

FTC's New Tech Task Force Is A Warning To Industry

By **Matthew Perlman**

Law360 (March 26, 2019, 8:44 PM EDT) -- The Federal Trade Commission has launched a task force with more than a dozen attorneys to focus on conduct and mergers in the technology space, the latest in a series of actions amid growing concerns over competition in the industry, and experts say its work could have major implications for big and small companies alike.

The FTC launched its Technology Task Force in late February, assigning a team of 17 attorneys from its Competition Bureau to monitor technology markets, hunt for anti-competitive conduct in the space, and review both completed and pending mergers for competitive issues. Experts say it's the latest sign from the commission that the sector is an area of concern and could face more aggressive action from the agency.

Chairman Joseph Simons and his fellow new commissioners have shown an interest in the industry's competitive behavior and privacy practices since their confirmation hearings, and the agency kicked off a series of public hearings last year aimed at addressing the current state of competition and consumer protection enforcement in light of the increasing role that dominant technology platforms play in the economy.

Alexis J. Gilman, a partner with Crowell & Moring LLP and a former assistant director of the Mergers IV Division at the FTC, told Law360 that the new task force is a significant development considering that similar initiatives in the past have led to more enforcement. He also said Simons has a record of being an aggressive enforcer from his previous stint as head of the agency's Competition Bureau in the early 2000s.

"While I think it may be a while or be challenging for the technology task force to bring a case, I think it would be a mistake to underestimate its creation," Gilman said. "I don't think [Simons is] someone who's going to create a task force just as window dressing to pretend he's doing something. I think this is a serious effort."

As a sign of how seriously the agency is scrutinizing the sector, its consumer protection bureau on Tuesday also issued orders to several broadband providers — including AT&T, Comcast and Verizon — seeking information about how they collect and use consumer data.

The agency said that effort is aimed at understanding the privacy practices of internet providers as they evolve into "vertically integrated platforms that also provide advertising-supported content."

What's Behind the Moves?

The FTC has attorneys who are dedicated to other industries, such as health care and oil and gas, which allows for the development of expertise and experience in sectors that are important to the economy and consumers. Assigning this amount of resources can be seen as a recognition of the industry's increased prominence and need for oversight.

"It shows that the tech industry now is getting that type of treatment," said Maureen Ohlhausen, a partner with Baker Botts LLP who served as acting chairman of the FTC before Simons came on board. "Those are areas that are big parts of the economy, and they can have big competitive impacts."

The technology industry also covers a wide range of companies, with narrow sectors that differ in many ways. Andrew I. Gavil, senior of counsel with Crowell & Moring LLP, who formerly served as director of the FTC's office of policy planning, told Law360 the task force could be a recognition of the industry's increasing complexity.

"Building tech capacity is a recognition that technology is not a single market, it's not a single business model, it is not a single company," Gavil said. "It's been described as the fourth industrial revolution. It's a phenomenon affecting the economy in many different ways."

Additionally, there has been a global push to scrutinize tech companies more closely in recent years. Europe has taken a particularly strong posture, namely with its multibillion-dollar fines against Google for various practices enforcers allege are anti-competitive, including favoring its own comparison shopping service over others.

What's Been Done?

The FTC has made major forays into the tech space before, successfully blocking mergers such as last year's deal between CDK Global and Auto/Mate, which both supply software to auto dealerships, and the 2017 merger of daily fantasy sports operators DraftKings and FanDuel. The agency is also currently taking on chipmaker Qualcomm Inc. over its licensing practices for cellular patents in a monopolization case.

But the new dedicated team will allow for a more focused approach in the space, said former FTC Chairman William E. Kovacic, who's now a professor at George Washington University Law School. It also gives industry participants a place to air concerns about the market.

"Both internally and externally, it has the effect of increasing the likelihood that we will see more investigations and more cases in this area," Kovacic said.

The task force is led by Patricia Galvan, the current deputy assistant director of the Mergers III Division, and Krisha Cerilli, the current counsel to the director. Kovacic said having them head up the effort is another sign of the seriousness the agency is approaching the issue with.

In announcing the new task force, the FTC pointed to one launched in 2002 to address a string of losses on merger challenges that it said helped reinvigorate the hospital merger reviews and focus its enforcement in other industries. It also signaled that it would take a look at consummated mergers to see if they've had an impact on competition.

Additionally, in the early 2000s, it successfully unwound Chicago Bridge and Iron Co.'s acquisition of a rival engineering and construction company. And in 2017, the FTC sued to undo Otto Bock HealthCare GmbH's acquisition of Freedom Innovations over concerns about the market for prosthetic knees that use microprocessors.

While unwinding a deal can be complicated, Kovacic said the FTC has plenty of experience and that the task force could be used to analyze what went right in those cases. It also has other tools at its disposal, including the possibility for conduct remedies.

"You've got a big toolkit, but part of the process of formulating a strategy is you take careful account for what you've done in the past, you look at the tools you've got, and in a more focused way, you think about how to use them," Kovacic said.

What's Next?

During a congressional hearing shortly after the task force was announced, former FTC Chairman Jon Leibowitz, now a partner with Davis Polk & Wardwell LLP, suggested it could be used to initiate an industrywide study under the agency's so-called 6(b) authority. Section 6(b) of the FTC Act allows the agency to compel companies to provide answers to questions even when there's no specific case or investigation involving the parties.

"It's not part of an investigation into one company because they did something bad," Ohlhausen said, elaborating on Leibowitz's suggestion. "It's more a tool the agency uses to do more of an industry deep-dive."

While Ohlhausen was at the commission, the FTC did a study of patent assertion entities — which are sometimes called "patent trolls" — that led to legislative recommendations. She said that study helped enforcers better understand the industry and to conclude that some of the groups were largely licensing valid patents.

But Ohlhausen also warned that conducting such studies is a very detailed process, and that it could require approval from the Office of Management and Budget. She also noted that 6(b) studies themselves are not an "end run around bringing enforcement investigations."

"It could uncover behavior that then could trigger an enforcement action," Ohlhausen said. "But 6(b) is not a substitute."

Kovacic pointed to enforcement in the pharmaceutical industry as an area that benefited from a 6(b) study. In the early 2000s, the FTC used the authority to force companies to turn over data and information it used to better understand the harm that results from the generic version of a drug being delayed.

The result was an FTC crackdown on so-called pay-for-delay settlements being used by branded drug companies to delay the introduction of lower-priced generics.

"It informed the enforcement process and it changed the law," he said.

The agency invoked its 6(b) authority with the orders issued to broadband companies on Tuesday, which seek information about how they collect information from users, how the data is used and whether it's

shared with third parties. The orders also ask for information about what the companies disclose to consumers about their data collection practices.

--Editing by Philip Shea and Orlando Lorenzo.

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