Antitrust Enforcement Against Big Tech
What Happens Next - 11.15.2023

Larry Bernstein:
Welcome to What Happens Next. My name is Larry Bernstein. What Happens Next is a podcast which covers economics, political science, and law.

Today's topic is Antitrust Enforcement Against Big Tech.

Our speaker is my college roommate Josh Soven who is a partner at Paul Weiss who works in Antitrust. Josh previously worked at the Department of Justice and the Federal Trade Commission. The Biden Administration is attacking Big Tech with the intent of changing business practices at companies like Amazon and Google.

I want to learn from Josh why Lina Khan who is the Chair of the Federal Trade Commission decided to go after the big technology companies. Is the problem Big Tech's size and does that mean that these firms need to change how they do business?

In the recent past there was a bipartisan consensus that anti-trust policy's goal was to maximize consumer welfare. Why is that no longer the goal and what will replace it?

Buckle up. Josh, please begin with your opening six-minute remarks.

Josh Soven:
Larry, thanks for inviting me back to the program. These are my views, not those of any Paul Weiss client. We represent many companies with interests in these issues, including virtually all the large technology companies. Antitrust policy today has a sky-high profile. The headline of a Politico article on Monday was "The Next Generation of Law Students is obsessed with FTC Chair Lina Kahn." According to the article, antitrust is hip. Those are two words that I never thought I would read in the same sentence, but today I want to go beyond the headlines and talk about what is really going on in antitrust policy and enforcement.

First, it is important to remember that for at least the last 30 years, there has been strong bipartisan support for the core components of antitrust policy. The reason is simple; antitrust helps to make a free market economy. Without it, there would be price fixing, bid rigging, and mergers that would harm consumers. Nobody, regardless of where they are on the political spectrum, wants such anti-competitive conduct to happen.

Second, while you would never know it from the press, the ultimate outcomes of antitrust investigations in the Biden administration look pretty much the same as they did in Republican

and Democratic administrations for the past three decades. Mergers like the ones that were completed in the Trump, Obama, Bush, and Clinton administrations are still going through today. The antitrust box scores look very similar. In making this observation, I'm not critiquing what the antitrust agencies are doing today, just the opposite. I think it's a sign that antitrust policy continues to work.

Now, what is different? Merger investigations that previously took 30 to 60 days to go through, now can take months and DOJ and the FTC are more inclined to ask merging parties to produce tens of millions of pages of documents and many reams of data. But companies in the market are adapting. The antitrust agencies' demand for documents and data are causing merging parties to adopt new strategies and new technologies to produce materials faster and prevent the agencies from attempting to run out the clock on their deals.

There have been some substantive changes. DOJ and the FTC have challenged a handful of mergers that their predecessors probably would have let go. But to date, the antitrust agencies have lost all those cases where they attempted to push the envelope of antitrust law. For example, the court rejected the FTC's attempt to stop Meta's acquisition of a startup company with many competitors that produced a virtual reality fitness app. And companies continue to adapt to the new process by preparing to litigate as soon as they sign their deals. But not withstanding these losses, DOJ and the FTC continue to work hard to make sure to restore the antitrust laws to their original purpose.

They are proposing new merger guidelines that draw heavily on Supreme Court cases from the 1950s and 1960s. Whether they can get any traction on these changes is highly uncertain because the changes are not self-executing. Unlike in many other countries, the DOJ and the FTC need to go to court to stop conduct that companies are committed to pursuing, and for the Biden Administration to accomplish its objectives, judges will not only need to look past several generations of antitrust cases but will need to alter the fundamental assumptions about the purpose of antitrust in the first place.

The real-world practical change that occurred in antitrust after the 1960s was that the courts decided that for conduct to violate the antitrust laws, there had to be actual evidence that the conduct was likely to increase prices, lower wages, or reduce innovation. Chair Khan, which she is really trying to do, is expand the objectives of antitrust to include other goals including protecting small businesses, unconcentrated market structures, and what the chair described in her famous article about Amazon as the dispersion of political and economic control. Today's judges have absolutely no experience thinking about antitrust along these lines.

Larry Bernstein:
Why are law students so interested in Lina Khan and what she is trying to accomplish with antitrust?

Josh Soven:
It's a combination of things. The Chair has been able to talk about antitrust in a real-world way. Antitrust law has been this inside baseball, DC legal practice that's loaded with jargon and economics and sounds obscure. The Chair has been effective at explaining her view of antitrust in layperson language and making it accessible. That and the fact that the most prominent targets of antitrust law today are well-known companies, is drawing law students to her cause.

