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Insight

Why big business may learn to love EU competition policy

by Zach Meyers 1 February 2022

Big multinationals sometimes criticise the EU's competition policy, which is more aggressive than America's. But in the long term, Brussels' approach could prove more balanced and predictable than Washington's.

Law-makers around the world have become fearful that markets are becoming too concentrated, with a few firms making most sales, especially in innovative sectors like pharmaceuticals and digital markets. Reports show that large firms' market power is increasing, leading to less investment and innovation in developed economies.

EU policy-makers believe these concerns justify the Union's competition policy, which since the 1980s has been more aggressive at tackling market concentration than America's. Now, even America acknowledges the problem. In July 2021, Joe Biden issued an executive order encouraging stronger antitrust enforcement. He has also appointed two hawks, Lina Khan and Jonathan Kanter, to lead the two US agencies responsible for competition law enforcement, the Federal Trade Commission (FTC) and the Department of Justice (DOJ) Antitrust Division. Pressure across Congress to reform US competition law is also growing.

Two important aspects of competition policy are the way competition authorities regulate dominant firms, and how authorities review corporate mergers and acquisitions. In these two areas – and leaving aside the sweeping laws it proposes for digital platforms – EU reforms are likely to remain modest, thanks to the guardrails provided by the EU treaties and EU courts. In comparison, the US risks overcompensating for its past timidity – banning activities which benefit consumers. In the long run, the EU's competition policy may prove less volatile and overzealous than America's.

Regulating dominant firms

In the EU and the US, competition law prohibits dominant firms from engaging in anti-competitive conduct. Nominally, both EU and US authorities identify whether conduct is anti-competitive through the 'consumer welfare standard'. The standard tests whether the dominant firm harms consumers – for example, by making it impossible for efficient competitors to remain viable, thereby reducing consumers' choices. Conduct is not anti-competitive just because it harms individual competitors – after all, the point of competing is to become more efficient, innovative or to offer better or cheaper products, and that way to gain advantages over rivals.

But the EU and US have applied the consumer welfare standard in different ways in recent years. Generally, US courts have focused on whether questionable conduct leads to increases in prices. Defenders of the American laissez-faire approach believe dominant firms should be free to reap rewards from their success so that other firms have strong incentives to replace them. They assume that competition law enforcement should be restrained – because dominant firms who become greedy or lazy will be quickly replaced.

The European Commission, which enforces competition law at EU level, is more conscious of barriers for new firms. This explains why it can accuse pharmaceutical firms of excessive pricing, and is quicker to accuse businesses of predatory pricing. The Commission is increasingly focused on the barriers created when dominant firms build ecosystems of different services and then combine those services, or use one service to promote another (often called 'self-preferencing'). This practice makes life harder for newer firms – who must either replicate the full bundle of services a dominant firm provides, or work within the dominant firm's ecosystem, even though the two firms compete.

The Commission's focus on self-preferencing is not new: the Commission challenged Microsoft for bundling other services with Windows nearly 20 years ago. But the Commission has recently pursued a new wave of similar investigations. It has already fined Google multiple times for how its services are linked. And in the last two years, the Commission began similar new investigations against Alphabet (which owns Google), Apple, Meta (formerly Facebook) and Amazon. The Commission is also considering how Microsoft promotes Microsoft Teams over alternatives like Zoom.

In the past, the EU institutions passed laws where self-preferencing posed a general problem in a sector, such as in telecommunications. The EU is adopting the same approach with the Digital Markets Act. But now the Commission seems to suggest that – even without any sector-specific laws – competition law requires integrated firms to provide a "level playing field" for their competitors. The Commission's ongoing tech investigations could therefore affect many other sectors.

The problem is that self-preferencing often creates efficiencies which lower prices and can give consumers a 'one stop shop'. For example, supermarkets produce cheap own-brand goods in addition to selling third-party products; and banks provide related services, like mortgages, credit cards, and everyday accounts. It can also help introduce more competition in some markets: for example, where a firm uses self-preferencing to get a foothold into a new market, thereby disrupting a monopolist. Self-preferencing is only harmful when it deprives consumers of potentially better choices. To its credit, in recent years, the Commission has generally assessed the economic effects of alleged anti-competitive conduct, to prove it excludes efficient rivals. But in some of the Commission's current investigations, big tech's rivals are doing well. Spotify, for example, has a larger European market share than Apple's own music service.

Consumers could therefore lose if the Commission starts overzealously imposing a level playing field. Fortunately, the European Court of Justice (ECJ) should constrain the Commission. In the recent Google Shopping case, the General Court agreed with the Commission that Google acted anti-competitively when it used its search engine to promote its price comparison service. But the court was anxious not to ban all self-preferencing. The court said Google had special responsibilities because it was "super-dominant" and because competing services relied on Google for customers to find them. The court emphasised Google did not just promote its own services, but actively made others harder to find. The judgment does not say what would have happened if these factors were not present – but it throws into doubt whether the Commission will find anti-competitive conduct in some of its current self-preferencing investigations, which lack many of the same features. The Luxembourg judges sent another warning to the Commission when they overturned the Commission's €1.06 billion fine on chipmaker Intel for giving discounts if its customers bought nearly all their chips from them. In the Commission's first biggest antitrust loss in over 20 years, the court carefully and rightly scrutinised the Commission's economic analysis and was uncertain that Intel's alleged malpractice really did risk excluding competitors. By insisting on this analysis, EU courts will probably stop the Commission becoming too aggressive in other innovative industries which lack sector-specific regulation.

