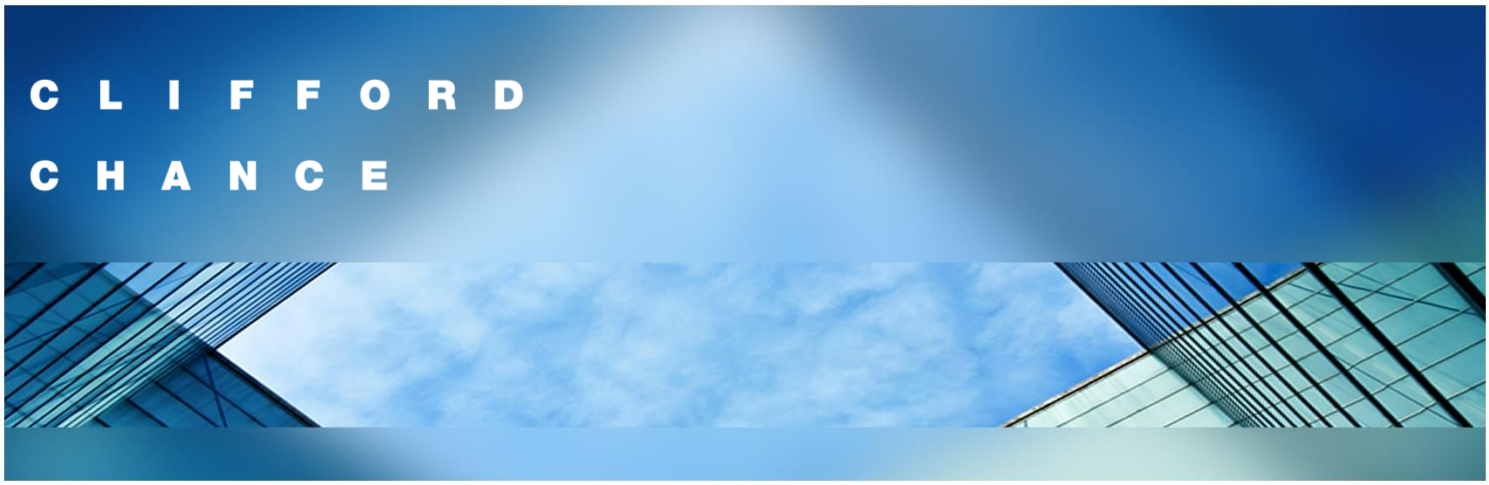

FTC TASK FORCE TO SCRUTINIZE COMPETITION IN TECH INDUSTRY

On February 26, 2019, the US Federal Trade Commission's ("FTC") Bureau of Competition—the arm through which the FTC enforces US federal antitrust laws—announced the creation of a new Technology Task Force charged with "enhanc[ing] the Bureau's focus on technology-related sectors of the economy."[1] The Task Force's mandate is broad: it is empowered to participate in the review of prospective—and importantly, *completed*—mergers in the technology sector (among the hottest markets for business combinations in recent years), as well as to pursue investigative and enforcement actions concerning potential exclusionary conduct in technology markets.

Background

The launching of the Technology Task Force is the latest sign that the FTC is serious about participating in the growing worldwide debate over the role competition policy plays in policing the markets for rapidly-evolving technologies. As public awareness grows of online platforms' efforts to gather and combine users' personal data, antitrust enforcers, scholars, and advocates have raised questions such as (1) whether leading technology platforms have—on their own, or through combinations—grown too large to police; (2) the competitive effects of large-scale collection of consumer data; and (3) whether antitrust laws enacted in the Industrial Age can protect consumers in a digital marketplace.[2]

In June 2018, one month into his tenure, FTC Chairman Joseph Simons announced a series of technology-related public hearings, entitled "Competition and Consumer Protection in the 21st Century," covering topics such as digital marketplaces, so-called "Big Data," and prevailing standards for analyzing competitive harm in the US. In announcing the Technology Task Force last week, Simons called those hearings—which remain ongoing—a "crucial step" in

---

1 Press Release, Federal Trade Commission, *FTC's Bureau Competition Launches Task Force to Monitor Technology Markets* (Feb. 26, 2019), https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology.

2 *See, e.g.*, D. Bruce Hoffman, Acting Dir., Bureau of Competition, U.S. Fed. Trade Comm'n, *Competition Policy and the Tech Industry – What's at stake?*, Remarks at Computer & Communications Industry Association (April 12, 2018), *available at* https://www.ftc.gov/system/files/documents/public_statements/1375444/ccia_speech_final_april30.pdf.

"deepen[ing]" the Bureau's understanding of technology markets and described the Technology Task Force as the "next step" in that effort.

The FTC says the Task Force will "centraliz[e]" the agency's "expertise and attention" in the technology markets. It will consist of 17 staff attorneys who will focus exclusively on technology issues, some of whom have expertise in markets such as: (1) online advertising, (2) social networking, (3) mobile operating systems, (4) apps, and (5) "platform businesses." The Task Force will also include a so-called "Technology Fellow," whom the Bureau says will support the Task Force by providing "important technical assistance and expertise." The group will report directly to Bureau of Competition leadership, including Director Bruce Hoffman.

