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## US Merger Guidelines Review: Comment by Reset<sup>1</sup>

April 21, 2022

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### Executive Summary

This Comment responds to the Request for Information on Merger Enforcement by the US Department of Justice and the US Federal Trade Commission, dated January 18, 2022. The review of merger guidelines is a crucial first step of a necessary broader overhaul of antitrust laws. Accordingly, while mergers are the focus of this Comment some of our proposals are also relevant to unilateral conduct and co-operation in the digital sector.

Many digital markets are characterized by persistently high levels of market concentration and there is broad consensus that acquisitions by significant digital conglomerates (SDCs)<sup>2</sup> such as Alphabet, Meta, Apple and Amazon require a greater degree of scrutiny due to the central role that their services play in the economy.<sup>3</sup>

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<sup>1</sup> Reset is an initiative of the Luminare Group engaged in programmatic work on technology and democracy that provides grants and contracts while working alongside partners with a shared policy, technology, and advocacy agenda in countries with immediate opportunities for change.

This Comment is respectfully submitted by Michael D. Hausfeld, Scott A. Martin, Thomas Höppner, Lesley Hannah, Kyle G. Bates, and Maximilian Volmar of Hausfeld LLP, counsel for Reset.

<sup>2</sup> This term is used throughout this Comment to refer to digital conglomerates which control important online platforms (intermediation services) that are, essentially, incontestable thereby allowing them to act independently of normally competitive pressures. For the precise definition see further paragraph 194 below.

<sup>3</sup> ACCC, *Digital Platform Services Inquiry, Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services*, Feb. 2022, at 65; Stigler Center for the Study of the Economy and the State, *Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report*,

Until recently, none of the over 800 acquisitions by Google/Alphabet, Amazon, Facebook/Meta, Apple, and Microsoft<sup>4</sup> since 2010, had been opposed by a competition authority.<sup>5</sup> The Google/DoubleClick, Facebook/WhatsApp and Facebook/Instagram mergers stand out as clear errors of the current merger review process but they are not the only ones. There are a number of very public examples of antitrust under-enforcement where an unchecked web of acquisitions and anticompetitive conduct has rendered markets incontestable and even led to largely walled-off ecosystems operated by a single company that may, in effect, unilaterally set the rules and thereby control the development of any competition within such ecosystem. Where there is a history of anticompetitive behavior, such as self-preferencing, tying or predatory pricing by an SDC, there should be a presumption that any acquisition by that SDC will likely exacerbate such behavior and thereby lessen competition. The Chicago-inspired error cost ranking of non-intervention above intervention based on the belief that markets will self-correct is outdated. Any potential ‘chilling effect’ of stricter merger control could be minimized by the merging firms’ opportunity to rebut any presumptions of anti-competitive harms. There is little to lose but much to gain from a more thorough scrutiny of mergers involving SDCs. After all, where failure to intervene at an early stage risks a ‘tipping’ of a market towards a monopoly that may be irreversible due to lock-in effects and lack of interoperability, the risks of not intervening are much higher than in other markets.

Although the Clayton Act, broadly outlaws mergers and acquisitions whose effect “*may be substantially to lessen competition, or to tend to create monopoly*”, the current Merger Guidelines do not adequately capture the breadth of foreseeable unlawful effects required in an increasingly digital era.

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CHICAGO BOOTH, 1 July 2019, at 111; Jason Furman, *Unlocking digital competition*, REPORT OF THE DIGITAL COMPETITION EXPERT PANEL, Mar. 2019, at 6, 95; Jacques Cremer et al., *Competition policy for the digital era*, EUROPEAN COMMISSION DIRECTORATE-GENERAL FOR COMPETITION, at 10-11 (2019).

<sup>4</sup> These firms meet the definition of Significant Digital Conglomerates (“SDCs”) used in this paper. See Glossary of Terms, Appendix A; see also Anne Witt, *Who’s Afraid of Conglomerate Mergers?*, 67(2) ANTITRUST BULL. (Apr. 6, 2022).

<sup>5</sup> ACCC, *supra*, at 66; Furman, *supra*, at 91.

In digital markets, antitrust policy in general and merger review in particular, needs to move to a form of assessment which considers the wider impact of conduct or an acquisition across multiple markets. The antitrust analysis needs to capture the different economic factors at play in digital markets, where users rarely pay a monetary price for services, and lack of capacity restraints and minimal marginal output costs means output can be expanded rapidly. Digital markets are also characterized by data-driven network effects and feedback loops, economies of scale, technical lock-ins, path dependency, behavioral barriers to entry and the tendency of markets to ‘tip’ and monopolies or quasi-monopolies to become entrenched.

In digital markets, once the market has tipped, in order to ensure their position remains entrenched, some SDCs actively look to put in place protective measures to prevent innovators or ‘disruptors’ from building a sufficiently large user base to generate the type of network effects necessary to render the market effectively contestable – so-called ‘moat’ building. This can take the form of expansion into other markets beyond their ‘core’ market allowing the SDC to expand its reach and obtain cross-market network effects and sharable resources that can be used by several services within its ecosystem. This kind of diversification may enable the SDC to position itself as an unavoidable trading partner across several markets, giving it multiple options to tie products together and greater ability to dictate the terms and conditions of carrying out business within the firm’s ecosystem. Such cross-market strategies quickly escape classical antitrust individual market analysis.

Traditional price and output-focused analysis is less appropriate in digital markets because it does not capture the breadth of harms that can result from lack of adequate regulation such as from loss of choice, innovation, variety, quality, privacy or commercial independence. The main constraints in digital markets are potential competition through differentiated products and “disruptive” substitutes that may lead to multi-homing and/or displacement of an incumbent.

Many mergers in digital markets will not have significant effects on prices, but may still result in significant non-price harms to consumers. The revised Guidelines should confirm that non-price effects are major causes for concern in digital markets and provide an illustrative list of harms that frequently arise in digital markets. These non-price harms include, among others:

a) *Exposure to harmful content*: Large platforms frequently harm consumers by failing to protect their users from harmful online content. In fact, some platforms funded by advertising have a commercial incentive to favor attention-maximizing harmful content (including fake, illegal, discriminatory content, and disinformation).

b) *Exploitation of user data*: In the same way that customers can be exploited by charging high prices, customers may also be exploited by a requirement to provide more data to the platform than is necessary or appropriate for the service received (also known as excessive data retrieval).

c) *Decreased transparency on information networks*: Platforms frequently exploit their users and protect their market position by preventing users and competitors from obtaining accurate information about service quality, including harmful content, disinformation and misinformation, and addictive algorithms; this opacity harms consumers and competition.

Reform of the Merger Guidelines should focus on dynamic cross-platform competition, particularities of multi-sided markets and non-price harms to consumers. The Merger Guidelines should expressly encompass the wider anticompetitive harms which may result in digital markets; such as: limiting users' choice by eliminating rival products and services; discriminatory or collusive algorithms; exploitation of behavioral biases, etc.

The Merger Guidelines should make it a priority to avoid high error costs resulting from inactivity, recognizing that digital markets are unforgiving once authorities have taken their eyes off them. In practice, authorities will have to pursue more cases and accept that some of them will be lost because new technologies require new legal theories that must be tested in court individually.

The Merger Guidelines require digital sector-specific parameters to assess competition. The current guidelines do not address the factors that really matter in digital competition.

At a minimum, the Merger Guidelines need to include a sophisticated concept for defining the relevant criteria for actual or potential harms in the operation of multi-sided platforms. By not

sufficiently distinguishing between their economic and the legal parameters, the Supreme Court's decision in *Ohio v. American Express*<sup>6</sup> created, for example, economically inappropriate principles and unnecessary legal uncertainty. The Guidelines should provide a more sophisticated and modern approach to assess competitive forces and substitutability between platform services. The Guidelines should also take recourse to new assessment tools for zero-price markets such as the Small but Significant Non-Transitory Reduction in Quality (SSNRQ) Test,<sup>7</sup> or the Upward Pricing Pressure Test.<sup>8</sup>

The Merger Guidelines should recognize that not all relevant competition phenomena occur within classical antitrust market concepts. The guidelines need to address cross-market concentrations and the moat-building strategies that may render core platform services incontestable. The most powerful companies have embedded their core platform services into a network of ancillary products and services as well as specific conduct (e.g., pre-installations, tying) which serve to shield the core service from disruptions. Merger review needs to focus on blocking any acquisitions that would further deepen such moats by facilitating, amplifying, or expanding any of its elements. Amongst others, keeping such embedded services contestable requires a significantly less lenient approach to vertical and conglomerate mergers, *i.e.*, mergers where the acquired firm's activities do not overlap with the acquirer's dominated sector. Any acquisition that strengthens an incumbent's ecosystem, at least indirectly also strengthens its embedded core platform service. Accordingly, merger review must capture any acquisition that deepens or broadens a protective moat around any acquirer's dominant core service, irrespective of how far away from the core service the acquired firm's activities may appear to be. Merger review needs to assess whether an acquisition involves digital resources that the acquiring incumbent may use across service, such as user data and content (and the respective rights to use those), storage, software, or KI capabilities. Such resources may be acquired in a sector seemingly unrelated to the

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<sup>6</sup> *Ohio v. American Express Co.*, 138 S.Ct. 2274 (2018).

<sup>7</sup> John M. Newman, *Antitrust in Attention Markets: Definition, Power, Harm*, UNIV. MIAMI LEG. STUD. (Jan. 2021), at 22, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3745839](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3745839).

<sup>8</sup> Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, 10(1) B.E. J. THEOR. ECON., ARTICLE 9 (2010); Pauline Affeldt et al., *Upward Pricing Pressure in Two-Sided Markets*, TILBURG UNIV. (July 2012), <https://ssrn.com/abstract=2115382>.

acquirer's core platform sector. However, since 'shareable inputs' may be used across sectors, they can deepen protective moats and the broader ecosystem and thereby, at least indirectly, also entrench the dominant position of the acquirer's core platform service within. Such cross-market benefits of acquired assets need to be considered more thoroughly.

Considering the economic realities and in the interest of prioritizing enforcement capacities, the Guidelines should create specific rules that ensure closer regulatory scrutiny and higher hurdles for acquisitions involving companies that possess particular power for a service of systemic relevance for competition and society more generally. Such services typically involve intermediating a high number of transactions between consumers and business users, including general search services, app stores, social networks, browsers, cloud services or online marketplace. These rules should be particularly stringent where a company dominates the market for the provision of a core platform service and, its position is protected by a network of ancillary services, the structure of the sector or its own (anti-competitive) conduct. Accordingly, SDCs with a strategic market status offering such services should be subject to stricter notification obligations. This should be combined with a legal presumption that any further acquisition is harmful to competition, thereby reversing the typical burden of proof. In the framework of a "balance of harms", the merging entities would need to show that their merger does not result in more harm than benefit. In some cases, the thresholds for a rebuttal should be very high, *i.e.*, for killer acquisitions or ecosystem strengthening. Overall, in case of a "Significant Digital Conglomerates", the threshold for a probability of harm should be lower, while the threshold for accepting commitments to neutralize concerns should be higher.

In addition, when predicting the likelihood of a lessening of competition following an acquisition by an SDC, more attention must be paid to that firm's history in engaging in anticompetitive conduct. If there is a history of anticompetitive behavior, such as self-preferencing, tying or predatory pricing (e.g., by inclusion of new services for the same price), there should be a presumption such any acquisition will likely exacerbate such behavior and thereby lessen competition.

The stronger focus on a digital company's market behavior could be seen in considering a broadening of the traditional Structure-Conduct-Performance (SCP) paradigm by including a

new Conduct-Structure-Effects-Harm (CSEH) approach. The current Merger Guidelines are still largely influenced by the structural emphasis of the S-C-P paradigm. Yet, it can be observed that in digital markets it is often the *conduct* of the incumbent that is amplified by the structure of its market and the resulting performance thereof - not the other way around. It is therefore often the conduct, not the structure, that may be the prime indicator of future anticompetitive performance. The scope of multi-homing and product differentiations, for instance, are widely seen as key structural elements of digital markets. However, both factors can be influenced by an incumbent. Digital gatekeepers that intermediate between user groups can influence the behavior of such users and thereby determine the ability and likeliness of them to multi-home. By monitoring the markets through traffic and performance analysis software, they can also detect any innovation and quickly acquire, steal, or squash it to prevent any disruptive product. Acknowledging the high impact of an incumbent's market behavior on the contestability of its position, this broader approach would first focus on identifying previous and current conduct of the acquiring digital conglomerate and whether that alone has created significant barriers to entry. Regulatory review would then benefit from this assessment in determining the likelihood that the acquisition at stake facilitates such conduct or increases, extends or fortifies its harmful effects. Such combined assessment of conduct and structure is likely to provide a more accurate evaluation of the likely long-term harms and benefits of the acquisition.

In order to safeguard the competitive forces arising from disruptive innovations, the Merger Guidelines should also include sophisticated tools to prevent any "killer acquisitions", i.e., acquisitions with the primary purpose or effect of preventing the development or distribution of an innovation that could potentially disrupt the acquirer's position. Beyond a universal notification requirement, the academic literature has proposed several feasible methods to identify and assess such transactions.

Finally, the Merger Guidelines should be changed to address the unique aspects of digital markets enforcement. The most sophisticated merger assessment becomes obsolete when authorities lack timely, smart, and effective remedies. Full-scale refusals or divestitures must become a reality after decades of approvals. The UK's Facebook/Giphy blocking decision may serve as an example. In most situations such outright refusals would appear to be the remedy

of choice to prevent anti-competitive mergers<sup>9</sup>. We are highly skeptical that such approvals under such conditions are preferable to outright refusals, given the high monitoring costs and the fact that those decisions “treat only symptoms, not the disease”. However, Agencies in the United States should also consider cooperating with their European counterparts to develop joint approaches to merger control in digital markets. The Digital Competition Expert Panel agreed in its 2019 report, concluding that “[m]any digital policies would ideally be globally coordinated and enforced.”<sup>10</sup> The EU is currently revising its Market Definition Notice and has agreed on the Digital Markets Act, its major legislation to enhance competition in the digital sector. Similar initiatives are under way in Australia, Japan, South Korea and United Kingdom. If there is ever a right moment for international alignment in antitrust, it is now.

In short, we propose consideration of the following **key principles** in amending the Guidelines:

1. Adopt a post-Chicago theoretical framework and, in particular, broaden the array of potential antitrust harms to include not only indirect price effects, but also aspects of choice, quality, innovation, transparency and privacy; measuring both scale and balance of likelihood of harm versus demonstrated benefits.
2. Update the error-cost framework and clarify that due to the risk of irreversible ‘tipping’, non-intervention is more costly in digital markets than intervention (the “Intervention Imperative”). Accordingly, pursue more cases.
3. Develop a specific concept for assessing mergers in multi-sided markets, with regard to revising traditional market definitions and appropriately accounting for factors determining competition in such markets, including cross-market feedback loops.

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<sup>9</sup> See Carl Shapiro, *Antitrust in the time of populism*, 61 INT. J. IND. ORGAN. 714-748 (Feb. 27, 2018). “Sound competition policy would tolerate some false positives – blocking mergers involving targets only to find that they do not grow to challenge the incumbent – in order to avoid some false negatives – allowing mergers that eliminate targets that would indeed have grown to challenge the dominant incumbent.

<sup>10</sup> Furman, *supra*, at 7; see also Stigler Center for the Study of the Economy and the State, *Stigler Committee on Digital Platforms: Final Report*, CHICAGO BOOTH, Sept. 2019, at 115, <https://research.chicagobooth.edu/stigler/media/news/committee-on-digitalplatforms-final-report>.



4. Adopt an analytical framework for evaluating competitive forces beyond classical antitrust market-by-market analysis, particularly with regards to ‘shareable inputs’ like data, user attention or IP/usage rights, that can be used across several layers of an ecosystem in order to entrench the position for a core platform service or the scope or effects of anti-competitive conduct within the ecosystem.
5. Raise the bar for the clearance of acquisitions by an SDC dominating the market for a significant intermediation service, inter alia, by shifting the burden of proof that an acquisition does not further entrench its dominance.
6. In case of a SDC, a “significant lessening of competition” should be assumed whenever an acquisition, directly or indirectly, (i) strengthens any structural elements (e.g. vertical integration, network effects) or any conduct (e.g. a pre-installation, default settings) that shield off the undertaking’s core platform service (e.g. search, app store, marketplace) from competition or (ii) facilitates any anti-competitive conduct or (iii) amplifies the effects of such conduct carried out by such core platform service (e.g. by enabling or expanding any self-preferencing).
7. Properly identify and effectively block any “killer acquisitions”.
8. Build Agency units that are specialized in digital markets.
9. Encourage private interventions from third parties (competitors, business users, consumers), outlining competitive concerns and foreseeable harms.
10. To the extent practicable, consider aligning merger review and digital antitrust policy internationally, including with the concepts underpinning the EU’s Digital Markets Act.

To facilitate the implementation of the above principles, a new methodology for assessing mergers in the digital sphere should be considered:

- I. Creation of a specialized enforcement unit overseen by both the Department of Justice and the Federal Trade Commission designating firms as “Significant Digital Conglomerates” (SDCs) to which stricter rules apply.

- II. Imposing an obligation for SDCs to notify any envisaged acquisition, regardless of revenue or transaction value thresholds.
- III. Utilize a rebuttable presumption of “significant lessening of competition” through any acquisition by an SDC, provided that such a presumption is only rebutted when it can be shown that the acquisition does not entrench, directly or indirectly, a position for core intermediation service.
- IV. In principle, mergers that fail to rebut the presumption should be blocked; commitments offered to resolve the Agencies’ concerns shall only be considered if proven that they will sever any algorithmic, data, IP or other positive feedback loops between the target and the core platform service.

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## A. Introduction

- 1 This Comment responds to the Request for Information on Merger Enforcement by the US Department of Justice and the US Federal Trade Commission (the “**Agencies**”), dated January 18, 2022.
- 2 The Comment focuses on issues associated with digital markets (Question 11 of the RFI), which due to very high market concentration and limited antitrust enforcement in this sector, is the area where updated Merger Guidelines are most urgently needed.
- 3 The Comment will proceed as follows. It will begin by giving reasons why the Merger Guidelines should be updated, grouped by substantive and procedural issues (section B.I. and II.). The internet economy faces numerous competitive issues, including high levels of market concentration facilitating potential or actual abuses of economic power induced by economic factors such as network effects (section B.I.1.). This result is historically correlated with cautious merger control. This will be illustrated by examining several merger approvals which are now widely regarded as errors, including Google/DoubleClick and so-called killer acquisitions. We will also review administrative and regulatory decisions made by the EU, including in the Digital Markets Act (DMA), and analyse learnings from those for US enforcement (section B.I.3.).
- 4 The Comment identifies the present inadequacies of the current legal framework of merger review as a major cause of these shortcomings (section B.II.). The current theoretical framework is still focused on static competition and too focused on price effects in the tradition of the 1970s Chicago School doctrine. In digital markets the price to the consumer is often \$0 (because many apps and online services are provided either entirely for free or initially free with the option to purchase content later). Modern economists however, utilize a “quality-adjusted price” factor to determine whether there is net harm. Stated differently, poor service for example, has a cost for consumers even if the price is \$0.<sup>11</sup> This includes a preference for non-intervention which is misplaced in the digital sector where failure to intervene at an early phase of the development of a market can have irreversible consequences. Also, the Merger Guidelines are not presently built to sufficiently address the

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<sup>11</sup> See more detailed discussion at Section C(l)(1)(d), *infra*.

economic particularities of digital markets, such as their multi-sidedness, the power of network effects, behavioural economics and the development and control of ecosystems and the power to set rules governing competition within (section B.II.1.). In addition, many “killer acquisitions” fly under the radar of authorities because thresholds are too high (section B.II.2.).

- 5 Based on this analysis, the second part of this Comment will make specific proposals to amend the Merger Guidelines (section C.). First, substantive issues will be addressed (section C.I.) The theoretical framework of merger review should adapt to the insights of post-Chicago antitrust economics and adopt a new error-cost approach. Merger review should not only consider negative effects on prices, but a wide array of consumer harms.
- 6 Relevant economic factors of digital markets should be listed and classified. The Guidelines should also include a concept of market definition which takes account of multi-sided, zero-price, and innovation markets. Further concepts on shareable inputs, killer acquisitions, and potential competition will also be discussed. Moreover, the Comment proposes a presumption of anti-competitive effects in cases where acquirers are designated “super-dominant” firms or “gatekeepers”.
- 7 In terms of procedural proposals, the Comment sets out to discuss notification thresholds and remedies (section C.II.). Authorities should consider both behavioural and structural remedies. Particularly with regards to remedies, the Agencies should consider international alignment with their EU counterparts (section C.II.5.). Finally, we conclude (section D.).

## **B. Why the Merger Guidelines should be amended**

### **I. Competition concerns in the internet economy related to mergers**

#### **1. Unprecedented level of market concentration in the digital sector**

- 8 The digital sector has reached levels of concentration so staggeringly high that commentators need to go back in history more than one hundred years to find examples of similar firms. In the end of the 19<sup>th</sup> century, firms such as Standard Oil were comparably dominant with respect to their control on markets. The Economist hence labelled Google “Standard Data”, Amazon “Standard Commerce”

and Facebook “Standard Social”.<sup>12</sup> The gigantic power of these SDCs (Google, Amazon, Facebook, Apple, and Microsoft) is today so widely undisputed that this comparison accurately describes the current state of competition in the digital sector.

9 This development went hand in hand with others:

- **Reduced innovation.** Twenty years ago, new firms sprang up frequently, no internet company enjoyed dominance for long, and fluctuation among them was high (one after another, for example in search engines: Altavista, AOL, Yahoo!, Google). This sequence of vigorous competition “for the markets” appears to have come to a halt. The GAFAMs have conquered stable positions. Their youngest part, Meta, was founded in 2004 and hardly a start-up anymore.
- **Higher likeliness of cartels and ‘mergers without merging’:** Highly concentrated markets are more prone to forming cartels.<sup>13</sup> The recent revelations relating to the “Jedi Blue” and “Project Bernanke” agreements between Google and Facebook<sup>14</sup> as well as the various “Revenue Sharing Agreements” that Google has concluded, including with

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<sup>12</sup> *The New Titans and How to Tame Them*, THE ECONOMIST, 20 Jan 2018, at 21.

<sup>13</sup> For game theory models, see Reinhard Selten, *A simple model of imperfect competition, where 4 are few and 6 are many*, 2 INT. J. GAME THEORY 141-201 (1973); Yale Brozen, *The Concentration-Collusion Doctrine*, 46 ANTITRUST LAW J. 826-863 (1977); Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?* 44 J ECON LIT 43-95 (2006); Rupayan Pal & Marcella Scrimatore, *Tacit Collusion and Market Concentration Under Network Effects*, 145 ECONOMICS LETTERS 266-269 (2016); for empirical evidence see Arthur G. Fraas & Douglas F. Greer, *Market Structure and Price Collusion: An Empirical Analysis*, 26 J. IND. ECON. 21-44 (1977); Stephen Davies et al., *Tacit collusion, firm asymmetries and numbers: Evidence from EC merger cases*, 29 INT. J. IND.L ORGAN. 221-231 (2011); for experimental evidence see Steffen Huck et al., *Two are few and four are many: number effects in experimental oligopolies*, 53 J. ECON. BEHAV. ORGAN. 435-446 (2004).

<sup>14</sup> Compl., *Texas v. Google*, Case no. 1:21-md-03010-PKC (S.D.N.Y.), at ¶ 26 (Jan. 14, 2022).

Apple<sup>15</sup>, have illustrated that GAFAMs co-operate among each other with a view to defining their spheres of influence.

- **Incumbents define and defend their territories.** GAFAM have acquired more than 400 firms from 2009 to 2020.<sup>16</sup> Many think that a large part of those are “killer acquisitions”, that is, acquisitions that do not have the intention of positively integrating the target into the acquirer’s corporate system but to shut off the target’s development or product to eliminate a potential competitor.

## 2. Novel economic mechanisms are at play

10 In many aspects, this digital sector plays by different rules than the old industrial economy.

- **Network effects:** Digital markets are characterized by services that intermediate between several separate user groups. Such multi-sided platforms do not sell a simple “pipeline product”, such as a car. There, the manufacturer buys primary products, assembles cars, and sells them to consumers. Platforms work differently – they are about connecting multiple user groups. Network effects exist where the benefit that a user group derives from a platform depends on either the number of users of the same user group (direct network effects) or on the number of users of the other user group (indirect network effects). If the benefit increases with the number of users, such network effects are ‘positive’, if the benefit decreases, they are ‘negative’. Apple’s and Google’s app stores for iOS and Android respectively form and display such classical platforms and network effects. They connect end users with app developers and advertisers. The more apps an app store bundles, the more attractive it is for end users (positive indirect network effect).

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<sup>15</sup> According to the agreement, Google pays Apple over \$12 bn to be the default search engine on all Apple devices. Apple, in turn, has refrained from developing its own general search engine, despite controlling the standard browser on iOS devices, Safari, which would ensure an immediate full penetration of the market if Apple’s own search service came as default.

<sup>16</sup> Oliver Latham et al., *Beyond Killer Acquisitions: Are There More Common Potential Competition Issues In Tech Deals And How Can These Be Assessed?*, CPI ANTITRUST CHRONICLE, May 2020, at 5, <https://bit.ly/3ppru4y>.



- **Irreversible tipping:** Where positive network effects exist, a single platform can generate the maximum benefit for its respective user groups. Accordingly, platform markets have an inherent tendency to push market concentration to one supplier, until the market “tips”: that “tipping point” is when one platform has so many users (and thereby generates such strong benefits) that any other platform appears unattractive from the user groups’ perspective because it cannot offer access to a meaningful number of members of the opposite user group. Users start to “single-home” instead of trying multiple services (“multi-homing”) or switching their standard platform. The number of users required to generate sufficient positive network effects to be attractive is called “critical mass”. The tipping point is usually cemented by high switching costs for users: dominant platforms make it burdensome or costly for all their user groups to switch to rivals (try porting data from iOS to Android). Once a market has “tipped”, newcomers offering the same kind of product are unlikely to gain a critical mass. Therefore, where products and services are not interoperable (thereby ‘sharing’ the network effects triggered by the joint user bases), such tipping is typically irreversible. The competition “for the market” is decided. New competition can only arise from products and services that are so different to the incumbent platform that the user groups do not directly compare the benefits of such platforms but consider them as complementary. This is why, for incumbent platforms, the most serious threat does not come from “within” their markets – that is, from equivalent platforms, even if they offer services at much lower prices – but from product differentiations that include the incumbent’s core platform service but gain additional attention and users through different and new features that the incumbent does not provide.
- **Moats around core platform “cash cow” services:** Most large digital undertakings have one core business which is their “cash cow”: Amazon has its online marketplace, Meta has its social network Facebook, Google has its general search service Google Search, Microsoft has the operating service Windows, and Apple has its devices, run by the operating system iOS. By their nature as market leaders, these core platform services generate very strong network effects and ensure a very high market penetration that can be used as a sales platform for the launch of new services and products. These core products or services also generate high profits – they form the firm’s cash cow and

financial backyard for any expansions. For example, Google, despite various ventures into far corners of the economy, still generates 80% of its profits from online advertising (mostly on Google Search).<sup>17</sup> Naturally, the platforms want to protect their cash cows and construct “moats” around them<sup>18</sup>. Shielding their cash cows from competition, such moats can take the form of many ancillary products and services. For example, a general search engine such as Google strongly depends on people turning to it as first port of call when entering the Internet – that is what generates search queries and valuable data for advertising income. Most people use the search engine that is set as default on their devices and in their browsers (“status quo bias”). That means that the browser and the device become a key leverage point for deciding which search engine receives all those users and all those accompanying benefits.<sup>19</sup> It would be commercially dangerous for Google to stay dependent on browser and device makers to set Google as a default. With an entirely unilateral choice by Apple, Google would no longer be the default search engine on iOS and Google’s traffic would drop significantly, destroying billions in profits. Thus, Google had to react, and developed its own browser (Chrome) which now dominates the global market for browsers. It has also started selling devices such as the Google phone (Pixel) and laptops based on Chrome (Chromebooks). More importantly, Google controls the most widely used mobile operating system in the world: Android. Android has Google Search set as the default search engine. Such moat-building permeates the strategies of all GAFAMs and is a core business principle in digital markets (Figure 1).

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<sup>17</sup> Alphabet Inc., SEC 10-K filing (2021), at 10, [https://www.sec.gov/Archives/edgar/data/1652044/000165204422000019/goog-20211231.htm#i0ef93c820da04204a9c5a49f49a3b2eb\\_130](https://www.sec.gov/Archives/edgar/data/1652044/000165204422000019/goog-20211231.htm#i0ef93c820da04204a9c5a49f49a3b2eb_130).

<sup>18</sup> Tae Kim, *Warren Buffett believes this is ‘the most important thing’ to find in a business*, CNBC.COM, May 7, 2018, <https://www.cnbc.com/2018/05/07/warren-buffett-believes-this-is-the-most-important-thing-to-find-in-a-business.html>.

<sup>19</sup> Google Android, EU Commission, Case no. AT.40099, (July 18, 2018), at ¶ 116.

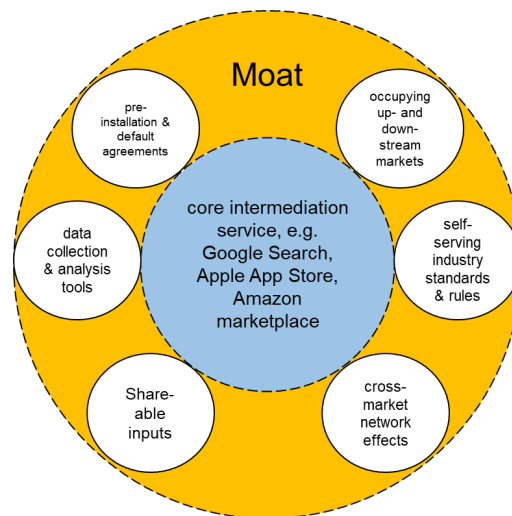


Figure 1: Moat around core intermediation services.

- **Ecosystems in walled gardens.** Protective moats tend to develop into full-scale ecosystems which are to varying degrees closed to third parties (“walled gardens”).<sup>20</sup> For example, Apple’s devices and software are only fully interoperable with its own products. The Apple iPhone can only run iOS as an operating system and works best with additional Apple equipment such as its earphones (e.g., AirPods) and smart watch (Apple Watch). Third-party equipment often displays interoperability issues. As a result, consumers are on a path dependency once they have bought one Apple device: they have an incentive to purchase further Apple items, eventually resulting in a “**lock in**” where it comes with high costs for users to switch to other products or into other ecosystems (**high switching costs**). It is increasingly difficult (and annoying) for Apple users to use accessories for their devices or software from third parties, such as an Android tablet or a Garmin smart watch. A similar path dependency can exist for advertisers that gain a commercial advantage if they use several Google services simultaneously, thereby raising the costs for any switching to an alternative advertising intermediary. The build-up of such ecosystems is typically realized by a certain set of behaviors, such as exclusive interoperability (e.g., iPhone and iOS, Search Ads and

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<sup>20</sup> Generally, see Daniel Crane, *Ecosystem Competition and Antitrust Laws*, 98 NEB. LAW REV. 2 (2019).

