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Comments of

TechFreedom

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In the Matter of

Request for Information on Serial Acquisitions

Docket (FTC-2024-0028-0001)

September 20, 2024

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TechFreedom[2] welcomes the opportunity to respond to the Federal Trade Commission's ("FTC") and Department of Justice's ("DOJ") (collectively, the "Agencies") *Information Request on Serial Acquisitions and Roll-Up Strategies Across the U.S. Economy*.[3] There is a "long and successful history" of such acquisition strategies leading to more innovate, more competitive, and more productive firms.[4] We request that the Agencies clarify the treatment of efficiency claims in mergers or acquisitions ("mergers") that are alleged to raise anticompetitive effects through cumulative anticompetitive effects.

Both the 2023 Merger Guidelines[5] and the FTC's 2022 Policy Statement on Unfair Methods of Competition[6] indicate that a series of mergers may harm competition through a cumulative effect even if no specific merger is anticompetitive. According to the 2023 Merger Guidelines, "the Agencies will consider … individual acquisitions in light of the cumulative effect of" a series of acquisitions, and "examine the impact of the cumulative strategy … if that strategy may substantially lessen competition or tend to create a monopoly."[7] The FTC's UMC Statement strongly suggests that the Commission will use Section 5 of the FTC Act to prohibit "a series of mergers, acquisitions, or joint ventures that tend to bring about the harm that the antitrust laws were designed to prevent, but individually may not have violated the antitrust laws."[8]

We disagree with the idea that a series of mergers, none of which violates the antitrust laws on its own, can violate the antitrust laws when considered cumulatively: zero times one, or zero times 100, is still zero. However, we recognize that an interpretation of case law that requires the Agencies to establish a minimum *prima facie* case of harm from a merger, or case law that requires a showing of more than a de-minimis lessening of competition from a merger, may create unjustified hurdles to challenging a merger with small but reasonably probable anticompetitive effects. When the acquiring firm has engaged in a series of such acquisitions, a cumulative approach may be defensible. In other words, it is not always

[2] Founded in 2010, TechFreedom is a nonprofit think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

[3] Press Release, *FTC and DOJ Seek Info on Serial Acquisitions, Roll-Up Strategies Across U.S. Economy* (May 23, 2024).

[4] See Asheesh Agarwal and Andy Jung, *The Long and Successful History of Nascent Acquisitions Suggests Caution in Rethinking Antitrust Enforcement* (2020). A copy of this paper is submitted with this comment.

[5] U.S. Department of Justice and Federal Trade Commission, Merger Guidelines (2023) ("Merger Guidelines").

[6] Federal Trade Commission, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* (Nov. 10, 2022) ("UMC Statement").

[7] Merger Guidelines at 23.

[8] UMC Statement at 14.

improper for the Agencies to aggregate small transactions that violate the antitrust laws but would normally escape scrutiny because of their size into a single, cumulative enforcement action.

The same logic requires that efficiency claims be treated symmetrically.[9] To be credited as a countervailing factor in support of a merger, the 2023 Merger Guidelines require efficiencies to (i) be merger-specific; (ii) be verifiable; (iii) prevent a reduction in competition; and (iv) not be anticompetitive.[10] Efficiency claims that are vague or speculative or outside the