Larry Bernstein:
Since Robert Bork published his influential book The Antitrust Paradox in 1978, the idea was that the purpose of antitrust law was to increase consumer welfare. In your opening remarks you mentioned that Lina Khan ideas go back to the ideas of scholars from the 1950s and 1960s. What were the prior generation of legal academics and judges trying to accomplish with antitrust law?

Josh Soven:
The antitrust laws were passed in 1890 in the Progressive Era. The FTC itself was set up under the Wilson administration in 1914. There was great concern about economic concentration. And for the first 60 years of the history of antitrust, the law was applied in a way that was very focused on form of the conduct with little emphasis on the effect of the conduct. A contract with a certain form was illegal in certain circumstances, even though there was no demonstrable effect on price or output. The Bork Revolution or the Chicago Revolution, it's often talked about in hyperbolic and, by some, in sinister terms. But it was just a set of principles to say, we think antitrust is important, but we need to ground it into some objective standards because otherwise the antitrust agencies are essentially engaging in arbitrary social planning.

What Bork and other scholars such as former Justice Breyer said, is we need to think in terms of output and price, and the clearest way to do that is to focus on consumers. It is a clean, objective target where we can make decisions. That is not to minimize the other issues that led to the formation of antitrust, but we think there are better government policies and agencies to handle them."

Larry Bernstein:
40 years ago, we took an economic history class together at Penn with Walter Licht. And in that class, we read the Marxist historian Gabriel Kolko about the complex politics necessary to pass the Sherman Act that resulted in busting monopolies. But for the past 20 years, there has been a bipartisan consensus that consumer welfare should be the objective for antitrust policy. Why did that consensus change recently?

Josh Soven:
The short version of the history was you had 60 years of focus on structure and small competitors. Then, there was over a 20-year period, a bipartisan resetting of antitrust. What we are talking now is a focus on consumer welfare and wage rates and expansion of output.

The Chair is very much a product of her time as well as an original thinker. What she's saying is "I see some very powerful large companies about which I'm concerned, and I don't believe that the traditional tools of antitrust that have been in place are effective at addressing these issues related to corporate power and increases in market concentration." None of this is tightly tied to consumers, and in fact, the Chair has pushed back on using the consumer welfare standard as a focus of liability in part because she has some doubts as to whether it will be effective in litigation. If you are concerned primarily about market structure and keeping small businesses in place, then a standard which requires you to prove that there will be a price effect often is not helpful.

Larry Bernstein:
Before joining the FTC, Lina Khan wrote an essay challenging Amazon's business practice. I would like to use Amazon as a case study before moving onto Google and Meta. What were Chair Khan's arguments?

Josh Soven:
Her famous article, "Amazon's Antitrust Paradox," is a play on Judge Bork's famous book, The Antitrust Paradox, was largely focused on Amazon and its providers of capital charging prices that were too low that were driving out competitors. The Chair wrote that Amazon is losing money but nonetheless was thriving. Its market share increased, and its market cap was going up. And her theory articulated in the article was that this was essentially a form of predation.

Larry Bernstein:
Lina Khan's FTC recently sued Amazon asserting that Amazon charges too much for small businesses, forces them to use Amazon's logistics for Amazon Prime. How does this case fit in with Lina Khan's original Amazon essay about the company lowering prices too much?

Josh Soven:
The case she recently brought does not really address that issue. The case is traditional in terms of its structure. The core of the complaint is that Amazon is allegedly using practices to prevent competing platforms and sellers from lowering price through distribution avenues that are competitive alternatives to Amazon. In that sense, the complaint is a 180 from what she originally wrote. Just to underscore again, Amazon is a client of Paul Weiss. This is my reflection on what the Chair was doing.

Larry Bernstein:
Many retailers offer generic products or even products that they manufacture themselves. Is the FTC heading in the direction of fairness to competitors versus actions that hurt consumers?

Josh Soven:
That's a good point. The last 30 years of antitrust have said fair really shouldn't count. Maybe political leaders can decide what fair is, but it doesn't make sense for a relatively small number of unelected lawyers at the FTC and the Justice Department to be deciding what fair is. Society makes judgements about what's fair all the time, but antitrust law and the Justice Department and the FTC are the wrong place to decide that. The FTC understands that problem in terms of litigating their case.

Larry Bernstein:
I thought that if you build the best product and that dominates the market then that is fine under antitrust law, but if you acquire your competitors to create a monopoly that is problematic.

Josh Soven:
There's this famous maxim that the competitor having been urged to compete should not be penalized when he or she wins. We want companies to work hard to do well, but having done well, there are certain rules of the road that are put up to prevent companies from doing things which reduce competition.

Larry Bernstein:
Unlike a merger where the FTC can stop it with a business practices case, can a company simply agree to change its practices and then everyone is happy. This business practices change seems small in the bigger picture.

