Updates
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Consummated Tech Mergers: Will the Government Seek to Unscramble the Eggs?

There are increasing calls for the antitrust enforcement agencies to review the effects of past acquisitions in the tech sector. Senator Elizabeth Warren has pledged to appoint enforcers committed to reversing such mergers. Earlier this year, the Federal Trade Commission (FTC) launched a Technology Task Force to investigate certain consummated deals, which the agency declined to identify by name.

How significant is this threat? Is it easier, or harder, to prove the anticompetitive effects of a merger that was completed years ago?

It is not unusual for the U.S. Department of Justice (DOJ) or the FTC to challenge a consummated merger, and their track record is a good one when litigating against "done deals." Among others, in 2017, the FTC unwound the acquisition of a medical practice by St. Luke's Health System in Idaho, and, in 2014, the DOJ reversed the acquisition by Bazaarvoice of PowerReviews, a rival in the market for online reviews and ratings. In addition, both agencies have been able to completely or partially unwind consummated mergers by settling with defendants in several other cases.

But there is one striking difference between the consummated mergers reviewed by the agencies in the past and those likely being probed in the tech sector now. In virtually all the deals that the DOJ or FTC have investigated to date, the agency started its investigation shortly after the merger had closed. One exception was the FTC's challenge to Evanston Northwestern Healthcare Corporation's acquisition of Highland Park Hospital in suburban Chicago, which was challenged more than four years after it was consummated. In that case, the FTC proved that the merger was anticompetitive, but the FTC did not order divestiture because of the high cost of splitting apart hospitals that had been functioning as a merged entity for, by the time of the FTC's opinion, seven years. Instead, the FTC imposed behavioral remedies requiring the defendant to negotiate separate managed care contracts for the two hospitals.

This problem of the passage of time may be even bigger in the tech deals being investigated now. In the Evanston case, the FTC challenged a deal that was four years old. At least some of the tech deals rumored to be under investigation are far older than that.

In such rapidly changing industries, trying to unwind one of these mergers would raise several difficult questions. Have the relevant product markets changed in the years since these mergers were consummated? Were any changes in price, quality or other attributes such as consumer privacy the result of the merger, or were they caused by something else? Is it still desirable or even practicable to "unscramble the eggs" and divest what was acquired so many years ago?

At the recent FTC hearing on merger retrospectives, several academics and former agency officials discussed many of the challenges faced by the FTC when it tries to determine the competitive effects of consummated mergers, including those in the tech sector. These include (1) identifying causal links between any harms to consumers and the merger, especially when the merger occurred years before and there have been several intervening events in the market; (2) determining the effects of acquisitions of potential or nascent competitors, where the issue is whether the acquired company would have entered or expanded its presence in the market but for the transaction; and (3) assessing the competitive effects of consummated deals involving two-sided

platforms where the retail prices of services to consumers are zero (both before and after the merger).

Whether the DOJ or FTC challenges any of the consummated mergers in the tech sector remains to be seen. If they do, they will face many more obstacles than they have encountered in most of their challenges to "done deals" in the past.

Authors

Jon B. Jacobs

Partner
JBJacobs@perkinscoie.com 202.654.1758

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