Oldie-but-Baddie: The Revival of an Antitrust ‘Efficiencies Offense’?
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Recent antitrust forays on both sides of the Atlantic have unfortunate echoes of the oldie-but-baddie “efficiencies offense” that once plagued American and European merger analysis (and, more broadly, reflected a “big is bad” theory of antitrust). After a very short overview of the history of merger efficiencies analysis under American and European competition law, we briefly examine two current enforcement matters “on both sides of the pond” that impliedly give rise to such a concern. Those cases may regrettably foreshadow a move by enforcers to downplay the importance of efficiencies, if not openly reject them.

Background: The Grudging Acceptance of Merger Efficiencies

Not long ago, economically literate antitrust teachers in the United States enjoyed poking fun at such benighted 1960s Supreme Court decisions as *Procter & Gamble* (following in the wake of *Brown Shoe* and*Philadelphia National Bank*). Those holdings—which not only rejected efficiencies justifications for mergers, but indeed “treated efficiencies more as an offense”—seemed a thing of the past, put to rest by the rise of an economic approach to antitrust. Several early European Commission merger-control decisions also arguably embraced an “efficiencies offense.”

Starting in the 1980s, the promulgation of increasingly economically sophisticated merger guidelines in the United States led to the acceptance of efficiencies (albeit less then perfectly) as an important aspect of integrated merger analysis. Several practitioners have claimed, nevertheless, that “efficiencies are seldom credited and almost never influence the outcome of mergers that are otherwise deemed anticompetitive.” Commissioner Christine Wilson has argued that the Federal Trade Commission (FTC) and U.S. Justice Department (DOJ) still have work to do in “establish[ing] clear and reasonable expectations for what types of efficiency analysis will and will not pass muster.”

In its first few years of merger review, which was authorized in 1989, the European Commission was hostile to merger-efficiency arguments. In 2004, however, the EC promulgated horizontal merger guidelines that allow for the consideration of efficiencies, but only if three cumulative conditions (consumer benefit, merger specificity, and verifiability) are satisfied. A leading European competition practitioner has characterized several key European Commission merger decisions in the last decade as giving rather short shrift to efficiencies. In light of that observation, the practitioner has advocated that “the efficiency offence theory should, once again, be repudiated by the Commission, in order to avoid deterring notifying parties from bringing forward perfectly valid efficiency claims.”

In short, although the actual weight enforcers accord to efficiency claims is a matter of debate, efficiency justifications are cognizable, subject to constraints, as a matter of U.S. and European Union merger-enforcement policy. Whether that will remain the case is, unfortunately, uncertain, given DOJ and FTC plans to revise merger guidelines, as well as EU talk of convergence with U.S. competition law.

Two Enforcement Matters with 'Efficiencies Offense' Overtones

Two Facebook-related matters currently before competition enforcers—one in the United States and one in the United Kingdom—have implications for the possible revival of an antitrust "efficiencies offense" as a "respectable" element of antitrust policy. (I use the term Facebook to reference both the platform company and its corporate parent, Meta.)

FTC v. Facebook

The FTC's 2020 federal district court monopolization complaint against Facebook, still in the motion to dismiss the amended complaint phase (see here for an overview of the initial complaint and the judge's dismissal of it), rests substantially on claims that Facebook's acquisitions of Instagram and WhatsApp harmed competition. As Facebook points out in its recent reply brief supporting its motion to dismiss the FTC's amended complaint, Facebook appears to be touting merger-related *efficiencies* in critiquing those acquisitions. Specifically:

> [The amended complaint] depends on the allegation that Facebook's expansion of both Instagram and WhatsApp created a "protective 'moat'" that made it harder for rivals to compete *because* Facebook operated these services at "scale" and made them attractive to consumers post-acquisition. . . . The FTC does not allege facts that, left on their own, Instagram and WhatsApp would be less expensive (both are free; Facebook made WhatsApp free); or that output would have been greater (their dramatic expansion at "scale" is the linchpin of the FTC's "moat" theory); or that the products would be better in any specific way.

The FTC's concerns about a scale-based merger-related output expansion that benefited consumers and thereby allegedly enhanced Facebook's market position eerily echoes the commission's concerns in *Procter & Gamble* that merger-related cost-reducing joint efficiencies in advertising had an anticompetitive "entrenchment" effect. Both positions, in essence, characterize output-increasing efficiencies as harmful to competition: in other words, as "efficiencies offenses."

UK Competition and Markets Authority (CMA) v. Facebook

The CMA announced Dec. 1 that it had decided to block retrospectively Facebook's 2020 acquisition of Giphy, which is "a company that provides social media and messaging platforms with animated GIF images that users can embed in posts and messages. . . .

These platforms license the use of Giphy for its users."

The CMA theorized that Facebook could harm competition by (1) restricting access to Giphy's digital libraries to Facebook's competitors; and (2) prevent Giphy from developing into a potential competitor to Facebook's display advertising business.

As a CapX analysis explains, the CMA's theory of harm to competition, based on theoretical speculation, is problematic. First, a behavioral remedy short of divestiture, such as requiring Facebook to maintain open access to its gif libraries, would deal with the threat of restricted access. Indeed, Facebook promised at the time of the acquisition that Giphy would maintain its library and make it widely available. Second, "loss of a single, relatively small, potential competitor out of many cannot be counted as a significant loss for competition, since so many other potential and actual competitors remain." Third, given the purely theoretical and questionable danger to future competition, the CMA "has blocked this deal on relatively speculative potential competition grounds."

Apart from the weakness of the CMA's case for harm to competition, the CMA appears to ignore a substantial potential dynamic integrative efficiency flowing from Facebook's acquisition of Giphy. As David Teece explains:

> Facebook's acquisition of Giphy maintained Giphy's assets and furthered its innovation in Facebook's ecosystem, strengthening that ecosystem in competition with others; and via Giphy's APIs, strengthening the ecosystems of other service providers as well.