Josh Soven:
That brings up a really important point about remedies in antitrust. The way this tends to work is the government spends a lot of time deciding rightly or wrongly that they think there's a problem, but then what are we going to do about it? Because we as a government agency are admittedly terrible at regulating markets. They'll try, but then judges get skeptical. And businesses, to your point, can and do change business practices midstream to go, “look, we don't think there's a problem at all, but in any event, we will move X to Y and then there's clearly no problem.” So, part of the reason that people have been reluctant to bring these big cases is they're not at all sure what's going to happen at the end of the case, even if they win on liability.

The cases that are going on right now raise very complex remedy issues. The last thing you want to do is come up with a remedy which results in less innovation, less dynamic change, stifles the next big thing that would benefit consumers.

Larry Bernstein:
Next topic is the Meta acquisition of a VR company. Here is a startup that Meta wants to buy that appears to be just about an idea. The firm does not even have a product. What are we even talking about as it relates to competition and monopoly?

Josh Soven:
Typically, merger cases involve facts where it's clear the government thinks they can prove in the foreseeable future something bad will happen to price or outcome and can show this through super high market shares or bad documents or data. This was a case where the company was essentially a startup, so really hard to say what was going to happen in the future. Lots of other people are working on this technology, so they couldn't prove that other large companies weren't going to put their back into this and be hyper-aggressive in the same space.

Judges have been very reluctant regardless of where they fit on the political spectrum to stop deals where they don't have a pretty high level of confidence that something bad is likely to happen. Now, the Chair's point is that's the wrong standard.

Larry Bernstein:
Is this Meta case simply about being anti Big Tech? Meta is a huge business with a big concentration in social media, and the last thing the government wants is for Meta to also win in VR. Should size matter, especially in big bad Tech?

Josh Soven:
The Chair of the FTC has certainly been clear that she believes that was the purpose of the antitrust law is these companies are big, have significant market share and economic power. Therefore, the way she sees, it is appropriate to apply the antitrust laws to them in a rigorous way.

The counter to that is we should be basing enforcement decisions on what is happening in the market. Are prices going up or down? Are we seeing innovation? Are we seeing new entry? Are we seeing contestable markets? Are we seeing increases in consumer welfare? There's a strong argument that's where the antitrust laws should be focused not on whether a company is big or small.

Larry Bernstein:
What was the role of competitors and clients in encouraging the FTC to bring litigation?

Josh Soven:
That brings me back to the point I made that none of this is self-executing, that you cannot wave a wand to change this very substantial part of US economic policy. It's an operational exercise, and by that I mean you have to go to court for many of these cases and demonstrate to a generalist judge that there's a problem. Judges take the government seriously. They assume they're acting in good faith, but, for the most part, they're not simply going to do something because the government says it's the right thing to do. They're going to look at the evidence of how the market is performing and customers are sometimes, but not always, a relevant indicator of whether there's a problem or not. The batting average of customers in litigation is mixed at best.

You would think they are the most reliable neutral parties to express opinions about whether conduct is anti-competitive or not. The track record is uneven. Sometimes they are persuasive to courts and courts will rely on them, which is why the government seeks them out when they're investigating cases and putting together the litigation strategy. But often judges have said, "there's really no factual basis to what you're saying. You're simply speculating about what's going to happen. It seems like you have lots of competitive alternatives, and so while I'm not doubting your sincerity, I think you're wrong." But customers, competitors, other third parties have been and will remain an important part of the fact discovery process and the way the government puts together their cases.

Larry Bernstein:
You said that for the previous 20 years there was bipartisan agreement about antitrust. Is that still true, or has Lina Khan split the parties?

Josh Soven:
I think it is still bipartisan. Clearly the Chair is doing certain things that Republicans would not agree with and probably many Democrats would not agree with, but that core of the policy, three quarters of the pie chart, the consensus still exists.

Larry Bernstein:
What could be different if the Republicans take over or if there was a new Democratic administration?

Josh Soven:
First, with respect to process, there is certainly the hope amongst many clients we represent that the investigations would become more focused and less broad in terms of the discovery requests. Those have significantly expanded. There's not a lot of evidence that improves government

decision-making or ability to litigate cases, and so there would be significant advocacy efforts to scale those back.

And finally, I think there'll be a push to argue that resources should be better spent on conduct that is unambiguously anti-competitive. Make sure you do those things well rather than bringing cases whereby their own admission, they may have a low probability of winning.

Larry Bernstein:
How does Elizabeth Warren and her progressive allies in the Democratic Party want to change antitrust policy?

