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DIGITAL MARKETS GUIDE

SECOND EDITION

Editors
Claire Jeffs, Danny Sokol and Susan Ning

Digital Markets Guide

Second Edition

Editors

Claire Jeffs, Danny Sokol and Susan Ning

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Publisher's Note

The digital economy is transforming day-to-day lives, with an exponential rise in connectivity not only between people but also between vehicles, sensors, meters and other aspects of the internet of things. Yet, as noted by Claire Jeffs and Nele Dhondt in their introduction, even as the Fourth Industrial Revolution accelerates, the traditional concerns of competition authorities are still very much present. Practical and timely guidance for both practitioners and enforcers trying to navigate this fast-moving environment is thus critical.

The second edition of the *Digital Markets Guide* – published by Global Competition Review and edited by Claire Jeffs, Danny Sokol and Susan Ning – provides just such detailed guidance and analysis. It examines both the current state of law and the direction of travel for the most important jurisdictions in which international businesses operate. The guide draws on the wisdom and expertise of distinguished practitioners globally and brings together unparalleled proficiency in the field to provide essential guidance on subjects as diverse as how pricing algorithms intersect with competition law and antitrust enforcement in certain tech mergers – for all competition professionals.

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United States: E-Commerce and Big Data Merger Control

Daniel S Bitton, Leslie C Overton, Melanie Kiser and Neelesh Moorthy[1]

Introduction

Mergers and acquisitions in technology industries have garnered even more attention than before in the United States in recent years. In July 2021, President Biden issued an executive order on competition policy that, among other things, raised concern over consolidation in the tech sector and encouraged agency action. Biden said it was:

> *the policy of [his] Administration to meet the challenges posed by new industries and technologies, including the risk of dominant Internet platforms, especially as they stem from serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects.*[2]

Biden's executive order followed a trend towards more aggressive scrutiny of the tech industry and successful internet platforms. In 2020, the House Judiciary Antitrust Subcommittee issued its Majority Staff Report and Recommendations from its Investigation of Competition in Digital Markets, finding that there is excessive concentration in digital markets and that there should be a presumptive prohibition against future mergers and acquisitions by dominant digital platforms.[3]

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1 Daniel S Bitton and Leslie C Overton are partners, Melanie Kiser is counsel, and Neelesh Moorthy is an associate at Axinn, Veltrop & Harkrider LLP.

2 See Executive Order No. 14036, 56 Fed. Reg. 36987, 36988 (9 July 2021).

3 Staff of H. Subcomm. on Antitrust, Commercial and Admin. Law of the Comm. on the Judiciary, 116th Cong., Investigation of Competition in Dig. Mkts., at 11, 20 (2020).

Even some Republican legislators, who have traditionally advocated for greater government restraint in antitrust enforcement, have recently shown concerns over certain tech mergers. For example, on 12 August 2021, Republican Representative Ken Buck of Colorado and Republican Senator Mike Lee of Utah sent a letter to the Federal Trade Commission (FTC), outlining their concerns about online real estate company Zillow's US$500 million acquisition of ShowingTime, a scheduling platform that facilitates real estate showings. Representative Buck and Senator Lee wrote that the acquisition could 'further entrench Zillow's consumer information advantage to the detriment of homebuyers and their competitors', although the deal closed in October 2021 without FTC challenge.[4]

Antitrust regulators have also signalled a more aggressive approach to their review of tech mergers. This is especially the case at the FTC, where big tech critic Lina Khan, in her role as Chair, has taken a number of steps to change how the agency approaches merger review, making it more aggressive and less predictable. Some of this increased stringency may come in the form of challenges to non-reportable transactions.

On 15 September 2021, the FTC presented findings from its retrospective study of acquisitions by tech companies, which looked into past acquisitions of Amazon, Apple, Meta Platforms (the parent company of Facebook), Google and Microsoft that were not reportable under the Hart-Scott-Rodino Act (the HSR Act).[5] Chair Khan commented that the findings 'capture[] the extent to which these firms have devoted tremendous resources to acquiring start-ups, patent portfolios, and entire teams of technologists—and how they were able to do so largely outside of our purview'.[6]

However, the report explicitly avoids making recommendations or reaching conclusions about HSR thresholds.[7] Additionally, rather than focusing on whether the transactions resulted in competitive harm, the study 'quantifies and

4 Letter from Representative Ken Buck and Senator Mike Lee, to Lina M Khan, Chair, Federal Trade Commission (FTC) (12 August 2021): www.scribd.com/document/520074846/Letter-to-FTC-from-U-S-senators-on-real-estate-and-antitrust#download&from_embed.

5 Press Release, FTC, 'FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies' (15 September 2021): www.ftc.gov/news-events/press-releases/2021/09/ftc-report-on-unreported-acquisitions-by-biggest-tech-companies.

6 id.