Google Ads<sup>21</sup>), tying (e.g., iOS and Apple App Store, Android and Google Play Store), default-setting (e.g., Safari is pre-installed on iOS, Chrome on Android), self-preferencing (e.g., Google Search favoring specialized search services such as for shopping, jobs, hotels etc.), and data envelopment (where data from two markets are combined to strengthen the firm's position in both).<sup>22</sup> Frequently, mergers pave the way for those types of conduct as digital sector firms acquire suppliers of additional devices or services, such as Google/Fitbit (which will be discussed in more detail below).

### **3. Underenforcement of merger review**

#### **a) Mergers that should not have been cleared**

- 11 Even where mergers in the digital sector are notifiable under the current rules, they have been approved in almost all cases.
- 12 In some of those approved mergers, competitors and other critics have voiced grave concerns about their anti-competitive effects – so much that some approvals can today – *ex post* – be regarded as errors.

#### **aa) Google/DoubleClick<sup>23</sup>**

- 13 Chief among those misjudged transactions is Google's acquisition of DoubleClick in 2008. To understand the significance of this transaction, unfortunately, one must delve deeply into the arcane world of online advertising technology. In essence, Google's business that we – consumers – see, its search engine, is only the tip of the iceberg. The money-making machine behind it is a vast

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<sup>21</sup> Google Ads is a Google service that merchants need to use if they wish to serve search-based ads on Google Search. However, through an Google Ads account, the merchant may then also easily book non-search-based display ads, for instance on YouTube.

<sup>22</sup> Padilla Condorelli, *Harnessing Platform Envelopment in the Digital World*, 16 J. COMP. L. & ECON. 143-187 (2020).

<sup>23</sup> Hausfeld LLP, counsel to Reset, is also counsel for the Commonwealth of Puerto Rico in *Texas v. Google*, a case in which several state attorneys general have alleged that Google's acquisition of certain ad tech companies allowed it to violate the state and federal antitrust laws. See also Thomas Höppner et al., *Online Advertising: The French Competition Decision on Google's Self-Preferencing in Ad Tech*, CONCURRENCES E-COMPETITIONS (Sept. 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3929310](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3929310).

empire for advertising technology. Every time a user visits a website, a hidden process takes place behind the curtains, which decides which ads to display to that user. A long chain of technological suppliers provides the services that regulate the sale of such advertising “inventory” on websites. To sell their inventory, operators of websites (“publishers”) use a service called “publisher ad server”. DoubleClick offers such a server, acting as a sort of sales agent for publishers. Google operates an ad exchange – like a stock exchange, this is a trading venue for buyers and sellers meet: here, publisher ad servers sell inventory on behalf of their publisher clients. The buyers are advertisers, themselves relying on buying agents (called demand-side platforms or DSPs). Google’s AdX was one of the largest ad exchanges in the US. Then, Google bought DoubleClick, the largest publisher ad server in ad tech. Even to the untrained eye, such a merger of a buying agent and a (supposedly) neutral exchange is evidently problematic. As one senior Google employee put it, “[t]he analogy would be if Goldman or Citibank owned the NYSE”.<sup>24</sup> There are obvious conflicts of interest for an exchange platform to favor its buying agent, and vice versa. Accordingly, in hindsight, the acquisition of DoubleClick by Google is seen as the initial spark that allowed Google to dominate ad tech.<sup>25</sup>

- 14 The Google/DoubleClick merger did not go through without resistance. Commissioner Harbour issued a dissenting statement laying out how Google and DoubleClick competed at the time of the merger and were likely to compete in the future.<sup>26</sup> Yet, Google’s lobbying efforts were persistent, and the FTC ultimately approved the merger.<sup>27</sup> As justification, the agency primarily cited potential competition in the online advertising sector<sup>28</sup> – a projection which turned out to be wildly optimistic.

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<sup>24</sup> Compl., *Texas v. Google*, *supra*, at ¶ 5.

<sup>25</sup> Dina Srinivasan, *Why Google Dominates Advertising Markets, Competition Policy Should Lean on the Principles of Financial Market Regulation*, 24 STAN. TECH. L. REV. 55, 88 (2020).

<sup>26</sup> Google/DoubleClick, FTC File No. 071-0170, (20 Dec 2007), Dissenting Statement of Commissioner Pamela Jones Harbour.

<sup>27</sup> Google is the largest spender on lobbying in the US, see Jonathan Taplin, *Why Europe got tough on Google but the U.S. couldn’t*, WASHINGTON POST, June 28, 2017, <https://www.washingtonpost.com/news/posteverything/wp/2017/06/28/why-europe-got-tough-on-google-but-the-u-s-couldnt/>.

<sup>28</sup> Google/DoubleClick, *supra*, at 5, 6, 8, 13.

15 This was the first step for Google on its ladder to ad tech domination. Google later acquired AdMob, another exchange, focused on intermediation of ads on mobile devices. It also acquired DV360, a buying agent for advertisers. From then on, Google owned a sales agent, an exchange, and a buying agent (!). YouTube followed, one of the largest publishers in the world (YouTube is considered a ‘must-have’ among advertisers).<sup>29</sup> Today, Google owns the dominant supplier on each level of the ad tech stack:<sup>30</sup>

- Google holds a market share of 90% in publisher ad server services, meaning that 90% of web inventory is managed and sold by Google’s ad server, Google Ad Manager.<sup>31</sup>
- On the level of Supply-Side Platforms (“SSPs”), Google’s services such as AdX handle 30-60% of the trading volume.<sup>32</sup>
- Google operates the largest DSPs (with a market share of 50-60%) called Google Ads and DV360.<sup>33</sup>

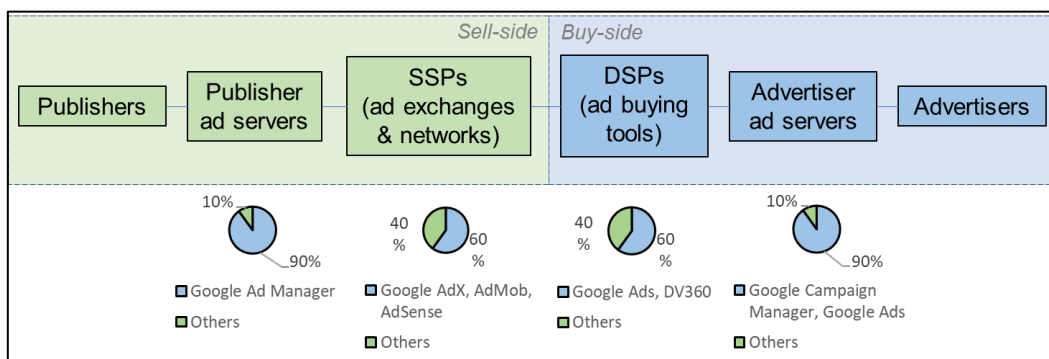


Figure 2: Google’s position in ad tech.

<sup>29</sup> ACCC, *supra*, at 96.

<sup>30</sup> Sometimes, advertisers use advertiser ad servers to manage their campaigns. Google’s Campaign Manager holds a market share of 80-90% in advertiser ad servers, *Online platforms and digital advertising market study: Final Report*, COMPETITION MARKETS AUTHORITY, July 1, 2020, at ¶¶ 5.215-5.217.

<sup>31</sup> *Id.* at ¶¶ 5.222, fn. 37.

<sup>32</sup> On the SSP level, Google is present with three services: AdX (for large publishers), AdMob (for app inventory) and Google Display Network (for web inventory such as YouTube), see *id.* at ¶¶ 5.221-5.223.

<sup>33</sup> *Id.* at ¶¶ 5.218-5.220.

- 16 If judged in hindsight, the Google activity could be compared to Goldman Sachs owning the NYSE, but also NASDAQ, the CME, Blackrock, Vanguard, and Bank of America. Such concentration along the intermediation line for financial services is unthinkable in finance, but in ad tech, it is the reality.
- 17 In 2020, Texas and numerous other states filed a complaint alleging Google's monopolizing of ad tech. The alleged conduct consists mainly of tying and self-favoring.<sup>34</sup> Those are classical types of anti-competitive conduct observed after intense vertical and horizontal integration. Only such integration allows firms to tie products (only a firm which offers multiple, related products can reasonably tie them) or to favor its own services over others (this is only possible where a firm runs a vertically integrated platform such as an exchange where a subsidiary can be favored over other customers). Through this activity, Google amassed huge profits enabling it to fortify the moat around its core search service and transform ad tech into a competitive desert.
- 18 As a result, many consider merger control in ad tech to have failed. Not only Google/DoubleClick, but also the acquisitions of AdMob and DV360 should have been blocked.

**bb) Google/Fitbit**

- 19 In November 2019, Google announced its acquisition of Fitbit.
- 20 Fitbit produces wrist-worn fitness devices which track health data. It developed its own operating system and app store for those devices. The devices are used in conjunction with a smartphone, usually connecting via Bluetooth.
- 21 According to the EU Commission, the Google/Fitbit merger raised serious concerns as it allowed Google to:
- enter the market of fitness devices,
  - collect more data, and

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<sup>34</sup> Compl., *Texas v. Google*, supra.

- spread the use of its Android operating system.

22 Google and Fitbit were competitors in a number of markets, including operating systems, wearable devices, app stores, and mobile payment services. Following the merger, Google would have the ability to – inter alia – degrade interoperability of competing wearable devices with Android.<sup>35</sup> Still, the merger was approved by the EU Commission, albeit under conditions (which will be discussed below).<sup>36</sup> The DOJ investigated the acquisition but let the HSR waiting period expire without taking action, allowing Google to consummate the merger. Afterwards, both the ACCC and the CMA went public with the view that they would reject the commitments accepted by the EU.<sup>37</sup> Also, the Electronic Privacy Information Center opposed the deal based on privacy concerns.<sup>38</sup>

### cc) Facebook/WhatsApp and Facebook/Instagram

23 Facebook acquired two rival social media providers, WhatsApp and Instagram. WhatsApp is a messenger service which functions in a very similar way to Facebook’s Messenger. The merger was not reviewed by US authorities, which is another problem in and of itself (discussed below at para. 96). But the EU Commission reviewed it and eventually approved it. Instagram is a photo-sharing app. The FTC investigated Facebook’s acquisition of Instagram in 2012, but eventually closed the probe without taking any action.<sup>39</sup>

24 These mergers had two kinds of negative impact:

- **Facebook was allowed to swallow potential competitors.** Today, the market for social networks in the US is primarily dominated by Facebook and Instagram (both operated by Meta), with TikTok and Snapchat lagging far behind. At the time of the merger, Facebook was already the largest social network by far. In hindsight, this market situation evidently

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<sup>35</sup> Google/Fitbit, Case no. M.9660, EU Commission (17 Dec 2020), at ¶ 772.

<sup>36</sup> *Id.*

<sup>37</sup> Alec Burnside et al., *Google/Fitbit: Merger control unfit for purpose?*, 20(2) COMP. LAW INSIGHT 1 (2021).

<sup>38</sup> EPIC, *Google Closes Fitbit Acquisition While DOJ’s Review of Merger Continues*, EPIC.ORG, Jan. 14, 2021, <https://epic.org/google-closes-fitbit-acquisition-while-doj-s-review-of-merger-continues/>.

<sup>39</sup> FTC, *FTC Closes Its Investigation Into Facebook’s Proposed Acquisition of Instagram Photo Sharing Program*, FTC.GOV, Aug. 22, 2012, <https://www.ftc.gov/news-events/press-releases/2012/08/ftc-closes-its-investigation-facebooks-proposed-acquisition>.



casts doubt over why Facebook was allowed to purchase Instagram without any further investigation. In a market of four (then: three) major players, the thresholds for a merger between the top two suppliers would be very high. Assume that the largest drug store chain in the US, CVS, intended to purchase number two, Walgreens, accumulating a combined market share of 89% in the drug store market.<sup>40</sup> Such a transaction would be eyed very closely by regulators, and would very likely be blocked – but in the cases of WhatsApp and Instagram, authorities did not even open a detailed investigation. Before the mergers, both WhatsApp and Instagram had the potential to develop into full-scale competitors of Facebook, offering the full social media experience (including messaging, posts, photos, etc.). In the 1990s, similarly, Netscape wanted to extend its browser Netscape Navigator to develop into a full-scale operating system which could have competed with Microsoft. This plan caused Microsoft to engage in anti-competitive conduct to eliminate Netscape, eventually triggering an antitrust action that almost led to Microsoft’s breakup. As a result, consumers were deprived of a potential alternative to the now omnipresent Microsoft Windows. This is particularly concerning today when we can have a glimpse into the alternative reality of rigid merger enforcement: TikTok is now a competitor that entered the market with a new, innovative product for social interaction online (short, editable videos).<sup>41</sup> If Instagram or WhatsApp had been allowed to remain independent, competition in social media could have been fierce.

- **Facebook combined its data with WhatsApp’s.** The EU Commission asked Facebook about the technical possibilities of the company to combine both firms’ datasets post-merger. Facebook denied such a possibility, saying it was not technically feasible. Yet, after the consummation of the merger, Facebook did precisely that. It used privacy policies that were in violation of the EU’s General Data Protection Regulation. The EU

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<sup>40</sup> OPEN MARKETS INSTITUTE, *Monopoly By The Numbers*, <https://www.openmarketsinstitute.org/learn/monopoly-by-the-numbers>.

<sup>41</sup> Describing those “reverse killer acquisitions” more generally, see Cristina Caffarra et al., *How tech rolls: Potential competition and ‘reverse’ killer acquisitions*, VoxEU.ORG, May 11, 2020, <https://voxeu.org/content/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions>.

Commission fined Facebook \$121 mil<sup>42</sup> for providing false information, but the damage was done.<sup>43</sup> Facebook was able to combine the two datasets, which both harmed consumer privacy and gave Facebook a competitive edge against other firms that monetized data. Data is the new oil of the internet economy as it serves to understand consumers' needs, and enables advertisements to be highly targeted. More user data indirectly translates into more advertising dollars.

**dd) Facebook/Onavo**

25 In 2013, Facebook acquired Onavo, a surveillance company. The FTC described the transaction the following way:

*“Onavo marketed itself to users as providing secure virtual private networking services, but—unknown to many users—it also tracked users’ online activity. By acquiring Onavo, Facebook obtained control of data that it used to track the growth and popularity of other apps, **with an eye towards identifying competitive threats for acquisition or for targeting under its anticompetitive platform policies.** As a December 2013 internal slide deck noted: “With our acquisition of Onavo, we now have insight into the most popular apps. We should use that to also help us make strategic acquisitions.” Facebook also used Onavo data to generate internal “Early Bird” reports for Facebook executives, which focused on “apps that are gaining prominence in the mobile eco-system in a rate or manner which makes them stand out.”<sup>44</sup>*

26 While the FTC was notified about the transaction,<sup>45</sup> it was reviewed neither by the FTC, nor the DOJ or the EU Commission. Yet, clearly, such use of a target company to prepare anti-competitive acquisitions should fall within the scope of merger review and should probably have been blocked.

**ee) Facebook/CrowdTangle**

27 A transaction similar to Facebook/Onavo is the acquisition of CrowdTangle in 2016. CrowdTangle offered a tool that tracked user engagement on social media such as Facebook. It could show which posts and which authors attracted most user attention in the form of views, likes, and comments. It

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<sup>42</sup> Hereafter, and for consistency, fine amounts initially imposed in Euros or Pounds sterling will be expressed in terms of US Dollars at the current rate of exchange.

<sup>43</sup> Facebook/WhatsApp (Art. 14 decision), Case no. M.8228, EU Commission (17 May 2017).

<sup>44</sup> FTC v. Facebook, Case 1:20-cv-03590-JEB, (January 13, 2021), at ¶¶ 74-75.

<sup>45</sup> FTC, Communications with Facebook, at 430, <https://bit.ly/35Jjp3N>.

allowed marketing experts to track the success of their posts, and researchers to see what people were interested in. CrowdTangle published its results to anyone interested. This was not a problem until CrowdTangle data revealed that the top 10 posts on Facebook in election times were those of right-wing authors often spreading misinformation. Consequently, Facebook decided to break up the CrowdTangle team in 2021. Employees were assigned new roles, and the former CrowdTangle founder and chief executive, Brandon Silverman, left Meta in October 2021. While the CrowdTangle tool is still formally intact and public, its future is uncertain.<sup>46</sup>

- 28 Like other digital sector mergers, this one has no obvious negative effects on price or the competitive process. However, it awarded Meta the opportunity to shut down a service that had provided at least some transparency in the algorithmically riddled universe of social network echo chambers. The fact that Meta – until now – refrained from shutting down the service and take data offline does not eliminate the threat of such action. This decision was voluntary and may be temporary.
- 29 The merger allowed Facebook to decrease transparency on its own network. Absent the acquisition, CrowdTangle would never have been threatened of being broken up. This loss of transparency translates into user harm in a variety of ways: Where no third party can provide checks and balances regarding echo chambers, users are more vulnerable to harmful content, misinformation, and addiction algorithms. A merger review should have considered such non-price user harms. However, to our knowledge, the merger was not reviewed by any agency. As a result, this merger shows both the substantive shortcomings regarding types of consumer harms, and procedural shortcomings regarding review thresholds.

#### **ff) Amazon/MGM**

- 30 Amazon's purchase of MGM appears to be another classical example of a moat-building strategy. At first view, Amazon, an e-commerce giant, and MGM, a movie studio, have little in common. Horizontal effects are difficult to find. However, as Amazon's founder, Jeff Bezos, himself put it:

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<sup>46</sup> Kevin Roose, *Inside Facebook's Data Wars*, N.Y. TIMES, July 14, 2021, <https://nyti.ms/3JeF8zE>; Ben Smith, *A Former Facebook Executive Pushes to Open Social Media's 'Black Boxes'*, N.Y. TIMES, Jan. 2, 2022, <https://nyti.ms/3lctcwY>.

“when we win a Golden Globe, it helps us sell more shoes.”<sup>47</sup> How? MGM will deliver more and exclusive content to Amazon’s Prime Video service, attracting more customers with well-known franchises like James Bond. Yet, Prime membership grants not only access to the video streaming database, but also to special benefits in Amazon’s e-commerce business, such as free shipping. Rival e-commerce platforms compete against Amazon not only on the basis of their retail business, but also in the video streaming dimension – to offer a real substitute to Amazon’s service, it is not enough to simply “sell shoes”, but it becomes necessary to offer additional services such as video streaming. This helps secure Amazon’s “cash cow” – the core platform service that it offers: the e-commerce marketplace.

31 Hence, the anti-competitive link between MGM and Amazon’s core business although indirect – does not mean it does not exist. The acquisition of MGM is another mosaic piece for building a moat that is insurmountable, eventually making Amazon’s ecommerce business incontestable. Each single mosaic piece serves to strengthen the moat around Amazon’s core business.

32 In fact, this anti-competitive link is very real in the face of Amazon’s recent conduct. For example, Amazon only agreed to put WarnerMedia’s HBO Max app on Amazon Fire TV streaming devices if Warner agreed to extend a deal with Amazon’s cloud service AWS.<sup>48</sup> Two seemingly unrelated services – cloud and a smart TV device – are linked in an anti-competitive tie to make third parties dependent on Amazon’s ecosystem.

33 This business strategy is not novel but rather is a repetition of history. In the 1930s, the major Hollywood studios dominated the film industry and attempted to lock up distribution channels by taking over movie theaters (the place where people went before streaming existed). In 1938, the DOJ filed an antitrust lawsuit alleging that eight major motion picture companies (including MGM) were illegally fixing prices and monopolizing the market.<sup>49</sup> Eventually, in 1948, the Supreme Court

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<sup>47</sup> Patricia Aufderheide, *Don’t Let Amazon Eat the Film Industry*, N.Y. TIMES, Oct. 3, 2021, <https://www.nytimes.com/2021/10/03/opinion/amazon-antitrust-movies.html?searchResultPosition=11>.

<sup>48</sup> Martin Peers, *The Briefing*, MILLED.COM, March 17, 2022, <https://bit.ly/36eHSie>.

<sup>49</sup> Aufderheide, *supra*.

decided in *United States v. Paramount Pictures* that those vertically integrated firms covering both production and exhibition of movies were to be split up.<sup>50</sup>

- 34 The similarities to the modern streaming market are striking, even surpassing the competitive concerns of 1948, as not only movie production and exhibition are being integrated, but also other businesses such as e-commerce and cloud services.
- 35 Agencies have not opposed the merger. However, the EU Commission also cleared the merger on March 15, 2022. While the Commission considered the conglomerate links regarding MGM's content and Amazon's existing bundle of audio-visual retail and marketplace products, it eventually concluded that the addition of MGM's content into Amazon's Prime Video offer would not have a significant impact on Amazon's position as provider of marketplace services.<sup>51</sup>
- 36 This is certainly a case to watch, and one that, in a couple of years, might feature as a prime example of anti-competitive integration that combines vertical and conglomerate effects.

## gg) Other critical transactions

- 37 The list of GAFAM acquisitions which should have been blocked goes on. Other questionable approvals were, for example, the Facebook/Kustomer transaction where the FCO itself admitted that it would have blocked the deal but could not because of competence overlaps with the EU Commission.<sup>52</sup> Moreover, Google/Waze is another transaction that has been publicly criticized for its approval.<sup>53</sup> Waze offers navigation software (similar to Google Maps) and may have developed

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<sup>50</sup> *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

<sup>51</sup> European Commission Press Release, *Mergers: Commission approves acquisition of MGM by Amazon* (Mar. 15, 2022), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_1762](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1762).

<sup>52</sup> The Bundeskartellamt Press Release, *Bundeskartellamt clears acquisition of Kustomer by Meta (formerly Facebook)* (Nov. 2, 2022), [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/11\\_02\\_2022\\_Meta\\_Kustomer.html?nn=3599398](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/11_02_2022_Meta_Kustomer.html?nn=3599398).

<sup>53</sup> John M. Simpson, *FTC Probes Google-Waze \$1.1 Billion Deal After Consumer Watchdog Cites Antitrust Issues*, CONSUMER WATCHDOG, 2014, <https://www.consumerwatchdog.org/blog/ftc-probes-google-waze-11-billion-deal-after-consumer-watchdog-cites-antitrust-issues>.

into a strong rival of Google Maps because it offered superior services such as traffic estimates (which Google Maps did not have at the time), speed limit information, and speed camera warnings.

38 Commentators have also pointed to the CDK/AutoMate, Verisk/EagleView, Thoratec/Heartware, and Nielsen/Arbitron mergers in the US,<sup>54</sup> and PayPal/iZettle, Sabre/Farelogix, and Amazon/Deliveroo in the UK.<sup>55</sup>

#### **hh) Summary of examined mergers**

39 The merger approvals that are today widely regarded as “false negatives” can be grouped into four categories:

- Vertical integration, allowing the merged entity to engage in tying and self-preferencing (Google/DoubleClick).
- Conglomerate mergers, allowing both tying and the strengthening of ecosystems (Amazon/MGM and Google/Fitbit).
- “Killer acquisitions” of potential rivals (Facebook/WhatsApp and Facebook/Instagram).
- Mergers that serve indirect anti-competitive goals (Facebook/Onavo and Facebook/CrowdTangle).

40 In all of the groups above, one commonality is striking: the fact that many of the examined mergers result not only in economic, but also in other harms, such as harms to privacy (Google/DoubleClick,

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<sup>54</sup> *Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms, Hearing Before the Subcommittee on Antitrust, Competition Policy, and Consumer Rights*, 116 Cong. (2019), at 17 (Testimony of Bruce Hoffman, Director, Bureau of Competition of the FTC); Compl., CDK Global, Inc., FTC Matter No. 1710156 (Mar. 19, 2018); Compl., Verisk Analytics, Inc., FTC Matter No. 1410085 (Dec. 16, 2014); Compl., Thoratec Corp., FTC Matter No. 0910064 (July 28, 2009); Compl., Nielsen Holdings N.V., FTC Matter No. 1310058 (Sept. 20, 2013); Kelly Fayne & Kate Foreman, *To Catch a Killer: Could Enhanced Premerger Screening for ‘Killer Acquisitions’ Hurt Competition?*, 34 ANTITRUST 8, 9 (2020).

<sup>55</sup> C. Caffarra et al., *supra*.

Facebook/WhatsApp, Facebook/Instagram) or market transparency (Facebook/CrowdTangle and Facebook/Onavo).

**b) “Killer acquisitions”**

**aa) Definition and concerns**

- 41 Some scholars argue that preemption of potential competitors is one of the main motivations for acquisitions in the digital economy. In 2017 alone, GAFAM acquired start-ups worth \$31.6bn. Business analysts speak of a “kill zone”, i.e., a range of products or services where incumbent digital firms will make sure that competition does not arise, either by acquiring competitors or by reacting aggressively to the launch of new products (such as predatory pricing). Consequently, the argument goes, potential entrants are unlikely to obtain funding from venture capital firms and others if they develop products in the kill zone. According to Cunningham et al., the researchers who first used this term with regards to the pharmaceuticals industry, a “killer acquisition” is an acquisition where one firm buys another, smaller one, with the intent of shutting down the small firm’s development of a new product.<sup>56</sup> Such killer acquisitions are reported to constitute 5-7% of total transactions in the pharmaceutical industry.<sup>57</sup>
- 42 Based on the definition above by Cunningham et al., killer acquisitions in the digital sector are not seldom. And Facebook was able to make at least seven such acquisitions since 2009: Facebook has acquired and then shut down other social networks including Parakey (2007), FriendFeed (2009), Nextstop (2010), Divvyshot (2010), Beluga (2011), Gowalla (2012) and Lightbox (2012), a London-based photo sharing start-up.<sup>58</sup> Timothy Wu, special assistant to President Biden for Technology and Competition Policy, counted as many as 39 killer acquisitions by Facebook between 2009 and 2019.

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<sup>56</sup> Colleen Cunningham et al., *Killer Acquisitions*, 129(3) J. .POLIT. ECON., 649–702 (May 2021), <https://ssrn.com/abstract=3241707>; also Mark Bourreau & Alexandre de Stree, *Digital Conglomerates and EU Competition Policy*, UNIVERSITE DE NAMUR, Mar. 2019, at 21, <http://www.crid.be/pdf/public/8377.pdf>. They give an extensive overview of current literature.

<sup>57</sup> Cunningham et al., *supra*.

<sup>58</sup> Tim Wu & Stuart A. Thompson, *The Roots of Big Tech Run Disturbingly Deep*, N.Y. TIMES, June 7, 2019, <https://www.nytimes.com/interactive/2019/06/07/opinion/google-facebook-mergers-acquisitions-antitrust.html>

- 43 Such a strategy may be more prevalent in the pharmaceutical industry where one firm intends to stop another from bringing a rival drug to market. This can make commercial sense because the acquirer can continue to sell its own drug post-merger for high prices and it is unlikely that competitors quickly develop rival drugs. Drug development takes years of research, clinical testing, and finally FDA approval. That is different in tech markets where apps can be developed easily, quickly, and can spread swiftly. Compared to the process of FDA approval, being approved by the Apple and Google app stores is relatively easy. As a result, acquiring a tech competitor to “kill” the product would simply motivate another one to copy it (imagine a “Greek Hydra”). That is why, typically in the digital sector, firms acquire potential competitors not to terminate their innovation efforts completely. Instead, incumbents may integrate the acquired technology into their own product to prevent rivals from using such innovation as a feature to distinguish their product from that of the incumbent with a view to incentivizing multi-homing. If an incumbent integrates all the new technologies or features developed in the market, its users will never have any incentive to try out a separate service. Over the years Google, for example, has acquired several providers of new search technology (such as semantic or voice search), to integrate such solutions into its own search service (and to prevent rivals from differentiating their offerings).
- 44 Against this background, the literature adopted a wider definition of killer acquisitions in the digital sector, including the acquisition of what the current guidelines refer to as “Maverick” firms.<sup>59</sup>
- 45 Digital sector markets are particularly vulnerable to killer acquisitions because firms frequently engage in competition “for the market” instead of “in the market”, meaning that there is competition to dominate a winner-takes-all market instead of the coexistence of multiple firms. In competition “for the market” cases, competitive threats are likely to stem from nascent firms that “disrupt” an incumbent by means of a (very) different product.<sup>60</sup> In tech, “today’s complement can become tomorrow’s substitute”.<sup>61</sup>

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<sup>59</sup> See for instance Latham et al., *supra*.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 3.



46 Some commentators call into question if digital sector companies truly intend to extinguish innovation. Indeed, in its report “Unlocking Digital Competition”, the UK’s Digital Competition Expert Panel stated that it had seen a significant volume of evidence which suggests that the prospect of being bought-out by a digital sector company acts as an important incentive for innovative start-ups to enter the market and that this, in fact, drives innovation.<sup>62</sup> Commentators point to the fact that R&D spending is frequently led by digital sector companies (in 2017, by Amazon and Alphabet), followed by Samsung, Volkswagen, Microsoft, Huawei, Intel, and Apple. The argument goes that these firms are genuinely motivated by pushing innovation, in their R&D spending as well as in their acquisitions.<sup>63</sup> However, it is difficult to generalize a firm’s motivations from one area (R&D) to another (M&A) – the underlying assumption that these firms are permeated by one single “spirit” which is pro-innovation, is hardly realistic. For example, the Bell System, through Bell Labs, invested heavily in R&D and was highly innovative, collecting seven Nobel Prizes, more than any other corporate laboratory. But simultaneously, Bell suppressed innovations that may have been able to threaten the old telephone network.<sup>64</sup> It is economically rational for firms to pursue both paths – on the one hand, develop own products and improve them through in-house R&D, but also eliminate potential competition through strategic acquisitions. There is no contradiction in such a business strategy.

**bb) Reverse killer acquisitions**

47 Economists recently began to describe another variant of killer acquisitions called “reverse killer acquisitions”: The standard killer acquisition is an acquirer purchasing the target with the aim of the target ceasing its operations or development efforts regarding a certain product. With reverse killer acquisitions, it is the other way around: The digital sector acquirer is developing a product but notices that one or more other, nascent firms are working on the same project. Possibly, the start-ups are even more advanced in their development process than the digital sector acquirer. This makes the acquirer face the “Buy versus Build” choice. It can either develop the product in-house or save these costs to purchase another firm which is further ahead in the process. If the acquirer chooses the “Buy” option, it will typically cease its own efforts at developing the product – that is

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<sup>62</sup> Furman, *supra*.