[9] Appellate and district courts routinely consider efficiency claims in merger matters. *See, e.g.*, *FTC v. Sanford Health*, 926 F.3d 959 (8th Cir. 2019); *United States v. Anthem*, 855 F.3d 345 (D.C. Cir. 2017); *FTC v. Penn State Hershey Medical Center*, 838 F.3d 327 (2016); *Saint Alphonsus Medical Center-NAMPA v. St. Luke's*, 778 F.3d 775 (9th Cir. 2015); *FTC v. University Health, Inc*., 938 F.2d 1206 (11th Cir. 1991); *FTC v. Thomas Jefferson Univ.,* 505 F. Supp. 3d. 522, 538 (E.D. Pa. 2020) (defendants can rebut presumption by showing "that the anticompetitive effects of the merger will be offset by extraordinary efficiencies resulting from the merger."); *FTC v. Peabody Energy*, 492 F. Supp. 3d 865, 913 (E.D. Mo. 2020) ("even if evidence of efficiencies alone is insufficient to rebut the government's prima facie case, such evidence may nevertheless be relevant to the competitive effects analysis of the market required to determine whether the proposed transaction will substantially lessen competition.") (internal quotation marks eliminated); *New York v. Deutsche Telecom AG*, 439 F. Supp. 3d 179, 207-08 (S.D.N.Y 2020) ("lower courts have … considered whether possible economies might serve not as justification for an illegal merger but as evidence that a merger would not actually be illegal"; this Court will consider evidence of efficiencies, given courts' and federal regulators' increasingly consistent practice of doing so, and because Section 7 requires evaluation of a merger's competitive effects under the totality of the circumstances." (internal citations omitted); *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d. 27, 71-72 (D.D.C. 2018) ("efficiencies produced by a merger can form part of a defendant's rebuttal of the FTC's prima facie case … but the court must undertake a rigorous analysis of the kinds of efficiencies … in order to ensure that those efficiencies represent more than mere speculation and promises about post-merger behavior") (internal citations omitted); *FTC v. Tronox Ltd*., 332 F. Supp. 3d. 187 (D.D.C. 2018) ("When a court "finds high market concentration levels, defendants must present proof of extraordinary efficiencies to rebut the government's prima facie case. … To be able to offset a merger's likely anticompetitive effects, purported synergies and efficiencies must represent more than mere speculation and promises about post-merger behavior.") (internal citations omitted); *United States v. Aetna*, 240 F. Supp. 3d. 1, 94, 95 (D.D.C. 2017) ("Court will … consider Aetna's and Humana's efficiencies defense" and "is unpersuaded that the efficiencies generated by the merger will be sufficient to mitigate the transaction's anticompetitive effects."); *FTC v. Sysco*, 113 F. Supp. 3d 1, 81 (D.D.C. 2015) ("efficiencies resulting from the merger may be considered in rebutting the governments prima facie case"); *United States v. Bazaarvoice, Inc.*, 2014-1 Trade Cas. (CCH) ¶¶ 78, 641 (N.D. Cal. Jan. 8, 2014) (evaluating efficiencies but court not persuaded that the merger will result in efficiencies sufficient to overcome the merger's anticompetitive harms); *FTC v. OSF Healthcare Sys*., 852 F. Supp. 2d 1069, 1089 (N.D. Ill. 2012) ("The court has thoroughly reviewed the claimed efficiencies in this case and the expert testimony from both sides and is compelled to conclude that, at least for the purpose of these proceedings, defendants have failed to present sufficient proof of the type of "extraordinary efficiencies" that would be necessary to rebut the FTC's strong prima facie case."); *FTC v. LabCorp*., 2011 WL 3100372, ¶ 164 (C.D. Cal. Feb. 22, 2011) ("In evaluating the legality of a merger or acquisition under section 7, courts consider the procompetitive benefit of efficiencies related to the transaction."); *United States v. H&R Block*, 833 F. Supp. 2d 36, 89-92 (D.D.C.2011) (evaluating the parties efficiencies claims, pursuant to the guidance of FTC v. Heinz, 246 F.3d 708 (D.C. Cir. 2001); *FTC v. Foster*, 2007-1 Trade Cas. (CCH) ¶¶ 75, 725, 245 (D.N.M. 2007) ("The Defendants have, however, rebutted this presumption with proof of ease of entry, cognizable efficiencies, or other recognized defenses."); *United States v. Oracle Corp*., 331 F. Supp. 2d 1098, 1173-75 (N.D. Ca. 2004) (evaluating efficiency claims); *United States v. Long Island Jewish Med. Ctr*., 983 F. Supp. 121, 149 (E.DN.Y. 1997) (hospitals established, to reasonable certainty, that efficiencies gained in merger would result in benefits to consumers).

[10] Merger Guidelines at 32-33.

relevant market are not credited as off-setting potential (or reasonably likely) anticompetitive effects of a merger.[11] The 2023 Merger Guidelines requirements, especially but not only of merger specificity, suggest that a cumulative approach will not apply to efficiency claims by a so-called serial acquirer.

But efficiency improvements *can* be cumulative. For example, a series of small horizontal acquisitions that combine otherwise substitutable capacity may cumulatively increase production to obtain economies of scale; non-horizontal acquisitions can create economies of scope and can combine complementary assets to allow for an increase in innovation, the speed of innovation, and the distribution of new products. No single acquisition may be sufficient to achieve meaningful efficiencies, but multiple acquisitions may have these cumulative effects.

When challenging a series of mergers based on a theory of cumulative effects, the agencies should also evaluate the efficiency claims of the acquiring person on a cumulative basis, not a merger-specific basis. The impact of efficiencies associated with a series of mergers ("cumulative efficiencies") may or may not be sufficient to counter the anticompetitive effects associated with a series of acquisitions ("cumulative harm") in the same relevant market.

Where cumulative efficiencies arise in a market different from, or in addition to, the market in which cumulative harm occurs, if the cumulative efficiencies are significant and the cumulative harm is relatively de minimis, the agencies should balance competitive effects across markets, particularly when there is significant overlap in customers (or potential customers) in the different markets.

Additionally, where a challenge to a series of mergers or acquisitions is predicated on a *strategy* of acquiring multiple current or future competitors (or multiple firms in a non-horizontal relationship), efficiency claims should be cognizable if they are *strategy*-specific, rather than merger-specific.

In short, the agencies should recognize cumulative efficiencies, and, in so doing, should evaluate them symmetrically with concerns of cumulative harm from so-called serial acquisitions.

[11] Id. at 32.

Respectfully submitted,

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