CPI's North America Column Presents:

An Anticlimactic Ending in the "Roadmap for an Antitrust Case Against Facebook": *An Antitrust Enforcement Action Against Facebook's Long-Consummated Acquisitions Would be Unwise*

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The "Roadmap for an Antitrust Case Against Facebook" (the "Roadmap") purports to explain how publicly available materials, sourced primarily from an investigation conducted by the UK Competition and Markets Authority ("CMA"), "might support a finding of liability in a monopolization case [against Facebook] here in the US."[2] Although the Roadmap alleges a range of anticompetitive conduct by Facebook, one of its main allegations is that Facebook's acquisitions of what the authors describe as nascent or potential rivals — including Instagram and WhatsApp — had a causal connection to the acquisition or maintenance of monopoly power by Facebook. Similar charges were levied during a recent House Judiciary Antitrust Subcommittee hearing.

Although these allegations could theoretically raise Section 2 concerns, there are a number of common-sense reasons to think that such a claim would be speculative and difficult to prove, especially as the main predicates for this theory — the acquisitions of Instagram in 2012 and WhatsApp in 2014 — are well in the past. Given the consumer benefits from those transactions, and the procompetitive rationale for acquisitions of complementary products generally, a challenge to Facebook's long-consummated acquisitions would be unwise.

First, a plaintiff would struggle to make out a *prima facie* case on the basis of the conduct alleged in the Roadmap. A Section 2 plaintiff must show that the challenged conduct had some causal connection to the acquisition or maintenance of market power, that is, that the conduct resulted in a less-competitive future, with likely effects on price, output, or quality. Both Instagram and WhatsApp have grown since their acquisition by Facebook, which has itself seen strong growth over the relevant timeframes, and consumer surplus has been created in the process.[3] There is no reason to think that Instagram and WhatsApp would have been more successful but-for their acquisition, and reconstructing after many years what these two firms would have achieved but-for their acquisition by Facebook would be nearly impossible.[4] In fact, the CMA Final Report finds evidence "suggestive of Facebook's wider resources having contributed to Instagram's success."[5] Similarly, a retrospective study commissioned by the CMA found "reasons to believe that Instagram's growth has significantly benefitted from the integration with Facebook: Snapchat's case shows that transforming users' attention into advertising revenue is no easy task, and Instagram's success in this respect has likely benefitted from Facebook's guidance and expertise."[6] Conversely, it is by no means clear that Instagram and WhatsApp would have even survived, let alone thrived, absent their acquisition by Facebook.[7] And absent any reason to believe that Instagram and WhatsApp would have grown into even stronger platforms but-for the acquisitions, there is no reason to think that the real world is any worse off as a result of the acquisitions. This, on its own, would likely end a challenge to these acquisitions.

The pre-merger review that each of these transactions received illustrates the forensic and evidentiary differences that a retrospective challenge to these long-consummated transactions would face. The Federal Trade Commission closed its investigation of the Instagram transaction in 2012, which included a second request, by taking no action.[8] The UK Office of Fair Trading

("OFT"), which also closed its review of the Instagram transaction without taking action, issued a closing statement in 2012 that explained that "In the social networking space, the OFT has no reason to believe that Instagram would be uniquely placed to compete against Facebook, either as a potential social network or as a provider of advertising space."[9] Nor does the benefit of hindsight change the view. For example, in 2019, a retrospective study commissioned by the CMA found no clear way to determine whether Instagram would have struggled as a standalone competitor or, alternatively, developed into a close and capable competitor to Facebook, and that there were efficiencies from the transaction in either scenario.[10]

Similarly, the European Commission approved the WhatsApp transaction in 2014 without condition, finding that Facebook and WhatsApp were "if anything, distant competitors" in a social networking services market.[11] The FTC similarly reviewed and did not challenge the WhatsApp acquisition. Moreover, given that there is no monetization strategy for WhatsApp, the acquisition's causal connection to any form of consumer injury is especially attenuated.

Second, even if a *prima facie* case could be established, there are many procompetitive justifications for the acquisitions. In general, acquisitions of start-up companies can allow acquirers to effectively outsource early stage R&D, acquiring new technology only after competition between start-ups has revealed the best technology. Acquirers can also obtain access to top talent in acquisitions of promising start-ups. For start-ups, acquisitions can be an attractive exit strategy in lieu of a risky IPO, and the option to monetize investments in entrepreneurial activity and early-stage R&D may provide high-powered incentives to innovate. In digital markets with differentiated products and innovation-based competition, mergers can enhance incentives to invest in R&D as the merged entities share technological knowledge.[12] In fact, the 2019 retrospective commissioned by the CMA found evidence-based and merger-specific efficiencies from Facebook's acquisition of Instagram in the form of more effective targeted advertisements, which can benefit both users of social networks and advertisers.[13] The Roadmap authors acknowledge that more effective targeted advertisements benefit consumers.[14]

The purely speculative theory of harm in any challenge to Facebook's long-consummated acquisitions, the demonstrable and substantial consumer surplus that accompanied those acquisitions in the real world, and the procompetitive justifications for these and similar transactions, together strongly suggest that an antitrust challenge to these acquisitions risks tampering with an engine of innovation that has developed market-leading companies in the United States. In particular, it would be perverse to focus enforcement efforts on the transactions that were successful in delivering benefits to consumers, chilling the incentive of acquirers to invest in output-enhancing post-merger integration lest they find themselves defending an antitrust action based on those very investments.

