FTC Task Force May Lead To Wider Enforcement In Tech

By **Raymond Jacobsen, Jonathan Ende and Sara Fernandez** (March 6, 2019)

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Last week, the Federal Trade Commission announced the creation of a "Technology Task Force" dedicated to monitoring competition in U.S. technology markets, investigating potential anti-competitive conduct in those markets, and taking enforcement actions when warranted.[1]

The announcement marks the latest in a series of developments that demonstrate the U.S. federal antitrust enforcement agencies' growing preoccupation with technology markets. Since the fall of last year, the FTC has been holding a series of hearings on "Competition and Consumer Protection in the 21st Century," which have focused in large part on technology markets and the unique problems they present for antitrust enforcement. Makan Delrahim, assistant attorney general of the Antitrust Division at the U.S. Department of Justice, has addressed technology markets on several occasions, including a Feb. 11 speech dedicated to platform and zero-price markets.[2]

During the hearings, the FTC frequently raised the question of whether it was necessary to create a task force specialized in high-technology markets. Many panelists argued that in an increasingly digitalized economy, a specialized group well-versed in the specifics of these markets would enhance antitrust enforcement. The FTC seems to have agreed with this view, as the creation of the Technology Task Force demonstrates.

The FTC noted that the Technology Task Force will be modeled on the FTC's 2002 Merger Litigation Task Force, which was the launching point for the FTC's reinforced hospital merger review program. As with hospital mergers then, the creation of the Technology Task Force may result in wider enforcement in technology markets now. Considering this, it is helpful to have an overview of how the FTC and the Antitrust Division of the Department of Justice have assessed these markets in recent years.

This article explores the main lessons that have emerged from these mergers, using individual cases to illustrate. The article will also examine some of the unusual features of high-technology mergers and how the agencies have approached those issues.

Step 1: Define the Market

As with all merger reviews, in reviewing high-technology mergers, the agencies first define the relevant product and geographic markets. However, high-technology markets often have complex structures, making product market definition more challenging.

The 2015 Zillow/Trulia merger, between the two largest consumer-facing web portals for home buying, illustrates several of the features that can complicate market definition in high-technology mergers. First, as is common in high-technology markets, the merging companies operated two-sided platforms: on one side, the merging companies served consumers looking to buy homes, and on the other side, the companies offered a platform for real estate agents advertising to home buyers.[3] Second, the market that the merging companies operated in was a rapidly evolving market. The commission acknowledged that because the competitive dynamics of the industry were rapidly changing, it might find a narrower product market were it to examine the same product in the future.[4]

Step 2: Consider Theories of Harm

Once they have defined the relevant product market, the agencies have considered different theories of harm. In reviewing high-technology mergers, the agencies have examined many of the same theories of harm that they have for other industries. In particular, they have assessed the ability of the buyer to (1) eliminate actual competition, (2) eliminate potential competition, (3) exploit the seller to engage in bundling or tying of products/services, and (4) foreclose access to the seller´s services to the benefit of the buyer´s own products.

In 2007, the FTC explored the first three theories of harm in the same case, Google Inc.'s acquisition of ad server DoubleClick.[5]

First, the FTC examined whether the acquisition threatened to eliminate actual competition between the two companies. The agency concluded that the companies were not direct competitors in any relevant market, and therefore that the merger would not eliminate actual competition.[6]

Second, the FTC examined whether the merger would eliminate any potential competition in DoubleClick's ad serving market because Google had explored entering the market. The agency concluded that competition in the ad serving market was sufficiently competitive without Google, and that Google's entry would not have a significant pro-competitive effect.[7]

Third, the FTC examined whether Google would be able to exploit DoubleClick to engage in bundling or tying in the ad intermediation market, in which Google participated. The FTC concluded that DoubleClick's market share was not high enough to allow Google to leverage it into greater market share in the ad intermediation market.[8]

The ability of the buyer to foreclose access to services or products was assessed by the DOJ in Google's acquisition of ITA Software in 2011. ITA was the provider of the leading airfare pricing and shopping system, and Google intended to use ITA's software to vertically integrate flight search tools into its search engine. The DOJ alleged that, post-merger, Google could foreclose access to ITA's system to other flight search companies to gain an advantage for Google's own flight-search product.[9]

Factoring in High-Technology Market Features

In assessing the potential competitive harm of a merger, the agencies have considered some factors common in high-technology markets, namely (1) the dynamism of the market, (2) the existence of multiple sides of the market, and (3) whether aggregation of data after the merger is likely to harm competition. Other factors common to high-technology mergers that are integral to competitive effects analysis include the importance of innovation, the stage of development of the market, the presence of meaningful substitutes, and the likelihood of entry by competitors.