<sup>63</sup> Fayne & Foreman, *supra*, at 9.

<sup>64</sup> Tim Wu, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES 187-188 (2010).

now the job of the target after it has been integrated into the acquirer's business. In this sense, the acquisition does not “kill” the target's innovations efforts, *but the acquirer's*. Such a reverse killer acquisition can have comparable negative welfare effects as compared to standard killer acquisitions. It is not the target's innovation which is lost for society, but that of the acquirer. From an antitrust policy perspective, it makes no difference if rival innovation efforts originate from the acquirers or the targets of an acquisition. In both cases the acquisition would reduce the number of companies working on such innovation. Only “the prospect of being chased, caught, and overtaken” creates the strong incentive to come up with better solutions.<sup>65</sup> In general, the consensus in academic literature is that consumers and society are better off when innovative firms are *not* permitted to merge.<sup>66</sup>

**II. A major cause: the inadequate legal framework**

**1. Substantive issues**

**a) Theoretical framework is outdated**

48 The current Merger Guidelines are still grounded in a theoretical framework which is anchored in the Chicago School doctrine from the 1970s that focuses on static competition and efficiency primarily in terms of price. This framework is inadequate in digital markets where competition is mostly dynamic, and consumers rarely pay for services and products they use.

**aa) Focus on static competition rather than dynamic competition**

49 Static competition is a type of competition which focuses on reducing prices for consumers. In a market with effective static competition, there are numerous suppliers of the same or a very similar product. These suppliers improve their products incrementally, increase the efficiency of their production processes, in other words, increase their productivity, and thereby reduce prices. While

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<sup>65</sup> Caffarra et al., *supra*.

<sup>66</sup> *Id.*; Ioannis Kokkoris & Tommaso Valletti, *Innovation Considerations in Horizontal Merger Control*, 16(2) J. COMPETITION LAW ECON. 220-261 (2020). This conclusion is further supported by a complementary literature using dynamic methods, including Gautam Gowrisankaran, *A Dynamic Model of Endogenous Horizontal Mergers*, 30(1) RAND J. ECON. 56-83 (1999); and Ben Mermelstein et al., *Internal Versus External Growth in Industries with Scale Economies: A Computational Model of Optimal Merger Policy*, 128 J. POLIT. ECON. 1 (Jan. 2020).

quality surely is a relevant factor for consumers, in those static markets, price is a more important parameter for competition. An example of such a market can be found in simple products that can typically be seen in supermarkets, such as butter: quality differences are small, and many consumers primarily decide which butter to buy based on its price. The production process is not overly complicated, and the product cannot really be changed by innovation. As a result, suppliers focus their efforts on optimizing their production processes.

- 50 The utopian market structure for static competition has received the label “perfect competition”, describing a situation where products are identical, no supplier has market power to determine prices, suppliers have equal market shares, buyers have complete information about prices and products, and barriers to entry do not exist. Any deviation from this state is considered “imperfect competition”.<sup>67</sup>
- 51 Assessing mergers from the perspective of static competition can make sense when the concerned firms are concerned that are primarily active in such markets. However, this framework is inadequate for assessing markets where competition works fundamentally differently. As explained above, due to the relevance of product differentiation to challenge incumbent network effects, in digital markets innovation plays a central role<sup>68</sup> Accordingly, in such markets, we witness a higher pace of product cycles and alterations. Plus, competition focuses less on the price than on the quality of a product or service. Hence, dynamic competition is considerably more relevant than static competition. The notion of dynamic competition is associated with the ideas of Joseph Schumpeter and his theory of creative destruction. According to Schumpeter, competition can take the form of an innovation which replaces current products.<sup>69</sup>
- 52 This type of competition is prevalent in digital markets. For example, Apple and Sony never competed statically for music players. Sony was a market leader for a long time with its Walkman and Discman. This was the main way to listen to music out of one’s home. However, this suddenly changed when Apple marketed its new product, the iPod. This new product was not a mere

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<sup>67</sup> Gunnar Niels et al., *ECONOMICS FOR COMPETITION LAWYERS*, 2<sup>ND</sup> ED. ¶ 1.37 (2016).

<sup>68</sup> J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5(4) *J. Competition Law Econ.* 581-631 (Nov. 20, 2009).

<sup>69</sup> Joseph A. Schumpeter, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (1942).

incremental improvement of Sony’s Walkman but an entirely new technology based on MP3. It replaced Sony’s technology. Later, smartphones completely replaced MP3 audio players by including this functionality in a new device. This was again not a mere incremental improvement of a product or a similar product at a lower price, but a completely new one. The development of those new products required a lot of creativity, new technologies and patents, making it considerably more complicated than offering butter at a lower price or with better taste.

- 53 As explained above, network effects are widespread in digital markets. As a result, once a market has tipped, it is dominated by one supplier that generates the strongest positive network effects. Rivals know that, economically, it does not make sense for them to compete only on price because lower prices do not necessarily allow them to generate the network effects that are necessary to compete and to outweigh the size advantages of the incumbent. Accordingly, competition takes place *within the market* and *for the market*, in particular by means of product differentiations.<sup>70</sup>
- 54 The Merger Guidelines need to take account of those fundamental changes in the nature of competition. They may no longer focus on price competition.
- 55 To be fair, the current Guidelines explicitly mention non-price factors to be relevant in merger review:

*“A merger enhances market power if it is likely to encourage one or more firms to raise price, **reduce output, diminish innovation, or otherwise harm customers** as a result of diminished competitive constraints or incentives ... For simplicity of exposition, these Guidelines **generally discuss the analysis in terms of such price effects**. Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced **product quality, reduced product variety, reduced service, or diminished innovation**. Such non-price effects may coexist with price effects, or can arise in their absence. When the Agencies investigate whether a merger may lead to a substantial lessening of non-price competition, they employ an approach analogous to that used to evaluate price competition.”<sup>71</sup>*

- 56 Furthermore:

*“The Agencies also consider whether a merger is likely to give the merged firm an incentive to cease offering one of the relevant products sold by the merging parties.*

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<sup>70</sup> This is true in some cases but of course there are exceptions. In markets where multi-homing is prevalent, competition does take place within the market.

<sup>71</sup> Horizontal Merger Guidelines, DOJ, Aug. 19, 2010, at 2.

*Reductions in variety following a merger may or may not be anticompetitive. Mergers can lead to the efficient consolidation of products when variety offers little in value to customers. In other cases, a merger may increase variety by encouraging the merged firm to reposition its products to be more differentiated from one another.”<sup>72</sup>*

57 The Guidelines also explicitly consider potential competition:

*“The Agencies consider whether a merger may lessen competition by **eliminating a “maverick” firm**, i.e., a firm that plays a disruptive role in the market to the benefit of customers. For example, if one of the merging firms has a strong incumbency position and the other merging firm threatens to disrupt market conditions with a new technology or business model, their merger can involve the loss of actual or potential competition.”<sup>73</sup>*

58 While the Guidelines do mention those non-price factors, they rarely reference them in their descriptions of actual review methods. For example, the Guidelines rely on the Hypothetical Monopolist test to measure market power. This test also labelled SSNIP-test,<sup>74</sup> simulates a small increase *in price* to find out if consumers would switch suppliers.<sup>75</sup> Such a test is hardly adequate in markets where price is a secondary parameter of competition. In fact, in many digital markets, consumers do not pay a monetary price. Products such as search engines and social networks are financed by advertisements. Similarly, the guidelines focus on the number of market participants, market shares, and market concentration.<sup>76</sup> This reflects what a utopian market with perfect static competition would look like: numerous market participants, each with a low market share, competing on price. But, in digital markets, competitive pressure often comes from outside of a dominated market, as was the case with smartphones versus mp3 players and the Walkman.

#### **bb) Chicago versus Brandeis, Bork versus Khan**

59 The insights gained from the research on dynamic competition have been accompanied by increasing criticism of the Chicago School doctrine. Today, a new school of thought dominates

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<sup>72</sup> *Id.* at 24.

<sup>73</sup> *Id.* at 3-4.

<sup>74</sup> SSNIP stands for small but significant and non-transitory increase in price. See Richard Whish & David Bailey, COMPETITION LAW, 10<sup>TH</sup> ED. Part 1, Sec. 1.V.D.(iv) (2021).

<sup>75</sup> Horizontal Merger Guidelines, *supra*, at 8.

<sup>76</sup> *Id.* at 15.

academic debates which takes inspiration from the former judge Louis Brandeis.<sup>77</sup> Amongst others, it advocates taking account of dynamic competition. While the Chicago-style focus on static competition has led to under-enforcement in dynamic and innovative industries, the Brandeis school calls for more intervention.

- 60 As a central milestone of the Chicago School doctrine, antitrust enforcement since the 1970s was also heavily influenced by Robert Bork's *The Antitrust Paradox*. This book argued that the primary goal of antitrust law was the protection of consumer welfare, understood in a narrow economic sense of the lowest prices for consumers. Consequently, while agreements such as cartels, which directly lead to higher prices for consumers, should be prohibited, agreements or practices that did not have such an immediate effect on consumer prices should – according to Bork – in principle be allowed. These ideas led to a significant drop in antitrust enforcement and could be seen to pave the way to today's unprecedented levels of concentration in American markets. Bork argued for a very narrow interpretation of the antitrust laws, one which today appears to be neither coherent with the goals that antitrust is associated with today, nor with the economic reality of digital markets.
- 61 Also, Bork's ideas can be seen as an overly narrow understanding of what constitutes "consumer welfare". No modern antitrust lawyer would dispute that antitrust is about protecting consumer welfare. In this sense, there is no disagreement with Bork. However, what can be seen differently is what counts as harmful to consumer welfare. Bork wanted to capture only direct price effects such as those from cartels. This view disregards the many ways in which the competitive process can be harmed by firms. Mergers can prevent new products and new markets from emerging. In today's interpretation, such a prevention of dynamic competition would also constitute harm to consumer welfare. It is just that consumers do not feel this harm directly by paying higher prices, but indirectly because they are, for instance, deprived of more relevant products or services or because they must sacrifice more data, effort or privacy to acquire such products than they otherwise would. Digital

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<sup>77</sup> Ariel Ezrachi & Maurice E. Stucke, *The Fight Over Antitrust's Soul*, 9(1) J. EUR. COMPET. L. PRACT. 1-2 (2018), <https://doi.org/10.1093/jeclap/lpx070>; Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9(3) J. EUR. COMPET. L. PRACT. 131-132 (2018), <https://doi.org/10.1093/jeclap/lpy020>.

sector firms have apparently deployed numerous strategies to harm the competitive process and consumer welfare.<sup>78</sup> For example, Lina Khan, *Amazon’s Antitrust Paradox*.

- 62 Furthermore, the Chicago School doctrine was hostile to the motion that vertical mergers are capable of negatively affecting competition.<sup>79</sup> In particular, it argued that vertical mergers are efficiency-enhancing because double marginalization is eliminated: The thinking was that after a vertical merger, end consumers will have to pay only one markup to the integrated firm as opposed to two markups for subsequent firms along the supply chain. Another assumption of the Chicago School was the Single Monopoly Profit Theory, which holds that a firm which has a monopoly in one product cannot increase its monopoly profits by leveraging itself into a second monopoly in another product. As a result, even the US Supreme Court has accepted this rationale in recent decisions.<sup>80</sup> Such leveraging, however, is characteristic for digital markets. It forms the theory of harm underlying most of the recent (successful) competition cases against SDCs for abuses of dominance in Europe.<sup>81</sup> The assumptions of the Chicago School doctrine have rightly been criticized by economists for being unrealistic and overly limited.<sup>82</sup> Yet, merger review has been hesitant to block vertical mergers.
- 63 Conglomerate mergers or mergers otherwise involving complementary products have clearly been identified by economists and antitrust enforcers illustrative of raising anti-competitive concerns.<sup>83</sup>

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<sup>78</sup> Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 Yale L. J. 564-907 (2017), <https://www.yalelawjournal.org/note/amazons-antitrust-paradox>.

<sup>79</sup> For example, see Koren Wong-Ervin, *Antitrust Analysis of Vertical Mergers: Recent Developments and Economic Teachings*, 18 ANTITRUST SOURCE 1, Feb. 2019.

<sup>80</sup> *Verizon v. Trinko*, 540 U.S. 398 (2004); *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438 (2009).

<sup>81</sup> Google Search (Shopping), Case no. T-612/17, EU General Court (Nov 10, 2021); Google Android, Case no. AT.40099, EU Commission (July 18, 2018); European Commission Press Release, Antitrust: Commission sends Statement of Objectives to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices (Nov 10, 2020); Google Ad Tech, Decision 21-D-11, Autorité de la concurrence (June 7, 2021).

<sup>82</sup> Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 Harv. L. Rev. 2, 4 (Dec. 2009).

<sup>83</sup> “Mergers of complements? No issue. In fact, great! Integration is efficient. Potential entry is too speculative to worry about.”, Caffarra et al., *supra*.

The dynamics of digital markets where complements can often develop into substitutes, and complements can be used in other types of anti-competitive leverage, have overturned such thinking. SDCs are a great example; conglomerates of vertically related or complementary products and services that form an ecosystem that the company largely controls. Amazon, Apple, Google, Meta and Microsoft all only got to where they are now because of conglomerate acquisitions. Due to the high significance of 'shareable input' such as data and content for competition within and between digital ecosystems, conglomerate mergers play a crucial role in this area and stricter scrutiny of mergers in this area is necessary.<sup>84</sup>

64 The Guidelines have yet to properly consider this paradigm change in the economic thinking of merger review.

### **cc) Focus on markets and indifference about non-market power factors**

65 As a by-product of the Chicago framework, antitrust policy has been focused on the classical antitrust market as a group of substitutes, and the shares that firms hold within such a market. This belief is rooted historically in the pre-Chicago concept of the Structure-Conduct-Performance Paradigm, i.e., the idea that market outcomes such as price and quality (Performance) are caused by firm conduct, which is in turn caused by market structure (such as concentration). Such a focus makes sense for many classical industrial markets where control of production capacities typically awards a certain kind of market power regarding price-setting.

66 This is true for classical industrial markets such as cars. Assume a car maker with a large market share reduces production. Given the complexity and financial requirements of enlarging car production, other suppliers would need a considerable amount of time to increase their production in response to the reduction in supply. The large car maker would be able to charge higher prices as a consequence of the squeeze in supply. High market shares in the form of large production capacities translate into market power.

67 On the other hand, high or low market shares in digital industries may not always be indicators of the existence of or the lack of market (economic) power. Often, economic power in the digital sector

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<sup>84</sup> Witt, *supra*.



does not stem from large production capacities but from the existence of network effects and the control of shareable inputs such as data. The search engine and social network businesses are not defined by production capacities. Digital production capacities can be enlarged quickly, with marginal costs are near zero. In other words, the costs for Google or Facebook to serve one additional user are very small, whereas the production of one additional car is considerably more expensive. This also means that the infrastructure of such digital companies enables them to launch any new service at negligible cost or risk. As their costs are mostly fixed, any incremental revenue is profit. This creates an incentive and an ability to enter neighboring markets that is absent in most industrial markets<sup>85</sup>.

68 The central parameter of competition in digital markets is not production costs but network effects. Indeed, the ability to leverage data on user behavior across different platforms or between users on the same platform (also known as “data feedback loops”) have been extremely advantageous for digital services providers who can acquire a large number of users quickly. Chair Lina M. Khan of the FTC remarked that “[t]he ability to surveil users, furthermore, has let firms provide services for zero dollars while monetizing user data, a business model that incentivizes endless tracking and hoovering up of data, while also providing platforms with another way to draw large groups of users to scale quickly.”<sup>86</sup>

69 The extent of network effects at stake cannot be measured by reference to a company’s current market share, not by reference to the company’s share of overall revenues on a traditionally defined market. Where end users do not regularly switch their providers, i.e., single-home, even a company with a small percentage of the revenues on the business-facing side of a platform service still enjoys economic market power on that side of the sector if it controls access to a significant share of single-homing end customers. Since such end customers may only be reached through the undertaking’s platform, the undertaking may, at least initially focus only on the most profitable business users

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<sup>85</sup> Hal Varian, *Inside the Googleplex*, THE ECONOMIST, Aug. 30, 2007, <http://www.economist.com/node/9719610/print>.

<sup>86</sup> Lina M. Khan, *Remarks of Chair Lina M. Khan at the Charles River Associates Conference, Competition & Regulation in Disrupted Times* Brussels, Belgium, FTC, Mar. 31, 2022, <https://www.ftc.gov/news-events/news/speeches/remarks-chair-lina-m-khan-charles-river-associates-conference-competition-regulation-disrupted-times>.

thereby keeping its overall sector share on this side of the platform small. Similarly, a digital company may decide to charge its end customers on a particular market less than its competitors, or even be the first to offer the service for free – only to generate even stronger indirect network effects (and then charge business users more) or in order to acquire more relevant user data that it can monetize on a separate sector. For example, Google is offering around 100 products and services for free (to all user sides) only to acquire data that it can use to for its core advertising services elsewhere. This should not, however, exempt such 100 products and service from merger control. For good reasons, therefore, where indirect network effects are at stake, traditional market share definition should not be measured in terms of a revenue share but in terms of the share of end customers that a platform bundles into a sector. And the more of those users that single-home, the lower the threshold for market economic power.

70 Regarding ‘shareable inputs’, resources that a company may use across its services, market share analysis may not be informative at all. For example, try to calculate the market share of Google or Facebook in the ‘market’ for personal data (and the acquired consent to use such data) than can be used for targeted advertising or the ‘market’ for digital content (and the IP rights to use it) that may be presented to attract end users. Such a calculation is hardly possible, given the manifold sources of data and content and the unclear criteria by which shares would be calculated. Also, such a perspective would miss the point. When dealing with digital conglomerates that already control an ecosystem the question may no longer be whether, following a merger, the company may also dominate the market for the acquired asset. The crucial question must be whether the acquired asset entrenches or even further strengthens the already existing dominant position on any given sector. For this assessment it is crucial that due to the ‘moat’ strategy described above, SDCs typically do not derive their power from activities on one single sector rather from the combination of numerous products and services that generate such powerful cross-sector network effects that their ‘cash cow’ core services become incontestable. In other words, market economic power flows from a combination of assets that is greater than the sum of its parts. For example, in online advertising, Google is powerful not because it controls one single level of the value chain, such as the ad exchange via DoubleClick,<sup>87</sup> but because it has a strong sector foothold at each level of the

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<sup>87</sup> Now Google Ad Manager.

value chain. This strong presence across the entire value chain generates size advantages that not even rivals with a higher sector share on any level or any individual sector, within this value chain, can match. Among other factors, it is also Google's control of access to personal data and the privacy rights to use those for targeted advertising as 'shareable inputs' that give the firm such power in the online advertising sector. Similarly, it is Apple's control of the operating system iOS that provides it with a de-facto monopoly over the app store on its devices, which in turn allows Apple to determine the conditions for competition amongst app developers and for accessing end users of Apple devices, across virtually all sectors on which apps are offered on Apple devices.

- 71 The FTC, in its 2007 Google/DoubleClick decision, did mention data as a competitive factor, but did not perform any detailed evaluation. Instead, it only mentioned that other firms also "have at their disposal valuable stores of data", saying that these are "unique" without investigating what those consist of:

*„At bottom, the concerns raised by Google's competitors regarding the integration of these two data sets – should privacy concerns not prevent such integration – really amount to a fear that the transaction will lead to Google offering a superior product to its customers. Yet, the evidence indicates that **neither the data available to Google, nor the data available to DoubleClick, constitutes an essential input to a successful online advertising product. A number of Google's competitors have at their disposal valuable stores of data not available to Google.** For instance, Google's most significant competitors in the ad intermediation market, Microsoft, Yahoo!, and Time Warner have access to their own **unique data stores**. These firms own popular search engines, and will have access to consumer information from their internal ad servers, ad intermediation services, other web properties, and software. The entry and expansion of these well-financed competitors has transformed the ad intermediation marketplace over the last six months. All of these firms are vertically integrated, and all appear to be well-positioned to compete vigorously against Google in this new marketplace“.*<sup>88</sup>

- 72 It is difficult to find a projection to be more at odds with reality. One may object that it is easy to make such statements in hindsight. However, there were plenty of critics who grasped the significance of the Google/DoubleClick merger already in 2007. For example, Jeff Chester, representing a US privacy group, the Center for Digital Democracy (CDD), said in December 2007, after the merger had been cleared by the FTC:

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<sup>88</sup> Google/DoubleClick, Case no. 071-0170, FTC (20 Dec 2007), at 12.

*“But several commissioners mistakenly believe that we are still living back in the dotcom boom of the Nineties, when barriers to market entry were low. Its analysis of the market is flawed.”<sup>89</sup>*

- 73 Today, we know that not only mergers which occur in the same sector or concern horizontal or vertical competitors can cause considerable competitive harm. Instead, acquisitions of firms that produce seemingly unrelated products may foreclose competition because they may provide the acquirer with ‘sharable inputs’ that make it even less contestable.
- 74 Finally, adding to the specific concerns about market definition and market shares in the digital sector, more general concerns reinforce the doubts about this approach. For example, depending on the service or product, substitutability as a core criterion for market definition can be highly subjective as the needs of users differ. As a result, markets are often defined too narrowly or too broadly.<sup>90</sup> The ensuing random market shares can give enforcers or judges a false sense of clarity by producing an exact number – which may in fact not be meaningful at all. The Horizontal Merger Guidelines 2010 themselves recognize that market shares can be misleading.<sup>91</sup>
- 75 Yet, the current Guidelines do not offer a theoretical framework that could capture non-market competitive dynamics in a meaningful way. Quantitative methods such as the Hypothetical Monopolist test or the Herfindahl-Hirschman index (“**HHI**”)<sup>92</sup> only work in environments of static competition, not of dynamic competition. The Guidelines can only capture competitive concerns that emerge in the framework of this traditional antitrust market model.

**dd) Short-termism in merger review**

- 76 Another by-product of the Chicago School doctrine’s focus on prices is the short-sighted perspective in merger review. If, as is common in the Chicago doctrine, the only concerns that can possibly be raised after a merger pertain to price increases and reductions in choice, those reactions would be expected to follow shortly after a merger is consummated. When an industrial producer acquires a

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<sup>89</sup> John Kennedy, *Google-DoubleClick merger go-ahead raises fears*, SILICON REPUBLIC, Dec. 20, 2007, <https://www.siliconrepublic.com/life/google-doubleclick-merger-go-ahead-raises-fears>.

<sup>90</sup> Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437 (2010).

<sup>91</sup> Horizontal Merger Guidelines, *supra*, at 8.

<sup>92</sup> *Id.* at 18-19.

competitor, it can cut production right away to raise prices. If the newly merged firm intends to take competing products off the market, it may also do so relatively quickly. As a result, the time horizon of Chicago-inspired merger review is rather short and limited to one or two years.

77 Such short-termism is inadequate for the long development time horizons that are typically pursued in the digital sector. Digital sector firms care less for short-term gains. They are in for the long-term winnings. For example, founded in 1994, it took Amazon 10 years to break even in year 2003. It took another 13 years, till 2016, for Amazon to become the leading e-commerce company. Parts of its international retail business still operate at a loss.<sup>93</sup> Yet, based on its digital infrastructure, it took Amazon only three years to build an advertising business that generated \$ 31.13 billion in 2021.<sup>94</sup> Similarly, when Google acquired YouTube in 2006 for \$ 1,65 billion, the video service was loss making. In 2021 alone, YouTube made over \$ 28 billion from ads, up 47% from 2020 and 90% compared to 2019.<sup>95</sup> For example, Apple and Google both have made acquisitions in the autonomous driving sector although it remains unclear if this technology will ever develop into a product that can actually be used on the road, let alone, when. Nevertheless, the course for future monopoly power in this sector may be set today if firms are able to conclude the right transactions and amass indispensable know-how and patents. Taking this into account requires a longer time horizon for Agencies and a challenging projection further into the future than considered by the Chicago School doctrine.

#### **b) Lack of a merger review concept in multi-sided markets**

78 The current Merger Guidelines also lack a concept about the treatment of multi-sided markets, particularly for sector definition. The current Guidelines analyze the sectors as if they are always one-sided, disregarding one of the major characteristics of SDCs and their platforms.

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<sup>93</sup> Lina M. Khan, *supra*.

<sup>94</sup> Statista, *Advertising revenue of Amazon worldwide from 2019 to 2021*, <https://www.statista.com/statistics/259814/amazons-worldwide-advertising-revenue-development/>.

<sup>95</sup> Statista, *Worldwide advertising revenues of YouTube from 2017 to 2021*, <https://www.statista.com/statistics/289658/youtube-global-net-advertising-revenues/>.

- 79 The Supreme Court has advanced a first conceptualization of this issue in *Ohio v. Amex*,<sup>96</sup> however, this attempt has serious flaws which should prompt developing a new concept in the future Merger Guidelines:
- 80 The core problem of market definition in multi-sided markets is whether digital sectors should be defined separately along the sides of a platform or unified to encompass all sides. In other words, the question is whether for a platform with several user groups, several separate sectors need to be defined or whether there is a single sector for the “platform service” as such. For example, through its marketplace, Amazon serves consumers (buyers) seeking products and third-party merchants keen to reach buyers. How are the markets supposed to be defined? Should there be two markets for (i) the provision of e-commerce services to consumers and (ii) the provision of access to consumers for third-party merchants on the marketplace? Or should there be a single market for “online merchant platforms”?
- 81 The Supreme Court addressed this question in *Ohio v. Amex*.<sup>97</sup> However, the decision has been criticized and left many questions unanswered.
- 82 The Merger Guidelines should clarify that the Supreme Court’s method for defining markets, if it is to be applied in the context of Section 7 of the Clayton Act, should only be applied narrowly in cases such as the one decided. This refers in particular to platforms that facilitate simultaneous transactions. Also, the rule may be limited to cases involving vertical restraints, for example against merchants (American Express used anti-steering provisions).<sup>98</sup> For cases not concerning such constraints and thus falling outside the scope of the *Ohio v. American Express* rule, the Guidelines should develop their own concept for the definition of multi-sided markets.
- 83 The particularities of multi-sided markets also need to be considered when dealing with aftermarket (e.g., the market for software updates adjacent to the market for software or the market for in-app

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<sup>96</sup> *Ohio v. American Express*, 138 S.Ct. 2274 (2018).

<sup>97</sup> *Id.*

<sup>98</sup> Irving Scher, *Ohio v. American Express Co.: The Supreme Court addresses anti-steering*, HAUSFELD COMP. BULL., Aug. 16, 2018, <https://www.hausfeld.com/en-us/what-we-think/competition-bulletin/ohio-v-american-express-co-the-supreme-court-addresses-anti-steering/>.

purchases) which are of particular concern in the digital economy. The theories of harm that were previously applied to the pre-digital marketplace no longer account for the unique concerns posed by digital goods and services.<sup>99</sup> In particular, while there may have been arguments to not distinguish between competition on the primary markets and competition on aftermarkets, such distinction is required in the digital sphere to effectively address leveraging practices. In this respect, the legal framework for aftermarkets needs to be reexamined to better reflect the reality of so-called “data-driven lock-ins,” or the network effects created by users’ repeated use of a digital platform or service.<sup>100</sup>

**c) Challenges posed by single-homing**

**aa) Single-homing and competitive bottlenecks**

84 One of the points that the Supreme Court did not elaborate on in its *Ohio v. American Express* decision is the particular competitive situation where a significant part of one user group only uses one platform, i.e., single-homes. If business users on one side of a platform are using multiple services (multi-homing), while end users on the other side of the platform primarily use only one service (single-homing), the platform enjoys a significant market power vis-à-vis business users irrespective of its overall market share (in terms of revenues).<sup>101</sup> That is because, where end users single-home, business users can only reach all customers if they are present on each platform. The more single-homing end users a platform bundles, the more dependent business users on the other side become on such platform for access to their customers. This dependence, in turn, conveys significant bargaining power to the platform when dealing with its business users.

85 Credit cards, for instance, constitute such bottlenecks. While merchants usually accept a variety of different credit cards (i.e., multi-home), consumers usually have or use only one or perhaps two different cards, (i.e., single-home). It is very important for merchants to offer their customers a convenient payment method so that they must accept *all* credit cards. Otherwise, a potential customer might not be able to pay for the product. Now, if a credit card company controls access to

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<sup>99</sup> Cremer, *supra*, at 116-17.

<sup>100</sup> *Id.* at 125.

<sup>101</sup> Travelport/Worldspan, Case no. M.4523, EU Commission (21 Aug 2007).

a large customer base, merchants will have to accept this credit card, even if they would prefer another one (with lower fees). Otherwise, they would lose a large group of potential customers. In this way, merchants depend on that credit card company. This dependence translates into the credit card company's market power.

**bb) Single-homing and intermediation power**

86 The market power that a platform enjoys if end users are single-homing grows even further if – as is typical for online intermediation services – the platform does not just enable interactions between its user groups, but, in effect, matches the supply and demand of its user groups itself. Where single-homing end users rely on the selection and ranking of certain business users in return of any search or navigation query entered by an end user, the online intermediation service may determine the ‘winners and losers’ amongst the business users that the platform intermediates. Such ‘intermediation power’ provides commercial incentives and opportunities for the intermediary to exploit its dependent business users by playing them off against each other (for better access to end users). In particular, platforms with significant intermediation power may render the intermediation of business users (their ranking and display vis-à-vis end users) dependent on such business users granting the platform commercial benefits (such as payments, IP rights or the use of further services) that are unrelated to the actual intermediation at stake.<sup>102</sup> To address such power was a central component of the reform of competition law for digital markets in Germany.<sup>103</sup> To prevent such exploitative intermediation, the Digital Markets Act obliges gatekeepers to apply fair,

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<sup>102</sup> See Thomas Hoppner & Philipp Westerhoff, *Un-FRAND-ly Use of Content and Data and Other Abuses of Intermediation Power: The German Competition Probes into Google's Ecosystem*, HAUSFELD COMP. BULL., Feb. 28, 2022, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4044911](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4044911).

<sup>103</sup> Heike Schweitzer et al., *Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen*, DICE CONSULT, Aug 29, 2018, at 42, <https://bit.ly/3iaDkLO>.



reasonable and non-discriminatory general conditions of access for business users (FRAND<sup>104</sup> access to core platform services).<sup>105</sup>

87 The Merger Guidelines should address these concepts, as they are prevalent in multi-sided markets<sup>106</sup> and in the digital sector in particular.<sup>107</sup>

**d) No framework for killer acquisitions**

88 The current Merger Guidelines do not contain a specific framework to identify or assess killer acquisitions (as defined above at ¶¶ 42-48). While the Agencies have challenged some mergers where potential competitors were acquired, some of those even being successful, those cases involved mostly non-digital industries (such as medical technology or seeds).<sup>108</sup> Where those actions involved tech companies, they were limited to small firms<sup>109</sup> – none of the cases involved digital sector firms.<sup>110</sup>

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<sup>104</sup> While the FRAND concept originated in the context of the licensing of standard-essential patents (see *In Re Qualcomm Antitrust Litigation*, Case No. 3:17-md-02773 (N.D. Cal.)), the underlying rationale of finding appropriate conditions for the access to essential inputs also applies to SDC intermediation services. While critics may argue that such requirements may chill investment or development, FRAND is inherent in the economics of platforms: To generate positive network effects, in the original phase of competition ‘for the market’ platforms typically need to offer all users fair, reasonable and non-discriminatory access to the platforms. It is such openness that typically brings all user groups on board in the first place. Hence, an obligation to maintain FRAND access conditions only reflects the very business model that rendered incumbent platforms dominant.

