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Antitrust Enforcers Need Merger Presumptions to Reduce Market Power?

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Under the Clayton Act (15 U.S. Code § 18), certain business acquisitions are prohibited where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Long-standing jurisprudence has established that merger challenges require, at the outset, a prima facie showing of the likelihood of a substantial lessoning of competition that would result from the merger or acquisition. Such prima facie showing typically takes the form of claims and evidence related to market shares above a certain level, but can take other forms.

Proposals afoot would turn things around and provide instead that certain acquisitions by "dominant platforms" (undefined in the Report) might be *presumed* anticompetitive – unless the merging parties affirmatively establish that the transaction was "necessary for serving the public interest and that similar benefits could not be achieved through internal growth and expansion."[1] Other proposals, such as the Bust up Big Tech Act, would prohibit certain acquisitions outright.

The proposals arise out of the belief that certain platform firms built lines of business through acquisitions over a 20-year period from 2000 through 2019, while others used acquisitions to neutralize competitive threats – and that antitrust enforcers stood aside while it was taking place.

According to the Digital Markets Report (*id*. 388) issued in 2020, "[t]he Subcommittee's investigation revealed that several … acquisitions enabled the dominant platforms to block emerging rivals and undermine competition." Examples pointed to include Google's acquisition of Fitbit and Looker, Amazon's acquisition of Zoox, and Facebook's acquisition of Giphy. According to the Report, such acquisitions entrench existing positions, eliminate nascent competitors, strengthen market power, and can foreclose entry.

The strong criticism that "[i]t is unclear whether the antitrust agencies are presently equipped to block anticompetitive mergers in digital markets" went on to charge that "significant missteps and repeat enforcement failures" took place. The Report includes a recommendation that Congress consider *shifting presumptions* for acquisitions by the "dominant platforms" such that acquisitions by such dominant platforms would be presumed anticompetitive unless shown to be necessary for serving the public interest, and that similar benefits could not be achieved through internal growth and expansion. The recommendation also suggests that such review would take place separate from the standard Hart-Scott-Rodino Act ("HSR") review process. Dominant platforms would be required to report all transactions, without the benefit of HSR deadlines, and would be required to make their affirmative case for approval.

The Report also accuses the antitrust agencies of consistently failing to "block monopolists from establishing or maintaining their dominance through anticompetitive conduct or acquisitions," and of "institutional failure … whereby the antitrust agencies have constrained their own authorities and advanced narrow readings of the law." Importantly though, the Report also charges that the FTC "has been reluctant to use the expansive set of tools with which Congress provided it, neglecting to fulfill its broad legislative mandate."

Subsequent to the Report, the Bust up Big Tech Act, introduced April 19, 2021, goes a step further and provides a blanket prohibition on certain covered platforms ($1.5 billion annual revenue; and 30 million U.S. users or 300 million worldwide users). Among other things, the proposed legislation would prohibit covered platforms from selling on their own platform, would prohibit acquisitions of companies that sell on the platform, and would prohibit the provision by covered platforms of online hosting services or back-end online services to third parties. The proposed legislation would also provide a private right of action with respect to enforcement of the prohibitions.

The findings and proposals present the question of whether legislative changes and changes to long-standing jurisprudence are the answer to the alleged market harms, or whether the "expansive set of tools" already in place, including the broad reach of Section 5 of the FTC Act, are effective law enforcement measures. If so, the harms perceived by the Report's authors may be the result of institutional and law enforcement failure (or policy determinations), and not the ineffectiveness of the legislative tools available to enforcers.

They also raise the question of what role serving the public interest should have in antitrust jurisprudence. While generalized public interest standards are sometimes given weight by competition authorities in South Africa, China, and Canada, it is not the standard by which mergers are reviewed in the Unites States. Incorporating such a change into law for only certain classes or categories of businesses would have far reaching implications, including advancing favored treatment for certain firms.

Inherent in the recommendations is also the proposition that building lines of business through acquisition or using acquisitions to remain competitive represent a market failure. Expansion through acquisition is a cornerstone of the American economy dating back at least to the 19th century, and the very premise of its utility and lawfulness is rooted in the Clayton Acts' prohibition only on mergers that substantially lessen competition, or that tend to create a monopoly. And of course such transactions are already prohibited by law. According to published reports, the antitrust agencies brought action against hundreds of transactions in the period in question in the Report. So the issue may not be that the tools do not permit enforcers to enforce, but rather that enforcers and legislators do not always agree on enforcement doctrine and priorities, which is not necessarily justification for a change in the law.

While a shift in presumptions may not be necessary for effective antitrust enforcement, this and a number of related proposals are beginning to take shape and gain traction. Real change to antitrust law and enforcement should be expected – and likely will mean more antitrust scrutiny not just for the largest tech firms but across the board. We'll continue the discussion in subsequent blogs addressing proposals that include forced structural separation, prohibitions on self-preferencing, forced interoperability and open access, safe harbors for news publishers to collectively negotiate with dominant online platforms, and reigning in perceived abuses of superior bargaining power. Stay tuned.

[1] https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaig
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