ICLE International Center for Law & Economics

Lambert & Sykuta Comment to FTC on Common Ownership
August 20, 2018
Thomas Lambert

The Federal Trade Commission will soon hold hearings on Competition and Consumer Protection in the 21st Century. The topics to be considered include:

1. The state of antitrust and consumer protection law and enforcement, and their development, since the [1995] Pitofsky hearings;
2. Competition and consumer protection issues in communication, information and media technology networks;
3. The identification and measurement of market power and entry barriers, and the evaluation of collusive, exclusionary, or predatory conduct or conduct that violates the consumer protection statutes enforced by the FTC, in markets featuring "platform" businesses;
4. The intersection between privacy, big data, and competition;
5. The Commission's remedial authority to deter unfair and deceptive conduct in privacy and data security matters;
6. Evaluating the competitive effects of corporate acquisitions and mergers;
7. Evidence and analysis of monopsony power, including but not limited to, in labor markets;
8. The role of intellectual property and competition policy in promoting innovation;
9. The consumer welfare implications associated with the use of algorithmic decision tools, artificial intelligence, and predictive analytics;
10. The interpretation and harmonization of state and federal statutes and regulations that prohibit unfair and deceptive acts and practices; and
11. The agency's investigation, enforcement and remedial processes.

The Commission has solicited comments on each of these main topics and a number of subtopics. Initial comments are due today, but comments will also be accepted at two other times. First, before each scheduled hearing on a topic, the Commission will accept comments on that particular matter. In addition, the Commission will accept comments at the end of all the hearings.

Over the weekend, Mike Sykuta and I submitted a comment on topic 6, "evaluating the competitive effects of corporate acquisitions and mergers." We addressed one of the subtopics the FTC will consider: "the analysis of acquisitions and holding of a non-controlling ownership interest in competing companies."

Here's our comment, with a link to our working paper on the topic of common ownership by

institutional investors:

To Whom It May Concern:

We are grateful for the opportunity to respond to the U.S. Federal Trade Commission's request for comment on its upcoming hearings on Competition and Consumer Protection in the 21st Century. We are professors of law (Lambert) and economics (Sykuta) at the University of Missouri. We wish to comment on Topic 6, "evaluating the competitive effects of corporate acquisitions and mergers" and specifically on Subtopic 6(c), "the analysis of acquisitions and holding of a non-controlling ownership interest in competing companies."

Recent empirical research purports to demonstrate that institutional investors' "common ownership" of small stakes in competing firms causes those firms to compete less aggressively, injuring consumers. A number of prominent antitrust scholars have cited this research as grounds for limiting the degree to which institutional investors may hold stakes in multiple firms that compete in any concentrated market. In our recent working paper, The Case for Doing Nothing About Institutional Investors' Common Ownership of Small Stakes in Competing Firms, which we submit along with these comments, we contend that the purported competitive problem is overblown and that the proposed solutions would reduce overall social welfare.

With respect to the purported problem, our paper shows that the theory of anticompetitive harm from institutional investors' common ownership is implausible and that the empirical studies supporting the theory are methodologically unsound. The theory fails to account for the fact that intra-industry diversified institutional investors are also inter-industry diversified, and it rests upon unrealistic assumptions about managerial decision-making. The empirical studies purporting to demonstrate anticompetitive harm from common ownership are deficient because they inaccurately assess institutional investors' economic interests and employ an endogenous measure that precludes causal inferences.

Even if institutional investors' common ownership of competing firms did soften market competition somewhat, the proposed policy solutions would themselves create welfare losses that would overwhelm any social benefits they secured. The proposed policy solutions would create tremendous new decision costs for business planners and adjudicators and would raise error costs by eliminating welfare-enhancing investment options and/or exacerbating corporate agency costs.

In light of these problems with the purported problem and shortcomings of the proposed solutions, the optimal regulatory approach—at least, on the current

empirical record—is to do nothing about institutional investors' common ownership of small stakes in competing firms.

Thank you for considering these comments and our attached paper. We would be happy to answer any questions you may have.

Sincerely,

Thomas A. Lambert, Wall Family Chair in Corporate Law and Governance, University of Missouri Law School;
Michael E. Sykuta, Associate Professor, Division of Applied Social Sciences, University of Missouri; Director, Contracting and Organizations Research Institute (CORI)

Kudos to the Commission for holding this important set of hearings.

View Article