<sup>105</sup> See European Parliament, Article 6(1)(k), DIGITAL MARKETS ACT.

<sup>106</sup> *Travelport/Worldspan*, Case no. M.4523, EU Commission (21 Aug 2007).

<sup>107</sup> *Supra*, at ¶ 10. While the FRAND concept originated in the context of the licensing of standard-essential patents (see *In Re Qualcomm Antitrust Litigation*, Case No. 3:17-md-02773 (N.D. Cal.)), the underlying rationale of finding appropriate conditions for the access to essential inputs also applies to SDC intermediation services. Critics may argue that stricter scrutiny on merging companies in this context may chill investment or development. However, requiring platforms to treat their users fairly (the acquisition of whom is what led to their dominant position in the first place) is actually more consistent with the broader goal of protecting competition.

<sup>108</sup> OECD, *Start-ups, killer acquisitions and merger control* (Note by the United States), June 11, 2020, at 7-8.

<sup>109</sup> *U.S. v. Bazaarvoice*, Case No. 13-cv-00133-WHO, 2014 WL 203966 (N.D. Cal. Jan. 8, 2014).

<sup>110</sup> OECD, *supra*, at 5-12.

**2. Procedural issues**

**a) Mergers flying under the radar of merger control**

**aa) “Acquisitions” – “merger without merging” through technological integration**

89 As outlined in the current Horizontal Merger Guidelines 2010, a “merger” does not require that full ownership and control of the target is acquired. A “partial acquisition” may also be analyzed.<sup>111</sup> However, under the current guidelines this pre-supposes an ability to influence the competitive conduct of the target firm by means of a relevant minority position or other governance rights based corporate links, such as the right to appoint members of the board in an acquisition. It is presumed that only through such corporate integration (by means of a partial joint ownership) allows the acquirer to align the competitive conduct of the target firm with that of the acquirer.

90 However, in the digital sphere there are strong arguments that effective “control” and “influence” may no longer require a corporate integration by means of a significant minority share or specific governance rights. A tight technical integration of a target company into the business of the acquirer may achieve the very same level of de-facto control over the activities of the target as legal integration. Technical integration may lead to an alignment of interests of both entities which can mean that they act as if they were one entity. Technical integration of a target’s key software systems may also give the integrating firm the ability to influence the competitive conduct of the target, in particular the performance of any of its key services using the integrated software. Thus, any cooperation leading to such integration or further expanding its scope or affects may actually convey effective control over the integrated firm and hence should be assessed as a “merger” rather than a mere co-operation. It needs to be ensured that such transactions no longer fly under the radar because they are not seen as a “partial acquisition” subject to merger review.

91 Already in 2009, in the context of acquisitions of press publishers, Eric Schmidt, then CEO of Google, explained in an interview that Google would prefer to “merge without merging” by means of technical integration:

*“The good news is **we could purchase them**. We have the cash. But I don’t think our purchasing a newspaper would solve the business problems. I think the solution*

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<sup>111</sup> Horizontal Merger Guidelines, *supra*, at 33.

*is tighter integration. In other words, we can do this without making an acquisition. The term I've been using is 'merge without merging.' The Web allows you to do that, where you can get the Web systems of both organizations fairly well integrated, and you don't have to do it on exclusive basis."<sup>112</sup>*

- 92 Eric Schmidt refers to a technical integration of the “web systems” of two organizations as an alternative to an acquisition. What he meant with that become clearer when he used the same “merger without merging” reference in relation to Apple when announcing a new cooperation with the company in 2010.

*“I thought if we just sort of merged the companies, we could call them AppleGoo. But I'm not a marketing guy. [...] What I like about this new device and the new architecture of the Internet is that you can actually merge without merging. [...] Internet architectures allow you now to take the enormous brain trust that is represented by the Apple development team and combine that with the open protocols and data service that companies like Google [provide].”<sup>113</sup>*

- 93 In practice, this led to a very tight cooperation between Google and Apple, with Apple receiving \$12bn from Google annually to set Google as the default search engine on iOS devices. With regards to this deal, a senior Apple employee wrote to a Google counterpart that “*our vision is that we work as if we are one company*”.<sup>114</sup>
- 94 Seen in combination, Eric Schmidt's statements suggests that by aligning commercial interests and integrating technical elements of the two undertakings, such undertakings can “work as if they were one company”. Thus, tight technical integration may amount to the same structural control over another company's business activities as the acquisition of a significant minority share.
- 95 Digital sector companies may see such technical integration as an alternative to mergers and a means to avoid the tight scrutiny that merger review should provide. Many business users are fully dependent on the intermediation services of digital conglomerates. There may also be a threat that the intermediary expands into their market and thereby ‘envelops’ such business users’ activities. In such a situation business users may have no choice but to accept any “technical integration” that

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<sup>112</sup> Adam Lashinsky, *Google news: CEO Eric Schmidt wishes he could rescue newspapers*, CNN MONEY, Jan. 7, 2009, [https://money.cnn.com/2009/01/07/technology/lashinsky\\_google.fortune/](https://money.cnn.com/2009/01/07/technology/lashinsky_google.fortune/).

<sup>113</sup> Tim Wu, *Steve Jobs, a New Mogul with Old Methods*, SLATE, Nov. 11, 2010.

<sup>114</sup> Daisuke Wakabayashi & Jack Nicas, *Apple, Google and a Deal That Controls the Internet*, N.Y. TIMES, Oct. 25, 2020, <https://www.nytimes.com/2020/10/25/technology/apple-google-search-antitrust.html>.

the dominant intermediary expects from them to gain control over them without having to notify any merger authority. The Guidelines should prevent such evasion of merger control scrutiny.

#### bb) Review thresholds

- 96 Numerous concerns have been raised regarding the GAFAM firms' ability to purchase small competitors because merger review thresholds are so high that these transactions "fly under the radar". Those concerns are primarily focused on the EU where purely revenue-based notification thresholds have been or still are in place.<sup>115</sup> In some cases, neither the EU's nor the member states' agencies were able to review those transactions. This is also a problem in the US. An HSR merger filing is required not only if certain revenue thresholds are met. In particular, the chief criterion for a filing requirement is the size of the transaction. If that number exceeds \$200m, an acquisition must be notified. If the valuation is between \$50m and \$200m, the transaction must be reported if one of the parties or their parents have revenues exceeding \$100m, and the other has \$10m or more.<sup>116</sup> Accordingly, the FTC was able to probe many relevant mergers which were not reviewed in the EU due to notification thresholds, such as *Google/Waze*<sup>117</sup> and *Facebook/Instagram*<sup>118</sup>.
- 97 Moreover, the fact that a merger is not required to be subject to notification does not mean that the Agencies cannot challenge it. Under Section 7 of the Clayton Act, the Agencies can challenge acquisitions regardless of notification requirements, including consummated transactions. For instance, the merger of Bazaarvoice/PowerReviews was a non-reportable merger which was

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<sup>115</sup> For example, Germany changed its merger control rules for the FCO to be able to review transactions based on valuation, Sec. 35(1a) ARC.

<sup>116</sup> Hart Scott Rodino Premerger Notification Program, *Introductory Guide II: To File or Not to File, When you must file a premerger notification report form*, FTC PREMERGER NOTIFICATION OFFICE, Sept. 2008, at 14.

<sup>117</sup> Competition Policy International, *Google's Waze Acquisition Likely Target of FTC Scrutiny*, CPI, Feb. 17, 2020, <https://www.competitionpolicyinternational.com/googles-waze-acquisition-likely-target-of-ftc-scrutiny/>.

<sup>118</sup> Federal Trade Commission Press Release, *FTC Closes Its Investigation Into Facebook's proposed Acquisition of Instagram Photo Sharing Program* (Aug 22, 2012), <https://www.ftc.gov/news-events/press-releases/2012/08/ftc-closes-its-investigation-facebooks-proposed-acquisition>.

successfully challenged by the DOJ.<sup>119</sup> Bazaarvoice was ordered to divest the PowerReviews business it had unlawfully acquired.<sup>120</sup>

- 98 However, despite this, numerous critics have raised concerns about the height of those thresholds. Research papers such as those by Cunningham et al.,<sup>121</sup> the Chicago Stigler Center<sup>122</sup>, and Carl Shapiro<sup>123</sup> have all expressed concerns that there are still too many acquisitions escaping the current thresholds. An article by Thomas Wollmann argues that an abrupt increase in HSR notification thresholds in 2001 corresponded with an increase in mergers between competitors, labelling this “stealth competition”.<sup>124</sup> Even deals below the value threshold of \$50m may concern nascent firms that are potential competitors.<sup>125</sup> Also, the parties to the transaction sometimes seek creative methods to avoid notification requirements. For example, in 36% of digital sector mergers that the FTC surveyed in a study, the buyer assumed debt or other liabilities to keep the deal’s value below reporting thresholds.<sup>126</sup> Other mergers, such as Facebook/Giphy, escaped US merger review because it did not satisfy the notification requirements.<sup>127</sup>
- 99 With a view to capture more problematic mergers in the digital sphere, the newly introduced notification threshold in Sec. 35(1a) of the German Act against Restraints on Competition (“**ARC**”)<sup>128</sup>

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<sup>119</sup> *U.S. v. Bazaarvoice*, Case No.13-cv-00133-WHO, 2014 WL 203966 (N.D. Cal. Jan. 8, 2014).

<sup>120</sup> OECD, *supra*, at 7, 13.

<sup>121</sup> Cunningham, *supra*, at 42.

<sup>122</sup> Stigler Committee, *supra*, at 111.

<sup>123</sup> Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33(3) J. ECON. PERSPS., at 69, 78 (Summer 2019).

<sup>124</sup> Thomas G. Wollmann, *Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act*, 1 AM. ECON. REV. 77-94 (June 2019).

<sup>125</sup> Bourreau, *supra*, at 32 (fn. 63).

<sup>126</sup> Federal Trade Commission Press Release, *FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies* (Sept. 15, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-staff-presents-report-nearly-decade-unreported-acquisitions-biggest-technology-companies>; Scott Nover, *The UK’s breakup of Facebook and Giphy spells trouble for Big Tech*, QUARTZ, Dec. 7, 2021, <https://qz.com/2098898/what-facebook-selling-giphy-says-about-the-future-of-tech/>.

<sup>127</sup> *Facebook’s Acquisition of GIPHY: Potential Competition Issues*, CONGRESSIONAL RESEARCH SERVICE, April 6, 2021, CRS Insight No. IN11411, at 1, <https://crsreports.congress.gov>.

<sup>128</sup> German: Gesetz gegen Wettbewerbsbeschränkungen (“GWB”).

is triggered if one party to the transaction has generated revenues of more than €50m and the target has revenues below €17.5m while the transaction value exceeds €400m.

100 Moreover, the HSR merger notification rules still apply across the board to every firm, without regard to their individual motivations to engage in killer acquisitions. This ignores that killer acquisitions are more prevalent in certain sectors such as the digital sector and pharmaceuticals. Notification requirements should take those differences into account, easing the burden for sectors that should not become targets of those rules. Smaller industrial firms do not need to be subject to the same thresholds as digital sector firms. Tightened notification requirements do not need to burden other types of businesses where markets are less prone to monopolization. As a result, the Merger Guidelines should apply new notification obligations only to certain designated firms (more on that below at ¶ 194).

#### **b) Information and technical know-how asymmetry between firms and Agencies**

101 There is a general information asymmetry between authorities and notifying firms as firms are naturally more knowledgeable about their own businesses.<sup>129</sup> This problem is exacerbated in the digital sector because the technical background is often highly complex and only comprehensible from an engineering perspective. The extent to which authorities are in fact under-equipped became soberingly clear in the aftermath of the Facebook/WhatsApp merger. Facebook had told the EU Commission that it was not technically possible for the firm to merge its data sets with those of WhatsApp. The Commission believed Facebook without further inquiry, despite widespread suspicions that getting access to WhatsApp's data was one of the key drivers for the transaction. The transaction was approved.<sup>130</sup> Post-merger, Facebook did precisely what it had hitherto deemed impossible: combine both datasets. The EU Commission fined Facebook over \$121 million for providing misleading information.<sup>131</sup> It is obvious that this sum is negligible in the face of the \$19bn transaction value and hence, that there is no significant deterring effect from such decisions. This

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<sup>129</sup> Bourreau & de Stree, *supra*, at 34 (fn. 63).

<sup>130</sup> Facebook/WhatsApp, Case no. COMP/M.7217, EU Commission (3 Oct. 2014).

<sup>131</sup> Facebook/WhatsApp (Art. 14 decision), Case no. M.8228, EU Commission (17 May 2017).

invites firms to provide false information and obscure their motivations for deals with regards to technical integration.

102 The Facebook/WhatsApp merger is a cogent reminder that the battle between authorities and notifying firms is not fought with the same weapons. Rather, one side has swords and arrows, while the other has tanks. As Agencies are staffed by lawyers and economists, it is difficult for them to evaluate the technical viability of projects, and to verify the truth of technical statements.

**c) Agencies' intervention hesitancy and risk aversion**

103 In past decades, merger review was guided by a principle called "decision theory". It is based on the idea that antitrust authorities will inevitably make mistakes, given that their decisions rely on future projections. Those mistakes can be grouped into two categories:

- Type I errors or false positives: In this case, an authority erroneously classifies certain conduct or a certain merger as anti-competitive although it is in fact not.
- Type II errors or false negatives: In this case, the authorities consider certain behavior to be benign or not harmful for competition although it is actually or turns out to be anti-competitive in the future.

104 The Chicago School doctrine had a particular method of handling those errors in mind, as Hovenkamp and Scott Morton describe:

*"One important element of the Chicago School's ideology was its analysis of error costs that **put large weight on type one errors**, or false positives, and very little weight on type two errors, or false negatives. Given the Chicago assumption that markets tend to be self-correcting, type two errors—where the court fails to see anticompetitive conduct that actually exists—are **not really problematic because the market itself will correct the situation**. By contrast, false identification of harmful monopoly tends not to be **self-correcting** because a court blocks the efficient conduct for a long time. This argument is part and parcel with the Chicago School's belief that **competitive equilibria are more robust and more durable than oligopoly, monopolistic competition, monopoly, or any alternative**. But invalidating that premise largely undermines the Chicago approach to error costs. If we reverse the premise and assume that markets tend more naturally to situations of market power, then the opposite presumption is warranted. **Economic theory and***

***evidence developed over the last forty years strongly support the reversed premise.***<sup>132</sup>

105 The Chicago School doctrine’s assumption that markets tend to correct failures is particularly hard to maintain in the digital sector. Where strong network effects exist, sectors have an in-built tendency towards high levels of concentration or even monopolies. Once the authorities miss an opportunity to intervene, such inaction will likely lead to a permanent state of weak competition. Once a firm has captured the critical mass of the market, prompting tipping, it will be able to secure its position through “moat-building” and make its position incontestable. Failure to act is very costly and likely irreversible. After a certain period of authority inaction, digital markets will be – and remain – monopolized, wiping out all effective competition. In digital markets, the reverse of the Chicago School’s doctrine is true: Sectors naturally tend towards high concentration and rarely self-correct. Consequently, merger review should give much less weight to type I errors and really focus on avoiding type II errors – the opposite of the Chicago School doctrine. In other words, if in doubt, it is better to act – to block a merger – than not to. This principle will be referred to in this document as the “Intervention Imperative in digital markets”.

106 Against this background, Caffarra et al. urge authorities to intervene more willingly:

*“Ultimately, the kind of policy we want needs to reflect our views – as a society – on what type of enforcement errors we think matter most (not the views of the parties and the howls of anguish of their advisors). We have proceeded for years on grounds that ‘Type 1 errors’ (the risk of overenforcement) are the most pernicious as they would ‘chill innovation’ stone dead, while ‘Type 2 errors’ (the risk of underenforcement) will quickly be corrected by the growth of rivals or new entrants. **But the recent track record in tech put that argument convincingly in the ground: hundreds of acquisitions not investigated, failures to diagnose potential ‘killer’ acquisitions, multiple ‘reverse’ cases where the buyer turns off its own effort, and fewer incentives to invest in challengers ‘under the shadow’ of giants...**”*<sup>133</sup>

107 They conclude:

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<sup>132</sup> Herbert J. Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PENN. L. REV. 1843, 1870 (2020).

<sup>133</sup> Caffarra et al., *supra*.



***“Time to have some false positives after twenty [rather: fifty] years of false negatives, and to see more innovation competition instead of ‘rollups’ and shopping sprees.”***<sup>134</sup>

108 Similarly, Carl Shapiro writes:

*“Sound competition policy would tolerate some false positives – blocking mergers involving targets, only to find that they do not grow to challenge the incumbent – in order to avoid some false negatives – allowing mergers that eliminate targets that would indeed have grown to challenge the dominant incumbent.”*<sup>135</sup>

109 Another problem which contributes to agency merger risk aversion is that many legal theories which digital antitrust cases rely on are yet untested. Authorities are generally hesitant to intervene based on untested legal theories because of concerns over their decisions being overturned by the courts.<sup>136</sup> This general hesitancy to try new legal theories is particularly dangerous in areas where it is necessary to test such new theories to keep up with rapid technological development. While some traditional theories of harm apply to digital markets as well, many other theories – especially those pertaining to killer acquisitions, potential competition, and other out-of-market competition – remain untested. Authorities cannot easily rely on precedent to push secure cases. Especially in times where authority resources are very limited, agencies must focus their efforts on cases with a high likelihood of winning. Those are unlikely to be found in digital sectors with new theories of harm. Accordingly, in such a time of testing new ground, antitrust policy is about creating new precedents to further develop antitrust law. When deciding whether to bring a case, authorities should assess not only the probability of winning, but also the cost of inaction – because these costs can be staggeringly high, as explained above. Testing new legal theories may lead to many setbacks and losses in court for the authorities, and with it, bad publicity – but it is necessary to cultivate progress in antitrust enforcement.<sup>137</sup> Indeed, even merger challenges that ultimately result in the merger

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<sup>134</sup> *Id.*

<sup>135</sup> Carl Shapiro, *supra*, at 741.

<sup>136</sup> Steven C. Salop, *An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards*, GEORGETOWN UNIVERSITY LAW CENTER (Nov. 6, 2007), <https://scholarship.law.georgetown.edu/facpub/2007>.

<sup>137</sup> Caffarra et al., *supra*.

being cleared still inform the courts' consideration of future mergers and the way in which agencies present challenges to those future transactions.<sup>138</sup>

**d) Post-merger action as an alternative?**

- 110 To sum up the handling of errors so far: the decision theory for the digital age is considerably pro-intervention, and the Merger Guidelines have yet to take account of this finding.
- 111 This insight should influence not only decisions to review and block mergers, but also the wider framework of merger review beyond pre-merger action. In this regard, Fayne and Foreman argue that the FTC and DOJ can open a Section 7 investigation at any time, including after a transaction has closed. This will supposedly protect start-ups because they do not have to bear the costs of premerger review as those costs lie entirely on the acquirer after the transaction has been consummated. Accordingly, an adjustment of premerger notification obligations is – so goes the argument – uncalled for.<sup>139</sup>
- 112 However, it is difficult to maintain this view in the face of the intervention imperative. Inaction comes with massive costs, and waiting can lead to irreversible damage for competition as markets cannot recover. Merger review in digital markets is more about early and fast intervention than post-merger correction. Transaction costs for start-ups could rise, but that will hardly force a very dynamic economy to stagnate. Transaction costs could be allocated between the start-up (the target) and the acquirer. Merging firms already routinely allocate potential costs of a merger blocking as part of their purchase agreements. Likewise, targets and acquirers can find bilateral solutions to split the costs of premerger notification. Against this background, post-merger action cannot serve as an alternative to a tighter premerger control.

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<sup>138</sup> See Peter Ormosi & Tomaso Duso, *Capacity Building Workshop on the Ex-Post Evaluation of Competition Authorities' Enforcement Decisions: A Critical Discussion*, OECD DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE (Oct. 26, 2015); Edith Ramirez, *Retrospectives at the FTC: Promoting an Antitrust Agenda*, ABA RETROSPECTIVE ANALYSIS OF AGENCY DETERMINATION IN MERGER TRANSACTIONS SYMPOSIUM, GW LAW SCHOOL (June 28, 2013).

<sup>139</sup> Fayne & Foreman, *supra*, at 11.

- 113 The review of the Merger Guidelines should also consider insights from the FTC’s ongoing suit against Meta to divest WhatsApp and Instagram. The FTC started this action in December 2020 but is still waiting for any major result today – more than a year later.<sup>140</sup> This alone demonstrates that even the theoretical possibility of ex post action is hardly optimal as it takes so much time to reverse a consummated merger.
- 114 To conclude, there is ample room for improvement in the Merger Guidelines for considering the realities of timely, streamlined and long-term focused merger review in digital markets.

### **C. How the Merger Guidelines should be amended**

#### **I. Substantive proposals**

##### **1. Update the theoretical framework of merger review**

###### **a) Shifting the focus from market structure to contestability and conduct**

- 115 The current merger control analysis is mainly, although not exclusively, structural. There is no reason to vary from the unifying theme of the Merger Guidelines 2010 which is “that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise.” A merger should still be seen to “enhance market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovate, or otherwise harm customers as a result of diminished competitive constrains or incentives”.<sup>141</sup> However, we would propose a different methodology and focus when analyzing whether a merger in the digital sector harms users.
- 116 In particular, the particularities of multi-sided digital markets require a more sophisticated approach to the definition of relevant markets (section 2.), the analysis of the current structure and concentration of the market (section 3) and the analysis of the likely “lessening” of competition (section 4.).

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<sup>140</sup> Federal Trade Commission Press release, *FTC Sues Facebook for Illegal Monopolization* (Dec. 9, 2020), <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization>.

<sup>141</sup> Horizontal Merger Guidelines, *supra*, at 2.

**aa) From static to dynamic competition and contestability**

- 117 The Guidelines should reflect the particularities of competition in digital markets. For example, that dynamic competition is more important than static competition.
- 118 The traditional view of antitrust policy goals gives the highest importance to allocative efficiency and price effects, then productive efficiency, and finally dynamic efficiency. In digital markets, this order should be reversed to give the highest importance to dynamic efficiency. This is because, in digital markets with zero-price services, competition typically focuses on quality, innovation, and product differentiation. Therefore, dynamic competition should be favored over static competition – which tends to manifest itself in the form of existing products offered at lower prices.<sup>142</sup>
- 119 A dynamic view of competition goes hand in hand with a more realistic understanding of markets, where perfect competition, as defined above, is hardly a reality. Antitrust policy overall and merger actual and potential control should focus on safeguarding competition in markets with the highest level of concentration. Due to network effects, markets for digital services are often highly concentrated. Where a market has already ‘tipped’, the main competition constraint left comes from potential competition from ‘outside’ of the market; that is, from disruptive innovations that threaten to displace the incumbent’s market position<sup>143</sup>. To ensure that the incumbent is indeed sufficiently disciplined by such potential competition, antitrust policy should focus on keeping the market contestable by enabling any disruptive innovation to challenge the incumbent. Incumbents have various options to prevent that any disruptive innovations can gain traction, including through acquisitions. A central strategy in this respect is to build protective ‘moats’ around the incumbent’s core platform service – services on up or downstream markets that may be used to shield users from any innovation that is offered. It is important that merger control capture any acquisitions that strengthens such moats as they can render the core platform service incontestable and thereby trigger substantial harm to competition and innovation, particularly over the medium to long term.<sup>144</sup>

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<sup>142</sup> Bourreau & de Stree, *supra*, at 24 (fn. 63).

<sup>143</sup> ACCC, *supra*, at 66.

<sup>144</sup> *Id.*

120 To counter such strategies by incumbents, antitrust policy should focus on keeping markets “contestable” by ensuring that the moat which an incumbent has built around its core platform service is penetrable for new, disruptive services. This is addressed at the European Regulation “on contestable and fair markets in the digital sector (also known as the Digital Markets Act). In line with such an approach, the Merger Guidelines should emphasize that one of its aims is to ensure contestability in (already tipped) markets. This includes a more critical review of mergers the only purpose or effect of which is to strengthen the protective moat around an acquirer’s core platform service, for instance by making it more difficult for disruptive newcomers to get a foothold and reach a critical user base to generate positive network effects.

**bb) From Structure-Conduct-Performance to Conduct-Structure-Performance**

121 In merger control, greater emphasis should be placed on the historic conduct of the incumbent firm involved in the merger.

122 US Merger Control is one of the last areas where the Structure-Conduct-Performance (“SCP”) paradigm still has significant importance. In its original form, the paradigm emphasized market structure over conduct and assumed that the structure of a market pre-determined the conduct (unilateral or cooperative) and the resulting performance (prices, choice etc.) of the undertakings on such markets. Even in its more recent, modified forms, the structure of a market is deemed to be the central prerequisite to anticompetitive performance.<sup>145</sup>

123 The paradigm has been criticized on the basis that the structure of a market is often determined by the prior conduct of market participants, such that there is a close relationship between conduct and structure.<sup>146</sup> This criticism is especially apt in digital markets where it is often the *conduct* of an incumbent that creates or shapes the structure of a market for a core platform service, as well as ancillary markets or even the way in which competition takes place within an entire ecosystem. This follows, for example, from the following factors:

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<sup>145</sup> Herbert Hovenkamp, FEDERAL ANTITRUST POLICY, THE LAW OF COMPETITION AND ITS PRACTICE (6<sup>th</sup> ed. 2020), at 56; Dennis W. Carlton & Jeffrey M. Perloff, MODERN INDUSTRIAL ORGANIZATION (4<sup>th</sup> Ed. 2015), at 270 (Chapter 8).

<sup>146</sup> Carlton & Perloff, *supra*, at 292.

- Core platforms services such as operating systems, web browsers, search engines, app stores or marketplaces that directly intermediate between business users and end users unilaterally set the rules and conditions by which businesses on downstream (intermediated) markets may access end users through their (upstream) platform. Some companies exercise control over whole platform ecosystems and may set the rules for business within. By defining which characteristics, a business user needs to fulfill and under which conditions it may reach any end user – and vice versa, such digital conglomerates can independently determine which business users will be the ‘winners’ or the ‘losers’ when competing via their platforms. Where success on a downstream market depends on the outcome of any upstream intermediation service, the rules set by the conduct of the upstream intermediary determine the structure of the downstream market more than any other factor. For instance, by defining under which conditions apps may request privacy consent from users to combine their data, the dominant operator of an app store may unilaterally determine the conditions for data-driven competition amongst apps on all devices coming with the app store.<sup>147</sup> Similarly, by defining which websites and which advertisers appear on its search results pages, a major source of traffic for most services, the incumbent general search service unilaterally defines the structure of competition between such websites and advertisers. It can dictate to business users (websites and advertisers) how to interact with its general search service, and also favor its own vertical search services over those of third parties at will.<sup>148</sup> A leading online marketplace, in turn, may determine under which conditions merchants compete amongst each other in reaching end users.
- Large digital platforms that intermediate between a majority of business users and a majority of end users, can directly influence their behavior and thus the matching of a substantial part of supply and demand.<sup>149</sup> By displaying (or hiding) products, services or

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<sup>147</sup> See Thomas Hoppner & Philipp Westerhoff, Privacy by Default, Abuse by Design: EU Competition Concerns About Apple’s New App Tracking Policy, HAUSFELD COMP. BULL., June 4, 2021, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3853981](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3853981)

<sup>148</sup> Google Search (Shopping), Case no. T-612/17, EU General Court (Nov. 10, 2021).

<sup>149</sup> See, DIGITAL MARKETS ACT, *supra*, at Recital (20).

consent requests, platforms can influence user behavior and thereby determine the structure of a market. By exploiting user biases and behavioral economics, digital platforms can influence which products or services end users detect, see, engage with, and ultimately use – and which they do not.

- Digital conglomerates can also determine market structure by pre-installing, tying or self-preferencing their own services or, conversely, by disallowing or hampering the use of third-party products or services or by making it difficult to access third-party products and services other than via the conglomerate’s own services.<sup>150</sup>
- Digital conglomerates typically monitor the performance of their business users. They are therefore the first to detect which new products or services are gaining or may gain market share. They can then react to the developments by either adjusting their own offerings or by acquiring the successful innovation before it turns into a competitive threat.

It follows that, companies exercising control over a significant intermediation service within an ecosystem have many means to control the markets within the ecosystem. Such intermediaries essentially become *market regulators* that set the framework for the matching of supply and demand. Thus, it is principally their conduct that determines the structure of the market, not the other way round.

In fact, any of the conduct described above could influence the structure of a digital market. For example:

- Whether a market is subject to positive or negative network effects is a central structural factor. However, typically, the character and scope of network effects is not inherent in a market but depends on the operator’s conduct. For instance, it is typically assumed that the presence of more advertising customers on a platform generates negative (indirect) network effects for consumers. However, if a platform succeeds in matching

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<sup>150</sup> See, DIGITAL MARKETS ACT, *supra*, at Articles 5 & 6, practices on contestable and fair markets in the digital sector.

ads to users' interests in such a way that a larger group of advertisers are able to provide more relevant ads to those users, rather than simply more ads, advertising can generate positive rather than negative indirect network effects. Thus, even though two platforms may provide the same service to end users, the network effects generated depend on the platforms' conduct.<sup>151</sup>

- Whether single or multi-homing prevails is also a central structural factor. However, whether users single or multi-home can be significantly influenced by the incumbent. For example, platforms may allow or disallow interoperability, steer users to new offerings or hide them. They may also incentivize their users to stop using alternative offerings, e.g., by means of exclusivity agreements or discounts. Thus, multi-homing options that may be present in a market at the time of the acquisition, can quickly disappear if the acquiring company alters its conduct to obstruct multi-homing.<sup>152</sup>

124 The Merger Guidelines should take account of this and take into account the power of conduct. This should not just apply to the conduct that an acquiring firm has implemented after previous mergers (for instance as regards the combination of data), but also to the effects of conduct which may not be otherwise addressed by antitrust tools. As recently pointed out by Jonathan Kanter, the assessment should involve “*examining the entire course of conduct of a monopolist across its entire ecosystem.*”<sup>153</sup>

125 In digital markets, and when dealing with digital conglomerates in particular, any assessment should be conducted in the order of Conduct-Structure-Effects-Harms (the “**CSEH**” paradigm). The effects

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<sup>151</sup> A prominent example is search engines: Between 2000 and 2004 Yahoo! was the leading search engine. However, because it displayed advertising that was unrelated to search queries, its advertising business generated negative network effects, limiting the platform's growth. In contrast, Google succeeded in combining the consumers' search interest with those of advertisers in such a way that more advertising customers and campaigns actually increased the quality of search results pages by allowing for less ads that were more relevant.

