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INSIGHT: Even Without Marty McFly Powers, Antitrust Regulators Generally Get It Right

By Kristen Limarzi

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Antitrust agencies don't have a back to the future time machine like Marty McFly's, but they generally do a good job assessing the future impact of global mergers, writes Gibson Dunn's Kristen Limarzi. She looks at the Facebook-Instagram and Google-Waze cases and says the remedy of unwinding long-consummated mergers should be reserved for cases where the loss of competition is clear, and not based on speculative counterfactuals.

More than 100 global competition authorities met Dec. 5-6, 2019, in Paris for the OECD Global Forum on Competition. On the agenda: How best to assess likely future effects of mergers in rapidly changing industries.

This discussion comes when many are criticizing the U.S. antitrust agencies for failing to block acquisitions of nascent competitors by large tech platforms. Critics charge, for example, that Instagram was poised to become a major social media platform when Facebook acquired it in 2012, and that Waze threatened to rival GoogleMaps in navigation when Google acquired it in 2013.

These critics focus on the eventual success of Instagram and Waze as proof that the acquisitions eliminated strong potential competitors. But, as Marty McFly learned in the 1985 sci-fi classic *Back to the Future*, altering the past changes the future.

The question for antitrust authorities is not whether an independent Instagram or Waze would provide more competition today, but whether there would have been more competition absent the mergers. The antitrust agencies don't have a time machine like Marty's to test the counterfactual. But they do have skilled investigators and economists, and there's no evidence they are systematically waving through anticompetitive mergers.

Potential Competition Doctrine

Merger review under the Clayton Act is always a forward-looking exercise. The statute prohibits mergers the effect of which "may be substantially to lessen competition." As the U.S. Supreme Court observed, the very wording "requires a prognosis of the probable future effects of the merger." Sometimes merging firms already compete, and sometimes there's only the potential of future competition. While the latter cases are often called "potential competition" cases, the essential analysis is the same: Will there be substantially less competition in the foreseeable future *with* the merger than *without* it?

This predictive exercise is doubtless harder when the merging parties aren't already competing. Without historical evidence of competition, enforcers must look for other facts establishing a "reasonable probability" that the acquired firm will likely enter the market in the near future and impact competition.

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Speculation isn't enough; the acquired firm must be on a well-defined path toward entry. And where successful entry depends upon factors like innovation, investment, know-how, and marketing, it can be difficult to establish that "reasonable probability." Moreover, to block a transaction based on potential entry, enforcers must prove that eliminating the entrant is likely to harm competition. That's tough in an already-competitive market, or one where several firms are equally well poised to enter.

Looking Back: Facebook-Instagram and Google-Waze

Looking at Instagram today, it is easy to think it was Facebook's greatest natural competitor in 2012. But all the features that make Instagram a strong social network—photo tagging, video sharing, direct messaging, Instagram Stories, live video streaming—were developed after the Facebook acquisition.

To block the merger, the FTC would have had to prove that, among all the photo sharing apps available at the time, an independent Instagram was likely to develop into a dynamic social networking platform. And they looked—conducting a months-long Second Request investigation. But in 2012, Instagram had fewer than a dozen employees, no revenue of any kind, and no plans to make money.

After the merger, Instagram had an infusion of cash and the know-how needed to monetize its platform through advertising. In the following years, Instagram's user-base grew enormously, but so did Facebook's—suggesting consumers benefited from the merger.

Likewise, Waze has grown its user base and improved its map accuracy and coverage since Google acquired it. In turn, Waze has helped Google Maps expand its use of localized advertising. To block the merger, the FTC would have had to prove not only that Waze was uniquely well positioned to improve its turn-by-turn navigation without access to Google's expansive coverage maps, but also that this loss of competition outweighed the benefits of improvements in both products.

The U.K.'s Office of Fair Trading found insufficient evidence that an independent Waze would prove a disruptive force. The FTC, which closed its investigation without comment, presumably found the same.

Revisiting Consummated Mergers

A merger's lawfulness is judged at the time it is consummated. Post-consummation evidence can be relevant to proving whether a merger was lawful at the time, but a merger doesn't become unlawful based on later developments. As former FTC Chairman Robert Pitofsky once wrote, holding companies liable for unpredictable events would be "anathema to American antitrust."

The agencies can and do challenge consummated mergers—even long-consummated ones. But their burden is to show that the basis for challenge was reasonably foreseeable at the time of consummation. The further from consummation, the more difficult it is to show that competitive harms resulted from the merger, rather than other marketplace dynamics.

Plus, enforcers and courts are rightly cautious about unwinding long-consummated deals. Structural measures like divestitures are usually best, but FTC studies show they often fail to restore lost competition when assets were commingled post-merger. And when the late divestiture eliminates scale and efficiencies that have benefited consumers, a remedy that also fails to restore competition is plainly not in the public interest.

Given these risks, the remedy of unwinding long-consummated mergers should be reserved for cases where the loss of competition is clear, and not based on speculative counterfactuals.

Rather, the agencies should examine carefully claims of lost potential competition at the time of consummation—and they do. The FTC evidently found insufficient basis to block Facebook-Instagram or Google-Waze, but both the FTC and the DOJ routinely challenge mergers because they will eliminate future competition, including Nielsen-Arbitron, CDK Global-Auto/Mate, and Sabre-Farelogix.

In their submission to the OECD Forum, the DOJ and

FTC reaffirmed that it is "particularly important to evaluate the effects of a merger on future competition," including when "a firm buys a company that is planning to, or would likely have the ability and incentive to, enter its market to compete directly."

That evaluation is being done by some of the most sophisticated antitrust investigators around—attorneys and economists at the DOJ and FTC. And the record shows they generally get it right.

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Although Gibson Dunn has represented Facebook in some matters, it did not represent Facebook in review of the Instagram transaction.