Antitrust in the Financial Sector

Remarks at Concurrences

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Good evening. Let me start by thanking Concurrences, and Nicholas Charbit and Carolina Malhado, as well as Morgan Lewis, Fordham University, and the other conference sponsors for inviting me. And, thanks to the audience for sticking around at this late hour.

I would like to provide the standard disclaimer that my remarks do not necessarily represent the views of the Federal Trade Commission, or any Commissioner.

I will cover four topics in my allotted 15 minutes. First, I'll provide a quick update on the FTC. I'll turn then to three topics that I think are of interest to those in the financial services sector: partial ownership acquisitions, HSR risks for passive transactions, and "big data."

As many of you know, we've experienced a very unusual period in our history at the FTC over the past 16 months or so, where we've had a steadily dwindling number of Commissioners. We were actually down to a single Commissioner for a brief moment in time. Acting Chairman Maureen Ohlhausen was the only Commissioner left after Commissioner McSweeny resigned on April 27. Despite that, the Commission has been on a very successful and active run. We've brought a lot of cases and had a number of good results. A lot of the credit for that productivity goes to former Acting Chairman Ohlhausen, who led the way, and to Commissioner McSweeny and the way that both Commissioners worked together. A two-person Commission could easily have deadlocked, with the result that no official action would be taken. But that's not what happened. Instead, our Commissioners worked well together and accomplished a great deal. While the Commission was not set up to run with only two Commissioners, it's to their credit that the Commission continued to do its work—and quite successfully at that.

Last week, the Senate confirmed five new Commissioners: Joe Simons, who will be Chairman, Noah Philips, Rohit Chopra, Rebecca Slaughter and Christine Wilson. All but Christine Wilson were sworn in over the last two days. Our former Acting Chairman Ohlhausen will continue to serve as a Commissioner until she leaves for the United States Court of Claims, if confirmed by the Senate. At that point, Christine Wilson will join the Commission.

What are the implications of going back to having a full panel of Commissioners? The most immediate impact is that if you're a lawyer representing clients and have a matter before the Commission, you now have to plan to meet with all five Commissioners, not just two—so please try to make your presentations slightly different so that the rest of us don't have to sit through the same presentation five times!

But on a more serious note, and beyond the mere logistics, it remains to be seen how the Commission will function with a full complement of Commissioners. Five is very different from two. There will be different dynamics. In addition, the Commissioners have very different backgrounds and different interests. Commissioner Chopra has a background in financial

services and consumer issues, while others, such as the Chairman, have practiced antitrust from every possible angle. Others have an interest in intellectual property or in different aspects of consumer protection. It remains to be seen how all these factors will play out. But we are excited to be back to a five-member Commission, as Congress intended.

Partial Ownership Acquisitions

Let me turn to my first substantive topic—acquisitions involving partial ownership interests. I picked this topic because this is a likely area of interest for those in the financial sector, especially here in New York where there are so many funds that own interests in numerous companies. I'm going to focus on transactions that involve acquisitions of only a partial interest in a firm and the effect that those transactions have on incentives and conduct.

This is a hot topic globally. There is a lot of buzz around how to view companies that own large or small interests in many different companies, especially when those companies are direct competitors. There is a brewing academic debate over what inferences that can be drawn from those investments.[1] There are some studies that have shown either reductions in competition directly, or reductions in some proxy for competition where there is some measure of cross ownership.[2] There have been some studies attacking those studies, including raising questions about the sensitivity of the conclusions to the assumptions that were used.[3]

One thing I can say with a fair degree of certainty is that we are uncertain about what all this shows. The FTC and DOJ submitted a paper in December 2017 to the OECD on the topic of common ownership that explains our view that there is still a lot that isn't known or fully understood about these issues.[4] For today's discussion, let me focus on two issues.