<sup>152</sup> Higher Appeal Court Berlin, U 4/21 Kart (11 Feb. 2022), at 34.

<sup>153</sup> Jonathan Kanter, *Keynote at CRA Conference* (Mar. 31, 2022), see MLex, [https://content.mlex.com/#/content/1369105?referrer=email\\_dailycontentset&dailyId=6f79bec29d4b4439be67aa4148e78fca](https://content.mlex.com/#/content/1369105?referrer=email_dailycontentset&dailyId=6f79bec29d4b4439be67aa4148e78fca).



of the combination resulting from the merger should be carefully examined to determine and balance the harms of those effects against their demonstrated benefits.



- 126 The Merger Guidelines 2010 already acknowledge that “Agencies presume that market conditions are conducive to coordinated interaction if firms representing a substantial share in the relevant market appear to have previously engaged in express collusion affecting the relevant market”.<sup>154</sup> In the same vein, Agencies should presume that market conditions are conducive to unilateral anticompetitive conduct if an incumbent firm with a substantial market share appears to have engaged previously in such conduct on the affected market or a comparable market with similar characteristics.
- 127 The CSEH-paradigm has far-reaching consequences across nearly all elements of merger control. Amongst these, the history and likely future conduct of an incumbent firm acquiring another firm needs to be considered in the context of assessing (i) market concentration, (ii) the likely lessening of competition, (iii) the required remedies to address anti-competitive concerns, and (iv) the balancing of harms against expected benefits.

### cc) From Per-Se to Dominance-Depending Thresholds

According to the current Horizontal Merger Guidelines 2010, the Agencies already “consider both the post-merger level of market concentration and the change in concentration resulting from a merger”<sup>155</sup>. The Guidelines note that “[t]he lessening of competition resulting from such a merger is more likely to be substantial, the larger is the market share of the incumbent, the greater is the

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<sup>154</sup> Horizontal Merger Guidelines, *supra*, at 25.

<sup>155</sup> *Id.* at 18.

*competitive significance of the potential entrant, and the greater is the competitive threat posed by this potential entrant relative to others”.*<sup>156</sup>

This concept should be further adjusted. The less contestable a particular service of an acquiring firm, the lower the threshold should be for blocking any acquisition that may further strengthen such position. The lower the level of competition remaining on any given market, the more such competition needs to be protected and the lower the threshold for any further “significant lessening of competition”. In the most extreme cases of an incontestable durable monopoly for a service of high social relevance, even a seemingly marginal addition of resources can be significant. In any case, to reflect the various degrees of market power, there should not be any standard minimum threshold for establishing a “significant” lessening of competition. Any consideration must depend on the respective characteristics of the market.

The correlation between market power and the threshold for blocking a merger is particularly relevant for digital markets. Accordingly, the lessening of competition resulting from a merger is more likely to be substantial, the more entrenched (incontestable) the market position of the incumbent service is. The more significant a service is for competition in other markets, in particular as it regards the intermediation of business users, the more the target firm strengthens such current significant market power.

Companies that do not just dominate the provision of a central gateway service (a core platform service for matching supply of business users with consumer demand) but control an entire ecosystem in which such significant intermediation service is embedded, need to be subject to higher thresholds for merger clearances because if such companies are not even disciplined by potential competition, there is a high likelihood that their behavior will significantly weaken competition, and any acquisition will further strengthen the conglomerate structure.

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<sup>156</sup> *Id.*

**dd) From Preventing the Creation of Dominance to Preventing the Maintenance of Dominance**

The Merger Guidelines should distinguish more clearly between mergers that may *create* a dominant position and those that may *strengthen* and *maintain* an already existing monopoly or near-monopoly.

Where none of the merging parties already enjoys a dominant position prior to the merger, there is a higher degree of uncertainty as to the impact of the merger. Since no market power has been achieved yet, it may be difficult to predict whether a merger will ultimately lead to such power or not.

In contrast, where a merging party has a dominant position already prior to an acquisition, the only question is whether such position is further strengthened. This should be easier to establish. Due to the existing dominance, the risk of overenforcement is lower.

Where a party already enjoys a persistently dominant position, merger enforcement should be more comprehensive because the risk of overenforcement is lower.<sup>157</sup> As has been described above, once a digital market has ‘tipped’, the winner has the incentive to use a web of acquisitions to prevent any entry into its core market. The company will have the incentive to buy up any firm that has the potential to develop into a competitive threat. Merger control should address such threats by introducing higher thresholds for merger clearance where a party already enjoys a dominant position.

The Merger Guidelines could include a general principle that the less contestable an acquirer’s core service, the more likely that any acquisition which directly or indirectly strengthens the service further, may significantly lessen competition. In highly concentrated digital markets, this would mean that, contrary to the current Guidelines, whether a merger is blocked should be dependent on factors other than whether there is an increase in the Herfindahl-Hirschman Index (“HHI”). A dominant position may also be entrenched by purely vertical or conglomerate mergers if such mergers allow

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<sup>157</sup> Kanter, *supra*, “A faithful application of [the] Congressional intent and the plain text of the statute to modern market realities demands aggressive enforcement against acquisitions by firms that already possess a dominant position”.

or amplify positive feedback loops that, indirectly, benefit the incumbent’s core service.<sup>158</sup> Any acquisition of a firm within the ecosystem that strengthens the firm’s position within that ecosystem, may indirectly further lessen the remaining competition in the acquirer’s core market.

**b) Stronger focus on avoiding type II errors**

128 As the analysis above shows, non-intervention is often more costly in digital markets than intervention, as it is less likely than in traditional markets that market failures will be corrected by effective competition.<sup>159</sup> The Merger Guidelines should take account of this by providing that avoiding type II errors is a core principle of merger review in digital markets.<sup>160</sup> The guidelines should also require the Agencies to include an assessment of the potential for type I and type II errors in any decision.

129 This may require a new culture of openness to taking risks at the Agencies. It has been suggested that authorities should engage in a “learn by doing”<sup>161</sup> and “trial and error”<sup>162</sup> approach in the uncharted waters of digital markets. We support this view. Technology has changed substantially in the past decades, and the law and its enforcement should evolve accordingly.

**2. Partial acquisitions**

The Merger Guidelines need to ensure that any transaction that may substantially lessen competition is captured. ‘Acquisition’ should therefore be defined broadly enough to capture any transactions that give the acquiring firm the ability to influence the conduct of the target firm. Under the 2010 Horizontal Guidelines, a voting interest in the target firm or specific governance rights, such as the right to appoint members to the board of directors, would

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<sup>158</sup> As described further below (at 5 b)). Cf. Kanter, *supra*, “We should acknowledge that nascent competitor acquisitions do not have to be purely horizontal or vertical – in digital markets, a nascent competitive threat can offer any novel or differentiated product in an adjacent market. Moats surround the entire castle, which means buying up firms anywhere in the ecosystem”.

<sup>159</sup> Bourreau & de Stree, *supra*, at 34 (fn. 63).

<sup>160</sup> Tim Wu, *The Utah Statement: Reviving Antimonopoly Traditions for the Era of Digital Sector*, ONEZERO, Nov. 18, 2019, <https://onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6be198012d7>.

<sup>161</sup> Jean Tirole, *Regulating the disrupters*, MINT, 1 Jan. 2019, <https://bit.ly/35j2S6Q>.

<sup>162</sup> Bourreau & de Stree, *supra*, at 34 (fn. 63).

amount to sufficient influence. Equivalent effective control over a target may also result from closer technical integration (“merger without merging”). Accordingly, the Merger Guidelines should provide that when assessing whether a partial acquisition presents significant competitive concerns, the degree of technical cooperation and integration of systems, algorithms, data, content, and IP pools of the two companies shall be considered. The closer such technical integration, the more likely it is that the acquisition conveys “effective control” and should be subject to merger review.

### **3. Market Definition**

130 Once an acquisition falls under Section of the 7 Clayton Act, the Agencies traditionally define the relevant markets as those that are most likely to be affected by the acquisition. We consider that in defining relevant markets in the digital sector, the primary focus should be the core platform services that generate the main revenues of the acquiring firm.

131 Defining markets for digital services poses numerous challenges: issues arising from the multi-sidedness of platforms (a)), free or zero-price services (c)), and innovation markets ,which will be discussed below.

#### **a) Defining markets for multi-sided platforms**

132 Market definition requires a different approach where multi-sided platforms are involved.

133 Competition authorities and courts have not yet established a coherent policy framework for defining multi-sided markets and the approaches taken by the US Supreme Court and EU competition courts and authorities vary significantly.

#### **aa) Market definition as first analytical step for determining competitive forces**

134 Before considering the approach to market definition, it is important to consider the purpose of market definition in antitrust law.

135 Definition of the market is neither a purpose in itself nor an independent procedure. Rather, it is the first analytical step in the overall assessment of the structure of a market, the power of individual companies, and the conduct of such companies. Antitrust law, including merger review, seeks to

restrict unilateral power where it cannot be assumed that such power is sufficiently neutralized by competitive forces. Since competition restricts power, the presence of a problematic level of power can only be determined in the context of specific markets, *i.e.*, by identifying all market operators that impose a competitive restraint on a company under investigation. This is the purpose of market definition. It is an important auxiliary tool for the subsequent assessment of competitive forces and resulting market power. Defining the market is thus (only) the first filter for determining the point at which it can no longer be left to the market to neutralize commercial power but where antitrust law must intervene. This conceptual function of defining the relevant market is also crucial for defining markets for multi-sided platforms.

**bb) Basic principles for determining market power of multi-sided platforms**

- 136 As with market definition in any other type of market, the purpose of market definition for multi-sided platform markets is to identifying substitutes for the relevant product or service. The difference for multi-sided platform markets is that they do not just serve the demand of one user group but of several.

**cc) Separate user groups require separate substitutability assessments**

- 137 A two- or multi-sided market is “a market in which suppliers simultaneously respond to two distinct demands from different types of service user”. On the one hand, there is typically a demand of end users (consumers) wishing to purchase, access or consume particular products or content. On the other hand, the demand of those producers or content providers (business users) wishing to reach the end users who feed the information about their offerings into the platform’s databases for the purpose of the platform matching both demands, although any transaction between end users and business users will take place, if at all, on a different market.
- 138 The existence of separate demands for the service of the same platform poses particular challenges for the assessment of market power by the platform operator. Such market power can exist vis-à-vis all user groups or just one of the user groups. This follows from the important economic reality that alternative services (substitutes) that exist for one user group, may not necessarily also serve as substitutes for another user group. For instance, a reader may consider other substitutes for a magazine or an online news outlet than an advertiser. Accordingly, to determine competitive forces and options for user groups to escape any harm by switching to an alternative platform, in principle,

interchangeability of services must be determined for each user group separately. In the context of defining markets for comparison shopping services and online marketplaces – classical digital platforms -, this was well summarized by the European General Court in the case of Google Shopping:

*“Yet, as BDZV pointed out in its statement in intervention, the fact that, in order to meet demand on one side of a two-sided market, the services of two categories of supplier may be largely interchangeable does not necessarily mean that that is the case on the other side of that market with regard to the other demand that is expressed there. On a two-sided market, since demand does not emanate from the same source on each side of the market, **it cannot be assumed that the issue of the substitutability of services will be resolved in the same way for each side.**”<sup>163</sup>*

- 139 This is a crucial finding, as it illustrates the difficulties of defining the relevant market for a multi-sided platform (which, by definition, provides services to distinct user groups with distinct demands) and highlights that by defining and examining only a single relevant market, relevant competitive forces may not be properly assessed.

**dd) In principle, each distinct user group forms a separate market**

- 140 We share the view of commentators such as Hovenkamp<sup>164</sup> and of the EU General Court that, to determine market power of two- or multi-sided platforms, it is “*necessary to ascertain whether, in respect of one or other of the two sides*” (or any third side), market power exists. This means that, ultimately, substitutability needs to be separately assessed for each relevant user group. Each distinct user group may form a separate market. As Justice Breyer explained in his dissenting opinion in *Ohio v. American Express*, the products of each side of the credit card business are complementary from the perspectives of consumers and merchants, respectively.<sup>165</sup> It is crucial not

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<sup>163</sup> Ibid. Note that Hausfeld represented BDZV, whose submission was based on the views expressed in, Thomas Hoppner, *Defining Markets for Multi-Sided Platforms: The Case of Search Engines*, 38 WORLD COMPETITION 349-366 (2015).

<sup>164</sup> Thomas Hoppner, *ibid.*; Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L. J. 1952, 1963 (June 2021).

<sup>165</sup> *Ohio v. American Express*, 138 S.Ct. 2274 (2018), Dissenting opinion Justice Breyer.

only to determine substitutability on each side of the platform, but also to assess the interrelationship between the different sides of a platform; in particular the indirect network effects between the separate user groups. It is much easier to identify and assess indirect network effects if all relevant user groups are first identified and then their respective substitutes are assessed.<sup>166</sup>

141 Consequently, to ensure sound merger review, independent relevant markets should be recognized and defined for each user group which has a distinct demand. To ensure that relevant interactions between the various user groups are not overlooked, the criteria for determining the existence of a separate market for one side of a platform should not be overly strict. In particular, the lack of monetary consideration for the relevant product/service should not prevent a finding of a separate market.

**ee) A definition of a single “platform” market is only appropriate where the user groups’ demand is largely homogenous**

142 Defining and assessing separate markets for each distinct user group can be burdensome. To reduce the administrative burden, in certain circumstances, it may suffice to define a single “platform” market or to combine several user groups into one assessment. This may be appropriate, where assessing substitutability for all user groups does not yield any further insights compared to a combined assessment for all or several user groups. This is likely to occur where, even though separate user groups can be identified, their demand is largely identical and reciprocal. On a dating app, for example, the ‘male’ and ‘female’ user groups are separate. However, they have the same demand: to meet someone through the platform and, largely, share the same product/services substitutes. In other words, the competitive conditions and, therefore, market power is likely to be the same vis-à-vis both user groups. The same may apply to platforms for second-hand products where consumers can buy and sell products, such as eBay. If it is a platform with a lot of sellers, it will likely also have a lot of buyers because both groups attract each other (and largely consist of the same overall user group). In this scenario, defining separate markets, one for sellers and one for buyers, would be unlikely to lead to a different outcome to an evaluation of a single “platform” market. The competitive pressures exerted by consumers on the platform is likely to be roughly the

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<sup>166</sup> Hoppner, *supra*, at 352 et sub.



same on both sides of the market. The competitive conditions are also homogeneous. In this case, antitrust scrutiny would be inefficient if it performed the examination twice.

**ff) Whether a platform is transactional or may increase prices on both sides should play no role for defining the relevant markets**

- 143 In any case, as outlined above,<sup>167</sup> the economics of multi-sided markets do not support the view that antitrust law and merger review, in particular, should distinguish between “matching platforms” and “advertising platforms”. There is no significant difference between them.
- 144 Neither should the fact that a platform may only be able to raise prices towards one user group be of relevance to market definition in a digital market. On the contrary, an authority will only be able to thoroughly assess the pricing interrelationships between both sides of the platform by first delineating the competitive pressures on both user groups. If, for instance, end users have significantly less substitutes than business users (due to indirect network effects), price increases on both sides of the markets will harm consumers. If, by raising prices vis-à-vis business users, a platform drives such users away from the platform, this will reduce the positive network effect of this user group for end users and thereby the benefit that end users derive from the platform – even if their price remained at zero.

**b) Response to *Ohio v. American Express***

- 145 As laid out above, the Supreme Court used a different approach to defining markets in *Ohio v. American Express* (*supra*, at ¶ 82). Part of this approach consists in the decision that anti-competitive harm on one market side can be offset or compensated by other sides’ benefits. In the case, the Supreme Court allowed American Express to anti-competitively affect merchants by setting supra-competitive fees so long as those fee increases were allegedly compensated for by simultaneous reductions in cardholder fees.
- 146 The Merger Guidelines should take a clear position against such offsetting calculations. If one dependent user group is harmed by anti-competitive effects, it does not provide any relief to this user group when another user group benefits. If it was accepted that harms to one user group could

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<sup>167</sup> *Supra*, at ¶ 84.

be offset with alleged benefits for another, platforms could play such user groups against each other to extract more revenue from both. Market definition and the subsequent assessment of anti-competitive effects should be two separate steps of antitrust analysis. First, a market is defined, second, effects are analyzed. A certain market definition should not presuppose further analysis in the direction of offsetting harms and benefits across platform sides. Also, the fact that separate markets are defined does not relieve authorities of considering cross-market network or other effects.

147 Principle No 7. of the Utah Enforcement Principles advocates adopting the following approach:

*Anticompetitive conduct harming one party or class should never be justifiable by offsetting benefits to another party or class. Netting harms and benefits across markets, parties, or classes should not be a method for assessing competitive effects.*<sup>168</sup>

**c) Zero-price markets – from SSNIP to SSNDQ**

148 Consumers frequently do not pay a monetary price in digital markets. To account for this the Merger Guidelines should clarify that the existence of an antitrust market is not precluded where a zero price is paid.<sup>169</sup> This clarification could reference more current case law that does not question the existence of zero-price markets.<sup>170</sup>

149 Moreover, market definition relies on the Hypothetical Monopolist Test or SSNIP test. In this test, a small but significant and non-transitory increase in price is simulated. By observing if consumers switch to other products following such a price increase, an array of products can be assembled which eventually constitutes the relevant market.<sup>171</sup>

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<sup>168</sup> Wu, *supra*.

<sup>169</sup> In a similar vein: Jens-Uwe Franck & Martin Peitz, *Market definition and market power in the platform economy*, CENTRE ON REGULATION IN EUROPE, May 2019, at 6.

<sup>170</sup> For example, *FTC v. Facebook*, No. CV 20-3590 (JEB), 2022 WL 103308 (D.D.C. Jan. 22, 2022).

<sup>171</sup> Newman, *supra*, at 22.

150 This test cannot be applied where a price is not paid. As an alternative, in its *Android* case of 2019, fining Google US \$ 4.3 billion, the European Commission was the first authority globally to have applied a SSNDQ-test (quality degradation).<sup>172</sup>

151 As an alternative, the option of an SSNIC test was promoted – whether a small but significant “increase in attention costs” would lead to significant switching. The issue with this approach, however, is that attention and its value is difficult to measure because it does not necessarily correspond with any commercial interest to convert in any transaction.

#### **4. Market Concentration and Market Power**

152 To assess the competitive effects of an acquisition, market concentration prior to and after an acquisition should be evaluated. The more concentrated a market is, the more likely it is that a merger will significantly lessen competition.

##### **a) The various levels of digital market power**

153 When dealing with digital services, and core platform services in particular, several levels of market power can be distinguished. It could be considered to introduce different thresholds for a merger clearance, depending on the respective scope of market power. Where due to high levels of single-homing, a platform for some niche service currently ‘merely’ enjoys intermediation power vis-à-vis its respective (few) users and the market has not yet ‘tipped’ towards such platform, merger review can be more lenient. In contrast, a platform that constitutes a commercially important gateway enjoys an entrenched and durable near-monopoly because it controls the ecosystem, merger review needs to be much more rigorous. We therefore propose different standards for such SDCs.

##### **b) Catalogue of relevant economic factors for assessing market power in the digital sector**

154 The assessment of the level of market power currently enjoyed by the parties to a merger should consider the economic particularities of digital markets described above in part B. The revised

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<sup>172</sup> Google Android, Case no. AT.40099, EU Commission (July 18, 2018), at ¶¶ 267, 487 et seq.

Merger Guidelines should outline all of the relevant factors to be considered as part of such an assessment.<sup>173</sup> The list could include:

- existence, intensity, and symmetry of direct or indirect network effects,
- the extent of single-/multi-homing,
- the switching costs for all user groups and other lock-in effects,
- the relevance of data for providing the service,
- access to such relevant data,
- share of fixed costs and ability to expand the service quickly,
- likelihood of tipping and winner-take-all-markets,
- access to venture/risk capital for new market entrants,
- ability to influence and steer consumer behavior,
- competitive pressure driven by innovative product differentiations and the likelihood of such differentiations gaining track,
- capabilities for own innovation (human resources, intellectual property, etc.),
- existence and strength of competition between ecosystems,
- control over inputs which are shareable across several markets, such as data, content, privacy and IP rights, data storage and KI capabilities,
- benefits arising from vertical and conglomerate integration of a service into a broader ecosystem,
- level of pre-existing and future technical integration of third-party services (via software, auctions, AI, shared data pools or indices) and the likelihood of market coordination,
- significance of a service for competition across markets, in particular

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<sup>173</sup> Note that Germany has even included such a list in its Act Against Constraints of Competition (Sec. 18).

- relevance of an activity for third party access to supply and sales markets and corresponding dependence of user groups (gatekeeper status),
- power to determine outcome of competition between third parties on intermediated markets in own favor (intermediation power),
- ability to preferentially determine the conditions and rules for competition on markets in own favor (rule-setting power),

## **5. Significant Lessening of Competition**

According to Section 7 of the Clayton Act, a merger shall be blocked if it “may significantly lessen competition”. This assessment should encompass all harms to consumers resulting from a lack of competition r, not just obvious or ‘traditional’ harms such as reduced output or higher prices (below at a)).

The Merger Guidelines should give guidance as to how an acquisition may lessen competitive parameters and thereby harm consumers. In this respect, a distinction should be drawn between (i) mergers that risk creating market power with likely harm to consumers and, (ii) mergers that entrench existing market power with likely harm to consumers. As, in the latter case, market power is already established, the legal threshold for clearance should be higher. The threshold should be particularly high when dealing with Significant Digital Conglomerates. The Guidelines should outline how an acquisition may further entrench the market power of such undertakings (below at b)). Finally, the Guidelines should set out a clear methodology for merger control, including presumptions, rebuttals, and the onus of proof (below at c)).

### **a) Relevant competition parameters and harms to consumers**

155 Currently, the target of merger policy is reduced output and higher prices, not other harms to consumers or market concentration for its own sake.<sup>174</sup> Merger review should take into account negative effects on prices that may occur following the merger. Many mergers in digital markets will

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<sup>174</sup> Hovenkamp, *supra*, at 672.

not have any effects on prices, at least not directly, but may still harm competition severely. The economics of multi-sided markets call for platforms to subsidize the service they provide to the user group that generates the strongest positive network effects for a platform overall. Since this is mostly the user group of consumers, most services are offered to them without any payment requirement or at a price below actual cost. This price below cost is cross-financed by charging the user group(s) more that generate the weakest positive network effects, or even negative network effects. These are typically business users such as merchants or advertisers. Charging those business users excessive prices will, in turn, also indirectly harm end users since business users will have to pass on their costs to end users. However, the end users to which the business users pass on their increased platform transaction costs do not have to coincide with the platform's end users. Accordingly, these indirect effects may be difficult to capture under a Merger Review that only considers direct price effects. Moreover, the fact that end users do not have to pay for a service does not mean that they are spared from any direct harm. In many cases, end users 'pay' with their data and their attention. Such provision of data may exceed what is required for the platform to function and to match the user groups effectively. This is the case, for instance, where an undertaking conditions the use of its platform (e.g., a search or social network service) on the granting of access to data (and corresponding usage rights) that are not used for the platform service as such but for a different service that the undertaking provides (e.g., the intermediation of online advertising). Equally, end users may be directly harmed by a reduced quality of the service they receive as a result of market concentration. An incontestable platform can have an incentive to sacrifice the quality of the service it provides to the user group of consumers (e.g., the quality of search results) if this allows the platform to maximize the profits it generates from the service it provides to the paying, other user groups (e.g., advertisers providing paid search results). All of this shows that evaluating only (direct) price effects may give a superficial impression of a benign merger.

- 156 The Horizontal Merger Guidelines currently take into account non-price factors such as innovation, consumer choice, quality, and "other consumer harms".<sup>175</sup> However, the Guidelines do not specify what those other harms are, nor do they attribute any special significance to them. The revised

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<sup>175</sup> Horizontal Merger Guidelines, *supra*, at 2.

Guidelines should clarify that non-price effects are major causes for concern in digital markets and provide a list of harms that are likely to arise in digital markets. Such a list should include the following factors:

**aa) Excessive data retrieval**

157 Digital platforms that intermediate between the demand of end users and the supply of business users are dependent on data from both sides of the platform. Platforms can only effectively match users if they know what end users are looking for and, in turn, what business users are offering. Therefore, there is typically a joint interest in providing the platform with the data which it requires to carry out its matching function. However, dynamics change once a market has tipped in favor of a particular platform and a user group has become dependent on it. In these circumstances, the platform will have an economic incentive to extract more data from the dependent user group than it actually requires to operate its platform; data which it may use primarily for other services that it provides. This type of “data exploitation” can harm end users in several ways.

- **Data exploitation:** Irrespective of its legal protection (under intellectual property or other laws), data has a commercial value. In the same way as customers can be exploited by prices that far exceeds the value of the service (excessive pricing), customers may also be exploited by a requirement to provide more data to the platform than is necessary or appropriate for the service received (excessive data retrieval). This can affect all user groups. High market concentration can enable a platform to condition the use of its service on (i) end users (a) providing more personal data and (b) data/privacy usage rights (consent) or (ii) business users (a) providing more relevant content (e.g., product offers and information, texts, images, audiovisual content) and (b) intellectual property usage rights (licenses) than is necessary for the platform to carry out its platform intermediation service. Mergers that facilitate excessive data exploitation should be viewed critically because the platform may use unfairly retrieved data to expand into new markets or to raise barriers of entry even higher.
- **Privacy concerns:** Where the data provided by end users is personal data, excessive data retrieval simultaneously triggers privacy concerns which, typically, also become competition concerns. Past mergers such as Facebook/WhatsApp and

Google/DoubleClick have been criticized by privacy advocates for allowing digital sector firms to encroach upon users' data privacy.<sup>176</sup> The main concern from the merger review perspective is that user data is not limited to one service (e.g., WhatsApp) but shared across an entire ecosystem (such as Meta's).<sup>177</sup> Indeed, Meta was found to have violated data protection law regarding the incorporation of WhatsApp's data following the acquisition because it did not communicate changes to users in a transparent and easily understandable way.<sup>178</sup> Combining data sets allows platforms to build up very large pools of data about their users, creating not only the per se violation of privacy by the data processor, but also an increase in the risk of potential privacy violations by third parties that legally or illegally access the data processor's database. Often, those harms go hand in hand with increased risk of opaque (and even deceitful) privacy policies or terms of service which were the subject of past FTC enforcement against Facebook.<sup>179</sup>

#### bb) Quality degradation

158 As outlined above, in digital multi-sided markets where the service to end users is often provided for no monetary cost, competition between platforms focuses on the quality of the service. As the price is identical (zero), consumers will pay more attention to the quality and the features that a platform service provides. Thus, in the absence of price competition, where a market has not yet tipped, platforms will need to focus on improving the service provided to end users (which typically generate the strongest network effects for the platform). This competitive pressure has spurred an immense level of innovation and needs to be encouraged and protected by antitrust policy. Once

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<sup>176</sup> E.g., Google/DoubleClick, FTC File No. 071-0170, (20 Dec. 2007).

<sup>177</sup> Stigler Center, *supra*, at 51-57 (fn. 206); ACCC, *supra*, at 407-434, 444-445 (fn. 36); also see Erika M. Douglas, *The New Antitrust/Data Privacy Law Interface*, 130 YALE L. J. 647 (Jan. 2021); Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 BOSTON UNIV. L. REV. 793 (2022); Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data Breach Harms*, 96 TEX. L. REV. 737 (2018).

<sup>178</sup> Hamburg Administrative Court, Case no. 13 E 5912/16, 24 April 2017. (in German). WhatsApp was also fined €225m by the Irish Data protection authority (DPC) in a cross-border GDPR enforcement case in September 2021 for serious breaches of the transparency principle under the GDPR for failing to provide adequate information to users about what information WhatsApp shares with Facebook.

<sup>179</sup> Stigler Center, *supra*, at 53, 56, 74-75 (fn. 206); ACCC, *supra*, at 395-407, 425-434, 449-451 (fn. 36); Federal Trade Commission Press Release, *FTC Imposes \$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook* (July 24, 2019), <https://bit.ly/35YF20h>.



tipping has occurred within a market, competition “for the market” ceases. A platform that has become incontestable is in position to exploit its business users, even if this means sacrificing the quality of its service vis-à-vis end users (consumers) because there is no longer any genuine risk that the quality degradation will result in a significant switching of end users to a competing platform. Where end users receive the same service but of decreasing quality, they are harmed by the market concentration as they would have been if prices had increased. Quality degradations may need to be considered when assessing likely consumer harm resulting from a merger in addition to when delineating relevant markets but also when assessing likely consumer harm resulting from a merger.

159 Quality degradation can come in many shapes and forms. Some examples:

- **Reduced quality of intermediation (self-favoring, discrimination etc.)** The EU *Google Search (Shopping)* case showed how Google sacrificed the quality of its search results pages in so far as end users were considered, in order to promote Google’s own downstream services on those results pages. Google reserved the most attractive and visible spots on search results pages for results (so-called ‘Shopping Units’) that only contained offerings from Google’s own comparison shopping service (Google Shopping), instead of presenting users with a choice of the best offerings from all comparison shopping services.<sup>180</sup> In the appeal of the Google Shopping infringement finding, the EU General Court noted that when users type queries into a search engine, they expect neutral results that are focused on relevance rather than on what is most profitable for the search engine.<sup>181</sup> It upheld the Commission’s finding that by depriving end users of the results (offerings, websites, etc.) that are most relevant and instead leading them to less relevant and/or more expensive offerings, users are significantly harmed. In the case of platforms that intermediate between commercial supply and demand, any degradation of the quality of their intermediation automatically impacts allocative efficiency because any degradation of the quality of matching supply and demand implies a market failure – a demand is not met with the most suitable offer. In

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<sup>180</sup> Google Search (Shopping), Case no. At.39740, EU Commission (27 June 2017).

<sup>181</sup> Google Search (Shopping), Case no. T-612/17, EU General Court (10 Nov. 2021), at ¶ 562.

addition, self-preferencing conduct harms third-party services which compete with a platform that is in position to favor its own services. Self-favoring cases are not limited to Google's search engine, Google and Apple are also in a position to favor their own app stores on iOS and Android. Amazon can favor its own products on its marketplace, and, in the future, smart home devices including digital voice assistants can favor the producer's other products and services.<sup>182</sup> Mergers that are likely to lead to a degradation of the quality of an intermediation service, for instance by enabling or incentivizing self-preferencing or the favoring of the acquired target vis-à-vis its competitors in the intermediation process, should be heavily scrutinized.

