FTC Tech Task Force: Temporary Scrutiny or Permanent Focus?

Skadden

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorney or call your regular Skadden contact.

Maria Raptis
Partner / New York
212.735.2425
maria.raptis@skadden.com

Tara L. Reinhart
Partner / Washington, D.C.
202.371.7630
tara.reinhart@skadden.com

Kenneth B. Schwartz
Partner / New York
212.735.2731
ken.schwartz@skadden.com

David P. Wales
Partner / Washington, D.C.
202.371.7190
david.wales@skadden.com

Four Times Square
New York, NY 10036
212.735.3000

The Federal Trade Commission's (FTC) Bureau of Competition has established a task force dedicated to monitoring competition in U.S. technology markets and taking enforcement actions as warranted. While the remit of the task force largely overlaps with the FTC's existing enforcement activities, the announcement signals regulators' increasing focus on the industry.

The Tech Task Force, established on February 26, 2019, is a stand-alone division that draws on existing staff — approximately 17 attorneys within the bureau who have experience in various technology markets, including those for online advertising, social networking, mobile operating systems and apps, and platforms. While the staff is not sufficiently robust to investigate or litigate conduct or mergers without assistance, the Task Force will coordinate with other divisions within the FTC as it weighs the need for longer-term changes. Even if it were to include staff from other divisions on its investigation or litigation teams, the number of permanent members limits the number and complexity of the matters it can handle.

In announcing the task force, FTC Chairman Joseph J. Simons said that "it makes sense for us to closely examine technology markets to ensure consumers benefit from free and fair competition." The task force is led by Patricia Galvan, currently a deputy assistant director of the Mergers III Division, and Krisha Cerilli, currently counsel to the director of the Bureau of Competition.

The FTC's announcement outlined three areas of focus: anti-competitive conduct, prospective mergers and consummated mergers, all of which already fall within the ambit of the FTC's enforcement activity. The FTC has long investigated conduct by technology companies, like Google and Facebook, and it has challenged a number of tech mergers, including the merger between CDK and Auto/Mate, two providers of dealer management systems for car dealerships, and that of DraftKings and FanDuel, the two largest daily fantasy sports websites. Even mergers that the FTC has declined to challenge have been subjected to significant scrutiny, such as the online real estate database Zillow's acquisition of Trulia. Further, federal enforcers, including the FTC, challenged three consummated tech mergers in 2017, demonstrating that the practice is far from novel.

Yet populist pressure continues to encourage the FTC to enforce the antitrust laws more aggressively, particularly against the major tech companies. Both sides of the political aisle have called for increased scrutiny of the activities of so-called "Big Tech." Commentators have criticized U.S. antitrust policy as being overly permissive, attributing the "bigness" of tech companies to merger enforcement that has been too lax and drawing attention to so-called "killer acquisitions," in which companies acquire nascent companies, purportedly with the goal of heading off a challenge to their market dominance. In March 2019, presidential candidate Sen. Elizabeth Warren called for breaking up a number of the big tech companies, including unwinding consummated mergers to "promote healthy competition in the market."

Concerns over privacy have likewise led to calls to apply antitrust principles more rigorously to regulate the use of customer data. Recent split decisions among the commissioners along political party lines in Staples/Essendant and Fresenius/NxStage — where Commissioners Rohit Chopra and Rebecca Kelly Slaughter issued strongly worded dissenting statements — suggest that the Democratic minority will echo these calls for more vigorous enforcement and closely scrutinize the task force's progress.

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There are potential lessons to be learned about what could come next for the Tech Task Force from the 2002 creation of the FTC's Merger Litigation Task Force by Simons, who at the time was the director of the Bureau of Competition. Simons created the task force after the FTC struggled to win a series of challenges to hospital mergers. At the time, the FTC employed retrospective studies to assess its approach to such mergers and used the knowledge gained to hone its method for challenging such mergers. The Merger Litigation Task Force thus "reinvigorated the [FTC]'s hospital merger review program, and also sharpened the agency's focus on merger enforcement in retail industries, particularly regarding matters involving food, beverages, and supermarkets," according to the February 26, 2019, FTC press release announcing the Tech Task Force. Perhaps most interestingly, the Merger Litigation Task Force also led to the creation of Mergers IV, the FTC division dedicated to mergers involving hospitals, consumer goods, supermarkets, funeral homes and retail outlets. While the FTC has made no such announcement, the creation of a permanent technology division is a real possibility.

Whether the Tech Task Force leads enforcers to impose materially stricter standards on tech companies is far less clear. The FTC shares oversight responsibility with the Antitrust Division of the Department of Justice (DOJ), including in matters involving technology and the digital economy, making the DOJ's approach to tech equally important. DOJ Principal Deputy Assistant Attorney General Andrew C. Finch has said that he is "skeptical of the drastic calls for breaking up firms or turning tech platforms into regulated utilities," and the DOJ is unlikely to cede tech enforcement to the FTC. Both agencies share jurisdiction over conduct in many tech industries, but the clearance agreement between them allows one agency to take the lead on an investigation. Accordingly, the FTC could be more aggressive on those matters over which it takes the lead. Regardless of what cases the federal agencies would like to bring, they still have to apply the existing legal standards and convince a court to rule in their favor.

Nevertheless, the task force likely will have an impact in the years to come, as its creation increases the scrutiny of how technology companies conduct their business and negotiate deals, and may result in the FTC staff learning new and more focused methods for evaluating the potential competitive effects of tech conduct and mergers.