There is no evidence that CMA seriously took account of this integrative efficiency, which benefits consumers by offering them a richer experience from Facebook and its subsidiary Instagram, and which spurs competing ecosystems to enhance their offerings to consumers as well. This is a failure to properly account for an efficiency. Moreover, to the extent that the CMA viewed these integrative benefits as somehow anticompetitive (to the extent that it enhanced Facebook's competitive position) the improvement of Facebook's ecosystem could have been deemed a type of "efficiencies offense."

Are the Facebook Cases Merely Random Straws in the Wind?

It might appear at first blush to be reading too much into the apparent slighting of efficiencies in the two current Facebook cases. Nevertheless, recent policy rhetoric suggests that economic efficiencies arguments (whose status was tenuous at enforcement agencies to begin with) may actually be viewed as "offensive" by the new breed of enforcers.

In her Sept. 22 policy statement on "Vision and Priorities for the FTC," Chair Lina Khan advocated focusing on the possible competitive harm flowing from actions of "gatekeepers and dominant middlemen," and from "one-sided [vertical] contract provisions" that are "imposed by dominant firms." No suggestion can be found in the statement that such vertical relationships often confer substantial benefits on consumers. This hints at a new campaign by the FTC against vertical restraints (as opposed to an emphasis on clearly welfare-inimical conduct) that could discourage a wide range of efficiency-producing contracts.

Chair Khan also sponsored the FTC's July 2021 rescission of its Section 5 Policy Statement on Unfair Methods of Competition, which had emphasized the primacy of consumer welfare as the guiding principle underlying FTC antitrust enforcement. A willingness to set aside (or place a lower priority on) consumer welfare considerations suggests a readiness to ignore efficiency justifications that benefit consumers.

Even more troubling, a direct attack on the consideration of efficiencies is found in the statement accompanying the FTC's September 2021 withdrawal of the 2020 Vertical Merger Guidelines:

> The statement by the FTC majority . . . notes that the 2020 Vertical Merger Guidelines had improperly contravened the Clayton Act's language with its approach to efficiencies, which are not recognized by the statute as a defense to an unlawful merger. The majority statement explains that the guidelines adopted a particularly flawed economic theory regarding purported pro-competitive benefits of mergers, despite having no basis of support in the law or market reality.

Also noteworthy is Khan's seeming interest (found in her writings here, here, and here) in reviving Robinson-Patman Act enforcement. What's worse, President Joe Biden's July 2021 Executive Order on Competition explicitly endorses FTC investigation of "retailers' practices on the conditions of competition in the food industries, *including any practices that may violate [the] Robinson-Patman Act*" (emphasis added). Those troubling statements from the administration ignore the widespread scholarly disdain for Robinson-Patman, which is almost unanimously viewed as an attack on efficiencies in distribution. For example, in recommending the act's repeal in 2007, the congressionally established Antitrust Modernization Commission stressed that the act "protects competitors against competition and punishes the very price discounting and innovation and distribution methods that the antitrust otherwise encourage."

Finally, newly confirmed Assistant Attorney General for Antitrust Jonathan Kanter (who is widely known as a Big Tech critic) has expressed his concerns about the consumer welfare standard and the emphasis on economics in antitrust analysis. Such concerns also suggest, at least by implication, that the Antitrust Division under Kanter's leadership may manifest a heightened skepticism toward efficiencies justifications.

Conclusion

Recent straws in the wind suggest that an anti-efficiencies hay pile is in the works. Although antitrust agencies have not yet officially rejected the consideration of efficiencies, nor endorsed an "efficiencies offense," the signs are troubling. Newly minted agency leaders' skepticism toward antitrust economics, combined with their de-emphasis of the consumer welfare standard and efficiencies (at least in the merger context), suggest that even strongly grounded efficiency explanations may be summarily rejected at the agency level. In foreign jurisdictions, where efficiencies are even less well-established, and enforcement based on mere theory (as opposed to empiricism) is more widely accepted, the outlook for efficiencies stories appears to be no better.

One powerful factor, however, should continue to constrain the anti-efficiencies movement, at least in the United States: the federal courts. As demonstrated most recently in the 9th U.S. Circuit Court of Appeals' *FTC v. Qualcomm* decision, American courts remain committed to insisting on empirical support for theories of harm and on seriously considering business justifications for allegedly suspect contractual provisions. (The role of foreign courts in curbing prosecutorial excesses not grounded in economics, and in weighing efficiencies, depends upon the jurisdiction, but in general such courts are far less of a constraint on enforcers than American tribunals.)

While the DOJ and FTC (and, perhaps to a lesser extent, foreign enforcers) will have to keep the judiciary in mind in deciding to bring enforcement actions, the denigration of efficiencies by the agencies still will have an unfortunate demonstration effect on the private sector. Given the cost (both in resources and in reputational capital) associated with antitrust investigations, and the inevitable discounting for the risk of projects caught up in such inquiries, a publicly proclaimed anti-efficiencies enforcement philosophy will do damage. On the margin, it will lead businesses to introduce fewer efficiency-seeking improvements that could be (wrongly) characterized as "strengthening" or "entrenching" market dominance. Such business decisions, in turn, will be welfare-inimical; they will deny consumers the benefit of efficiencies-driven product and service enhancements, and slow the rate of business innovation.

As such, it is to be hoped that, upon further reflection, U.S. and foreign competition enforcers will see the light and publicly proclaim that they will fully weigh efficiencies in analyzing business conduct. The "efficiencies offense" was a lousy tune. That "oldie-but-baddie" should not be replayed.

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