- **Exchange of unbiased, relevance-based intermediation for biased, paid-for intermediation.** The quality of search or other intermediation results may also be degraded through biased intermediation rather than neutral relevance-based intermediation. Multi-sided platforms typically combine an unbiased intermediation service based solely on the relevance of the proposed business offers (organic rankings) with a biased intermediation service based upon the amount of money a business user is willing to pay the platform to be displayed to end users (paid listings, ads etc.). An intermediary with significant intermediation power has the incentive to degrade the overall quality of its intermediation service by decreasing the unbiased intermediation (organic results) in favor of more biased intermediation (paid results) as it earns more from the latter.<sup>183</sup> For example, Google allocates an increasing amount of space on its search results pages to ads. Whereas a couple of years ago, each search displayed around 10 ads that were clearly labelled as such; today Google often fills the entire first search results page with ads (such as for products, hotels, flights etc.).<sup>184</sup> This distracts users' attention from their initial search, which would be better served by purely

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<sup>182</sup> Stigler Center, *supra*, at 187-192, 195-206, 282-289, 310-312, 359-361 (fn. 186).

<sup>183</sup> Thomas Hoppner, *Gatekeeper's Tollbooths for Market Access: How to Safeguard Unbiased Intermediation*, CPI ANTITRUST CHRONICLES (Feb. 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3791332](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3791332)

<sup>184</sup> *Investigation of competition in digital markets: Majority Staff Report and Recommendations, Before the H. Sub Comm. on Antitrust*, 117th Cong. (2020), at 197-201.

relevance-based search results, instead leading them to click on ads – maximizing Google’s profits

- **Excessive exposure to harmful content:** Large platforms consistently fail to protect their users from harmful online content. In fact, some platforms funded by advertising have a commercial incentive to favor attention-maximizing harmful content (including fake, illegal, discriminatory content). The recent revelations by Frances Haugen showed how dominant platforms such as Meta may disregard their users’ best interests in favor of the firm’s own commercial interests. Exposing end users to more harmful content can be conceptualized as quality degradation and, thereby, a relevant harm under antitrust law. There has been considerable effort to define, categorize, and quantify different forms of harmful third-party content; and the Antitrust Agencies should work with specialists in this field to develop consistent typologies of harmful content.<sup>185</sup> The Antitrust Agencies should focus on content posing a risk of severe harm in their assessment of service quality.
- **Excessive exposure to harmful/low-quality products:** A similar quality degradation can occur where a merger facilitates or amplifies the exposure of its users to harmful or low-quality products such as counterfeits, unsafe goods or products of questionable origin. Such concerns have been raised, in particular against the sale of such products on Amazon’s marketplace. And a failure on the side of Amazon to put effective safeguarding rules in place.<sup>186</sup>
- **Exploitation of self-harming biases:** Since end user engagement typically generates the strongest positive network effects for a platform, they are exploiting behavioral economics to maximize such user engagement. Many platforms have reached unhealthy levels in this respect, such as through using addiction algorithms that spur

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<sup>185</sup> For example, in Michele Banko et al., *A Unified Typology of Harmful Content*, PROCEEDINGS OF THE FOURTH WORKSHOP ON ONLINE ABUSE AND HARMS, at 125–137 (2020), they propose a comprehensive framework which provides both a typology and factors for determining whether content poses a risk of severe harm.

<sup>186</sup> *Investigation of competition in digital markets: Majority Staff Report and Recommendations, Before the H. Sub Comm. on Antitrust*, 117th Cong. (2020), at 292-295.

engagement, exploiting emotionally vulnerable states of mind for purposes of targeting and advertising, and implementing dark patterns that push users into decisions that are irrational and harmful to them.<sup>187</sup>

- **Discriminatory intermediation:** There is evidence that the targeting algorithms of online platforms can evolve into tools that discriminate against certain users and thereby degrade the quality of the service to the detriment of such users. For example, algorithms have been found to show users specific ads dependent on their race.<sup>188</sup>
- **Exploitative intermediation:** Finally, intermediaries may decrease the quality of their intermediation service by ‘playing off’ business users and pitting them against each other to extract a maximum rent. This happens, for instance, where intermediation (the ‘if’ and the ‘how’ in terms of outcome of the intermediation) is made dependent on the business users’ willingness to grant the intermediary commercial benefits (e.g., more data or content – or the rights to use both more broadly within the incumbent’s ecosystem). To the extent that business users have to provide ever more such benefits to the platform operator to access to their end users, the quality of the intermediation service decreases. Not least due to the indirect network effects at stake, any such harm to business users indirectly also harms users because if the former have to cease operations or leave the platform, this reduces choice for the latter.<sup>189</sup>

### cc) Reduction of choice

160 Harm to end users can also occur where a merger reduces choice. This can take many forms. One example is the reduction of choice through default settings. Platforms frequently diminish their customers’ array of options through default functions and apps. For example, Android smartphones come with Google apps pre-installed, as iPhones come with Apple apps. Google is also the default

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<sup>187</sup> Stigler Center, *supra*, at 53 (fn. 206); ACCC, *supra*, at 445-446 (fn. 36).

<sup>188</sup> *Id.* at 446-448 (fn. 36).

<sup>189</sup> As noted previously, this list of exemplary misuses of algorithms is not an exhaustive list of every possible misuse. The rising importance of the acquisition of a critical mass of users to drive network effects (and consequently prevent others without such a critical mass of users from accessing them) underscores the importance of ensuring that algorithms do not frustrate fair and equal access.

search engine on both Android and iOS. In some instances, users are not permitted to change these defaults at all. However, users can sometimes change these defaults to meet their preferences; for example, users can change the standard search engine. Even in those instances, the platforms intentionally make switching a function or app difficult and users are prone to “status quo bias”.<sup>190</sup> In effect, even where choice is possible in theory, in practice it is severely diminished.<sup>191</sup> Choice screens which allow users to set their own defaults after purchasing a device are rare and limited to certain cases, such as in the EU Commission’s Android investigation.<sup>192</sup> In response to the decision, *three* years later, Google implemented a choice screen on Android; however, it was implemented *only in Europe*.<sup>193</sup>

161 Merger review needs to ensure that an acquisition does not open the path for new default settings that reduce the choice for end users even further.

**dd) Market and user surveillance**

162 Merger control should also account for concerns arising from an increased surveillance of markets and market participants by digital sector firms.

- **Reducing competitive pressure from disruptive innovations through market surveillance tools:** In 2013, Facebook acquired Onavo, a surveillance firm. Onavo collected data from numerous apps which Facebook could use to track their popularity, identifying potential acquisition targets.<sup>194</sup> The acquisition of Onavo ticks none of the boxes of standard antitrust harms: It does not lead to higher prices, Onavo’s products are not substitutes to Facebook’s, both firms are not in a vertical relationship, and it is difficult to classify Onavo’s services as complementary to Facebook’s core services. Still, the merger is anti-competitive as it enabled Facebook to carry out targeted killer

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<sup>190</sup> Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5(1) J. ECON. P. 193–206 (1991).

<sup>191</sup> Stigler Center, *supra*, at 213-217, 240-242, 339-342, 352-358, 364-367 (fn. 206).

<sup>192</sup> Google Android, Case no. AT.40099, EU Commission (18 July 2018).

<sup>193</sup> Oliver Bethel, *Changes to the Android Choice Screen in Europe*, GOOGLE, Jun 8, 2021, <https://blog.google/around-the-globe/google-europe/changes-android-choice-screen-europe/>.

<sup>194</sup> FTC v. Facebook, Case 1:20-cv-03590-JEB, FTC (Jan. 13, 2021), at ¶¶ 74-75.

acquisitions. Similar concerns can be raised against digital sector acquisitions of companies that monitor the development of markets, traffic, user engagement or the performance of digital companies more generally. The Merger Guidelines should take into account harm to competition in the form of such tools that may be misused to indirectly harm “competitive fairness”.

- **Reducing trust in digital markets by excessive user surveillance:** Closely linked to the incentive of digital platforms to amass personal data, there is also an incentive to increase the intensity by which end users and their daily behavior are monitored, measured and analyzed by technical tools. Acquiring such tools may not directly strengthen the acquirers market position on any given tool. However, consumers may still be harmed as such acquisition may subject them to surveillance that far exceeds what is required to generate network effects and provide high-quality services.

### **b) Ways in which an acquisition may lessen competition**

As regards the anticompetitive effects that an acquisition may have, the current Horizontal Merger Guidelines focus on “Unilateral Effects”, in particular unilateral price increase, and “Coordinated Effects” (in particular coordinated interactions). These effects do not reflect the full scope of likely harm to competition that a digital merger may cause.

As regards the likely anti-competitive effects of an acquisition, a distinction should be made between cases where neither party to the merger enjoys any market power prior to the merger and cases where one party enjoys such power in at least one relevant market.

#### **aa) Creating market power**

Where neither party currently enjoys market power, an acquisition is problematic only if it is likely to create such market power and corresponding harm to consumers. As explained in the current Horizontal Guidelines this is likely in case of a horizontal merger that leads to a significant combination of market shares. The creation of market power is far less likely in case of a vertical or conglomerate merger. In any case, where no market power prior to an acquisition could be established, the competitive effects of such merger are not always easy to predict. Such mergers therefore justify a more lenient approach.

**bb) Maintaining and entrenching market power**

In contrast, where one party to the market already enjoys market power prior to the merger, competition may be lessened if such power is further entrenched or even expanded. Where market power, and thus an existing market failure, has already been established there is a far lower risk that blocking a merger would do more harm than good (Type I error), as compared to a merger that may engender market power. Where an undertaking already enjoys market power, such power may not just be expanded or entrenched by means of a horizontal merger. It may be equally expanded by a vertical or conglomerate merger if such merger generates benefits for the undertaking's core market. Accordingly, where market power is already established, merger review can impose a lower threshold for blocking a merger, either horizontal or vertical.

**cc) Maintaining and entrenching market power of "Significant Digital Conglomerates"**

Following the distinction described above, merger review can be, and needs to be, particularly stringent when it comes to a merger by an entity that operates one or several platform services that provide a significant gateway to end users and enjoys a durable position of market power due to this service being embedded in a protective moat of ancillary services amounting to an ecosystem. For the purpose of this paper, we refer to such undertakings as "Significant Digital Conglomerates" ("SDC").

SDCs such as Amazon, Meta, Google and Apple control ecosystems that render their core platform services nearly incontestable. These core services are nearly incontestable because of successful moat-building strategies. Accordingly, the low level of remaining competition demands particular protection and aggressive antitrust enforcement. Any acquisition that renders such core platform service even less contestable would be heavily considered for blocking. There are various ways in which an acquisition by an SDC may further entrench its current market power. Some examples are explained below.

**(1) Relevant competitive threats and corresponding moat-building strategies**

When dealing with SDCs, Agencies need to observe any competitive threats that exist for their core platform services and which may still discipline the incumbent firms.

As explained above, where a market for a core platform service has ‘tipped’, competition may arise primarily from disruptive innovations that displace the incumbent. Such innovations may be developed by existing competitors, by participants using the platform, or by potential entrants. An SDC may try to prevent such innovation from gaining a foothold by acquiring it and, where suitable, integrating it into its own service. To ensure that an SDC can acquire any innovation in time, SDCs typically use surveillance services to monitor the performance within their industry. This enables the SDC to quickly identify promising product differentiations as potential targets for an acquisition.

Another threat to a core platform service of an SDC can come from upstream intermediation services or platforms that serve as a gateway for user groups to access the core platform service. Where a user’s ‘journey’ to a core platform service leads through a competing platform, such platform may try to use its intermediation power to divert users to its own downstream services, or to provide such service directly through the upstream platform. Such practices are known as disintermediation.<sup>195</sup> Accordingly, when an SDC does not itself fully control the upstream intermediation level, there is a potential threat that such level may be used to disintermediate its downstream core platform service.<sup>196</sup>

In the interest of keeping an SDC’s core platform services contestable, merger review needs to ensure that an SDC does not use acquisitive moat-building strategies to reduce the threat from potential market entry or disintermediation. Below we describe several scenarios which are particularly problematic.

## **(2) Mergers creating positive cross-market feedback loops**

163 An acquisition should be seen to “significantly lessen competition” if it entrenches any element of the protective moat that an SDC has built around its core platform service to shield it from disruptive

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<sup>195</sup> See Thomas Hoppner et al., *Google Search (Shopping) as a Precedent for Disintermediation in Other Sectors - The Example of Google for Jobs*, 9 J OF COMP LAW & PRACTICE 627-644 (Nov. 2018).

<sup>196</sup> See Kanter, *supra*, see “In the digital economy, competition could come from platform participants, potential entrants or disintermediation technology”.



competition. Any acquisition that directly or indirectly further strengthen such a moat, by way of horizontal, vertical, or conglomerate effects, should be rejected.

164 Such a strengthening of an SDC's core platform service can be assumed if the transaction creates positive feedback effects to the benefit of the core platform service. Such loophole effects can relate to the market structure or to particular conduct:

- **Positive feedback-loop due to *structural* ties between SDC's core platform service and market for acquired service.** There may be cross-market feedback effects inherent in the structure of the affected markets. In particular, products and services on a separate but related market may pose indirect constraints as they may potentially be expanded or improved to become genuine substitutes, or at least credible alternatives, limiting the price-setting freedom of an incumbent. For example, vertical search services (such as for hotels, flights, and shopping) are in a market separate from general search services. However, they create indirect constraints in the general search market, as such services may attract user attention away from general search services. They may potentially be successively expanded to include further areas (e.g., combining hotels and flights to "travel" search). Hence, even though such services operate in a separate market, they pose a significant threat to general search providers. Accordingly, any acquisition by a dominant general search service of a vertical search service should be considered for blocking. Similarly, any acquisition of a platform upstream of an SDC's core platform service, which may try to disintermediate the latter, should be condemned. For instance, even if Google did not already dominate the market for web browsers, any acquisition of a browser should be blocked because browsers serve as an entry point to the market for general search services, where Google has a near incontestable monopoly. Such merger would lessen competition as it reduces the threat of disintermediation as one of the only remaining forces of discipline. Other structural ties may follow from a joint user base, joint data pools, algorithms or inputs which directly or indirectly strengthen the acquiring SDC's core platform service or any service creating a protective moat around it.

- **Positive feedback loop due to *behavioral* ties between SDC’s core platform service and acquired firm.** An SDC may also create moats around its core platform service by conduct. In particular, an SDC may create or sever links and feedback loops between markets through its own conduct, even where such markets were previously not inherently or naturally connected. For example, an SDC may enter into exclusivity agreements with upstream gateway platforms to reduce the risk of disintermediation. It may also use anti-competitive unilateral conduct to create moats, for instance by preventing interoperability or increasing switching costs. Any merger that further strengthens such conduct – and thereby the protective moat around the dominant core platform service – should be prohibited. For example, a retail e-commerce business has no obvious or technical link to a movie studio. However, Amazon linked those two businesses by connecting the benefits of a video streaming service with those of a better e-commerce experience such as free shipping in its Prime offering. In this way, Amazon’s acquisition of MGM served to secure the moat around its core e-commerce business. Even if the transaction does not raise concerns in the video streaming or movie-making businesses as a stand-alone market, the link to Amazon’s e-commerce business should indirectly raise competitive concerns.

**(3) Mergers acquiring sharable inputs**

165 An acquisition by an SDC may also significantly lessen competition if it involves a ‘shareable input’ that the SDC may directly or indirectly use for its core platform service.

166 Shareable inputs are assets that can be used for a variety of purposes (*supra*, at 160). The data used in one specific service or market (e.g., Google Maps) can be used for the development of new or the improvement of many other services, such as localized advertising. The combination of shareable inputs typically requires usage of a tool that brings together various inputs, such as a personal identifier for personal data (for example, the DoubleClick ID used within Google’s ad tech walled garden).<sup>197</sup>

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<sup>197</sup> Google Sec. 19a(1) ARC decision, Case no. B7-61/21, Federal Cartel Office (30 Dec 2021), at ¶ 141. (only in German).

*Insights from the German Federal Cartel Authority's Gatekeeper Investigations*

167 As the German Federal Cartel Authority recently explained in detail when assessing Google's "paramount significance for competition across markets", digital conglomerates may benefit significantly from shareable inputs both on the supply side and the demand side. On the supply side, digital firms benefit from economies of scale and scope in product development due to modular design and shareable inputs. This allows them to create product variants at low incremental costs that may be unrelated, or complementary to their main products. For example, when identifying Google as a particularly powerful gatekeeper, the German authority found that:

*"data and other resources to which Google has recourse to, such as the brand, may be reused freely across markets as 'shareable input.' By adding value through the combination of resources this allows to operate, improve, expand and develop new products and advertising services."*<sup>198</sup>

168 On the demand side, there are consumption synergies from using multiple services in the same ecosystem. Both effects reinforce each other to concentrate all intermediation in one player (feedback loops).<sup>199</sup> For example, it is practical for jobseekers to see job results directly on the Google general search results page.

169 Current merger review is not well-suited to address the acquisition of shareable inputs by a digital conglomerate, as by definition, such inputs may not be specifically designed to strengthen the position in a particular market. These may still, if used across services, significantly increase the barriers to entry and render the undertaking even less contestable. In practice, datasets as well as consent and IP rights can be seen as the most relevant shareable inputs. The Merger Guidelines should develop a framework which captures the power that digital sector firms gain from any acquisition of an undertaking with assets that may be seen as shareable input. It could be presumed, for instance, that if an undertaking already controls an ecosystem and thereby enjoys a particular

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<sup>198</sup> Ibid, ¶ 412.

<sup>199</sup> Bourreau & de Streel, *supra*, at 29 (fn. 63).

market position, any acquisition of further inputs that can be shared across its ecosystem requires demonstration of a business benefit other than to raise barriers to entry even higher.

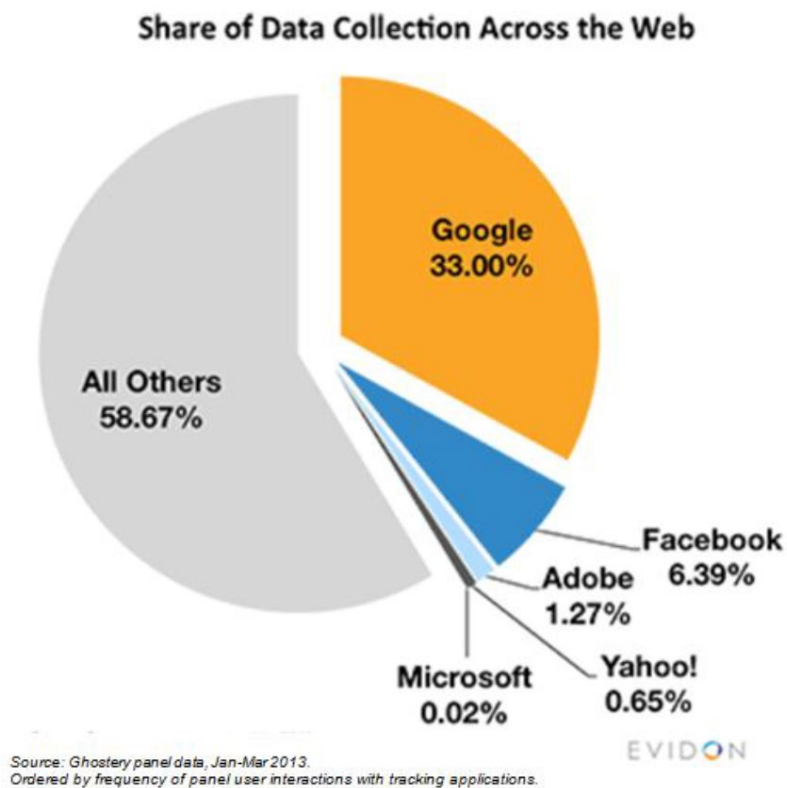
*Insights from EU competition investigations into sharable data*

- 170 The EU Commission has analyzed data as shareable inputs in several cases without yet developing a real concept.
- 171 In Facebook/WhatsApp, the Commission defined inter alia a market for social networks, but not for personal data which is being collected by these. Yet, regarding potential anti-competitive effects, the Commission observed:

*“[T]here are currently a significant number of market participants that collect user data alongside Facebook. These include, first of all Google, which accounts for a significant portion of the Internet user data and, in addition, companies such as Apple, Amazon, eBay, Microsoft, AOL, Yahoo!, Twitter, IAC, LinkedIn, Adobe and Yelp, among others. The graph below provides an overview of the estimated share of data collection across the web.”<sup>200</sup>*

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<sup>200</sup> Facebook/WhatsApp, Case no. COMP/M.7217, EU Commission (3 Oct. 2014), at ¶ 188.



*„Therefore, the Commission notes that, regardless of whether the merged entity will start using WhatsApp user data to improve targeted advertising on Facebook’s social network, there will continue to be a large amount of Internet user data that are valuable for advertising purposes and that are not within Facebook’s exclusive control.”<sup>201</sup>*

172 The Commission notes regarding the graph:

*„The data in this graph originate from an external market intelligence company and have been produced for purposes unrelated to the assessment of the Transaction. Those data are presented here for purely illustrative purposes and are without prejudice to any possible market definition as regards the provision of data, which, as explained above paragraph (72) is not covered by the Commission’s assessment in the present decision.”<sup>202</sup>*

173 The Commission’s approach illustrates the difficulties in defining a data market. While the authority gives no details about what data are considered as part of the graph, the large share of “other”,

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<sup>201</sup> *Id.* at ¶ 189.

<sup>202</sup> *Id.* at fn. 107.

unidentified sources (almost 60%) shows that a large part of personal data stems from atomistic sources that can be small personal websites, blogs, or local newspapers. However, it is highly questionable whether such data, which is scattered on millions of websites, can exert competitive pressure on Google's or Facebook's dataset. The great advantage of those two latter datasets is that they have so much data combined in one place. Also, the flow of such data to Google and Facebook is likely to remain steady as those two firms capture a large part of online users' attention. It is this combination of data and attention that grants the duopoly market power in online advertising.<sup>203</sup> Any concept adopted for the Merger Guidelines would have to take this element into account.

- 174 In Microsoft/LinkedIn, the EU Commission assessed competitive aspects of data combination as a part of the investigation into the online advertising market. Ultimately, the Commission had no concerns in this regard. It noted that both firms were restricted from combining parts of their data sets due to privacy rules, in particular the EU General Data Protection Regulation.<sup>204</sup> As comparable rules do not exist in the US, such considerations are unlikely to influence merger review. Moreover, the Commission noted that

*“the combination of their respective datasets does not appear to result in raising the barriers to entry/expansion for other players in this space, as there will continue to be a large amount of internet user data that are valuable for advertising purposes and that are not within Microsoft's exclusive control.”<sup>205</sup>*

- 175 The Commission also investigated whether the merged entity would have the ability and the incentive to refuse access to its database to third parties. However, until the transaction, its database was not open to third parties. Also, internal documents did not show any foreclosure strategy. Finally, LinkedIn data was not considered to be an important input for third-party providers of certain software that may rely on LinkedIn data for machine learning purposes.<sup>206</sup> Generally, the Commission examines if the merged entity has (i) the ability and (ii) an incentive to take undue advantage of its combined dataset.

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<sup>203</sup> Newman, *supra*.

<sup>204</sup> Microsoft/LinkedIn, Case no. M.8124, EU Commission (6 Dec 2016), at ¶ 177.

<sup>205</sup> *Id.* at ¶ 180.

<sup>206</sup> *Id.* at ¶ 246-277.

176 The Google/Fitbit merger concerned a comparable case of dataset combination where the Commission undertook a similar approach:<sup>207</sup>

*„[T]he transaction could **not give rise to horizontally affected markets in a traditional sense**, instead it is potentially horizontal affected because of Google’s availability of data pertaining to certain health and personal activities obtained from Fitbits wearable devices, which would increase Googles power in some data-based markets by further strengthening Googles ability to commercially exploit such data” (para. 399).*

*„the transaction would allow Google to combine its already very prominent datasets with those of Fitbit, giving it the **ability to cause a foreclosure of competitors’ entry or ability to expand in data-based supply markets**“ (para. 402)*

*„the Fitbit data gained from the merger could strengthen Google’s dominance in the markets for the supply of **online search advertising services** (para. 427)”*

*„the acquisition could raise barriers to entry or expansion for competitors; **Google’s data increment marginalizes Google’s competitors in online search advertising even further**” (para. 454)*

*„**none of Google’s competitors in online advertising has access to a database or data collection capabilities equivalent to those of Fitbit** and it is not likely that they would acquire such assets without incurring into significant costs and in timely manner; as none of Fitbit’s competitors seems to make its data available for advertising purposes **the EC doubts that Google’s competitors would be able to expand by gaining access to datasets like those of Fitbit**” (para. 457)*

*„ Google would have the ability to foreclose competitors in downstream markets for digital healthcare by restricting access to Fitbit Web API, as the data of Fitbit’s users are only available through that API and a number of players in digital healthcare access such data through the Web API to provide services to Fitbit users (p. 520); The possibility of Google having the incentive to restrict access to the Web API cannot be excluded” (para. 525)*

177 Despite these significant concerns, the Commission approved the merger – albeit with conditions regarding “data silos” which will be examined in more detail below in the remedies section.

*Insights from academic discussions of capabilities markets*

178 We suggest merging the concept of shareable inputs with capabilities markets, a similar concept discussed in the literature. Instead of considering product and output markets, as makes sense for

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<sup>207</sup> Google/Fitbit, Case no. M.9660, EU Commission (17 Dec 2020).

traditional industrial markets, authorities should focus on capabilities and input markets in the digital sector.<sup>208</sup> Capabilities markets should be defined for the digital sector's main assets:

- data,
- engineering know-how,
- computing capital (servers),
- venture capital.

179 User attention should be a relevant input as well, prompting the definition of attention markets.<sup>209</sup> Attention is a key source of market power in online advertising and other markets and often relates to data capabilities. Newman specifically argues that such markets can realistically be defined, countering the argument that attention markets would be so broad and vague that they are not workable for antitrust enforcement.<sup>210</sup>

180 Authorities should measure market power in those markets by considering the “four Barney conditions”. These ask, is the input:

- non-replicable?
- rare?
- valuable?
- non-substitutable?<sup>211</sup>

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<sup>208</sup> Bourreau & de Stree, *supra*, at 37 (fn. 63).

<sup>209</sup> Andrea Prat & Tommaso M. Valletti, *Attention Oligopoly*, AM. ECON. J. MICROECON. (May 25, 2021), <https://ssrn.com/abstract=3197930>; Tim Wu, ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS (2016).

<sup>210</sup> Newman, *supra*.

<sup>211</sup> Bourreau & de Stree, *supra*, at 28 (fn. 63).



#### (4) Mergers facilitating anti-competitive conduct

Finally, an acquisition may also lessen competition if it facilitates any anti-competitive conduct of SDC or amplifies the effects of such conduct.

As explained above (at I.1.a)) digital platforms, and in particular SDCs regularly determine the conditions for competition within the ecosystem they control by unilateral conduct. The SDCs use such power to set the rules in a way that further entrenches their core platform service and deepens the protective moats around it. It is important to acknowledge that any anticompetitive effects of such conduct can be magnified by the effects of any acquisition within the ecosystem concerned, and vice versa.<sup>212</sup> Any acquisition that facilitates anticompetitive conduct or amplifies its effects on market participants may significantly lessen the low degree of competition remaining on the market for a core platform service. Accordingly, merger review needs to assist in mitigating any harm from such conduct if carried out by an SDC, even if the original conduct could not be addressed by Section 2 of the Sherman Act. Section 2, for example, is designed to address abuses of market power *after* they happen, as opposed to Section 7 of the Clayton Act which is explicitly designed to address that market power *before* it arises.

This topic relates the new Conduct-Structure-Effects-Harm viewpoint proposed above (at C.I.1(a)bb). In line with this new approach, Agencies should first analyze how an SDC's current behavior deepens or widens its protective moat and shields off its core platform service from market entry. Based on such assessment, the Agency should then consider how the acquisition would fit into the existing moat-building strategy. Leaving out the assessment of the SDC's moat-building conduct would risk the merger analysis missing the crucial anti-competitive element, namely that the merger facilitates the maintenance of a monopoly by

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<sup>212</sup> Kanter, *supra*, "Reviewing moat-building conduct in a vacuum or in distinct parts risks misunderstanding the basic commercial realities at play. The anticompetitive effect of one aspect of the strategy is magnified by the other parts. So my second suggestion is that we consider as a whole the course of exclusionary conduct by dominant platforms".

magnifying effects of moat-building behavior such as pre-installations, tying, or default arrangements.

In line with the Merger Guideline's current classification of mergers facilitating "unilateral effects" and mergers facilitating "coordinated effects", this third category could be referred to as a mergers facilitating "behavioral effects".

**c) Efficiencies**

181 Past antitrust enforcement inspired by Chicago School Doctrine has given great weight to potential efficiencies generated through mergers, from technical integration to markup minimization in vertical mergers. The characteristics of digital markets urge authorities to be cautious when considering those claimed efficiencies. This is in line with the Supreme Court case law which decided in several cases that

*"Congress was aware that some mergers which lessen competition may also result in [efficiency gains], but it struck the balance in favor of protecting competition."<sup>213</sup>*

182 In any case, the parties to the merger should bear the onus of proof for demonstrating that (i) the acquisition generates actual immeasurable efficiencies, that (ii) such efficiencies will be passed on to consumers, (iii) that they outweigh the harm caused by the acquisition and that (iv) such efficiencies could not be achieved through any other means than the merger. Considering the information asymmetries at stake the threshold for accepting such claims must be set very high.

**6. Methodology: Presumptions, Rebuttals & Burden of Proof**

183 The overall substantial principles should go hand in hand with a new methodology for assessing mergers in the digital sphere. We propose that for Significant Digital Conglomerates any merger should be presumed to lessen competition. It should be up to such undertaking to rebut such presumption by proving that the acquisition neither directly nor indirectly entrenches its position in

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<sup>213</sup> *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967); *Brown Shoe Co. v. Unites States*, 370 U.S. 294, 344 (1962); *United States v. Philadelphia National Bank*, 374 U.S. 321, 371 (1963).

the market for its core platform service. At the very least there should be a reversal of the onus of proof for any alleged efficiency outweighing potential harm to competition.

