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Antitrust, Competition, and Economic Regulation Alert

In June 2015, the Federal Trade Commission (FTC) held a workshop on *The “Sharing” Economy: Issues Facing Platforms, Participants, and Regulators*. The Commission also solicited public comments on the topic, receiving more than 2,000 comments in response. On 17 November, the Commission issued a report summarizing the issues explored in the workshop and the public comments. The report emphasized that the workshop (and its ensuing summary) was not intended "as a precursor to law enforcement" but "an opportunity to learn more" about this rapidly evolving business model and to aid “the Commission, as well as regulators, consumer groups, platforms, participants using the platforms, incumbent firms, and others” to address the unique issues raised by sharing economy platforms.

Among other topics, the report discussed issues in consumer protection, regulation, and competition. The report noted that there can be tension between the twin goals of competition and consumer protection, and a key challenge for regulators is striking the right balance between ensuring adequate regulatory protection and allowing innovation, which can drive competition, to flourish. The FTC has cautioned regulators "not to impose legacy regulations on new business models simply because they happen to fall outside of existing regulatory schemes" because doing so could stifle competition and harm consumers. Accordingly, Chairwoman Ramirez has expressed that regulatory measures “should be no greater than necessary” to address consumer protection concerns. Below we address the seven key themes identified in the report and summarize two of the competition (or antitrust) concerns raised by panelists.

The report synthesized the workshop discussions into the following central themes:

- **Balancing Objectives**: The goal for regulators is to "strike a balance between competition and consumer protection so that overall consumer welfare is optimized." One concern was that regulation would serve as “protectionist measures” for incumbents to stifle new, disruptive competition. Sharing economy platforms can transform existing markets by lowering costs to enter (i.e., among other things, individuals do not need special tools to participate as sellers, transaction costs are greatly reduced by bringing many buyers and sellers together on the platform, and sellers can put underutilized assets like a car or an extra room in a home to work), potentially lowering prices for consumers and increasing quality. On the other hand, failing to apply regulatory requirements to sharing economy providers...
might undermine realization of the goals underlying those regulations. Some participants suggested that the sharing economy presents unique issues and thus requires different types of regulations.

- **Level Playing Field:** Some workshop participants suggested that regulations should be the same for all suppliers, otherwise sharing economy providers would have an unfair advantage by bypassing existing regulations. Commissioner Ohlhausen noted that creating a regulatory environment that favors new entrants would be “just as undesirable as retaining regulations that deter meaningful entry.” Some participants suggested that the way to level the playing field was by “deregulating down,” not by “regulating up.”

- **Protectionism and Regulatory Capture:** A prominent concern at the workshop was that regulators might apply existing regulations to sharing economy providers due to industry capture. The claim was that incumbents would “seek out protectionist measures ... to prevent their markets from being disrupted by ‘sharing economy’ services” and that these efforts would be successful because state and local governments “often fall victim to regulatory capture.”

- **Regulatory Restraint and Flexibility:** Workshop discussions addressed the risks of preemptive regulation and highlighted the importance of a flexible regulatory approach. With the sharing economy in its early stages, still growing and evolving rapidly, an appropriate regulatory framework needs to be able to adapt to keep pace with technology. Chairwoman Ramirez has advised that “[r]egulatory frameworks ... should be flexible enough to allow new forms of competition,” and should be "reviewed and revised periodically." Commissioner Ohlhausen has recommended “adopting a posture of regulatory humility," because predictions about the developing market “can be spectacularly wrong.” At the workshop, Commissioner Ohlhausen advised regulators to “tread carefully, particularly when considering hypothetical, rather than demonstrated, consumer harm.” Some panelists noted that it is not necessary to have "a preemptive regulatory policy in place to solve [every] problem," as some can be dealt with after the fact through "private insurance, contracts, torts and product liability law, [and] antitrust enforcement." Other panelists felt that the "wait and see" approach had its own risks. In terms of the FTC’s role, workshop participants suggested that the FTC should be vigilant in watching out for “de facto incumbency protection schemes.”