Proponents of an antitrust challenge to these acquisitions after all these years make a number of arguments to avoid this simple logic. Here are some of those points, drawn from the Roadmap and other contemporary materials, and presented in a conversational format.

Q. Regardless of the post-acquisition success of Instagram and WhatsApp as part of Facebook, can't we assume that consumers would have benefitted from these firms staying independent and competing with Facebook, regardless of whether these firms thrived or failed?[15]

A. Not unless we are willing to assume that these firms would have developed from complements into uniquely close substitutes for Facebook's social network. Note that if we make this assumption we should also be willing for the sake of intellectual consistency to regard highly differentiated competitors of Facebook today such as Pinterest or Snapchat as potentially strong competitors of Facebook tomorrow, calling into question the degree or durability of market power that Facebook enjoyed at the time of those transactions and today. Perhaps more importantly, and even if we make these assumptions, this argument simply assumes away of all of the demonstrated, measurable consumer welfare benefits that accompanied Facebook's acquisitions of Instagram and WhatsApp, benefits that are manifest from their impressive post-acquisition growth and could well have outweighed any short-run innovation and quality competition.[16] The plaintiff in this scenario would be required to prove that two birds in the bush are worth more than one in the hand. Absent a presumption that the acquisition of a nascent competitor by a firm with market power harms competition regardless of the demonstrated track record of post-acquisition success realized by the acquired firm, a presumption that appears unwarranted, a plaintiff would struggle to establish a *prima facie* case of harm on these facts.

Q. But what about that plaintiff-friendly causation standard in *United States v. Microsoft*? Wouldn't that standard relieve, in whole or in part, the plaintiff's burden to show that the world would be better off if the acquisitions of Instagram and Facebook had not occurred?

A. Not at all. *Microsoft* stands for the proposition that causation can be inferred from exclusionary conduct when that conduct likely caused anticompetitive effects, "reasonably appear[s] capable of making a significant contribution to . . . maintaining monopoly power" and has no legitimate business justification.[17] *Microsoft* would not authorize a presumption of causation in a challenge to acquisitions of (at most) nascent competitors that had merger-specific efficiencies.[18]

Q. Should we be concerned that Facebook's acquisitions eliminated competition with Instagram and WhatsApp?

A. All horizontal mergers eliminate a rival, and some vertical mergers have the potential to do the same, and yet the vast majority of transactions raise no significant antitrust concerns. Whether analyzed under Section 7's standard of a substantial reduction in competition or as monopolization under Section 2, the antitrust question turns on the closeness of competition between the parties before the merger, the competitive constraints that remain post-merger and on merger-specific efficiencies. Given the range of competitors Facebook faced at the time of the transactions and today, and the consumer surplus associated with the transactions, challenges to these transactions would likely fail and should probably not be brought in the first place.

In summary, while the acquisition of nascent competitive threats is potentially actionable conduct under Section 2, the case against Facebook's acquisitions of Instagram and WhatsApp appears unwarranted in the context of the clear consumer benefits from those acquisitions, not to mention legitimate interests in repose from litigating the merits of transactions examined and cleared by relevant enforcement agencies long ago. Nor is there any obvious reason to believe that the federal antitrust enforcement agencies are less than diligent in addressing acquisitions of nascent competitors when they have reason to believe that those acquisitions are anticompetitive under existing law, as shown by the recent activity of the agencies in this area.[19] The acquisitions of Instagram and WhatsApp, however, do not fit that description.

[1] Chris Renner is a partner at Davis Wright Tremaine LLP. The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm or its clients.

[2] Fiona M. Scott Morton & David C. Dinielli, Roadmap for an Antitrust Case Against Facebook, at 2 (July 2009), available at https://www.omidyar.com/news/roadmap-antitrust-case-against-facebook. A more comprehensive analysis of the allegations in the Roadmap will be published shortly. Davis Wright Tremaine represents Facebook. At the time of writing, the author is not part of the legal team representing the company on competition matters. However, he has received support from Facebook for a forthcoming paper to which this column will contribute.

All information used for this article was from publicly available sources.