**a) Presumption of lessening of competition for acquisitions by a Significant Digital Conglomerate**

184 Numerous politicians and scholars have argued for the introduction of presumptions in digital sector mergers, including the Stigler report,<sup>214</sup> Senator Klobuchar,<sup>215</sup> economists Peitz and Motta,<sup>216</sup> and the OECD.<sup>217</sup> Instead of authorities having to prove that a merger will impede competition – as they currently need to – it should be up to the notifying firms to show why their merger *is not* anti-competitive. As such, mergers by certain firms will be presumed to have anti-competitive effects. We strongly support these proposals. First, we outline why it makes sense to introduce presumptions (b)), and second, we propose how presumptions should be designed (c)).

**b) Why it makes sense to introduce presumptions**

185 Merger review in the digital sector necessitates presumptions for numerous reasons:

- **The existing framework does not work.** Merger review of the past decades has produced markets which are highly concentrated and in some cases, have been controlled by one firm for at least a decade (e.g., Google Search, Microsoft Windows). It is clearly not suited for the challenges of digital markets and has failed to achieve its goals – competitive markets and enhancement of consumer welfare. Changing this failed framework is inevitable.
- **High cost of Type II errors:** As outlined above, the traditional Chicago School Doctrine decision-theory does not hold in digital sector markets. It is not favorable to not intervene

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<sup>214</sup> For example, Stigler Center, *supra*, at 111. (Additional sources will be discussed below).

<sup>215</sup> Senator Amy Klobuchar (MN) Press Release, *Klobuchar Introduces Legislation to Modernize Antitrust Enforcement and Promote Competition* (Feb. 1, 2019), <https://www.klobuchar.senate.gov/public/index.cfm/2019/2/klobuchar-introduces-legislation-to-modernize-antitrust-enforcement-and-promote-competition>.

<sup>216</sup> Massimo Motta & Martin Peitz, *How to Deal with Big Tech Mergers*, VOXEU.ORG (Feb. 2020), summarized at <https://voxeu.org/article/how-deal-big-tech-mergers>.

<sup>217</sup> OECD, *Start-ups, Killer Acquisitions and Merger Control* (Background Note, DAF/COMP) (2020), at ¶ 143.

because markets will correct themselves (as may be true in static competition markets). In the digital sector, due to network effects and other economic factors described above, markets naturally tend towards high concentration. Also, market power is likely cemented long-term by the same economic effects. As a result, any failure to intervene risks creating an *irreversibly* high market concentration. In other words, there is a high cost associated with Type II errors. This leads to the principle that, in digital markets and in cases of uncertainty, authorities should rather act (block mergers) than stay idle (approve them). A presumption would transform this principle into law. It reverses the burden of proof in such cases of uncertainty to the merging firms. It means that clearly pro-competitive mergers will be approved and clearly anti-competitive mergers will be refused. This should be the same as absent presumptions. However, mergers that are not clear cases and where projections are uncertain will be blocked. This way, high error costs can be avoided.

- **High degree of uncertainty in projections:** Merger review inherently relies on predictions about the future, and increasingly long-term ones in digital sector particularly. Necessarily, predictions involve a level of uncertainty. This is squarely at odds with a framework where the burden of proof lies entirely on the authorities and thresholds to show anti-competitive effects are high. Such a framework is unworkable where Type II error costs are high because it disincentivizes intervention. As a result, the burden of proof needs to be tilted in favor of authorities. A certain number of false positive decisions must be accepted to avoid high error costs. As Caffarra et al. argued, “Time to have some false positives after twenty years of false negatives”.<sup>218</sup>
- **Historically unprecedented market concentration.** Market concentration is so high in the digital sector and conglomerates have spread out over so many markets that almost any transaction raises competitive eyebrows and justifies closer scrutiny. To take account of this sectoral phenomenon, presumptions should only be introduced with regards to the digital sector.

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<sup>218</sup> Caffarra et al., *supra*.

- **Information asymmetries.** As outlined above, notifying firms have a large advantage in terms of technical knowledge, and employing numerous engineers; whereas, authorities employ lawyers and economists without any technical specialization. Such information asymmetry makes use of presumptions necessary to reduce the costs of information collection.<sup>219</sup> In other words: where authorities know little, but firms know a lot, it is more efficient for the firms to explain why their merger is pro-competitive, than for the authority to explain why it is not.

186 Some commentators have argued against the introduction of presumptions. However, as will be shown, those concerns do not merit maintaining the current allocation of the burden of proof:

- **Transaction costs.** Fayne and Foreman noted that presumptions increase transaction costs, making it overly costly, especially for start-up targets to finance legal bills, filing fees, and costs associated with the uncertainty about the deal ultimately going through.<sup>220</sup> However, merging parties already currently allocate transaction costs among themselves. For example, corporate purchase agreements typically include clauses that allocate costs between the parties in case authorities do not approve the merger. Likewise, the acquirer could cover the target's costs associated with premerger notification.
- **Chilling effect on typical exit strategies.** Many start-ups are founded with the ultimate aim of being purchased by larger tech companies. An IPO has become a less likely and more costly exit strategy for founders. IPOs have dropped from their highs in 1999 (486) to more modest levels (159 in 2019).<sup>221</sup> This may disincentivize founders from starting a company.<sup>222</sup> However, presumptions would apply only to certain designated digital sector firms. Start-ups can still be acquired by other firms without the extra hurdle of a presumption. Silicon Valley is known for the largest venture capital and private equity funds in the world, providing vast financial resources to purchase promising start-ups.

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<sup>219</sup> Bourreau & de Stree, *supra*, at 35 (fn. 63).

<sup>220</sup> Fayne & Foreman, *supra*, at 11.

<sup>221</sup> *Id.* at 10.

<sup>222</sup> Latham et al., *supra*, at 2.

Also, large firms from other sectors can make purchases, allowing them to enter the tech sector, contributing positively to competition.

- **Low reported share of killer acquisitions.** Latham et al. report that only around 8 percent of total GAFAs acquisitions can be considered killer acquisitions, defined as “acquisitions of targets within the acquirer’s core business or vertically-related to the acquirer’s core business”.<sup>223</sup> Such a low ratio – so the argument goes – does not justify presuming all GAFAs acquisitions to be killer acquisitions. However, this percentage number may be misleading:
- **Dependence on definitions:** Which transactions are killer acquisitions depends on the definition of such a transaction which leaves considerable discretion upon researchers. Other studies may apply different criteria or count more transactions under Latham et al.’s criteria. In fact, Latham et al. admit themselves that their choice of transactions is not an “exact science”.<sup>224</sup>
- **Not only killer acquisitions justify presumptions.** For example, Latham et al. considered many targets that provide neighboring services not to be potential threats, such as Nest Labs and Motorola for Google, although these clearly serve to expand Google’s competitive position.<sup>225</sup> Motorola holds numerous smartphone patents, enabling Google to build devices. Nest Labs builds smart home devices, allowing Google to enter this market and forcing its software ecosystem upon those devices (Android, Chrome, Search, etc.). Those may not be killer acquisitions but still raise significant competitive concerns, and hence should justify a presumption.
- **Low ratio does not mean low damage to consumer welfare.** Caffarra et al. countered that every single target may potentially be a game changer, and a massive loss of innovation – the mere share of all acquisitions does not reflect the societal cost of killer

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<sup>223</sup> *Id.* at 6.

<sup>224</sup> *Id.* at 5.

<sup>225</sup> *Id.* at 6.

acquisitions.<sup>226</sup> In other words, the small share of total transactions does not reflect the fact that even one single killer acquisition can lead to a huge loss in consumer welfare. Absent such transactions, welfare gains could be substantial.

- **There are exceptions.** According to Latham et al., many transactions are driven by other motivations, such as the incremental improvement of products such as semiconductors for Apple. Also, GAFAs like to invest in “moonshot projects”, such as self-driving cars which have a very long, time horizon.<sup>227</sup> But, those transactions can easily rebut the presumption and will be approved. After all, a presumption is not an outright blockade of all mergers involving SDCs – only a reversal of the burden of proof.

187 In sum, the benefits of a presumption which is limited to mergers involving SDCs clearly outweigh the downsides. It is telling not only how strong the arguments in favor of a presumption are, particularly the error cost framework, but also what opponents’ counterarguments do *not* relate to: none of the counterarguments brought forward by SDC proponents raise serious concerns about severe threats to innovation or the survival of digital sector firms as a consequence of presumptions. The costs of tighter merger review are rather small – none of the GAFAM will declare bankruptcy as a consequence of a presumption, but numerous start-ups themselves went bankrupt after being the target of anticompetitive behavior in the digital sector– which was partially enabled by merger cascades (for example, regarding YouTube<sup>228</sup>). Concerns such as a chilling effect on start-up exit strategies and higher transaction costs are dwarfed by the massive competitive imbalance in the digital sector which was produced in major parts by failing merger control. Tightening this framework is inevitable in the face of the devastating outcome that the old laissez-faire rulebook has produced.

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<sup>226</sup> Caffarra et al., *supra*.

<sup>227</sup> Latham et al., *supra*, at 10.

<sup>228</sup> Lucas Shaw & Mark Bergen, *YouTube’s Trampled Foes Plot Antitrust Revenge*, BLOOMBERG, July 15, 2019, <https://perma.cc/HK7U-ZA8S>.

c) How presumptions should be designed

aa) Presumptions should only apply to Significant Digital Conglomerates

188 A presumption of anti-competitive effects should apply only to certain acquiring parties. This is an approach which is being adopted (or has already been adopted) in a number of other jurisdictions, with the aim of concentrating rules only on firms whose conduct might pose a long-term threat to the competitive landscape.

- The Stigler Report proposes that certain firms with “**bottleneck power**” to be subject to presumptions.<sup>229</sup>
- The EU general court made reference to concepts of dominance, **super-dominance and even ultra-dominance**<sup>230231</sup>
- The EU Digital Markets Act designates “**gatekeepers**” which operate “core platform services” (i.e., intermediation services) and satisfy certain revenue and user number requirements (Article 3).
- The UK intends to introduce a special regime for firms with “**Strategic Market Status**”.<sup>232</sup>

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<sup>229</sup> Stigler Center, *supra*, at 111.

<sup>230</sup> Tommaso Valletti, *Tech giants in the digital age*, CRA CONFERENCE, Dec. 5, 2018, <https://ecp.crai.com/wp-content/uploads/2018/12/Tommaso-Valletti-2018.pdf>; also <https://globalcompetitionreview.com/article/1177095/dg-comp-chief-economist-reverse-burden-of-proof-to-catch-killer-acquisitions>.

<sup>231</sup> Google v. Commission, Case no. T-612/17, EU General Court (10 Nov. 2021), at ¶¶ 180, 182; also see Whish & Bailey, *supra*, at § V.4.G. Such distinction is also proposed by Valletti, *supra*.

<sup>232</sup> Dept. for Digital, Culture, Media & Sport Press Release, *Government unveils proposals to increase competition in UK digital economy* (20 July 2021), <https://www.gov.uk/government/news/government-unveils-proposals-to-increase-competition-in-uk-digital-economy>.



- Senator Warren proposed to target transactions where one party generates **revenues** exceeding \$40bn.<sup>233</sup>
- Sec. 19a(1) German ARC relies on a mix of factors to designate certain firms with “**paramount significance across markets**”, including financial resources, vertical integration, access to competitively relevant data, and bottleneck positions.

189 For the purposes of this Comment, we have referred to such firms as “Significant Digital Conglomerates” (“SDCs”). An SDC is an actor that (a) offers at least one online intermediation services that in light of the number of its users and the transactions it generates is significant for the economy, (b) where the market for such intermediation service has tipped in favor of the actor and (c) where due to high barriers to entry, in particular any protective conglomerate ‘moat’ created by undertaking, disruptive market entry is unlikely in the foreseeable future. This is currently the case, in particular for Alphabet<sup>234</sup>, Apple<sup>235</sup>, Amazon<sup>236</sup> and Meta<sup>237</sup>. In line with the various proposals made internationally as described above, the designation should be based upon factors such as whether:

- The SDC controls an important **online intermediation service** that serves as a cash cow. For example, Google controls Search and browsers, Amazon controls e-

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<sup>233</sup> Eric Newcomer & Joshua Brustein, *Warren Is Drafting U.S. Legislation to Reverse ‘Mega Mergers,’* BLOOMBERG, Dec. 4, 2019, <https://www.bloomberg.com/news/articles/2019-12-04/warren-is-drafting-u-s-legislation-to-reversemega-mergers>.

<sup>234</sup> Google controls, inter alia, the following significant intermediation services: general internet search (Google Search), mobile operating system (Android), store for online applications (Google Play Store), web browser (Chrome), social network and video sharing service (YouTube), supply and demand side platforms (SSP, DSP) for the intermediation of display advertising (Google AdX/AdMob/AdSense/Google Ads, DV 360).

<sup>235</sup> Apple controls, inter alia, the following significant intermediation services: mobile operating system (Apple iOS), store for online applications (Apple App Store).

<sup>236</sup> Amazon controls, inter alia, the following significant intermediation services: online market place for products and services (Amazon marketplace), cloud computing service (AWS).

<sup>237</sup> Meta controls, inter alia, the following significant intermediation services: social network service (Facebook/Instagram), online communication services (WhatsApp).

commerce, and Facebook social networks. Those intermediation services are fundamental parts of the internet.

- The online intermediation service is protected by a moat which has made its position **incontestable**. It is highly unlikely that any competitor could arise that could seriously challenge that service. That is at least partially due to numerous “mosaic” parts of the moat that make the core service more attractive, such as Amazon’s Prime or Google’s vertical search engines (e.g., travel, shopping).
- Certain **conduct** indicating an SDC position produced anti-competitive harms. For example, the fact that a firm can offer a product of inferior quality and tie it to its core service, making it popular among users, can indicate that users can hardly switch to third-party providers. For example, despite Google Shopping offering inferior comparison-shopping services to third-party services, it obtains a considerable amount of traffic. That is due to the fact that Google’s general search engine is used by the majority of internet users.
- The SDC crosses certain thresholds regarding revenue and user numbers (reference could be made to Article 3 of the EU DMA or Sec. 19a of the German Act Against Restraints of Competition).

#### **bb) Potential rebuttal of the presumption by SDC**

190 If a presumption is in effect, it is up to the SDC to rebut it. There are many ways for SDCs to rebut, and any assessment of such arguments should consider the economic effects that are specific to digital markets, such as network effects (*Id.* at ¶ 10). This means that this part of the assessment of a merger can be the most important part, requiring the most attention.

##### **(1) Balance of harms**

191 Whether the presumption has been rebutted should be an assessment that takes into account more than just whether anti-competitive effects may likely occur. The likelihood of such effects may be very difficult to determine in the uncertain industry of digital services. Also, as described above, mergers in the digital sector can have serious impacts with irreversible consequences because

network effects and other factors lead those markets towards monopolies. This prompts the “Intervention Imperative”. As a result, merger assessment should not only take into account the likelihood of anti-competitive effects, but also the magnitude of those effects. Therefore, we propose to move away from a “likelihood approach” or a “balance of probabilities” to a “**balance of harms**” approach: Agencies should weigh the likelihood and magnitude of anti-competitive effects in case of a merger approval against the likelihood and magnitude of negative welfare effects of a merger refusal. Mergers should be blocked when they are expected to do more harm than good.<sup>238</sup> For example, even if anti-competitive effects are uncertain and difficult to forecast, a merger may be blocked if the magnitude of those effects would be devastating for the competitive process. Also, a merger may be blocked where there is a 20% chance of serious harm to consumers set against an 80% chance of relatively small benefits.<sup>239</sup> Regarding those facts, the burden of proof lies on the merging entities if the presumption has been activated. They would have to show that their merger does not have more negative than positive effects.

- 192 This new “balance of harms” approach should not entirely replace current merger policy, but add to it. Mergers that are already regarded as anti-competitive under conventional rules should be blocked on the merit of those criteria.
- 193 In some cases, such a balance of harms approach will almost certainly render a negative result, and a rebuttal should not be possible. Those cases include but are not necessarily limited to (2) killer acquisitions, **Error! Reference source not found.** increases of cross-market power in a cluster or ecosystem, and **Error! Reference source not found.** certain pre-merger conduct.

**(2) In particular: killer acquisitions and other elimination of potential competition**

- 194 The revised Merger Guidelines should include a special framework for assessing killer acquisitions that takes into account potential competition from nascent firms.

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<sup>238</sup> Furman, *supra*, at 6.

<sup>239</sup> *Id.* at 120.

**(a) Identifying killer acquisitions**

195 In a first step, such acquisitions need to be identified. In the literature, the following three criteria have been proposed to identify killer acquisitions:<sup>240</sup>

- Is the purchaser dominant in a market where the target is also active? That would be a simple case of a killer acquisition, and one which will likely already trigger concerns under the current horizontal merger review rules.
- Could the target soon evolve into a competitor of the acquirer? For example, is the target operating in a vertically related market that would allow the target to integrate into the acquirer's market? Does the target control a large user base or other capabilities that may allow it to permeate into the acquirer's market?
- Is the acquirer paying a very high price for the target? Valuation and the price/revenue ratio can indicate a "killer acquisition" motivation.

196 In a similar vein, in her keynote to the FTC Hearings on Competition and Consumer Protection, Susan Athey argued that Agencies must look at whether the target has the potential to provide faster scale and growth opportunities to others, such that an incumbent would want to block it from being acquired. Examples of such settings include

- when the target is a specialized vertical that can offer a rival an entry path,
- an intermediary that can offer a rival a block of users and accelerate growth, or
- a software tool which can be integrated in to help a rival scale quickly and make it a more effective competitor.

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<sup>240</sup> Latham et al., *supra*, at 4.

- 197 Agencies would need to think about how the target could help a rival be a stronger player and then consider whether its integration or acquisition by a dominant incumbent would stop this threatening path.<sup>241</sup>
- 198 Barreau and de Streel propose a similar test, inquiring whether the merger creates risks of cannibalization. In other words, is there a plausible scenario where the acquired firm (the potential entrant) could eat into the market of the acquirer? If no, there is no further review. If yes, Agencies would need to assess the transaction in more detail (see below).<sup>242</sup>
- 199 Agencies should not only consider killer acquisitions but also *reverse* killer acquisitions in their framework. They should assess whether the transaction may lead the acquirer to cease its innovative efforts, not only the target. In other words, it is important to assess both target and acquirer in the counterfactual.<sup>243</sup> To identify reverse killer acquisitions, Latham et al. propose to inquire whether the acquirer, absent the transaction, would have also entered the target's market with a strategy of organic growth.<sup>244</sup>

**(b) Assessing killer acquisitions**

- 200 In a second step, after having determined that a transaction has characteristics of a killer acquisition, there would be a strong presumption of it being anti-competitive. Thresholds for rebuttal should be very high.
- 201 Caffarra et al. note that there is usually internal documentation and financial analyses at the acquirer about "buy or build" scenarios which can be evaluated to assess the motivation for an acquisition. If such an examination finds confirming evidence, the transaction should be blocked.<sup>245</sup>

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<sup>241</sup> Federal Trade Commission, *Hearings on Competition and Consumer Protection in the 21st Century*, Oct. 15, 2018; Caffarra et al., *supra*.

<sup>242</sup> Bourreau & de Streel, *supra*, at 33 (fn. 63).

<sup>243</sup> Caffarra et al., *supra*.

<sup>244</sup> Latham et al., *supra*, at 11.

<sup>245</sup> Caffarra, et al., *supra*.

202 An example for such internal documentation is Facebook’s acquisition of Onavo. Facebook used the company’s data about app popularity to find potential targets:

*“With our acquisition of Onavo, we now have insight into the most popular apps. We should use that to also help us make strategic acquisitions.”*

203 Facebook also used Onavo data to generate internal “Early Bird” reports for Facebook executives, which focused on “apps that are gaining prominence in the mobile eco-system in a rate or manner which makes them stand out.”<sup>246</sup>

204 Moreover, it is sensible in these scenarios to analyze the acquirer’s incentives. In particular, a killer acquisition should be blocked if the gains from shutting the target’s innovation are greater than the gains from bringing the innovation to market.<sup>247</sup>

**cc) Inadequate presumptions should be removed**

205 Numerous merger review regimes view conglomerate and vertical mergers as less of a threat than horizontal mergers. Some commentators share this view.<sup>248</sup> The cases examined above show that this is not true in the digital sector. In fact, entering new markets by extending the reach of one core monopoly to neighboring markets is a frequently encountered strategy in the digital sector. Also, as Beck and Scott Morton showed, empirical evidence does not support any preferential treatment of vertical mergers.<sup>249</sup> Still, vertical mergers are virtually regarded as pro-competitive by antitrust

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<sup>246</sup> FTC v. Facebook, Case 1:20-cv-03590-JEB, Jan. 13, 2021, at ¶¶ 74-75.

<sup>247</sup> In a similar vein: Bourreau et al., *supra*, at 33 (fn. 63).

<sup>248</sup> Wong-Ervin, *supra*; Tad Lipsky et al., *DOJ/FTC Draft 2020 Vertical Merger Guidelines, Comment of the Global Antitrust Institute*, Antonin Scalia Law School, George Mason University, George Mason Law & Econ. Research Paper No. 20-03 (Feb. 7, 2020), [https://www.law.gmu.edu/pubs/papers/doj\\_ftc\\_draft\\_2020\\_vertical\\_merger\\_guidelines\\_comment\\_of\\_the\\_global\\_antitrust\\_institute](https://www.law.gmu.edu/pubs/papers/doj_ftc_draft_2020_vertical_merger_guidelines_comment_of_the_global_antitrust_institute).

<sup>249</sup> Marissa Beck & Fiona Scott Morton, *Evaluating the Evidence on Vertical Mergers*, YALE SCHOOL OF MANAGEMENT, (Dec. 31, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3554073](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3554073). The overview table at 25 is particularly helpful.

enforcers throughout the world.<sup>250</sup> This comes down to a presumption against anti-competitive effects in conglomerate mergers. The US should avoid this mistake and instead clarify that conglomerate and vertical mergers can be as anti-competitive as horizontal mergers.<sup>251</sup> The revised Merger Guidelines should not include any differentiation between those types of mergers with regards to their competitive harms.

## II. Procedural proposals

### 1. Notification thresholds and obligations

- 206 Certain digital sector firms, e.g., those that have been designated as SDCs, should be subject to notification obligations which exceed the basic requirements defined in the current HSR filing rules. One possibility is that those firms would be obliged to notify all planned mergers and acquisitions. This would give the authorities the opportunity to review every transaction regardless of transaction value or the revenue/turnover of the firms concerned. Such a rule could address some of the issues around killer acquisitions, where targets frequently fall below notification thresholds, thus escaping authority review.
- 207 Such extended notification obligations should be limited to certain pre-designated firms. In principle, the scope of such an obligation could be similar to that of the presumptions discussed above.
- 208 The EU Digital Markets Act delivers a prototype in this respect. Article 12 obliges designated gatekeepers to notify all transactions irrespective of any thresholds. The gatekeeper must describe any envisaged acquisition, even if it does not fall under the EU thresholds. For such ‘mini-notification’ it must outline the EU and worldwide annual turnover of the target, its fields of activity, including those directly related to the concentration, the transaction value or an estimation of it, a summary of the concentration (nature and rationale), as well as a list of the EU Members States concerned by the operation of such target. Ultimately, such notification obligations aims at ensuring

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<sup>250</sup> In the EU, the burden of proof in conglomerate mergers is particularly high, higher than for horizontal mergers, *Bertelsmann and Sony/Impala*, Case C-413/06P, ECLI:EU:C:2008:392, Court of Justice of the European Union, at ¶ 50; also, *TetraLaval v. Commission*, Case C-12/03P, ECLI:EU:C:2005:87, Court of Justice of the European Union, at ¶ 44; also *Cisco and Messaget v. Commission*, Case T-79/12, Court of Justice of the European Union, at ¶ 117.

<sup>251</sup> Wu, *supra*.

that the authority can see and assess *any* deal of a digital gatekeeper. This is also the approach likely to be adopted in the UK in its new digital markets legislation.

- 209 There are other options which could be as effective and less onerous on Agencies. Regulators understand digital markets and the potential risks to competition from under-enforcement much better than they did a decade ago. The CMA has updated its merger guidelines<sup>252</sup> to capture some of its learning from digital cases that it has examined both from an antitrust enforcement perspective (i.e., abuse of dominance cases) and merger assessments. There is, for example, specific mention of non-price competition including level of privacy offered to users. There is also a specific warning about conglomerate effects in digital markets.
- 210 One option put forward in the UK, is a change to the substantive merger assessment test which would change the standard of proof to be met when assessing whether a merger in a digital market should be cleared. The regulator would only be required to meet a ‘balance of probabilities’ standard in relation to whether there would be a substantial lessening of competition rather than the current ‘more likely than not’ standard. This would permit intervention in a larger number of cases where the impact of harm could be high.
- 211 The Agencies should try to design a framework to catch attempts to “merge without merging”. To our knowledge, no proposals to alleviate those concerns have been made in the literature. The Agencies should begin to tackle this issue by initiating a sector inquiry or by obtaining an expert opinion aimed at analyzing potential instances of this phenomenon and finding solutions. For example, the UK CMA finalized a market study into digital advertising in 2020 which paved the way for a subsequent case against Google regarding its Privacy Sandbox.<sup>253</sup> Also, the EU Commission obtained an expert opinion from economics and law professors for a “Competition policy for the digital era”, specifically addressing the authority’s concerns in the sector.<sup>254</sup>

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<sup>252</sup> Merger Assessment Guidelines, CMA 129, Mar. 2021.

<sup>253</sup> CMA Press Release, *Online platforms and digital advertising market study* (1 July 2020).

<sup>254</sup> Crémer et al., *supra.*



## 2. Build know-how in specialized Agency units

- 212 There is a huge information asymmetry between undertakings that control an entire ecosystem and Agencies having to analyze the competitive effects of an acquisition within such an ecosystem. Digital sector firms shield their activities in a fog of transparency to prevent effective law enforcement. Accordingly, it can be particularly challenging for Agencies to identify the actual acquisition strategies pursued such companies and its likely effects on the various markets affected.
- 213 To equip Agencies with the necessary skills and expertise to properly examine mergers by digital sector firms, they could, if available resources permit, hire additional technical staff, such as computer and data scientists.<sup>255</sup> Such staff could help better evaluate the data provided in transactions which are examined and understand the technical mechanisms which are used to implement anti-competitive measures, and the technical possibilities of combining datasets post-merger.<sup>256</sup>

## 3. Private intervention

- 214 Merger review should be further strengthened by allowing more interventions by third parties, in particular by competitors or user groups contributing valuable technical and business insights.

### a) Private merger law enforcement

- 215 Although relatively uncommon, private parties can challenge mergers that they allege to be anticompetitive under Section 7 of the Clayton Act. The passage of the Hart-Scott-Rodino Act created a formal system for pre-merger review that was closed to private plaintiffs. The dollar-amount threshold for mergers to be subject to HSR review simultaneously focused the government's attention on larger mergers and left smaller mergers for private enforcement. This, coupled with the

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<sup>255</sup> William E. Kovacic & David A. Hyman, *Regulating Big Tech: Lessons from the FTC's Do Not Call Rule*, GEORGETOWN UNIV. L. CENTER (2022), at 18-19, <https://ssrn.com/abstract=4042914>; This has also been the approach adopted by both the European Commission and the CMA in recent years, with the CMA establishing a "Digital Markets Unit" staffed by data scientists and technical experts.

<sup>256</sup> Bourreau & de Streel, *supra*, at 33 (fn. 63).

development of antitrust injury doctrine that added requirements for private plaintiffs seeking redress in conduct cases, led to relatively few private enforcement suits being filed since 1978.

- 216 All of that said, in February 2021 the Fourth Circuit affirmed the first court-ordered divestiture arising from a privately litigated merger challenge.<sup>257</sup> In that case, referred to herein as *Steves and Sons*, the Fourth Circuit upheld a \$36 million damages award in favor of the private plaintiffs as well as an award of attorneys' fees.
- 217 *Steves and Sons* concerned a proposed acquisition in the market for molded doors, or more specifically the market for the finished front and back of molded doors called "doorskins." At the time there were three manufacturers of doorskins in the United States: Jeld-Wen, CMI, and Masonite.<sup>258</sup> Jeld-Wen, which had a 38% market share, sought to acquire CMI which had a 16% market share. Steves, the plaintiff, filed a complaint alleging violations of the Clayton Act after experiencing increased prices in the face of falling costs and an observed drop in product quality.<sup>259</sup> One key problem with the current rules around private intervention is the requirement that private litigants show extant antitrust injury *after* a merger. That takes time to develop and evaluate that the markets simply do not have. For example, in *Steves and Sons* the plaintiff waited nearly four years after the merger to file its complaint. The merging party moved to dismiss the complaint on the basis of laches, and the district court agreed that the delay was reasonable given how long it takes to become aware of antitrust injury and the need to exhaust alternative remedies.<sup>260</sup>
- 218 As discussed above, the harm to digital markets associated with non-intervention is comparatively greater than any potential harms associated with intervention that ultimately results in the merger being permitted to go forward. Private plaintiffs can help fill in opportunities for necessary enforcement in situations where the government chooses not to act. Indeed, the *Steves and Sons* case is a prime example: the Department of Justice investigated and declined to intervene before the district court ultimately ordered the divestiture following a successful suit by a competitor.

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<sup>257</sup> See *Steves and Sons, Inc. v. Jeld-Wen, Inc.*, 988 F.3d 690 (4th Cir. 2021).

<sup>258</sup> *Id.* at 699.

<sup>259</sup> *Id.* at 701.

<sup>260</sup> *Id.* at 707.

**b) Private interventions in public merger enforcement**

- 219 While the Merger Guidelines may take little influence on private enforcement, they could strengthen the rights and opportunities for private parties to contribute to the merger reviews carried out by the Agencies. In particular when dealing with SDC's, it can be indispensable for Agencies to obtain technical and economical insights from affected parties, in particular competitors and business users of the acquiring incumbent. To facilitate such cooperation, merger review could institutionalize third-party interventions. To this end, at least for mergers involving several markets or digital conglomerates, third parties could be given the right to express their views and concerns relating to a merger.
- 220 By way of comparison, under EU merger control law, competitors have certain rights before the EU Commission decides on a merger, including access to records and a right to be heard (Article 18 of the EU Merger Regulation). It may be possible to challenge mergers prior to their consummation with an application for injunction, but such a case has not been attempted to our knowledge. Mergers can certainly be challenged after the EU Commission approved the transaction. Competitors can have legal standing in court for such challenges if they show that they are *potentially* affected by the merger.<sup>261</sup> However, plaintiffs do not need to show antitrust injury in the form of actual harm. Instead, they need to show that the approval decision is subject to legal errors.<sup>262</sup> This is no easy task because the EU Commission has a wide discretion in its competitive assessment of a merger.<sup>263</sup>

**4. Remedies**

- 221 The Agencies should consider various remedies to alleviate competitive concerns. Above all, those that can be grouped into behavioral and structural remedies. Behavioral remedies require the

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<sup>261</sup> France v. Commission, Case no. C-68/94 and C-30/95, Court of Justice of the EU (March 31, 1998), at ¶ 56; Air France v. Commission, Case no. T-346/02, EU General Court (March 24, 1994), at ¶ 80; Cableuropa v. Commission, Case no. T-346/02, EU General Court (Sept 30, 2003), at ¶ 70, 77.