The first issue is how to think about a common owner that has a small stake—say less than one percent—in a lot of different companies. So think about a common owner such as a large diversified fund or portfolio manager that has a small stake in many, many companies, some of which are in related businesses. That is the scenario that is getting a lot of the academic and media attention—but it is also the area where the research is at its most preliminary stage, where there are still a number of questions about what the analysis shows and whether there are competitive issues, and if so, what they may be, and what can and should be done about them.[5]

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[1] *See* Eric A. Posner, Fiona Scott Morton, & E. Glen Weyl, *A Proposal to Limit the Anti-Competitive Power of Institutional Investors*, 81 ANTITRUST L. J. 3 (2017),

[2] *See* José Azar, Martin C. Schmalz, and Isabel Tecu, *Anti-Competitive Effects of Common Ownership*, J. FIN. (forthcoming 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2427345&rec=1&srcabs=2430713&alg=1&pos=8. José Azar, Sahil Raina, and Martin C.Schmalz, *Ultimate Ownership and Bank Competition* (2016); *available at* https://ssrn.com/abstract=2710252.

[3] Pauline Kennedy, Daniel O'Brien, Minjae Song, and Keith Waehrer, *The Competitive Effects of Common Ownership: Economic Foundations and Empirical Evidence* (2017), *available at* https://ssrn.com/abstract=3008331.

[4] Submission of the United States to Hearing on Common Ownership by institutional investors and its impact on competition, DAF/COMP/WE(2017)86, available at https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/common_ownership_united_states.pdf.

[5] Jacob Gramlich and Serafin Grundl, *Testing for Competitive Effects of Common Ownership*, Finance and Economics Discussion Series 2017-029, Washington: Board of Governors of the Federal Reserve System (2017), *available at* https://doi.org/10.17016/FEDS.2017.029r1.

I would contrast this with cross-ownership, which the FTC has a long history of reviewing. Cross-ownership is where competitors own a minority stake in each other. Or, similarly, a common owner, such as an investment fund, holds a significant minority position in competing companies. In our experience, competitive issues have most often arisen where one or the other of these fact patterns existed, and two other conditions were present: first, that the ownership stake or stakes in question was reasonably substantial, usually in the double digits; and second, that there were also positions of either influence or access to information, such as the right to name directors of both companies. The FTC has taken action in a number of these cases, including imposing remedies.[6]

To illustrate, let's consider a recent example of a partial ownership acquisition involving a firm called Red Ventures. The antitrust issue here involved the market for third-party paid referral services for senior living facilities. Two private equity funds, Silver Lake and General Atlantic, together owned 34% of Red Ventures, plus the right to two board seats and other rights. In addition, these same two funds jointly owned a company called A Place For Mom.com (APFM). The transaction that caught our eye was when Red Ventures acquired Bankrate, a marketing company providing lead-generation services to a variety of industries and the owner of Caring.com. A Place for Mom.com and Caring.com were by far the two largest competitors in the market for third party paid referrals to senior living facilities. As a result of this transaction, Silver Lake and General Atlantic owned A Place for Mom.com, and they also owned a 34% stake, plus significant management rights, in the owner of APFM's most significant competitor, Caring.com. We alleged that that set of interests gave the firms the ability and incentive to reduce competition between APFM and Caring.com. The firms agreed to divest Caring.com, and last week the Commission approved the divestiture of that entity to a newly formed company called Caring Holdings.[7]

The lesson here is that firms considering mergers or acquisitions need to be aware of competitive overlaps at the investor level. When this Red Ventures and Bankrate transaction was being considered, it is possible that no one identified any risk of a competition investigation. Caring.com was only one of Bankrate's holdings, and Red Ventures itself owned no competing assets. But by looking more broadly at each investor's holdings, as we did, you can see why we would have concerns about the information exchange and the potential for influence by common owners—the funds that owned APFM and part of Red Ventures.

HSR Filing Risks for Passive Transactions

This is another area that is important for the financial sector, because ownership of stock in many entities creates a potential for being affected by transactions in which the firm itself is not directly involved. Specifically, certain passive transactions can create HSR filing obligations that funds (or other stock owners) may miss if they're not attuned to this issue.

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[6] FTC *Competition Matters* blog post, "What's the interest in partial interests?" *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2016/05/whats-interest-partial-interests.