Anticompetitive Conduct in the Technology Markets

The Task Force's review of potential "anticompetitive conduct" in the technology markets is sure to assess how large online platforms acquire or maintain dominant positions in their markets and whether prevailing US antitrust doctrine suffices to protect competition in those markets. The FTC is empowered by Section 5 of the FTC Act to pursue, among other things, "unfair methods of competition."[3] That standard reaches actual or attempted "monopolization" prohibited by Sherman Act Section 2, which forbids firms from acquiring or maintaining a dominant position in a defined market by unreasonably excluding competitors from that market.[4]

US antitrust law does not, however, punish dominant firms that charge high prices or achieve their position thanks to a "superior product, business acumen, or historical accident."[5] Instead, US antitrust law has coalesced around the "consumer welfare standard": that because consumers can benefit from the efficiencies generated by free-market competition, authorities should not act to protect inefficient competitors from a more efficient dominant player, but should instead condemn practices as unlawful only when they unreasonably harm the competitive *process* in ways detrimental to consumers.

The Technology Task Force can be expected to grapple with questions including how to apply the consumer welfare standard to allegations of anticompetitive conduct in the technology markets. As recognized by participants in the FTC's 21st Century Hearings, unresolved issues include questions about assessing market definition, market power, and price impact in "multisided" digital platforms, such as those for online advertising, in which technology companies bring together users of their products with advertisers targeting those users. In these settings, the analysis of competitive effect is sometimes further complicated because the platform depends on a so-called "zero-price strategy," providing one side of a platform to consumers for free (such as online searching or email), while profitably redeploying those consumers as input to another, related business centered around that free product (such as online advertising on the free email product). Indeed, senior antitrust officials have conceded that attitudes remain in flux over whether such products are truly "free" to users, or whether they "pay" in

3 15 U.S.C. § 45.
4 15 U.S.C. § 2.
5 *Verizon Comm's, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004).

exchange for access to a "free" platform by giving over their own private data to the platform operator.[6]

These questions are more than theoretical. Of course, the consumer welfare standard cautions a restrained approach by US antitrust enforcers, reflecting their long-held recognition that overapplication of the antitrust laws could produce the same inefficiencies it seeks to prevent. But as non-US competition authorities continue to impose large penalties on technology firms for excluding competitors (for example, the European Commission's recent and well-publicized actions against Google), US competition authorities are being pressured to assess these questions in the back yard of many technology firms. A primary role of the Task Force may be to ensure that these questions, when put to the FTC, are considered by a cross-section of FTC subject matter experts, rather than by an enforcement team assigned to a particular technology case.

Fresh Scrutiny for Technology Mergers

Another notable feature of the Technology Task Force is its planned review of merger activity in the technology markets, including assessment of the competitive effects of *consummated* mergers. The FTC and US Department of Justice, Antitrust Division, have authority to scrutinize—and seek to enjoin—business combinations under Section 7 of the Clayton Act, which prohibits mergers and acquisitions that could "substantially . . . lessen competition or tend to create a monopoly."[7] To facilitate review of such transactions before they are closed, Congress enacted the Hart-Scott-Rodino Act of 1976 (the "HSR Act")[8] The HSR Act requires parties to transactions exceeding statutorily-defined dollar thresholds to submit pre-closing notifications to both the FTC and DOJ, and to abide by a mandatory waiting period before consummating the proposed transaction. But while the US antitrust authorities have always had the authority under Section 7 to conduct such "ex post" merger reviews, those reviews are rare in traditional markets. Most such challenges occur in the context of deals that, when entered, fell below the HSR Act's valuation thresholds for pre-merger notification to authorities.

Transactions in the technology industry may be ripe for "ex post" review, because deals in which technology giants acquire small, nascent rivals often fall below the HSR Act's pre-merger notice thresholds. Regulators have raised concerns that, through these "smaller" transactions, large technology companies are able to eliminate nascent competitors before those technology companies are able to fully develop and truly present a competitive threat to that acquirer. Although the DOJ and FTC already watch for potentially anticompetitive transactions that do not require pre-merger notification filings, the Technology Task Force may provide the FTC with an additional resource to specifically look out for smaller technology deals that may raise nascent competition concerns.

The FTC may also be concerned that the FTC and DOJ's pre-closing merger reviews are unable to adequately assess the potential competitive consequences of a transaction in a rapidly-evolving dynamic market, in which the government—

---

6 Makan Delrahim, Asst. Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Don't Stop Believin': Antitrust Enforcement in the Digital Era*, Remarks at Booth School of Business, Univ. of Chicago (April 19, 2018), *available at* https://www.justice.gov/opa/speech/file/1054766/download.

7 15 U.S.C. § 18.