Josh Soven:
Senator Warren thinks markets are overly concentrated, that there's too much corporate power. She has urged the FTC and the antitrust division from the start of the Biden administration to be quite aggressive in how they litigate transactions, not to settle cases that are brought against merging parties, but rather to take those cases to verdict. She believes antitrust is an important tool to reducing the level of concentration in the economy.

Larry Bernstein”
Elizabeth Warren sent a letter to the FTC condemning a merger settlement with Amgen. Why did Senator Warren want the FTC to litigate?

Josh Soven:
The Amgen-Horizon merger was a non-traditional enforcement action because the parties didn't compete. The FTC brought the case, litigated it for a while, and then settled on terms that governed how the parties could operate their businesses going forward. Last week, Senator Warren wrote a letter to the chair of the FTC and the other Democratic commissioners critiquing that decision saying that the commission should have continued to prosecute and that she urged the commissioners to roll out new merger guidelines. She believes that verdicts are more effective than, so-called conduct consent decrees or negotiated settlements.

Larry Bernstein:
Why are settlements problematic? Are business practice solutions perceived to be toothless?

Josh Soven:
There's a view that these conduct remedies have not been particularly effective, that it is better to stop the merger outright. The thinking being that the government is not particularly good at monitoring company's behavior and that's a hard thing to do.

Larry Bernstein:
The FTC keeps losing the tough cases. Is there a benefit for the progressives to litigate and lose?

Josh Soven:
It is useful for judges to articulate the so-called Rules of the Road for antitrust. The antitrust statutes are quite general in nature. They're not particularly detailed or prescriptive. They don't provide a lot of guidance. A benefit of litigation has been judges writing opinions that apply these general principles to very facts specific matters, and then companies have more guidance about how the courts may or may not address future cases with similar facts.

Larry Bernstein:
Isn't Congress the right venue to establish the rules of the road?

Josh Soven:
There have been proposals in Congress to change the antitrust laws that lower the burden on the government to create stronger presumptions that certain transactions reduce competition. My view is that it would be difficult for Congress unless they want to come up with bright line rules about deciding what mergers are legal and what are illegal, to devise rules that are particularly prescriptive or detailed and the like, because there's so many fact situations out there that it's hard to come up with rules that are likely to be effective across the board.

Larry Bernstein:
If the progressives could act boldly, what would they want to accomplish with antitrust?

Josh Soven:
The debate that's going on is whether there should be bright line rules that prohibit certain conduct and certain transactions, regardless of whether you can show an anti-competitive effect or a likely effect on price or output. So, people who want to be particularly aggressive in antitrust will say a non-compete agreement or a merger above X percent should be automatically illegal. Let's cut to the chase instead of having this deep dive fact specific analysis to determine how the conduct at issue will affect the market. So, if you really want to change the way the work is done, then that's the route people are exploring, and many people would like to take. Thus far, there's been no support in the courts for that, and Congress has not passed any legislation which would move the antitrust laws into that paradigm.

Larry Bernstein:
I end each podcast with a note of optimism. What are you optimistic about as it relates to antitrust policy?

Josh Soven:
I am quite optimistic that bipartisan consensus is going to continue to prevail. All of this only makes sense and is only relevant in a free market economy. It is no accident that when you had a world populated with state-run economies that there were very few antitrust agencies out there. As markets moved away from government control to open markets, you had this dramatic proliferation of antitrust agencies. So, you went from like 20 agencies to a hundred in the space of about 15 years. That reflects a buy-in into open markets competition, a lack of incumbency, and that antitrust has been extremely effective in helping to protect that.

Larry Bernstein:
Thanks to Josh for joining us today. If you missed last week's show, check it out. The podcast's topic was the Urban Battle of Gaza City.

Our speaker was Anthony King who is a Professor of War Studies at the University of Exeter in the UK. Tony has written a recent book entitled Urban Warfare in the 21st Century. Tony explained about what will happen during the Israeli ground war, what the street battles will look like and how the hostages will impact the military strategy.

He explained how Hamas will rearm after their weapons run low. And what lessons learned from Ukraine/Russia War applies to the urban conflict in Gaza. We also discussed the historical experience from similar urban battles in Algiers, and more recently in Aleppo and Iraq.

I now want to make a plug for next week's podcast with Dr. Ari Ciment who is the author of a new book entitled Breathless Tales: Life, Laughter and Lessons. Ari ran the Covid ward at Mt. Sinai Hospital in Miami Beach when I was a patient recovering from COVID in December 2020.

I want to learn from Ari what the learning process for COVID doctors was during the pandemic and what lessons were learned for the next medical catastrophe.
You can find our previous episodes and transcripts on our website whathappensnextin6minutes.com. Please subscribe to our weekly emails and follow us on Apple Podcasts or Spotify.

Thank you for joining us today, good-bye.