[7] In re Red Ventures Holdco, C-4627 (complaint filed Nov. 3, 2017), https://www.ftc.gov/enforcement/cases-proceedings/file-no-1710196/red-ventures-holdco-bankrate.

In general, there are many ways to go wrong with HSR, and you need to have someone who is expert in these rules to help you comply. But we have identified one particular area where companies and investors could be at risk for missing some transactions—no-cash or "passive" transactions. A no-cash transaction occurs when you acquire a new interest under the HSR Rules without doing anything. One day, you suddenly own something new. Some of these transactions that "just happen," without an affirmative act by the acquirer like writing a check, may create the obligation to file an HSR notice and observe the waiting period.

We do routinely receive HSR filings in these circumstances. However, it is possible that some HSR compliance programs could be triggered by doing something—buying something, or some other affirmative act. But companies or individuals who only assess HSR filing obligations when they take action, for example through buying stock or paying for another type of interest, could be missing something.

Here's a simple example. In a merger of equals, when one company buys another company and they form a new company, Newco, the shareholders of Company A and Company B may receive stock in Newco in exchange for their prior shares in A or B. No money changes hands and the shareholders may not have been directly involved in the merger at all. But under HSR Rules, there is an acquisition of new shares, which may require an HSR filing.

Another example of cash-less transactions is an employee compensation plan. Here, the risk is highest for executives who are more likely to meet the other requirements of filing HSR notice. Another example is with secondary transactions where you acquire control of a company that owns voting securities of another company. That scenario could produce two reportable events.

The Bureau has prepared a blog post that goes into more detail about these no-cash transactions,[8] but the message I want to convey is that when you are thinking through HSR compliance, we encourage you to think about not only situations where you've done something, but also outside events that happen that change your investments so that you may need to file under HSR.

Big Data

Finally, I want to share just a couple of thoughts about data, and especially so-called "big data," which is another hot topic in antitrust. This is obviously an important topic in financial markets, especially as it relates to fintech. The FTC has published a great deal about the phenomenon of big data, mostly as it relates to consumer privacy and data security, including issues related to the Internet of Things.[9] I've also spoken on this topic before, but today, I want to highlight a couple of important issues relating to how we think about data from a competitive perspective.

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[8] FTC *Competition Matters* blog post, "You don't have to write a check to acquire an HSR-reportable interest," at https://www.ftc.gov/news-events/blogs/competition-matters/2018/05/you-dont-have-write-check-acquire-hsr-reportable.

[9] See FED. TRADE COMM'N, BIG DATA: A TOOL FOR INCLUSION OR EXCLUSION (Jan. 2016), https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf; FED. TRADE COMM'N, THE "SHARING" ECONOMY: ISSUES FACING PLATFORMS, PARTICIPANTS & REGULATORS: A FEDERAL TRADE COMMISSION STAFF REPORT 3 (2016), https://www.ftc.gov/reports/sharing-economy-issues-facing-platforms-participants-regulators-federal-trade-

First, data is everywhere, and there is more of it every day. But it's not clear how valuable or predictive that data is in any particular case, for a number of reasons.

One issue that affects the value of data in ways that may be difficult to predict ex ante is that many data analytics involve identifying correlations in data sets. With the tremendous increase in both available data and in processing power, there has been a corresponding increase in the ability to identify correlations that might previously have been difficult or even impossible to detect. But correlations in data are not always meaningful. For a correlation to be meaningful, there has to be a causal explanation for the correlation. Absent a coherent causal explanation, there is a significant risk that an observed correlation is spurious, and thus not useful or predictive. For example, an observed correlation could be due to a separate, unobserved variable that is causing both correlated phenomena, but there is no direct causal relationship between the two phenomena, i.e., one does not cause the other.[10] Further, correlations can be purely random, with no common causal link at all.[11]

There is a substantial body of literature devoted to the difficulty in recovering causation from observed correlations. On a "popular science" level, I highly recommend the book "Spurious Correlations."[12] The book provides a variety of accessible and informative spurious correlations, such as the very high correlation between drownings in pools and the release of Nicolas Cage movies. There are many correlations in the world for which there is no causal link, or we don't have a theory to explain the correlation.

