Insight

Mergers and Acquisitions Amid Calls for Increasing Antitrust Enforcement

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Executive Summary

- Regulators and policymakers in not only the United States but also in other jurisdictions such as the European Union are increasingly scrutinizing mergers and acquisitions.
- While maintaining appropriate market competition is a major priority for regulators, antitrust enforcers must at the same time recognize the benefits—in addition to the costs—of mergers and acquisitions, such as providing consumers access to new features or products or improving competition and innovation.
- Vertical mergers, which occur when two companies participate in different but complementary parts of an industry, typically do not substantially impact competition or the choice consumers have in a market.
- Because of the multi-national nature of many companies engaged in such transactions, the decision of a jurisdiction outside of the United States, such as an EU regulator, can impact U.S. consumers.

Introduction

Competition regulators in the United States and around the world are increasingly scrutinizing mergers and acquisitions in the technology industry as well as more generally. Some U.S. policymakers, including Senators Amy Klobuchar and Josh Hawley, have suggested more scrutiny and even presumptive bans on certain types of mergers. While regulators have an important role in protecting the public from damaging mergers, it is important that their analysis of mergers and acquisitions be focused on stopping those that would harm consumers rather than deterring those that are likely to provide a net benefit. To this end, regulators both domestically and internationally must have a sense of the different kinds of mergers as well as the potential benefits of mergers on top of their dangers.

Scrutiny of Mergers and Acquisitions by Antitrust Enforcers

It comes as no surprise that some mergers and acquisitions receive additional regulatory scrutiny. The appropriate scrutiny of mergers has been debated since the beginnings of antitrust enforcement. While the Sherman Antitrust Act of 1890 addressed many concerns about monopolies and anticompetitive behavior, it largely failed to address the impact of mergers and acquisitions on competition. In the Clayton Antitrust Act of 1914, this oversight was clarified by tasking regulators with ensuring that mergers and acquisitions are not harming consumer welfare by substantially reducing competition. Recently, however, it appears that mergers—especially those involving the technology or media sectors—are receiving more regulatory scrutiny.

Typically, the type of mergers that merit significant scrutiny occur when two companies in the same or closely related industries are joined together, known as a horizonal merger. For example, regulators blocked the merger of Blockbuster Video and Hollywood Video out of concerns that it would substantially lessen competition in the

video rental market despite emerging technologies at the time such as Netflix and Redbox, which were disrupting the market in new ways.

By law, some mergers require additional scrutiny before the transaction can occur. For example, under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, the Federal Trade Commission (FTC) and the Department of Justice (DoJ) must conduct preliminary review of large transactions to determine if they raise concerns that should be further investigated. This review applies to transactions that are valued at more than $92 million.

While antitrust enforcement of mergers that would result in harmful monopolies is crucial to a well-functioning market, the presumption that concentration or "bigness" is inherently bad is misplaced.

Vertical Mergers

As mentioned above, the mergers that more commonly receive increased scrutiny are "horizontal mergers," but the general rise in scrutiny may also lead to "vertical mergers" receiving increased regulatory attention. Vertical mergers occur when two companies that participate in different but complementary parts of an industry merge into one company. For example, an online marketplace merging with a payment processor, as eBay and PayPal did in 2002 before later splitting again, is a vertical merger.

Vertical mergers are extremely unlikely to lessen competition since they do not impact the number of players in a market, so it is unusual for this type of mergers to receive serious regulatory pushback. In some cases, there may be a dispute over whether a merger is appropriately considered a vertical or horizontal merger. In other cases, there may be concerns that a merger could negatively impact competition by preventing other competitors from having access to a necessary supplier or access to the industry's customer base. In many cases, these concerns are easily addressed in a way that allows the transaction to go forward.

Lately, given the heightened attention to mergers and acquisitions in certain industries, even vertical mergers and acquisitions are more intensely scrutinized. For example, the proposed acquisition of GRAIL by Illuminia has recently come under increased scrutiny in both the United States and the European Union (EU) despite being vertical in nature. The proposed merger would allow two health care companies to engage in different parts of testing that could lead to earlier cancer detection. Both the FTC and the European Union's (EU) European Commission regulators have sued to block the transaction, however. (In fact, the FTC recently announced it would withdraw its case pending the EU's decision on the matter.) Regulators are concerned that the acquisition could prevent others from having access to a critical technology for further health care innovation, but preventing this merger presumes a narrow view of the technological options. In the health care industry, vertical mergers are often important to research and development, and increasing scrutiny could deter transactions that would encourage rather than deter further innovation.

Many Mergers Are Beneficial to Consumers

The current U.S. antitrust standard presumes most mergers do not create harm and places the burden of proof on antitrust enforcers such as the FTC or DoJ to show that the merger would harm consumers rather than on the companies to show that it would not.

There are several ways mergers and acquisitions can benefit consumers. In some cases, the acquisition of a small company by a larger company can allow more customers to gain access to a product feature or idea. In other cases, a merger can allow two companies to better apply resources and talent to create more innovative

and competitive products within a market.

In many industries including pharmaceuticals and technology, mergers and acquisitions play a critical role in providing options for consumers and critical talent and intellectual property to the industry. Increased scrutiny or proposed changes to the standards could have a chilling effect either because of litigation or review or because the additional regulatory requirements raise the costs associated with a merger that make it less attractive to the parties. For example, Visa's proposed acquisition of FinTech company Plaid was called off after increasing regulatory intervention.

Recent regulatory tendencies seem to prioritize the potential harm of increased concentration in a market itself over expected harm to consumers. As a report by the Information Technology & Innovation Foundation's Joe Kennedy concludes, however, concerns about concentration directly impacting prices can be largely refuted.

Some mergers and acquisitions are harmful. But it is important not to presume all to be guilty lest antitrust enforcers prevent the good along with the bad.

The Global Antitrust Landscape

Increased antitrust enforcement and scrutiny is occurring not only in the United States, but in many other places around the world as well. Perhaps most notably, the EU has been increasingly focused on digital markets and antitrust enforcement targeting many American tech companies. The EU analyzes proposed mergers under a different standard than the United States, with EU competition authorities examining whether a merger would significantly impede competition rather than following the consumer welfare standard the way enforcers and courts in the United States do. This different standard can result in different outcomes, and the EU's heightened focus right now includes not only enforcement actions, but also proposed policies such as the Digital Markets Act.

Because many companies are multi-national, these actions an ocean away can also impact American consumers. As a result, decisions to deny mergers and acquisitions in one jurisdiction can result in consumers in another jurisdiction being denied the potential benefits of a merger.

Conclusion

Antitrust enforcers have the difficult task of applying the appropriate level of scrutiny to mergers and acquisitions in order to ensure a competitive market that benefits consumers. Increased scrutiny should be used in a principled way to stop mergers that are likely to be harmful to consumers and not simply to result in larger companies or more concentration. Recently, policy proposals and agency actions indicate a shift in the attitude toward mergers and acquisitions that may neglect to recognize the benefits that mergers can have for consumers.