<sup>262</sup> TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION, Art. 263.

<sup>263</sup> Bertelsmann and Sony Corp. of Am. V. Impala, Case no. C-413/06 P, Court of Justice of the EU (July 10, 2008), at ¶ 69.

merged entity to abide by certain rules (e.g., not refuse access to certain facilities) while structural remedies aim at dissolving the entity’s structure (to varying extents).

**a) Premerger injunctions instead of post-merger remedies**

222 In general, we prefer premerger injunctions over post-merger action. This benefits procedural efficiency as post-merger divestitures regularly impose costs on both the authorities and the firms. Also, as explained above, the intervention imperative in digital markets justifies premerger action: digital markets are likely to end up in irreversibly highly concentrated markets so that the costs of intervention tend to be lower than those of non-intervention. In this framework, early action trumps late action because later action carries the risk of an irreversible harm to competition.

223 Complaints seeking pre-merger injunctions often allege that problematic mergers will result in net harm to consumers within the so-called “consumer welfare standard,” but in practice the focus of harm to consumers is primarily economic. And while private plaintiffs can base their claims of pre-merger harm on non-economic factors (such as a reduction in consumer choice or diminished privacy), U.S. merger law still requires that such private plaintiffs make a showing of personal impact to them.<sup>264</sup> This requirement makes it particularly difficult for private plaintiffs to challenge mergers involving gatekeepers in digital markets where the non-economic harm may necessarily not affect consumers personally until it is too late. As a result, it is important that the Agencies’ premerger regime is effective, including rigorous enforcement of gun-jumping prohibitions (Sec. 7A HSR).<sup>265</sup>

**b) Block mergers**

224 The Agencies should put the updated error-cost framework into practice and in appropriate matters err on the side of blocking a merger which demonstrates a realistic potential of long-term competitive harm.

225 Facebook/GIPHY stands out amongst recently reviewed mergers in digital markets because, exceptionally, in its final decision United Kingdom’s Competition and Markets Authority (the “CMA”)

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<sup>264</sup> *United States v. Borden Co.*, 347 U.S. 514, 518 (1954).

<sup>265</sup> Sabine Zigelski et al., *Suspensory Effects of Merger Notifications and Gun Jumping*, OECD DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE (20 Feb. 2019), at 18.

required Facebook to sell GIPHY, a provider of GIFs & Animated Stickers online.<sup>266</sup> Facebook completed the acquisition of GIPHY in May 2020 but beginning in June 2020 was required to hold the businesses separate pending a detailed review by the CMA.

- 226 The decision of the CMA to review the merger is interesting in and of itself. The European Commission did not review the merger as it did not meet the notification thresholds under the EU merger control regime. However, the Austrian national antitrust court *did* review the merger under the Austrian national merger rules and cleared it in February 2022. This decision is currently on appeal at the Austrian Supreme Court.<sup>267</sup>
- 227 The CMA held that “*it is more likely than not*”<sup>268</sup> that the merger would result in a substantial lessening of competition (“**SLC**”) in social media and display advertising, harming social media users and businesses in the UK. The CMA’s theories of harm focused on the two-sided nature of the market for social media services and display advertising. The CMA concluded that the merger was likely to give rise to horizontal unilateral effects resulting from the loss of potential competition in display advertising together with vertical effects in the supply of social media resulting from Facebook being in a position to limit its rivals’ access to GIPHY (input foreclosure). As the merger had already taken place, the CMA made a divestiture order, requiring the sale of GIPHY, which is

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<sup>266</sup> *Completed Acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.: Final Report*, COMPETITION MARKETS AUTHORITY, 30 Nov. 2021, requiring Facebook, Inc (now Meta Platforms, Inc) to sell GIPHY, Inc.

<sup>267</sup> Bundeswettbewerbbehörde (Austrian competition authority), Press release, Zusammenschluss Meta(Facebook)/Giphy: BWB erhebt Rekurs gegen Freigabe unter Auflagen (March 4, 2022), <https://www.bwb.gv.at/news/detail/zusammenschluss-metafacebook-giphy-bwb-erhebt-rekurs-gegen-freigabe-unter-auflagen>.

<sup>268</sup> The ‘balance of probabilities’ standard which the CMA must satisfy.

unprecedented in terms of digital markets mergers.<sup>269</sup> Meta has subsequently appealed the CMA's order to the UK's Competition Appeal Tribunal,<sup>270</sup> which will hear the appeal in April 2022.

**c) Mixed structural-behavioral remedies**

228 With regards to structural remedies, the Merger Guidelines should focus on blocking mergers in their entirety without engaging in “grey area” measures that approve acquisitions under certain conditions. Those conditions usually impose behavioral remedies on the acquirer. Such mixtures of behavioral and structural remedies take many forms, and the FTC has wide discretion when it comes to designing them, as was decided in *Petroleum Refiners* by the D.C. Circuit Court of Appeals.<sup>271</sup> Examples include:

- **Informational unbundling:** The merged entity is obliged to institute “Chinese Walls” between various divisions of the firm. Such “data silos” have been created in the Google/Fitbit case by the EU Commission.<sup>272</sup> Such measures are light on the firm's economic liberty compared to a full legal unbundling but at the same time difficult to monitor and uncertain in their success. The Agencies should, in cooperation with the EU Commission, evaluate the success of the Google/Fitbit commitments to gain further insight on the viability of such measures. More generally, as Kovacic and Hyman argue, Agencies should put more focus on evaluating the success (or lack thereof) of their past actions, building knowledge from learning from past mistakes. Such insights should also be shared and discussed internationally, in particular where new regulatory frameworks

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<sup>269</sup> It is also notable (and, again, unprecedented) that Meta was fined \$65,689,600 million for failing to comply with an initial enforcement order (IEO) which required that, pending the review of the completed acquisition, the companies were to continue to compete with one another as they would have without the merger. Facebook's failure to comply with the order and to provide all of the required information to the CMA was found to have been 'deliberate'. *Completed acquisition by Facebook, Inc. of GIPHY, Inc.: Penalty Notice*, COMPETITION MARKETS AUTHORITY, 20 Oct. 2021.

<sup>270</sup> Summary of the grounds of appeal, *Meta Platforms, Inc. v Competition and Markets Authority*, Case no. 1429/4/12/21, Competition Appeal Tribunal (5 Jan. 2022).

<sup>271</sup> *National Petroleum Refiners Association v. FTC*, 482 F.2d 672 (D.C.Cir. 1973); Rohit Chopra & Lina M. Khan, *The Case for 'Unfair Methods of Competition' Rulemaking*, 87 U. CHI. L. REV. 357 (2020); Kovacic & Hyman, *supra*, at 23.

<sup>272</sup> Google/Fitbit, Case no. M.9660, EU Commission (17 Dec. 2020), at ¶ 965.

are currently developed around the world, representing a rare opportunity for international alignment.<sup>273</sup>

- **Algorithmic unbundling:** The Agencies may require the merged entity to keep their algorithms separate to avoid them influencing or reinforcing each other. For example, incorporating algorithms may incentivize the acquirer’s algorithm to favor the target’s services, or vice versa.
- **Algorithmic destruction:** The FTC has successfully ordered firms to not only unbundle their datasets but to destroy harmful data and associated algorithms. For example, the Agency ordered Cambridge Analytica in 2019 to delete data which it obtained by deceiving consumers.<sup>274</sup> Such actions could also be used in post-merger cases.
- **Separation of shareable inputs more generally:** Information and algorithms are only two examples of shareable inputs which may be used post-merger to gain a competitive edge. Beyond data and AI tools, structural remedies may also relate to server capacities or intellectual property rights.
- **Legal unbundling:** The divestiture of a firm may take different forms: It does not necessarily require the firm to fully sell one of its divisions. As Khan argued, it can mean that distinct lines of business must be operated by separate affiliates.<sup>275</sup> Furthermore, as Kwoka and Valletti note, any legal unbundling should take place along “fault lines” that reveal the “natural break points” of conglomerates.<sup>276</sup>

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<sup>273</sup> Kovacic & Hyman, *supra*, at 18-19.

<sup>274</sup> Federal Trade Commission Press Release, *FTC Issues Opinion and Order Against Cambridge Analytica for Deceiving Consumers About Collection of Facebook Data, Compliance with EU-U.S. Privacy Shield* (Dec. 6, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/12/ftc-issues-opinion-order-against-cambridge-analytica-deceiving-consumers-about-collection-facebook>.

<sup>275</sup> Lina Khan, *The Separation of Platforms and Commerce*, 119 COLUMBIA L. REV. 973-1098 (2019).

<sup>276</sup> John Kwoka & Tommaso Valletti, *Unscrambling the eggs: breaking up consummated mergers and dominant firms*, 30 IND. CORP. CHANG. 1286-1306 (2021).

- **Preemptive remedies:** Authorities should proscribe entry into certain markets for certain firms, effectuating a market-specific merger blockade.<sup>277</sup>

**d) Structural versus behavioral and mixed remedies**

229 Structural remedies are traditionally viewed to be *ultima ratio* measures and have been carried out only rarely in antitrust history. However, this stance is being called into question in the literature. The Merger Guidelines should take account of a number of factors when contemplating structural remedies and eventually, favor those remedies. Structural remedies are also preferable vis-à-vis mixed remedies:

- **Economic liberty.** Structural remedies may be viewed as the most severe intrusion into a firm’s economic liberty and the free market principle. However, the constant monitoring which takes place in behavioral remedies may be seen as an equally severe measure. While the first is drastic and the second leaves more freedom to the individual firm, the first is also short-term (it all ends when the corporate division is sold) while the second is long-term (monitoring can go on for years).
- **Incentives are ambiguous.** Critics of breakups usually cite counterproductive incentives as reasons to avoid such action. Breakups allegedly deter firms from innovating and growing. However, breakups also serve as a powerful deterrent for firms to engage in anti-competitive mergers and conduct. Breakups allow authorities to send a strong signal to comply with antitrust laws. In this sense, the picture on incentives is mixed and unclear – breakups may carry both positive and negative incentives.
- **The success of past structural measures is ambiguous.**
  - There have been instances of breakups which are widely regarded as successful (AT&T), and others which are regarded as failures (Paramount). The table below, compiled by Bernhardt, shows the short-term development of prices, output, costs,

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<sup>277</sup> Khan, *supra*.



and intensity of competition in the year following the break-up, with rising (+), decreasing (-), unknown (/) or unchanged (.) effects.<sup>278</sup>

Case	Year of break-up	Prices	Output	Costs	Intensity of competition
Standard Oil	1911	+	+	/	+
American Tobacco	1911	+	/	-	+
Alcoa	1950	-	+	-	+
Paramount	1950	+	-	+	.
United Shoe Machinery	1969	-	/	-	+
AT&T	1984	-	/	-	+

The table shows an unclear picture both for each breakup individually (many cases have mixed results of both positive and negative effects) and in the overall “big picture” (there is no clear tendency visible across all or most breakups). Adding to

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<sup>278</sup> The table is borrowed from and the data were compiled by Lea Bernhardt, presented at the Hamburger Forum Medienökonomie, Hamburg, Germany, 4 Mar. 2022 (Mimeo). Data sources are Engel, Christoph (2007): *Die verfassungsrechtliche Zulässigkeit eines Entflechtungstatbestandes im Gesetz gegen Wettbewerbsbeschränkungen als ultima ratio zur Beseitigung eines Wettbewerbsversagens* (German), in: Preprints of the Max Planck Institute for Research on Collective Goods (22), <http://hdl.handle.net/10419/26936>; Möschel, Wernhard (1979): *Entflechtungen im Recht der Wettbewerbsbeschränkungen. Eine vergleichende rechtspolitische Studie* (German); Crandall, Robert W., *The Failure of Structural Remedies in Sherman Act Monopolization Cases*. In: David S. Evans (Hg.): *Microsoft, Antitrust and the New Economy: Selected Essays*, Vol. 2, at 287–359 (2002); Nettesheim, Martin, Thomas, Stefan (2011): *Entflechtung im deutschen Kartellrecht. Wettbewerbspolitik, Verfassungsrecht, Wettbewerbsrecht*.

this fuzzy picture, the evaluation itself is far from clear as values such as “intensity of competition” is difficult to measure objectively. Furthermore, it is difficult to prove that the effects are causally linked to the breakup and not merely correlated (for example, prices may have risen post-breakup simply due to inflation).

- Reconcentration tendencies after break-ups have been observed historically. For example, the decartelization in Germany after the Second World War led to a reconcentration in certain markets, effectively restoring the wartime status in some cases.<sup>279</sup>
- The success of a breakup also depends on it being carried out thoroughly. If a divestiture renders the divested firm with remaining ties to its former parent, there is a risk of tacit collusion between former colleagues in now separated firms. Sometimes, a single firm with monopoly power is simply replaced by multiple firms in a cartel that can have a comparable monopoly power. This reportedly happened after the vertical break-up of Paramount which is now widely seen to have been a failure.<sup>280</sup>
- Innovation effects are difficult to project: A structural remedy can help smaller, nascent firms to compete and develop new products; but it may reduce innovation incentives for the (formerly) dominant firm and have a signaling effect for other firms which may be disincentivized from growing into a dominant position. In terms of innovation, the literature appears undecided as to whether structural remedies are overall helpful or deterrent to innovation.

230 In the face of such empirical uncertainty, it is important to keep three points in mind which eventually tip the discussion in favor of complete structural remedies in appropriate cases:

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<sup>279</sup> Lea Bernhardt, *Strukturelle und funktionale Entflechtung von Plattformen*, Presentation at the Hamburger Forum Medienökonomie, Hamburg, Germany, 4 Mar. 2022, Mimeo.

<sup>280</sup> *Id.*

- **The error-cost framework:** As outlined above, the error-cost framework in digital markets urges Agencies in situations of uncertainty to act rather than not to act (“Intervention Imperative”).<sup>281</sup> Network and other effects in digital markets mean that the costs of non-intervention are high and often irreversible. At the same time, costs associated with false positives are low since the vast financial resources of most SDCs will likely cushion any effect that a falsely blocked merger may have on them. This should lead Agencies to adopt the principle of blocking such a merger rather than approving it.
- **Procedural efficiency.** A great advantage of structural remedies is their procedural efficiency. Authorities need to act only once. After the divestiture is completed, there is usually little need to monitor behavior, as is the case for behavioral remedies. Such monitoring tasks can place heavy burdens on authorities’ resources.<sup>282</sup> Seen from a different angle, structural remedies radically reduce costs for merger review.
- **Burden on firms’ economic liberty.** Structural remedies are often viewed as placing a heavy burden on economic liberty as they impede on the firms’ decision-making powers. However, there are good reasons to see structural remedies as a conservative type of remedy. As former FTC Chairwoman Slaughter mentioned, “break-ups can provide a clean separation and a fresh start for a business, while behavioral remedies require ongoing involvement and monitoring by government overseers.”<sup>283</sup> Such ongoing supervision by authorities places a burden of a different sort on firms, but equally limiting their economic liberty. It requires them to finance monitoring trustees and employ compliance officers to handle cooperation with the authorities – for many years. Opposed to that, any costs incurred by the firms generated through divestitures may be balanced by compensatory payments.

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<sup>281</sup> *Supra*, at ¶ 105.

<sup>282</sup> Khan, *supra*.

<sup>283</sup> Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power, Before the H. Sub Committee on Antitrust, 118<sup>th</sup> Cong. (Mar. 18, 2021), at 6 (Prepared Statement of FTC Acting Chairwoman Rebecca Kelly Slaughter).

- **Circumvention risks.** Behavioral remedies are not always clear and sometimes easy to circumvent. For example, in the EU Commission’s *Google Search (Shopping)* case, Google has escaped compliance with the authority’s orders since the decision was issued in 2017. The EU Commission had ordered Google to bring its conduct to an end, without further specification.<sup>284</sup> Following this, Google implemented some technical modifications which changed nothing in respect of the anti-competitive effects that Google’s conduct is having. An extensive study based on data from 25 competing comparison-shopping services found that even today Google engages in the same type of self-preferencing that the EU Commission prohibited.<sup>285</sup> Yet, the EU Commission shies away from issuing a non-compliance decision. In this regard, EU antitrust policy serves as a warning of the mistakes to avoid in digital markets. With a clear-cut divestiture of Google’s comparison search service, such disregard of behavioral remedy orders would not have been possible.
- **Behavioral remedies target symptoms, not the disease** – they fail to target the underlying source of the problem, which is cross-market power and vertical and horizontal integration, creating strong incentives to abuse market power.<sup>286</sup> Structural remedies address the heart of the problem: market power. From the perspective of contestable markets, such contestability can only really be ensured by allowing third parties to enter the market. Third parties will only risk such a move if the “moat” of the incumbent is not overly strong or in other words if the firm is not overly integrated horizontally and vertically.
- **Divested units can be transferred into an entity to advance the common good.** After break-ups have been ordered, subjected firms do not have to sell relevant units to competitors. It is also possible to transfer them into non-profit, open-source entities, such as the Linux or the Mozilla Foundation. In this environment, such key assets can be

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<sup>284</sup> Google Search (Shopping), Case no. AT.39740, EU Commission (27 June 2017).

<sup>285</sup> Thomas Hoppner, *Google’s (Non-) Compliance with the EU Shopping Decision*, SSRN (2020), <https://ssrn.com/abstract=3700748>.

<sup>286</sup> Khan, *supra*.

used to advance the common good, providing assets to third parties neutrally. In this vein, Scott Morton et al. propose to, for example, outsource Google’s Android OS into an “Android Foundation”.<sup>287</sup>

#### **e) Temporary acquisition bans in cases of systematic non-compliance**

In order to incentivize digital platforms to adhere to any commitments they have made in merger cases and to comply with antitrust laws more generally, one consideration should be potentially making the clearance of mergers dependent on an undertaking’s compliance with previous antitrust decisions against it. To this end, the EU Digital Markets Acts contains a provision that allows the European Commission to sanction “systematic non-compliance” with a prohibition for the gatekeeper to make any acquisition in sectors linked to its violations for a “limited time period”. While the time limit for the temporary acquisition ban has not yet been clarified, a case of “systematic non-compliance” shall mean a minimum of three non-compliance decisions within a period of eight years. In effect, this would allow the Commission to prohibit acquisitions without any evaluation as to whether they would harm competition or not.

The addition of a similar mechanism to the US merger-control toolkit should also be considered.

### **5. International alignment**

231 To avoid fragmentation of merger review and handling of antitrust matters around the world, US Agencies should participate in coordination efforts with their counterparts in other jurisdictions, particularly the EU. In this sense, the review of the Merger Guidelines should be incorporated in the Joint Technology Competition Policy Dialogue which the EU and the US launched in 2021.<sup>288</sup>

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<sup>287</sup> Alessandro Bonatti et al., *More Competitive Search Through Regulation*, YALE TOBIN CENTER FOR ECONOMIC POLICY, Digital Regulation Project, Policy Discussion Paper No. 2 (2021), at 22.

<sup>288</sup> European Commission Press Release, *Competition: EU-US Launch Joint Technology Competition Policy Dialogue to Foster Cooperation in Competition Policy and Enforcement in Technology Sector* (7 Dec. 2021), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_6671](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6671).

232 While avoiding fragmentation is one crucial point for international exchange, another is that different approaches can be tested in different jurisdictions, allowing observers to discern which works best. Such a “competition of regulatory frameworks” is only beneficial if results from different jurisdictions are evaluated and compared.<sup>289</sup> For example, in a few years, the outcomes of the EU approach with the DMA should be compared with the US approach in revised Guidelines. Moreover, multiple interventions against digital sector companies around the world can increase pressure on them, making compliance or settlements more likely. As Kovacic and Hyman put it, authorities might “hunt in packs”.<sup>290</sup>

233 Merger control in the EU is governed by the EU Merger Regulation.<sup>291</sup> However, amending these rules requires going through the lengthy process of EU legislature. Instead, the Agencies should coordinate with the EU Commission particularly on soft law. The EU Commission adopted Guidelines on the assessment of horizontal mergers<sup>292</sup> which have not been updated since 2004 and contain none of the concepts that we have proposed above to take account of digital markets. Moreover, the EU Commission is currently reviewing the Market Definition Notice, a special piece of soft law setting out market definition rules in all areas of antitrust (including cartels and mergers).<sup>293</sup> The authorities should ideally adopt a uniform US-EU soft law to align their practices and reduce private sector transaction costs.

234 Regarding remedies, the EU put special rules in place:

**a) Regulation (EU) 1/2003**

235 Article 7 Regulation (EU) 1/2003 provides:

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<sup>289</sup> Kovacic & Hyman, *supra*, at 19.

<sup>290</sup> *Id.* at 24-25.

<sup>291</sup> Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32004R0139>.

<sup>292</sup> *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, OFFICIAL JOURNAL OF THE EUROPEAN UNION, 2004/C 31/3, May 2, 2004, at 5-18.

<sup>293</sup> European Commission Press Release, *Competition: Commission Publishes Findings of Evaluation of Market Definition Notice* (12 July 2021), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_3585](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3585).

*“Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them **any behavioural or structural remedies** which are **proportionate** to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is **no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.**”*

236 Recital 12 of Regulation (EU) 1/2003 provides:

*“Changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a **substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.**”*

237 Those rules apply to abuse of dominance procedures (not mergers) but still shed a light on the EU’s approach to structural remedies, which is guided by the principle of proportionality.

#### **b) Digital Markets Act**

The Digital Markets Act (“**DMA**”) is a special rulebook aimed at GAFAM which is planned to be passed by the EU legislature in the second quarter of 2022. It only applies to “gatekeepers” (as defined in Article 3) and their “core platform services” which are a number of specifically defined services such as search engines, video-sharing platforms, or operating systems. The DMA also includes rules on merger control:

- Article 12 DMA obliges gatekeepers to notify authorities of all transactions they intend to consummate irrespective of any revenue or valuation thresholds.
- Article 16(2) DMA allows for legal unbundling under the same conditions as set out in Regulation 1/2003.

238 Currently, members of the trilogue (a congregation of the EU Parliament, the Commission, and the Council) are discussing whether Article 16(1a) should be added to the DMA, a rule which would allow the Commission to impose a full-scale ban on carrying out any transaction for a designated gatekeeper.

**c) UK Digital Markets Unit and the Code of Conduct for Firms of Strategic Market Status**

239 The UK government has formed a specialist “Digital Markets Unit” within the CMA to address competition issues in digital markets. It is intended that the DMU will have the power to make ‘pro-competitive interventions’ to address the root causes of substantial and entrenched market power in digital markets, which should include data-related remedies and measures to enhance consumer choice. In addition, a Digital Regulation Co-operation Forum has been established between the CMA, Information Commissioner’s office (responsible for supervision and enforcement of GDPR) and the office of Communications (Ofcom) (the regulator for broadcasting, telecommunications, and the postal industries). The purpose of which is stated to be “*to ensure a greater level of cooperation, given the unique challenges posed by regulation of online platforms*”

**d) Proposal by the French competition authority**

240 The French competition authority proposed to institute a new framework for ex post merger control, including a rule pursuant to which the authority will be allowed to review mergers two years after their consummation with the right to break up the firm at this point. Critics have argued that this will only prolong the implementation of any anti-competitive integration by the acquirer for two years, meaning the rule would be easily circumvented.<sup>294</sup>

**D. Proposal: step-by-step assessment of digital mergers**

241 To summarize the proposals made above, we suggest a special methodology to assess digital mergers:

**I. Designation of Significant Digital Conglomerates**

242 First, the Agencies should designate certain firms with particularly entrenched market power and economic relevance for society. We have referred to such undertakings as “Significant Digital Conglomerates”. Such designation should be based on the criteria outlined above. This

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<sup>294</sup> Autorité de la concurrence, *Modernization and simplification of merger control*, 7 June 2018, <https://www.autoritedelaconcurrence.fr/en/communiqués-de-presse/07-june-2018-modernization-and-simplification-merger-control>.



determination should be made by a specialized enforcement unit overseen by both the Department of Justice and the Federal Trade Commission. The specialized unit should have the authority to hire independent experts to help make determinations about potential merging parties, and the unit should report annually on the transactions it has evaluated. Both the Department of Justice and the Federal Trade Commission should have co-extensive jurisdiction and authority to investigate and/or prosecute challenges to potentially problematic mergers identified by the specialized unit.

## **II. Obligation to notify all planned transactions**

- 243 Once an SDC has been designated, for a certain period of time, for instance five years, it should be obliged to notify any planned transaction to the Agencies, irrespective of revenue or transaction value thresholds. While, due to the small number of SDCs, this will not significantly increase the Agencies' workload, it will allow the Agencies to gain greater oversight and enable a focus on mergers by companies that already enjoy a particular position of power.

## **III. Presumption**

- 244 In case Agencies challenge a merger in court, they can rely on a presumption of anti-competitive effects if the merger involves an SDC. Any acquisition carried out by an SDC is presumed to lessen competition.

## **IV. Potential rebuttal**

- 245 It is now up to the SDC to rebut this presumption. The SDC needs to show that the transaction does not strengthen the moat around its core intermediation service, neither directly nor indirectly. Various economic factors need to be examined, such as network effects, the existence of a killer acquisition, and the acquirer's past conduct. All in all, the assessment of the facts brought forward by the merging entities to rebut the presumption will have to satisfy a "balance of harms" test (*supra*, at ¶ 196).

## **V. Remedy**

- 246 If the SDC is unable to rebut the presumption, the first choice of action should be an outright blockade of the merger or a post-merger break-up. As Chairperson Khan has argued, it can mean

that distinct lines of business must be operated by separate affiliates.<sup>295</sup> Furthermore, as Kwoka and Valletti note, any legal unbundling should take place along “fault lines” that reveal the “natural break points” of conglomerates.<sup>296</sup>

247 The SDC may avoid this by proposing commitments that sever any links between the core online intermediation service and the target’s products. Such commitments can include:

- **Informational unbundling:** The merged entity is obliged to institute “Chinese Walls” between various divisions of the firm. Such “data silos” have been created in the Google/Fitbit case. Such measures are light on the firm’s economic liberty compared to a full legal unbundling but at the same time difficult to monitor and uncertain in their success. The Agencies should, in cooperation with the EU Commission, evaluate the success of the Google/Fitbit commitments to gain further insight on the viability of such measures.
- **Algorithmic unbundling:** The Agencies may require the merged entity to keep their algorithms separate to avoid that the two influence or reinforce each other. For example, incorporating algorithms may incentivize the acquirer’s algorithm to favor the target’s services, or vice versa.
- **Separation of shareable inputs more generally:** Information and algorithms are only two examples of shareable inputs which can be used post-merger to gain a competitive edge. Beyond data and AI tools, structural remedies may also relate to server capacities or intellectual property rights.
- **IP & privacy consent separation:** any IP licenses or Privacy consent granted to the acquired entity must be limited to such entity and must not, automatically, also provide allowance to the acquirer overall (confer the Facebook/WhatsApp merger where this occurred).

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<sup>295</sup> Khan, *supra*.

<sup>296</sup> Kwoka & Valletti, *supra*.

- **Preemptive remedies:** Authorities should proscribe entry into certain markets for certain firms, effectuating a market-specific merger blockade.<sup>297</sup>
- **Design/architectural separation:** the acquirer must not embed the acquired service into any user-interface linked to its core platform service. Neither must there be any such link on the user-interface of the acquired entity. – closely linked:
- **Behavioral separation:** the acquirer must cease and commit to not engage in any conduct that would directly or indirectly reward or otherwise incentivize a customer of the acquired entity to also use the acquirer's core platform service; this may include: discount schemes, tying of both services (bundled offers), reciprocal favoring in search results or similar intermediation, cross-promotions, etc.
- **Functional separation:** Akin to functional separation of infrastructure and services in the telecoms industry, the undertaking could also commit itself to separate the business activities functionally (no joint management, separate legal teams, etc.).

248 For any commitments to be accepted, the merged entities must:

- accept automatic penalty payments for non-compliance,
- provide unrestrained insight in all AB or other tests they carried out in advance to assess the feasibility of the commitment,
- provide and describe such commitments, their likely impact and technicalities in a comprehensive, thorough way, testified by the CEO (triggering personal liability in case of misinformation),
- provide such commitments within a fixed timeframe of two months.

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<sup>297</sup> Khan, *supra*.

249 The Agencies shall provide no more than two opportunities to provide commitments within a total timeframe of 4 months. If the SDC's commitments fail to demonstrate that no positive feedback effect is likely, the merger shall be blocked automatically.

## **E. Conclusion**

250 Antitrust laws are indispensable to the preservation of healthy economies, the prevention of competitive and consumer harms, the promotion of economic welfare and the protection of democratic principles and values. History is riddled with experiences of the consequences of unchecked exercise and concentration of private market power. Enabled by broad policy mandates, our laws in the past have ably responded to many of these business challenges. That is not however, true today with respect to the ever-changing nature of digital markets and the frequency by which competition takes place across digital ecosystems within those markets.

251 Our merger review laws are ill equipped and ill-suited to effectively respond to the threats posed by the rise of digital giants. Our Comment has sought to demonstrate the shortcomings and flaws of both the process and the outmoded thought driving it. Digital markets create unique antitrust challenges urgently requiring significant reforms for effective regulation and enforcement.

Our Comment emphasizes the basis of those concerns, identifies the regulatory changes needed and suggests approaches and means to match the response to the concerns. We appreciate the opportunity provided by the Department and the Commission to express our views. We remain committed to being available for further comment or consultation as consideration of developing New Merger Review Guidelines progresses.

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# US Merger Guidelines Review: Comment by Reset

April 21, 2022

## Appendix A Glossary of Terms

Term	Definition
Core Platform Service	A service that provides ubiquitous functionality to consumers, including any of the following: online intermediation services; online search engines; online social networking services; video-sharing platform services; number-independent interpersonal communication services; operating systems; cloud computing services, or advertising services (including any advertising networks, exchanges, or intermediation services)
Cross-market network effects	benefits (network effects) that result from a larger user group of a platform operating on one product market (e.g., more users of a search engine) for a user group of a platform operating on a separate market (e.g., for advertisers using ad intermediation services by a search engine).
Digital sector	The sector of products or services that are distributed, acquired, used, or consumed using electronic devices
Gatekeeper	An entity that provides a Core Platform Service
Intermediation Power	The ability of an entity that operates a platform to allocate the benefit provided by the platform among users
Multi-homing	The non-exclusive use of a platform (e.g., multiple platforms that are substitutable)
Network effects	Value associated with a good or service that increases as more people use it
Platform	A service that connects users to digital content
Significant Digital Conglomerate	An entity that provides multiple Core Platform Services that have a significant impact on the market in which it operates