The US is following in the EU's footsteps in some respects – for example, the DOJ recently brought a lawsuit against Google which echoes some of the Commission's previous complaints, and there is bipartisan support for legislation similar to the EU's Digital Markets Act. But the US could easily end up with a more radical approach than the EU. For example, Lina Khan wants the FTC to explore bringing cases against firms for "unfair methods of competition" – a vague and untested standard which can even be applied to non-dominant firms. Khan also pointed to how dominant firms harm "independent businesses", suggesting that the FTC may try to prevent harm to competitors rather than protecting competition. Radical solutions like breaking up tech companies, which the EU is not seriously pursuing, are gaining traction. Political pressure to override US courts' scepticism of antitrust claims and reform antitrust laws is also intense. Most notably, the proposed Competition and Antitrust Law Enforcement Reform Act (CALERA) introduced by Senator Amy Klobuchar would ban dominant firms from engaging in conduct that materially disadvantages competitors. This is precisely the type of conduct the ECJ insists is a normal part of competition, and which benefits consumers.

The way EU and US authorities review mergers and acquisitions, and decide whether they would reduce competition, tells a similar story.

Merger review

Mergers and acquisitions can greatly benefit consumers, by helping firms become more efficient, or by giving a small firm resources to scale its business. But there is increasing evidence that some acquisitions by dominant firms have reduced business dynamism – allowing leading firms to take even more market share and discouraging potential competitors from trying to dislodge them. On both sides of the Atlantic, authorities now want to stop so-called killer acquisitions – large firms purchasing start-ups at an early stage to prevent them from becoming a big competitor.

The Commission can normally only review large acquisitions with EU-wide effects (smaller deals may be reviewed only by EU member-states' competition authorities, if at all). But the Commission has found a legal workaround, which allows it to review any deal that a member-state refers to the Commission. This workaround is controversial. First, it is unlimited – any acquisition could end up being reviewed by the Commission, even those so small they normally would escape national review. For example, six member-states referred Grail's acquisition of Illumina to the Commission (both firms develop different aspects of cancer-screening blood tests) even though Grail has no business in the EU. Second, the Commission has signalled it could reopen referred acquisitions after they have been completed. Third, it could also lead to overlapping reviews – for example, Facebook's acquisition of Kustomer was reviewed by both the Commission and the German competition authority, which refused to refer the deal to Brussels, and could veto the deal even though the Commission allowed it. Critics complain these factors create uncertainty, dissuading firms from making deals which benefit consumers – for example, Grail and Illumina believe their deal would make cancer-screening tests more widely available.

Despite this procedural uncertainty, the Commission's track record of stopping alleged killer acquisitions is conservative compared to regulators in the UK and the US. One important reason is the burden of proof. Nobody can reliably guess whether even a promising-looking start-up would succeed on its own. But while dominant firms can hoover up huge numbers of start-ups speculatively, competition authorities must individually identify those start-ups which would have succeeded, and prove the particular deal would likely reduce competition. This is particularly difficult for the EU, as the EU institutions cannot easily lower the burden of proof, like the US may do.

The US approach is causing more uncertainty. In September, the FTC suddenly withdrew guidelines to help businesses understand how it assesses acquisitions. The FTC reinstated a policy requiring that, if a firm previously attempted an anti-competitive acquisition, it must obtain an individual FTC approval for any future acquisition for ten years. Biden's recent executive order affirmed that the FTC and DOJ could retrospectively challenge completed mergers. And the FTC announced last year that it might retrospectively unwind acquisitions that went ahead without its blessing, even if the FTC failed to review the acquisition in time. The FTC is actively seeking to unwind Facebook's acquisitions of Instagram in 2012 and Whatsapp in 2014 – which it reviewed at the time and did not block.

Unlike the EU, the US may also radically change the burden of proof. For example, the proposed CALERA legislation would allow regulators to block deals that have only an "appreciable risk" of lessening competition. The proposed law would also automatically presume that some types of deals lessen competition. There is a good case for adjusting the legal standards for banning acquisitions – and some of the law's proposals in this regard are worth considering. But, overall, the proposed CALERA law is fairly extreme. It would not only embolden regulators, but in many cases force them to ban deals that are more likely to benefit consumers than to harm them.

EU markets have become less concentrated, and have had lower profit margins, than US markets since the 1990s. That suggests European consumers are getting better value for money than American consumers for comparable products. The US was previously content to show off the success of its megafirms and ignore concerns about consumer harm. But it, too, is now more concerned at the growing barriers to new firms succeeding and the long-term implications for consumers.

As global consensus shifts towards the EU's approach, competition authorities need to be cautious not to swing too far towards aggressive competition policy, and ban conduct which benefits consumers in the long run.

The EU can be optimistic. The Commission's enthusiasm in antitrust matters is being tempered by EU courts and is limited by the EU treaties. Big firms should be more worried about the US, which faces a perfect storm of populist attacks on big business; political pressure to break up big tech; and leaders seeking to overcompensate for past under-enforcement. The EU's approach to competition policy is imperfect and has long attracted resentment from big firms. But they may learn to love it.

Zach Meyers is a senior research fellow at the Centre for European Reform.