This has important implications for "big data." You could have data analytics that establish a correlation that is completely wrong for any predictive purpose. In other cases, the theory put forth to prove causation is wrong, or there could be other errors in data collection, measurement, or elsewhere in the data collection and analytical process. An example of this is "Google flu trends," a big data algorithm designed by Google to predict the flu that failed rather spectacularly for a number of reasons with sobering implications for those who think "big data" is automatically useful or capable of generating accurate predictions.[13]

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commission; FED. TRADE COMM'N, INTERNET OF THINGS: PRIVACY AND SECURITY IN A CONNECTED WORLD (2015), https://www ftc.gov/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internetthings (Staff Report).

[10] One example that is sometimes used in statistics is that purchases of sunglasses and ice cream are highly correlated. But inferring causation from that correlation would likely be erroneous. Buying sunglasses doesn't make you buy ice cream, nor does buying ice cream make you buy sunglasses. Rather, when it's hot and sunny, sales of both sunglasses and ice cream go up. The missing causal variable in the observed correlation is the weather. A pricing algorithm linking ice cream prices to sales of sunglasses could go badly awry; for example, sunglass sales might surge in the skiing season, or following a Surgeon General report recommending that everyone wear sunglasses to reduce the risk of vision loss due to ultraviolet light.

[11] This is sometimes described as "nonsense correlations" in statistical literature. See, e.g, Aldrich, "Correlations Genuine and Spurious in Pearson and Yule," Statistical Science, vol. 10, no. 4, 364-376 (1995).

[12] Tyler Vigen, Spurious Correlations, Hachette Books (2015).

[13] Lazer et al., "The Parable of Google Flu: Traps in Big Data Analysis," Science, 14 Mar. 2014, vol. 343, issue 6176, pp. 1203-1205.

Another example of the difficulty in inferring utility from the "bigness" of data is that merely having a lot of data does not necessarily mean that there are actual causal links between any of the data in the set—but there could be nonsense or spurious correlations. In order for data to be useful (to a machine or otherwise), the data has to be the right data for the intended purpose. There must actually be causal links inside the data set that have some relevance to the purpose for which the firm possessing the data is seeking to identify correlations (and thus infer causation). Mere quantity of data doesn't guarantee that these causal links exist.

The bottom line is that more data isn't necessarily better. There is no strict relationship between having more data and being closer to the "truth"—if by "truth" we mean being able to identify some relationship in the data that is meaningful to the competitive activity in which the firm using the data is engaged.

So, given the complications I've described above, how do we think about big data at the FTC? One key question in our analysis is whether there is competition *for* the data or *with* the data. Take an example a merger between two companies that have data. One scenario we consider is whether the firms are competing with each other using the data, i.e., competing with the data. If so, how significant is that competition and who else competes? This is not a new question. Lots of firms use data to compete. The relevant question for antitrust is whether the data of the two firms is a key differentiator and whether other firms that compete with them cannot replace the competition that would be lost from the merger. If that's not the case, then the data itself is not a key driving competitive issue and the fact that the firms have a lot of data is not significant for antitrust analysis.

But it is possible that the data could be unique and not easily replicated. As an example of a merger involving companies with unique data sets, in February 2009, Dun & Bradstreet acquired Quality Educational Data (QED) in a non-HSR reportable transaction. Prior to the merger, D&B's Marketing Data Retrieval division (MDR) was a competitor to QED in the then $45 million market for the sale of K-12 education data. K-12 education data consists of identifying information about K-12 educators (name, address, school affiliation, subjects taught, etc.). The largest purchasers of K-12 education data are education companies that use the data for marketing, mainly to teachers and school systems. D&B's post-acquisition share of that market was over 90%. Other market participants were small, with inferior data sets; as a result, many customers viewed MDR and QED as their only viable sources for K-12 education data. The Commission challenged the consummated merger in Part 3, and in September 2010, D&B agreed to divest key assets, including an updated version of QED's database to settle the charges and restore competition in the market.[14]

Amazon/WholeFoods is a counter-example. Some argued that once Amazon acquired an expensive "natural and organic" grocery store it would create a data problem; i.e., that Amazon's acquisition of Whole Foods would provide Amazon with data that would give Amazon an insurmountable competitive advantage in some undefined market. But there was no evidence to support that theory. The data set owned by Whole Foods—shopping preferences for a relatively small group of customers concerning premium natural and organic groceries—was neither unique to Whole Foods nor particularly meaningful in the competition between Amazon and

[14] Dun & Bradstreet, Dkt. 9342 (May 7, 2010).

other general retailers, such as WalMart, or other grocery stores, such as Kroger, or in any other competitive arena.