7 FTC, 'Non-HSR Reported Acquisitions by Select Technology Platforms, 2010–2019: An FTC Study', p. 3 (15 September 2021): www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf.

categorizes the pace, the size distribution of transactions in dollar terms, the types of transactions, and the number of non-HSR reportable transactions collectively by the five respondents'.[8]

The study found that 36 per cent of the transactions would have been reportable under the HSR Act had the debt and liabilities that the acquirer had taken on been included in the calculation of the purchase price.[9] This finding perhaps explains why the FTC announced just a few weeks prior, on 26 August 2021, that debt must now be included as part of the consideration paid for a target company when determining whether a transaction is reportable.[10]

The focus on tech mergers is part of a broader push for more antitrust scrutiny of mergers and acquisitions across all industries. There are legislative proposals to change the statutory burdens of proof to challenge mergers and acquisitions, and the US agencies have recently changed policies and procedures governing their merger investigations.

Given this changing landscape and increased scrutiny, understanding the US antitrust approach to tech mergers is more important than ever. This Chapter discusses a number of pertinent policy and process changes made by US agencies, as well as several recent US agency and court decisions involving tech mergers, to provide practitioners and in-house counsel insights into the current treatment of transactions in technology sectors under US antitrust law.

Increased scrutiny of all mergers

In response to a sentiment that various segments of the economy have become too concentrated, US legislators and agencies have signalled plans to increase antitrust scrutiny of mergers and acquisitions. This has led to legislative proposals and regulatory policy and process changes that affect all transactions, including those in technology industries.

In February 2021, Democratic Senator Amy Klobuchar introduced the 'Competition and Antitrust Law Enforcement Reform' bill. The bill includes provisions that would change the standard for mergers prohibited by Section 7

8 id. at 2–3.

9 id. at 8.

10 See Holly Vedova, 'Reforming the Pre-Filing Process for Companies Considering Consolidation and a Change in the Treatment of Debt', FTC Competition Matters Blog (26 August 2021, 2:06pm): www.ftc.gov/news-events/blogs/competition-matters/2021/08/reforming-pre-filing-process-companies-considering.

of the Clayton Act from those that 'substantially lessen competition' to those that 'create an appreciable risk of materially lessening competition', where 'materially' is defined as 'more than a de minimis amount.'[11]

The bill also adopts presumptions for when certain acquisitions create such an appreciable risk or tends towards monopoly:

- either the acquiring or acquired party has more than 50 per cent market power in the relevant market and the other has a 'reasonable probability' of competing against them;
- the acquiring entity would hold voting securities and assets of the acquired entity amounting to more than US$5 billion; and
- the acquiring entity is worth more than US$100 billion and would own voting securities and assets of the acquired person in excess of US$50 million.

This bill, if adopted, would apply to mergers in any industry, not just tech.[12]

At the FTC, Khan joined with the two other Democratic FTC commissioners at the time, Rebecca Slaughter and Rohit Chopra,[13] in seeking to overhaul competition policy and reconsider underlying economic principles. On 15 September 2021, the FTC withdrew from the 2020 Vertical Merger Guidelines and associated commentary that the FTC and the Department of Justice (DOJ) had issued in June 2020 under the Trump administration. In its announcement, the FTC suggested that the 2020 Guidelines were too lenient and stated that they 'include

11 Press Release, 'Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement' (4 February 2021): www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement.

12 Other proposals also targeted mergers based on their size. The proposed Trust-Busting for the Twenty-First Century Act, sponsored by Missouri Republican Josh Hawley, would have prohibited companies with a market capitalisation of US$100 billion from acquisitions that could reduce competition 'in any way'. Taking aim at dominant digital firms (defined as providing a website or service through the internet and possessing market power, to be determined by the FTC), the bill would presume any US$100 million acquisition by such firms to be an unfair and deceptive practice.

13 Commissioner Chopra has since left the FTC and now serves as Director of the Consumer Financial Protection Bureau.

unsound economic theories that are unsupported by the law or market realities'.[14,15] In particular, the FTC majority's statement argued that the Guidelines' focus on the pro-competitive benefits of the elimination of double marginalisation is not consistent with the text of the Clayton Act or market realities.[16] Although the Vertical Merger Guidelines still remain in effect from DOJ's perspective, then-Acting Assistant Attorney General Richard A Powers stated that '[t]he Department of Justice is conducting a careful review of the Horizontal Merger Guidelines and the Vertical Merger Guidelines to ensure they are appropriately skeptical of harmful mergers' and suggested that DOJ 'will work closely with the FTC to update them as appropriate'.[17]

More recently, the FTC and DOJ announced plans to publish new Merger Guidelines to replace those that have been in place since 2010 and widely accepted by courts and practitioners. In January 2022, the agencies requested public comments on a long list of topics and questions, including 'how to account for key areas of the modern economy like digital markets in the guidelines, which often have characteristics like zero-price products, multi-sided markets, and data

14 Press Release, FTC, 'Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary' (15 September 2021): www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines; see also Press Release, FTC, 'Statement of FTC Chair Lina M. Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Competition Executive Order's Call to Consider Revisions to Merger Guidelines' (9 July 2021): www.ftc.gov/news-events/news/press-releases/2021/07/statement-ftc-chair-lina-m-khan-antitrust-division-acting-assistant-attorney-general-richard-powers (responding to President Biden's executive order calling for reconsideration of the Guidelines).