8 15 U.S.C. § 18a.

and indeed, even the parties to the deal—may have difficulty identifying the ultimate business model of the combined entity. Director Hoffman confirmed that the Technology Task Force's planned retrospective reviews would "test theories about a merger's effects presented by parties" before a deal had been closed, and that this revived analysis may assist the Task Force in assessing the potential competitive effects of *future* technology deals. Importantly, however, Director Hoffman would not foreclose the possibility that the FTC could use the Task Force's work to unwind consummated deals that, in retrospect, have proven anticompetitive. Rather, Director Hoffman was clear to say that in reviewing closed transactions, the FTC retains "the full panoply of remedies available to [it]." These remedies could include imposing post-closing behavioral remedies on the now-combined entity or even unwinding consummated mergers.

What to Expect from the Technology Task Force?

The eventual impact of the Task Force remains uncertain. Director Hoffman has emphasized that the Task Force has not yet adopted particular theories of anticompetitive behavior in the technology sector. In the FTC's telling, the Task Force remains, for now, a blank slate.

One thing seems clear, however: parties should *not* expect the FTC to rush into US federal court in the near future to raise aggressive, untested arguments challenging single-firm conduct or merger activity in the technology sector. Rather, the FTC is assessing cautiously the role of competition enforcement in a changing economy. The announcement of the Task Force, coming on the heels of the 21st Century Hearings, underscores that deliberative posture. While the advent of the Task Force could prompt a fresh approach to competition policy as to one or more issues in the technology sector, it could just as easily support a decision by the FTC to preserve the status quo on those issues. FTC officials have said the agency presently has no plan for the Task Force to "reconsider [antitrust] rules or guidelines as they relate to the technology sector."[9] Instead, any change in enforcement priorities within the FTC is likely to be incremental and measured. Thus, for example, while some, such as Commissioner Christine Wilson, have pressed for the FTC to abandon its "consumer welfare" standard in favor of a "total welfare" standard that would consider the impact of a proposed merger on broader constituencies, it is not apparent that the Task Force is empowered to endorse such an approach (or apply it to backward-looking merger reviews).

The near term presents more practical uncertainties to parties going before the FTC. For example, the FTC has not explained how the Task Force will interact with existing divisions of the Bureau of Competition which would normally have primary investigative authority over a given competition investigation or merger review. It remains unclear whether, in matters involving "technology," the Task Force will take the investigative lead or play a supporting role to the existing divisions. If the Task Force is to lead, the FTC has not published any guidance describing how such "technology" matters will be identified: for instance, must they feature (and if so, to what degree) one of the five markets identified in the FTC's announcement, such as online advertising? Conversely, if the Task Force is to play a supporting role to the existing merger and conduct divisions, this could

[9] Wall St. Journal, *FTC's New Task Force Could Be Trouble for Big Tech* (Feb. 28, 2019), https://www.wsj.com/articles/ftcs-new-task-force-could-be-trouble-for-big-tech-11551357000.

have practical consequences to merger reviews, most notably, the prospect for delay, perhaps in the form of additional meetings and requests for materials from the Task Force.

The review of transactions in the technology markets is further complicated by the interplay between the FTC and the DOJ Antitrust Division, which divvy their oversight of proposed mergers based on their experience in a given industry. For example, as reflected in a Memorandum of Agreement between the two agencies, DOJ has typically led review of transactions involving computer software, media and entertainment, and telecommunications and services, while the FTC has reviewed transactions involving computer hardware.[10] And the FTC has long exercised pre-clearance merger review over high-technology deals, such as Google's 2007 acquisition of DoubleClick. As technologies continues to evolve and converge, it will become less clear which agency should have authority to review a proposed transaction, potentially slowing the merger clearance process as both agencies work to resolve a turf dispute. To account for these risks of delay, parties to planned mergers with a "technology" component may wish to consider including in their purchase agreements extended "longstop" dates to account for a longer review period within the FTC.

While it remains to be seen how the Task Force influences the FTC's approach to assessing competition in the technology markets, participants in those markets should continue to carefully assess their internal antitrust compliance functions and watch for further developments from the FTC.

[10] U.S. Department of Justice & Federal Trade Commission, Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations (Mar. 5, 2002), *available at* https://www.justice.gov/sites/default/files/atr/legacy/2007/07/17/10170.pdf.

CONTACTS

Timothy Cornell
Partner

T + 1 202 912 5220
E timothy.cornell
@cliffordchance.com

Steve Nickelsburg
Partner

T +1 202 912 5108
E steve.nickelsburg
@cliffordchance.com

Robert Houck
Partner

T +1 212 878 3224
E robert.houck
@cliffordchance.com

John Friel
Associate

T +1 212 878 3386
E john.friel
@cliffordchance.com

Brian Concklin
Associate

T +1 202 912 5060
E brian.concklin
@cliffordchance.com

Abigail Cessna
Associate

T +1 202 912 5452
E abigail.cessna
@cliffordchance.com

Philip Lockwood
Associate

T +1 202 912 5417
E philip.lockwood
@cliffordchance.com

www.cliffordchance.com

Clifford Chance, 31 West 52nd Street, New York, NY 10019-6131, USA

Clifford Chance US LLP

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Moscow • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.