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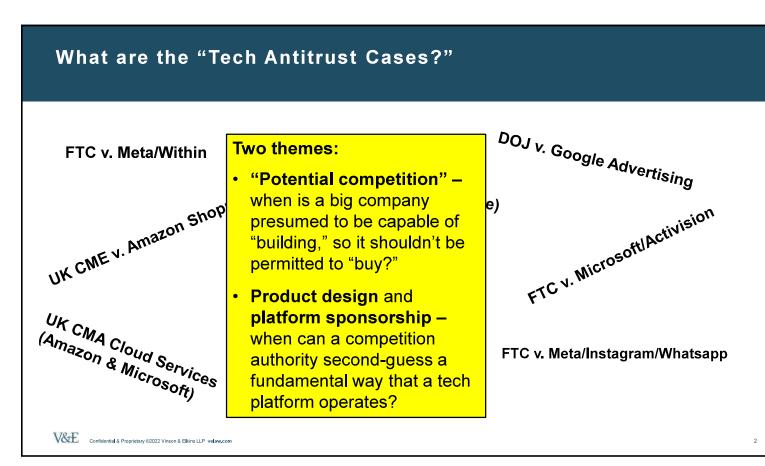
University of Texas 36th Annual Technology Law Conference

The "Tech Antitrust Cases" — A Survey of Current Cases against "Big Tech"

Presented by Hill Wellford

May 26, 2023

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The Biden Administration's Antitrust Enforcers

Federal Trade Commission

· Lina Khan, Chair

- 2017 Yale Law School graduate currently on leave from her position as an Associate Professor at Columbia Law School; took office at 32 years old
- Renowned among progressive antitrust proponents for her concern about business concentration in general and her hostility to Big Tech in particular
- · FTC currently consists of 3 Democrats and 2 vacancies
 - Republicans resigned, criticizing Khan as not attempting to be bipartisan

DOJ Antitrust Division

- Jonathan Kanter, Assistant Attorney General of the Department of Justice's Antitrust Division
 - Started out as an FTC staff attorney in 1998 before moving to a firm
 - Has extensive experience defending antitrust investigations and also has represented complainants against Big Tech companies





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Merger Injunction Case
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FTC v. Microsoft Corp. / Activision Blizzard King

- January 2022 deal announcement, \$70 billion
 - Microsoft is the largest OS publisher / desktop gaming platform; its Xbox is the second-largest console
 - ABK is the largest independent game developer
- In December 2022, FTC sued in Part III (administrative court) to block the deal, alleging:
 - "Vertical foreclosure" ability to deny games to rival platforms
 - Three "markets": consoles; muti-game subscription services; cloud gaming
 - Alleges Microsoft has a history of disavowing exclusivity in games (and other software), then going exclusive anyway (broken promises)
- What to watch:
 - Vertical foreclosure theories don't break new ground
 - But applying them in the fast-moving world of games may prove challenging
 - Are the lines between these "markets" clear?
 - Does it matter that Xbox is #2, while Sony PlayStation is #1?

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Merger Injunction Case

FTC v. Meta Platforms, Inc. / Within Unlimited, Inc.

- In October 2021, Meta announced plans to buy Within
 - Meta, the parent of Facebook, is aggressively moving into "Virtual Reality"
 - Within is a maker of VR fitness apps
 - Within's Supernatural app offers 800+ fully immersive VR workouts
- In July 2022, the FTC voted 3-2 to sue in federal District Court (N.D.Cal.)
 - Democrat Commissioners overruled an FTC staff recommendation to close the investigation
 - The two Republican commissioners dissented
- · Key allegation is "potential competition" Meta doesn't offer VR fitness apps, but could
 - FTC seemingly adopted the position that companies with sufficient financial and technical resources should build instead of buy their way into a new market; to do otherwise violates Section 7?
- In January 2023, court denied the FTC's request for a PI; FTC later dismissed its admin case
- Lessons:
 - Potential competition isn't a new theory
 - But it can't be mere speculation there was no evidence that Meta planned to make VR fitness apps

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