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Three Notable Antitrust & Tech Updates That May Have Flown Under Your Radar

Minding Your Business on **October 31, 2022**

Antitrust and tech is in the legal news almost daily, and often multiple times a day. Here are a few recent developments with notable implications that may have flown under the radar: 1) renewed focus on gig economy issues; 2) potential enforcement efforts regarding director overlaps; and 3) challenges to MFN pricing.

The Gig Economy. The FTC recently announced its enforcement priority to protect gig workers from issues such as anticompetitive wage fixing and coordination between gig economy companies. While not be solely tech focused, many tech companies, big and small, are based on the gig economy, often creating gig economies of their own. Indeed, 16% of Americans report having earned money from an online gig platform. In its statement, the FTC noted three main areas of focus: 1) claims and conduct regarding the costs and benefits of gig work; 2) contract terms, including any restrictive terms limiting the ability to seek other jobs; and 3) wage, benefits or fee fixing. The statement notes the prominent role of technology in the gig economy, including managing the gig work force through artificial intelligence or algorithms. And as part of the FTC's announcement, Elizabeth Wilkins (Director of the FTC's Office of Policy Planning) seemingly called out tech companies, saying, "Technological advances and novel business models are no license to commit unfair, deceptive, or anticompetitive practices."

Director Overlaps. In another issue that impacts tech and traditional companies alike, the DOJ has doubled down on its enforcement efforts relating to oft-ignored Section 8 of the Clayton Act and its prohibition (with a few exceptions) on director overlaps between competitors. Today, many private equity companies have stakes in competing "portfolio" companies, and with stakes comes some say in corporate governance. Expressing concern about the amount of common control – or even the impact of incentives – that can arise from private equity cross-ownership, the DOJ has begun issuing letters and opening investigations triggered by information disclosed in HSR flings, and sometimes public SEC filing. The letters warn that enforcement may be initiated with respect to alleged Section 8 violations.

MFN Pricing. Amazon doesn't ever truly fly under the radar. But it has largely avoided the high-profile antitrust cases that its Big Tech brethren have faced. Until now. This past year, state enforcement agencies took the lead in challenging Amazon's third-party seller contracts and policies, which according to the recent lawsuits, bar third-party sellers from offering lower prices or better terms on sites outside Amazon.com. Lawsuits filed by the Washington D.C. and California Attorneys General allege that Amazon's restrictive policies impede competition and harm consumers because they keep prices artificially high through charging third-party sellers high fees. In March 2022, the Superior Court of the District of Columbia dismissed the D.C. lawsuit for failure adequately allege anticompetitive effects. That decision is under appeal, and not long after, California filed its lawsuit in state court under a different and broader set of laws – the Cartwright Act and California's Unfair Competition Law – presumably in an effort to avoid the same fate as Washington D.C. If California's suit is successful, it may spur increased attention and litigation under state-specific antitrust laws going forward.

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