The dynamic nature of high-technology markets has been a factor in several merger reviews. The FTC acknowledged that the competitive dynamics of the market were rapidly changing in the Zillow/Trulia deal, and that those evolving dynamics might warrant a different market definition in the future.[10] In 2013, the DOJ challenged the acquisition of PowerReviews by Bazaarvoice in a case that went to trial. Both companies created product ratings and reviews platforms used by retailers to publish consumer reviews on websites. The court hearing the trial observed that "[b]ecause the social commerce industry is at an early stage of development, rapidly evolving, fragmented, and subject to potential disruption by technological innovations, the future composition of the industry as a whole is unpredictable."[11]

In 2010, the FTC approved Google's acquisition of AdMob, uniting the leading competitors in the mobile ad network market.[12] The FTC's approval was influenced in part by its conclusion that the underlying mobile operating system market was in flux and likely to draw new entrants.[13] Finally, the FTC noted in its statement clearing the Google/DoubleClick deal that the "dynamic nature" of the online advertising space made predicting the future of the industry a difficult task.[14]

As explained above, the FTC analyzed a two-sided market in the Zillow/Trulia merger. The FTC defined the market as a two-sided market for "consumer-facing web portals for home buying that sell advertising space to real estate agents seeking to attract customers buying and selling homes."[15] The FTC analyzed the competitive effects of the merger on both sides of the market, concluding that neither side would face significant competitive harm. On the real-estate-agent side, the FTC observed that an increase in advertising prices by the combined Zillow/Trulia entity would not be sustainable because real estate agents have many avenues for advertising.[16] On the consumer-facing side, the FTC concluded that the combined entity would continue to face sufficient competition from competing portals and have strong incentive to innovate and compete on quality.[17]

Mergers between high-technology companies may result in the aggregation of data on customers, vendors and other parties. The aggregation of these data may give the merged entity a competitive advantage in advertising and other areas. Though the European Commission has emphasized analysis of data aggregation in merger reviews, notably in the 2018 Apple/Shazam deal, the agencies typically have not. Nonetheless, the FTC did consider the competitive effect of data aggregation in the Google/DoubleClick deal. The FTC assessed whether the combination of two entities with large data collection systems would give Google a competitive advantage in the ad intermediation market.[18] The FTC concluded that it would not.[19]

Step 3: Propose Remedies

When the agencies have concluded that a high-technology merger would have substantial anti-competitive effects, they have intervened. The agencies have often required a divestiture or other structural remedy, but have accepted a mix of structural and behavioral remedies or even pure behavioral remedies in certain cases. For instance, after successfully challenging Bazaarvoice's acquisition of PowerReviews, the DOJ required Bazaarvoice to fully divest all of PowerReviews's assets.[20]

The FTC required a structural remedy in the 2013 Nielsen/Arbitron merger, as well. Nielsen and Arbitron were the two most likely entrants into the potential market for syndicated cross-platform audience measurement services, services that would allow media companies to measure audience size.[21] The FTC required Nielsen to sell and license, for at least eight years, certain assets related to Arbitron's cross-platform audience measurement services to an FTC-approved buyer.[22] The order also contained terms designed to ensure the success of the acquirer as a viable competitor, such as requiring that Nielsen provide technical assistance to the acquirer and remove barriers that might otherwise keep the acquirer from hiring key Arbitron employees.[23]

To clear Google's acquisition of ITA Software, the DOJ required only behavioral remedies. The DOJ mandated that Google continue research and development investment in ITA's software and license the software to other companies.[24] The DOJ also required Google to implement a firewall to prevent itself from seeing sensitive information from competitors, develop a formal reporting mechanism for complaints, and submit to government monitoring.[25]

Conclusion

The mergers that the agencies have reviewed offer several lessons on the agencies' approaches to high-technology merger review. Fundamentally, the agencies have used the same methods to review high-technology mergers that they have used for mergers in other industries. Within this traditional framework, the agencies have considered some of the defining features of high-technology markets, such as dynamism, multisidedness, and data aggregation.

