

Intelligence MEMOS



From: Joshua Krane and James Musgrove

To: Canadian Competition Watchers

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Re: **THE DANGER OF PRECAUTIONARY PRINCIPLE CHALLENGES TO NASCENT MERGERS**

Yogi Berra once invoked a famous Danish proverb: “Predictions are hard ... especially about the future.” Apparently, Mr. Berra was not just a remarkable student of baseball, he was also an antitrust scholar. He understood that while hindsight may be 20/20, no optometrist can help you see the future.

Over the past few years there has been an increasing chorus of voices internationally suggesting that mergers consummated years ago, often involving acquisitions of nascent tech firms by large players, should not have been permitted, and even be reversed. Facebook’s purchases of WhatsApp and Instagram are cited.

In our view, this argument is mistaken, for a number of reasons.

First, as noted above, clairvoyance is needed to know which mergers to block in order to protect competition. Accuracy is impossible, especially respecting acquisitions of small, emerging firms in dynamic technology markets. Antitrust agencies do, quite properly, take action against transactions for which there is credible evidence of likely harm, but that cannot capture every case. No one – no official, no agency, no regulator, however insightful or well informed – can foresee all problematic mergers.

Second, if you want to increase the chance of stopping injury to competition from acquisition of nascent firms, you need to stop a host of non-harmful transactions – that, in fact, are good for the economy – because at the early stages you cannot tell the difference. While the Instagram and WhatsApp examples are often discussed, Facebook has acquired hundreds of other companies. So have other big tech firms. The vast majority of these acquisitions were either neutral or beneficial for the economy. Stopping transactions on the precautionary principle that some small percentage may turn out to be anti-competitive is likely, on balance, to injure the economy.

Third, who can say with confidence that Instagram and WhatsApp themselves would have thrived without Facebook ownership? At the time it was acquired, Instagram had 13 employees and no revenue. Maybe Facebook’s deep pockets and market presence and expertise allowed both platforms to be what they became. So, it turns out that hindsight isn’t 20/20 either, because we don’t know what might have been.

Finally, the prospect of a company being able to sell its innovation to a larger firm is itself a driving force for innovation. Not every tech venture will succeed. But a strong tech startup ecosystem requires players willing and able to support investment and ultimately provide an ability for investors to realize the value of their investments.

We do not think that stopping scores of mergers on the “what if” principle is the right solution. Nor do we think that requiring the divestiture of Instagram after years of investment by Facebook in the company’s growth and success, simply for having made the initial investment, is appropriate. Under Canadian rules, that is only possible within a year of a deal closing, and although there are no US limits, challenges of long past transactions are rare.

This is not to say we take issue with actions challenging misuses of market power to preserve or maintain a dominant position. Our law, much like the law in the United States, allows the Commissioner of Competition to do just that, at any time, even many years after a merger.

A corollary to the rule that the future is hard to foresee is that markets tend to be resilient. Innovative firms will continue to find new ways to compete with existing market participants. Today’s giants will not be tomorrow’s. Change comes suddenly and unexpectedly.

TikTok launched less than four years ago and has hundreds of millions of users. Consumers who put a premium on privacy in their searches can use DuckDuckGo or other engines. While Apple has a significant presence in North America, foreign competitors Samsung and Huawei continue to challenge for market share.

Twenty years ago Microsoft was going to hold the entire world in its power. Today it’s not even among the FAANGs (Facebook, Amazon, Apple, Netflix and Google). Where will tomorrow’s dominant firm come from? We don’t know – and no one else does either. But we do know that all glory (and market power) is fleeting, and that we have tools to address its abuse.

The Competition Bureau’s recent big data and innovation white paper reached a number of important conclusions that continue to apply today, including not condemning firms just because they are “big.” At the end of the day, the Bureau said that “competition law and policy should continue to rely on market forces to lead to beneficial outcomes.”

That is the right conclusion.

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