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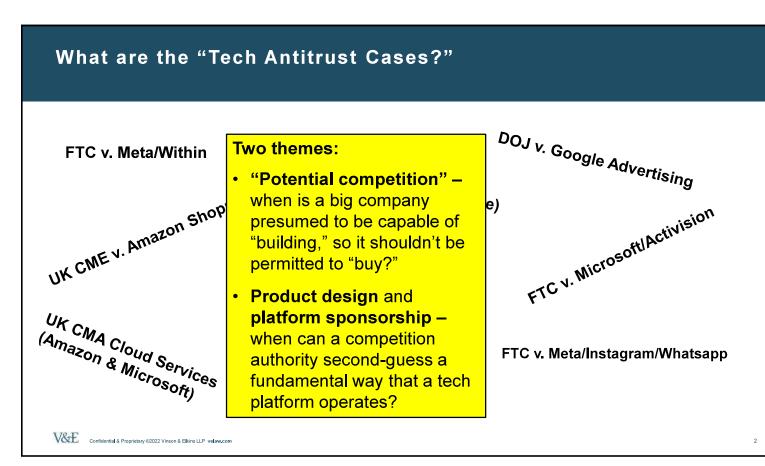
University of Texas 36th Annual Technology Law Conference

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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Title search: Recent Antitrust Tech Cases and Update on Non-Competes

Also available as part of the eCourse 2023 Technology Law eConference

First appeared as part of the conference materials for the 36th Annual Technology Law Conference session "Recent Antitrust Tech Cases and Update on Non-Competes"