The creation of the Technology Task Force strongly suggests wider FTC enforcement in technology markets. Though it is difficult to predict how the new task force may analyze these mergers going forward, the FTC has shown confidence in their traditional tools, and has offered little reason to believe it will dramatically shift their approach. A new approach, if adopted, may not be significantly different but may focus more on the distinguishing features of technology markets and embrace novel theories of harm, such as ones tied to data aggregation.

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[1] Press Release, Fed. Trade Comm'n, FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets (Feb. 26, 2019) (on file with author), available at https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology.

[2] Makan Delrahim, Assistant Attorney Gen. of Antitrust Div. of Dep't of Justice, 'I'm Free': Platforms and Antitrust Enforcement in the Zero-Price Economy (Feb. 11, 2019), available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-silicon-flatirons.

[3] See U.S. Fed. Trade Comm'n, Statement of Commissioner Ohlhausen, Commissioner Wright, and Commissioner McSweeny Concerning Zillow, Inc,/Trulia, Inc. (Feb. 19, 2015), available at https://www.ftc.gov/system/files/documents/public_statements/625671/150219zillowmko-jdw-tmstmt.pdf [hereinafter Zillow/Trulia Statement].

[4] Id. at n. 1.

[5] See U.S. Fed. Trade Comm'n, Statement of Federal Trade Commission Concerning Google/DoubleClick, FTC File No. 071-0170 (Dec. 20, 2017), available at https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf [hereinafter Google/DoubleClick Statement].

[6] Id. at 7-8.

[7] Id. at 8-9.

[8] Id. at 9.

[9] Press Release, U.S. Dep't of Justice, Justice Department Requires Google Inc. To Develop and License Travel Software in Order to Proceed with Its Acquisition of ITA Software Inc. (Apr. 8, 2011), available at https://www.justice.gov/opa/pr/justice-department-requires-google-inc-develop-and-license-travel-software-order-proceed-its[hereinafter Google/ITA Press Release].

[10] Zillow/Trulia Statement, supra note 2, at n. 1.

[11] United States v. Bazaarvoice, Inc., No. 13-cv-00133-WHO, 2014 U.S. Dist. LEXIS 3284, at *34 (N.D. Cal. Jan. 8, 2014).

[12] U.S. Fed. Trade Comm'n, Statement of the Commission Concerning Google/AdMob, FTC File No. 101-0031 (May 21, 2010), available at https://www.ftc.gov/sites/default/files/documents/closing_letters/google-inc./admob-inc/100521google-admobstmt.pdf.

[13] Id.

[14] Google/DoubleClick statement, supra note 4, at 13.

[15] Zillow/Trulia Statement, supra note 2, at 1.

[16] See id.

[17] See id.

[18] Google/DoubleClick Statement, supra note 4, at 12-13.

[19] Id.

[20] Press Release, U.S. Dep't of Justice, Justice Department and Bazaarvoice Inc. Agree on Remedy to Address Bazaarvoice's Illegal Acquisition of PowerReviews (Apr. 24, 2014), available at https://www.justice.gov/opa/pr/justice-department-and-bazaarvoice-inc-agree-remedy-address-bazaarvoice-s-illegal-acquisition.

[21] U.S. Fed. Trade Comm'n, Statement of the Federal Trade Commission In the Matter of Nielsen Holdings N.V. and Arbitron Inc., FTC File No. 131-0058 1 (Sept. 20, 2013), available at https://www.ftc.gov/system/files/documents/cases/140228nielsenholdingstatement.pdf.

[22] Press Release, U.S. Fed. Trade Comm'n, FTC Puts Conditions on Nielsen's Proposed $1.26 Billion Acquisition of Arbitron (Sept. 20, 2013), available

at https://www.ftc.gov/news-events/press-releases/2013/09/ftc-puts-conditions-nielsens-proposed-126-billion-acquisition.

[23] Id.

[24] Google/ITA Press Release, supra note 8.

[25] Id. The DOJ has since announced a strong preference against behavioral remedies and might not accept such a remedy package today.