enforcing in those areas." Simons did not temper his position by reference to the importance of incentivizing innovation in technology and Internet markets. Nor did Simons address the complexities associated with analyzing market definition and power in these unique and nontraditional markets that are typically characterized by low barriers to entry.

Christine Wilson, another nominee, additionally noted that it made sense to "take another look" at concerns that have been raised in the past, given the evolution of technology. This suggests that the Trump Administration may even reconsider the Obama Administration's decision to not pursue some previous high-profile complaints in the tech sector.

The FTC nominees also emphasized that data privacy and security issues will remain a key priority for antitrust enforcement going forward, as the agencies attempt to grapple with the harmful exposure that consumers face,

which will necessarily—and disproportionately—impact tech companies that use, gather, and monetize data on their platforms or those provided by others.

About a week after the confirmation hearing, DOJ Deputy Assistant Attorney General Roger Alford implied that the Antitrust Division would continue to pursue a balanced approach to enforcement surrounding digitalization, online platforms, and data applications, while taking into consideration the often procompetitive benefits surrounding such innovation. DAAG Alford indicated that the Division would remain vigilant in examining the growth and evolution of various innovative applications in the tech sector, spanning from pricing algorithms to standard essential patents and data and information sharing. DAAG Alford, however, also pointedly argued that intensive innovation itself contributes to growth such that “the stakes could not be greater in deciding whether or not we will enforce antitrust laws to promote innovation.”

The remarks by Simons and Wilson suggest that the new leadership of the FTC may pursue tech, Internet, and social media companies more aggressively in the near future than the antitrust agencies have historically. Prior speeches by Chairman Ohlhausen and Commissioner Ramirez expressed concern about the potential chilling effects on innovation that antitrust enforcement may have. Similarly, the FTC’s statement in 2013, during the Obama Administration, regarding its decision to close the investigation into online search practices without taking any action, reflected a focus on consumer benefits relating to the technology’s product design and improvements.

This potential enforcement shift magnifies the need for more robust and nuanced antitrust counseling and compliance efforts on the front end as the agencies pursue uncharted territory with increased interest. One thing to watch for will be to see whether the FTC seeks to breathe renewed life into the FTC Act, which could be used more expansively to reach conduct that does not fall squarely within the Sherman Act’s prohibitions on conspiracy and monopolization.

3 Min Read

Related Locations

- Charlotte
- Chicago
- Dallas
- Houston
- Los Angeles
- New York
- San Francisco
- Silicon Valley
- Washington, DC

Related Topics

- Federal Trade Commission (FTC)
- Antitrust and Competition
- Antitrust Litigation

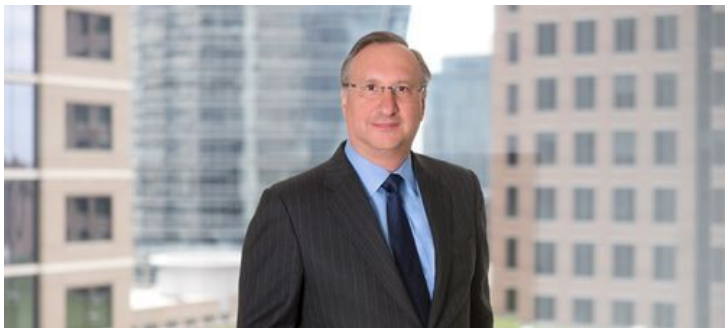
Related Capabilities

- Antitrust/Competition
- Litigation/Trials
- Technology Antitrust

Related Regions

- North America

Related Professionals



Aldo A. Badini



Susannah Torpey