- **Self-Regulation, Reputation Mechanisms, and Branding:** Workshop participants and commenters suggested that sharing economy platforms, as the mediators between suppliers and consumers, may have a role to play in self-regulation. Already, features such as reputation rating systems and other trust mechanisms reduce the need for regulation by providing consumers with information about suppliers. One panelist suggested that in the future, there may be "platform competition between different local regulators." Another panelist advocated "delegated regulation through data," in which platforms are responsible for self-regulation and the government monitors platform performance using “audited evidence.” Other panelists were skeptical of self-regulation, noting that in order to be effective, there would need to be “a real enforcement mechanism.” Discussions on the
Although the sharing economy has the potential to spur competition and transform traditional markets, panelists identified two potential antitrust concerns: (1) the potential for so-called "network effects" that can undermine competition, and (2) the potential for anticompetitive effects resulting from vertical integration.

- **Privacy Concerns Raised by Collection and Storage of Participants' Data:** As sharing economy platforms handle larger and larger amounts of consumer data, privacy and data security become significant issues. One panelist suggested that this is a problem inherent to the sharing economy—features that result in greater consumer safety and trust may generate concerns about data collection. The workshop discussed the possibility of using concepts of fiduciary relationships; however, the platform's position "in the middle of two peers" made such analysis problematic. The report noted that the Commission's prior work on this issue has emphasized the need for clear and conspicuous disclosure of the platform's practices so that consumers can make informed decisions. If the platform misrepresents its practices or fails to take reasonable security measures, the platform could be subject to FTC enforcement.

- **Provision of Platform Data to Governments:** The workshop also discussed the tension between data privacy and the importance of sharing data with government entities to help regulators formulate effective regulations. Several panelists indicated that anonymized data could be part of the solution. One panelist advocated partnerships between cities and sharing economy platforms. Others felt that platforms should be required to supply governments and the public with data. Yet another concern was that information provided by companies may not be sufficient.

**Potential Competition Concerns Associated with Sharing Economy Platforms**

Although the sharing economy has the potential to spur competition and transform traditional markets, panelists identified two potential antitrust concerns: (1) the potential for so-called "network effects" that can undermine competition, and (2) the potential for anticompetitive effects resulting from vertical integration.

- Network effects arise from the phenomenon that a platform may only be successful when a significant number of participants sign up as sellers, attracting buyers in turn. But, once a platform becomes dominant, smaller rival platforms may be deterred from entering or fail to attract a sufficient number of buyers and sellers to successfully challenge the dominant incumbent platform. Others, however, pointed to the fact that in many sharing economy platforms, participants on both sides of the platform have the ability to switch easily or use multiple, thus "platform-shopping disciplines the power of [] platforms." Additionally, some sellers might prefer a smaller network where they have less internal competition, for instance.

- Panelists also identified the potential for anticompetitive foreclosure stemming from vertical integration of sharing economy platforms. A platform that offers both a marketplace...
for selling goods or services but also sells goods or services on its own behalf can be procompetitive and create increased efficiency. On the other hand, some panelists were concerned that “if a vertically integrated platform controls a large portion of supply, buyers might be unwilling to switch to other platforms if those platforms do not have enough participating suppliers.”

**Takeaways**

The key takeaways from the FTC’s report are that the sharing economy presents unique challenges for consumer protection and antitrust regulation, but that it also presents new opportunities for innovation and competition that ultimately benefit consumers. As existing platforms grow and new platforms emerge, we anticipate the dialog among all stakeholders—federal, state, and local governments; economists; traditional and new participants in industries; and consumers—will continue on how regulators can balance the sometimes competing goals of competition and consumer protection. Over time, the precise balance struck may diverge between jurisdictions, which may diminish some of the procompetitive potential of sharing economy platforms. What is clear is that the FTC is closely attuned to these issues, and we anticipate other regulators are too.

**Contacts**

Tim P. Tobin  
Partner

Logan M. Breed  
Partner

Meghan Rissmiller  
Partner

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