

In FTC Probe Of Small (Big) Tech Deals, Knowledge Is Power

By Bryan Koenig

Law360 (February 19, 2020, 9:15 PM EST) -- Google, Amazon, Apple, Facebook and Microsoft face the arduous task of compiling and turning over years of internal material related to “hundreds” of small deals they carried out in the past decade — transactions so small they could be carried out without triggering antitrust scrutiny.

Amid increasing public scrutiny of major technology companies and online platforms, the Federal Trade Commission voted last week 5-0 to invoke its unique research authority under Section 6(b) of the FTC Act, which obligates targets to comply with the agency’s requests for internal documents.

Its focus: to gain insight into the “hundreds” of acquisitions the five companies are believed to have made over the last decade that were below merger reporting requirements based on deal size. Although the study possibly could set the stage for enforcement action against any transactions deemed “problematic,” the FTC is entitled to the information simply because it wants to understand the impact small deals have made on the tech sector.

“These orders are not being issued for law enforcement purposes. This is a research and policy project. The responses to these orders will help us better understand whether the federal antitrust agencies are getting adequate notice of potentially anti-competitive transactions,” FTC Chairman Joe Simons told reporters when announcing the probe Feb. 11.

At the same time, Simons said that all options are on the table in the event that the FTC turns up anti-competitive transactions, with the agency casting a wide net to include minority investments and certain licensing deals, not just straight acquisitions.

“We’re also asking questions about rights to both somebody else’s shares or the rights to appoint somebody to the board of another entity,” Bilal Sayyed, the head of the FTC’s Office of Policy Planning, who’s leading the 6(b) probe, told reporters.

The FTC’s announcement that it would consider “whether large tech companies are making potentially anti-competitive acquisitions of nascent or potential competitors” is aggressive, but does not necessarily mean the FTC will ultimately pursue an enforcement case, according to David Reichenberg, an antitrust litigator with Cozen O’Connor.

“Any potential litigant, including the government, does not want to foreclose its options. So they are

using the tools that are available to determine whether there's [anything] there in the first instance," he said.

Simons and experts alike say the probe could yield a variety of outcomes outside of any merger challenges and the research authority is not meant to drive specific enforcement actions. At minimum, the FTC is expected to issue a report on its findings and perhaps policy proposals, as it often does at the close of 6(b) probes, and experts say the results could be a boon to understanding transactions that have traditionally flown under the radar established by the Hart-Scott-Rodino Act.

Nevertheless, Stephen Calkins, a former FTC general counsel who is now a professor at Wayne State University Law School and a fellow at University College Dublin, sees the probe as a "dramatic step" by the agency. He said the FTC is employing a "unique tool" that the U.S. Department of Justice does not have, "to address the wide-spread perception that the HSR process failed with respect to Big Tech acquisitions."

"There has been extensive discussions about 'killer' acquisitions of nascent competitors. Now, the FTC will collect information that will allow it to form a view about just what has been happening, and why, and with what effect," Calkins said in an email. "The agency has made clear that it will use what it learns both to improve, if necessary, the HSR process, and to address problematic behavior."

Like the current one, past 6(b) studies have often aligned with the public zeitgeist and political interest. The last high-profile antitrust probe, for instance, was launched against patent assertion entities, sometimes referred to as "patent trolls," which have been blamed for the proliferation of patent litigation and driving up the cost of technology products.

"The purpose is to discover information that is otherwise not discovered by the public yet, in a way that aids public discourse about a topic," said Reichenberg.

When the FTC looked at PAEs in a study launched in 2013, the probe didn't yield any major enforcement actions. Instead, the end result was a detailed 2016 report on how PAEs operate, along with a series of proposed reforms to patent litigation.

In that same time period, though, the agency struck a 2014 deal with a PAE accused of making empty threats of patent infringement litigation based on false representations that other technology users had already agreed to licensing terms. That settlement, under the FTC's consumer protection authority rather than its antitrust mandate, made no mention of the 6(b) probe. Even if the two were connected, the FTC cannot use anything gleaned from 6(b) demands directly toward an enforcement action.