Another merger scenario focuses on the data held by one of the firms that could be an important input to downstream competitors of the other merging firm. This was a theory that was examined in *Microsoft/LinkedIn*, but it turned out not to be the case, in the judgment of the European Commission. Again, vertical foreclosure theories—where a merger could allow the merged firm to deny or limit access to an asset its down- or upstream rivals need—are not novel, and we take them seriously.[15]

It is important to note that at least in the United States, if a merger allows the merged firm to compete better post-merger—to provide better quality products or better service, including through the use of data—that is very unlikely to be viewed as anticompetitive. On the contrary, a merger that makes the merged firm a better competitor because it better serves customers is typically procompetitive. Antitrust law is not intended to keep firms from providing better service, lower prices, or other benefits, and using antitrust law to hobble competitors would simply hurt consumers.

Let me turn briefly from mergers to a few scenarios involving a single firm. In scenario one, the firm uses its own data—data the firm is gathering or developing itself without a merger—to improve its own competitiveness. As a consequence of providing better service, the firm grows or even attains market power. That would not typically be actionable under US law; that is the competitive process that we are charged with protecting.

In scenario two, that same firm takes steps to limit its rivals' access to data other than its own. For example, it signs an exclusive contract with a data supplier. In this scenario, the standard rule of reason/monopolization analysis would apply, and there could be an antitrust problem.

In the third scenario, we return to scenario one where the firm is growing, but does not take steps to limit rivals' access to data. But in this iteration, rivals claim they require access to the firm's own data in order to compete. They claim that they cannot replicate the data and that they cannot compete without access to the data.

It is unlikely that this set of facts would violate US law. There is no general obligation under U.S. law to assist rivals.[16] Nevertheless, there could be a very narrow set of circumstances that could support a potential claim. For example, rivals could assert that the firm's data amounted to an "essential facility." In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, the Supreme Court has expressed doubts about this theory, but it has not been extinguished. [17] The Supreme Court's decision in *Trinko* also left open the possibility that in certain circumstances not amounting to essential facilities, there could be some obligation to interact

[15] "Vertical Merger Enforcement at the FTC," Remarks of Bruce Hoffman at Credit Suisse 2018 Washington Perspectives Conference, Washington D.C. (Jan. 10, 2018), at https://www.ftc.gov/public-statements/2018/01/vertical-merger-enforcement-ftc.
[16] *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); *see also Pac. Bell Tel. Co. v. Linkline Communications, Inc.*, 129 S. Ct. 1109, 1118 (2009)("As a general rule, businesses are free to choose the parties with whom they deal, as well as the prices, terms, and conditions of that dealing.")
[17] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004).

with rivals. For example, one scenario discussed in *Trinko* involves a business that had a prior course of dealing with another firm, where the prior relationship was profitable for both sides. Then, one of the firms cut the other off, and as a result either gained or maintained market power. The *Trinko* court noted that under *Aspen Skiing*, this set of facts could potentially support a monopolization claim.[18]

Thus, at the FTC we have looked at data issues for quite a while, and under a number of rubrics. Nothing about "big data" suggests—yet—that the analytical paradigms we employ for considering the implications of data are inadequate (though of course we constantly need to update our understanding of the facts around big data—what it is, how it works, how it can be used, and so forth). But, this is an area that we intend to continue probing and exploring.

In conclusion, thanks for the chance to discuss these topics. I hope that at least some of what I had to say was useful, or at least worth postponing your enjoyment of the cocktails our hosts have graciously provided.

[18] *Trinko*, 540 U.S. at 408.