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It's Not Just the "Tech Giants" Who Should Be Paying Attention to the FTC's New Technology Task Force

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News of the Federal Trade Commission's (FTC) plans to create a new task force focused on monitoring competition in U.S. technology markets is making headlines for the suggestion that the agency might seek to unwind already approved mergers involving the nation's so-called "tech giants." But the FTC's initiative is likely to have at least as significant an impact on mid-size and start-up technology companies.

The FTC's Bureau of Competition announced that the new task force, which will consist of approximately 17 staff attorneys from within the Bureau's various divisions, will be dedicated to investigating potential anticompetitive conduct in technology markets, as well as working with other FTC staff reviewing both prospective and completed technology mergers. The FTC noted that the task force will include staff with expertise in online advertising, social networking, mobile operating systems and apps, and platform business markets.

While some consumer advocates hailed the announcement as a first step toward a move to undo prior acquisitions that have created such technology behemoths as Facebook and Alphabet, the agency's creation of the task force through the reassignment of current FTC attorneys, rather than the hiring of additional staff, has led to skepticism that the announcement may be more show than substance. It remains to be seen whether the new task force reflects a significant change in course for the FTC as it combines its resources to reinvigorate and sharpen its focus on U.S. technology markets, or merely an effort to deflect criticism from some circles, as well as pressure from members of Congress, over the agency's response to technology industry consolidation.

Either way, it seems unlikely that the FTC—an agency that has traditionally taken a cautious and incremental approach to antitrust enforcement—is about to embark on a campaign to break up leading technology companies through the systematic reversal of years-old mergers. The announcement does suggest, however, that the FTC is seeking to become more nimble in administering an antitrust enforcement regime that has struggled to keep up with industry innovation. The result could be an increase in challenges to technology mergers as well as in investigations of potentially anticompetitive conduct.

That said, all technology sector businesses, not just the tech giants, should take a close look at their practices to ensure compliance with the FTC's expanded efforts. Based on the FTC's history (and that of the Department of Justice (DOJ), with which the FTC shares antitrust enforcement authority) in enforcing competition in technology markets, the new task force's areas of focus could include:

Non-horizontal mergers and acquisitions. While the vast majority of merger enforcement activity focuses on “horizontal” mergers between direct competitors, substantial consolidation in the technology industry has occurred through “vertical” mergers between companies at different levels of the supply chain, between companies offering complementary products, or between potential competitors. While the FTC may be reluctant to seek to unwind transactions that it might now regret having allowed to proceed, it may be more willing to challenge non-horizontal deals in an effort to contain industry consolidation.

The DOJ’s recent attempt to block AT&T’s acquisition of Time Warner—the first time the DOJ has challenged a “vertical” merger through litigation in nearly 40 years—though unsuccessful, may prove helpful to the FTC in this area. In holding that the DOJ failed to meet its evidentiary burden to show that the merger was likely to substantially lessen competition, the district court opinion included an elaborate analysis of the legal framework for a vertical merger case. That analytical framework went unchallenged on appeal, and undisturbed by the D.C. Circuit’s affirmance of the decision last week. The district court’s analysis could provide a valuable blueprint for subsequent non-horizontal merger cases with fact patterns more favorable to the government.

Collusive personnel practices. Following the settlement of private litigation against several major technology companies involving agreements not to hire each other’s employees, the FTC and DOJ issued antitrust guidance in 2016 warning against personnel-related agreements that violate the antitrust laws—particularly “no-poaching” and “wage-fixing” agreements. Both agencies have subsequently brought enforcement actions alleging such unlawful agreements by employers.

Single-firm conduct. Early antitrust enforcement in the technology sector focused on potentially monopolistic conduct, particularly where one company allegedly sought to exploit control over a key utility (such as the Windows operating system in the Microsoft litigation) to restrain competition in an adjacent market by selling the adjacent products as a package or by restricting competitors’ access to the utility. Such enforcement actions have proven to be an uphill battle, as courts have taken an increasingly narrow view of the antitrust theories permitting such challenges, and the agencies have been increasingly reluctant to bring them. One focus of the task force may be to revisit that reluctance.

In short, if the FTC is serious about a more rigorous approach to antitrust enforcement in the tech sector, its enforcement history suggests that it is more likely to police competition through stricter prospective merger review and through conduct enforcement than through retrospective attempts to re-structure existing markets. Such an approach could impact mid-size companies and start-ups at least as much as the tech giants. Careful review of acquisition strategies, as well as marketing strategies that seek to leverage unique technologies to expand into new markets, will take on heightened importance.

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