Sayed acknowledged the separation between 6(b) research and enforcement last week.

"[We're] going to be very careful about treating what we're doing as distinct from the investigations being undertaken by the rest of the agency. We don't want it perceived that we're using this unique authority to surreptitiously conduct investigations," Sayed said. "So, we're going to be very careful to maintain that line until or unless we identify something that indicates a law of violation."

But 6(b) probes can still indirectly spark enforcement.

Lisa Kimmel, a senior counsel in Crowell & Moring LLP's antitrust group and an FTC alum, said "it would be misleading to the recipients" for the 6(b) probe to morph directly into an enforcement action. At the

same time, when it comes to the separation of enforcement and research, “it’s not a wall,” Kimmel said.

Charlotte Slaiman, an FTC alum and current policy counsel with advocacy group Public Knowledge who supports the study, argued even the smallest companies can have “an important competitive impact” on the giants. She noted that even though the Office of Policy Planning is not a litigation office, the two units do sometimes swap staffers.

“They’re separate divisions but not as separate as you might think,” she said.

Short of enforcement, the probe could yield actions more extensive than a report on the impact of small deals.

Simons told reporters that the FTC could conclude it needs more extensive reporting requirements than those imposed by the HSR.

“And that could involve either an amendment to the HSR rules or we could issue further 6(b) orders that require specific reporting from specific companies. Those are two potential options,” Simons said.

The idea 6(b) powers could be used to mandate prospective reporting obligations on small deals appears to be fairly novel. Several experts expressed surprise that it’s a possibility.

One critic of the probe blasted the idea of prospective 6(b) orders only on select companies as “discriminatory.” Robert D. Atkinson, president of the think tank Information Technology and Innovation Foundation, further argued that if it takes action against the deals being studied the FTC could risk creating a chilling effect on startups who often see acquisition by the major technology firms as an important incentive and exit strategy.

Additionally, Atkinson argued that the FTC appears to be on “a fishing expedition” that’s burdensome to the companies and the agency. The probe appears to assume anti-competitive effects from deals he asserted have had overwhelmingly positive effects on consumers, which he said should be the ultimate benchmark of any scrutiny.

An FTC spokesperson told Law360 that it would be “premature” to consider how the terms of such an order would work until the FTC has had a chance to weigh the results of the data due to be filed by April 20, according to a sample order published by the agency.

Criticizing the FTC for launching a fishing expedition misses the point, according to former FTC Chairman William E. Kovacic, now a professor at George Washington University Law School. The 6(b) authority, Kovacic noted, traces back to the original 1914 law creating the FTC, which contains language authorizing it to require companies to cough up information on an “annual or special” basis.

“Congress gave us a fishing license,” Kovacic said, although he cautioned that any fishing must be “disciplined.”

Under 6(b), Kovacic noted, the FTC is able to launch probes “without having a specific case in mind.”

Nor would any challenge of the study have much of a shot, according to experts.

“The power is fairly well set out in the FTC Act,” said Constantine Cannon LLP partner Henry C. Su,

another FTC alum. “It’s been used enough times over the years over the life of the commission that I don’t think ... there’s any doubt that the FTC has the power to do this.”

Kovacic additionally said the technology companies are in a “vulnerable position” where they would be unlikely to get much outside support for a challenge and could risk making “an already agitated Congress” even more “belligerent” against them.

“The companies are not dealing from a position of political strength right now,” Kovacic said.

Microsoft was the only one of the five companies to respond to requests for comment from Law360. The company said only that it looked forward to working with the FTC to answer the agency’s questions.

In addition to its implications for technology companies, Calkins said that the study could prove important for the FTC’s role in antitrust law. Noting that the commission has come under criticism for not being hard enough on technology companies, Calkins said the commission and the Justice Department are both trying to plant their flag on big tech enforcement.

“DOJ has been demanding increasing turf and this step makes clear the the FTC is not conceding any,” Calkins said.

--Editing by Emily Kokoll.