[3] Erik Brynjolfsson, Avinash Collis & Felix Eggers, *Using Massive Online Choice Experiments to Measure Changes in Well-Being*, 116 Proceedings of the National Academy of Sciences, at 7252 (2019) ("Overall, these results indicate that Facebook provides substantial value to consumers. They would require a median compensation of $40 to $50 for leaving this service for a month.").

[4] Even advocates of challenges to long-consummated mergers seem to agree with this point. See Roadmap at 21 ("In analyzing any acquisition of a nascent or potential competitor, the impact on competition must be evaluated as an expectation, given the uncertainty about what that competitor would have done in the future as a standalone firm."); see also C. Scott Hemphill & Tim Wu, *Nascent Competitors*, University of Pennsylvania Law Review, forthcoming (2020), at 9 ("The nascent competitor may fail in various ways: the unproven cure, despite highest hopes, may flunk its clinical trials; the technologies thought to be the future might, in fact, be overrated. This uncertainty may not be a quantifiable risk, like the odds in a casino, but closer to Knightian true uncertainty—in other words, not readily susceptible to measurement.") available at https://scholarship.law.columbia.edu/faculty_scholarship/2661; George J. Stigler Center for the Study of the Economy and the State, *Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report* at 67 (July 1, 2019) ("The problem is that it is very difficult to know at the time of an acquisition whether the acquired firm is likely to develop into a competitor or whether, to the contrary, acquisition by the platform offers the most promising path to the commercial development and use of the acquired firm's new technology or an essential exit strategy for investors in the acquired firm.").

[5] Competition & Mkts Authority, *Online Platforms and Digital Advertising: Market Study Final Report* Box 3.6 at 134 (July 1, 2020).

[6] Lear, *Ex-Post Assessment of Merger Control Decisions in Digital Markets Final Repor*t at 71 (May 2019).

[7] Catherine Tucker, *What Have We Learned in the Last Decade? Network Effects and Market Power*, Antitrust, at 74-75 (Spring 2017) (describing transient success and eventual exit of once prominent social networks, including MySpace and Google Plus).

[8] See https://www.ftc.gov/news-events/press-releases/2012/08/ftc-closes-its-investigation-facebooks-proposed-acquisition.

[9] *Facebook/Instagram Inc.*, Office of Fair Trading (August 22, 2012), at 9 available at https://assets.publishing.service.gov.uk/media/555de2e5ed915d7ae200003b/facebook.pdf.

[10] Lear, *supra* note 6, at 70.

[11] See https://ec.europa.eu/commission/presscorner/detail/en/IP_14_1088. A subsequent review in 2017 left this conclusion undisturbed. https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1369.

[12] Lear, *supra* note 6, at 8 ("It makes sense to assume that in industries characterized by rapid innovation and sizeable R&D, the merging parties will each boast a stock of knowledge that they would then share if they were to merge. In turn, this inevitable sharing of technological knowledge, and, more broadly, a reorganization of the R&D efforts across previously independent research labs typically leads to higher incentives to invest.").

[13] Lear, *supra* note 6, at 71.

[14] Roadmap, *supra* note 2, at 3 ("Targeted advertising can increase social welfare. Users may experience well-targeted ads as informative and helpful, and less irritating than advertisements that attract their attention but provide information that is ill-suited for the particular user. From the standpoint of the advertiser, well-targeted ads are more likely to spur purchases.").

[15] See Roadmap, *supra* note 2, at 21 ("However, the uncertainty about the nascent competitor's eventual success does not extend to uncertainty about consumer welfare: such competition is beneficial to consumers even if the entrant eventually fails. As noted above, vigorous competition for the market is often the main source of competition in markets with network effects. The entrant's efforts to overthrow the incumbent produce valuable competition on quality and innovation during this phase, regardless of the identity of the final winner.").

[16] In a related context, involving allegedly exclusionary conduct by a platform seeking to replace a complementary product with its own complement ("Z"), Professor Scott Morton, one of the authors of the Roadmap, appears to agree. See Stigler Report at 68 ("If the platform's new product Z is a wonderful innovation, there will be an efficiency (in the form of higher quality) to weigh against any harms from less innovation.").

[17] *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam).

[18] See generally Timothy J. Muris & Jonathan E. Nuechterlein, *First Principles for Review of Long-Consummated Mergers*, 5 THE CRITERION J. ON INNOVATION 29 (2020); Douglas H. Ginsburg & Koren Wong-Ervin, *Challenging Consummated Mergers Under Section 2*, COMPETITION POLICY INT'L (May 25, 2020).

[19] See, e.g. *United States v. Sabre Corp.*, No. 1:19-cv-01548 (D. Del. filed Aug. 20, 2019); *In re Illumina Inc. and Pacific Biosciences of California, Inc*., Docket No. 9387 (F.T.C. 2020) (complaint filed Dec. 17, 2019; complaint dismissed as moot after Illumina Inc. abandoned its proposed acquisition of Pacific Biosciences (Jan. 6, 2020).