15 In their dissenting statement, Commissioners Phillips and Wilson heavily criticised the decision to withdraw from the Vertical Merger Guidelines, writing, 'Today the FTC leadership continues the disturbing trend of pulling the rug out under from honest businesses and the lawyers who advise them, with no explanation and no sound basis of which we are aware.' 'Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Commission's Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement' (15 September 2021): www.ftc.gov/system/files/documents/public_statements/1596388/p810034phillipswilsonstatementvmgrescission.pdf.

16 Statement of Chair Lina M Khan, 'Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines' Commission File No. P810034, at pp. 2–5 (15 September 2021): www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

17 Press Release, US Department of Justice (DOJ), Antitrust Division, 'Justice Department Issues Statement on the Vertical Merger Guidelines' (15 September 2021): www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines.

aggregation that the current guidelines do not address in detail.'[18] Other topics included the Guidelines' discussion of potential and nascent competition, how they could better account for non-price competition, the validity of distinctions between horizontal and vertical transactions, the necessity of market definition in cases where there is direct evidence of competitive effects, and whether the threshold for presumptions of illegality should be lowered. The public comment period closed on 21 March 2022.

Under Khan, the FTC has made a practice of warning merging parties that even if the statutory waiting period set by Congress expires, allowing them to close, they may still be sued at any point for the transaction.[19] That is a significant departure from prior practice.

The FTC has always had the statutory power to challenge mergers even if they are not HSR reportable or after the HSR waiting period has expired. Until the policy change in 2021, however, the FTC typically would signal that the parties should pull and refile their HSR form to restart the initial 30-day clock or issue a Second Request if it had concerns about a transaction. Alternatively, the FTC would let the HSR waiting period expire (or grant early termination of the HSR waiting period) if their investigation in the first 30 days did not surface grounds for material concerns. That approach provided merging parties more certainty.

The FTC explained this departure from prior practice as being because of the increase in HSR filings, suggesting that it is harder for the FTC to finish investigations within the first 30-day HSR waiting period.[20] The change in policy has attracted significant controversy and criticism for diminishing deal certainty and disregarding the HSR reporting regime established by Congress, which contemplates that the FTC will either close its investigation at the end of the waiting period or issue a Second Request to prevent a merger from closing while it investigates.

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18 Request for Information on Merger Enforcement, FTC-2022-0003-0001 (17 January 2022): www.regulations.gov/document/FTC-2022-0003-0001; see also Press Release, FTC, 'Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers' (18 January 2022): www.ftc.gov/news-events/press-releases/2022/01/ftc-and-justice-department-seek-to-strengthen-enforcement-against-illegal-mergers.

19 See Holly Vedova, 'Adjusting merger review to deal with the surge in merger filings', FTC: Competition Matters Blog (3 August 2021, 12:28pm): www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings.

20 id.

Republican FTC Commissioner Christine S Wilson said that she was concerned that this, along with other recent changes, amounts to a 'death by a thousand cuts' for the merger review framework, which collectively 'raise the costs of doing mergers and threaten to chill harmful and beneficial deals alike'.[21] Since the FTC introduced its warning letter policy in 2021, the volume of HSR filings has gone down, removing the justification the FTC originally asserted for this policy. It will be interesting to see if it will accordingly abandon the policy or continue it.

Another major change at the FTC came with its October 2021 announcement that it would start requiring 'prior approval' commitments in consent orders, a practice that had been discontinued in 1995.[22] To settle FTC merger concerns by consent decree under this new policy, parties will have to agree to obtain the FTC's advance approval of all future acquisitions in the relevant market or related markets for 10 years, regardless of the size of the target company or transaction value.

The FTC's prior approval provision lacks the timing and due process protections as the HSR Act. In its press release, the FTC cited a desire to encourage anticompetitive deals to 'die[] in the boardroom,' rather than forcing the FTC to expend time and resources analysing those deals.[23] Companies contemplating transactions that might require divestitures or other remedies implemented via consent decree will now need to weigh the risk that reaching a settlement with the FTC would require submitting all future transactions in that market, and potentially related markets, for FTC review on an unspecified timetable.

In Spring 2022, the agencies hosted a series of 'listening forums' about past mergers in specific industries, including one focused on the technology sector.[24] Chair Khan and Assistant Attorney General Jonathan Kanter introduced a series of prearranged speakers who had been affected by consolidation in the industry. The speakers focused on a range of merger effects that have historically been

21 Statement of Commissioner Christine S Wilson Regarding the Announcement of Pre-Consummation Warning Letters (9 August 2021): www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf.

22 Press Release, FTC, 'FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers' (25 October 2021): www.ftc.gov/news-events/news/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive-mergers.

23 id.

24 FTC and Justice Department Listening Forum on Firsthand Effects of Mergers and Acquisitions: Technology, FTC (12 May 2022), https://www.ftc.gov/news-events/events/2022/05/ftc-justice-department-listening-forum-firsthand-effects-mergers-acquisitions-technology.

outside the scope of antitrust law, including the impact of delivery apps and ghost kitchens on the restaurant business,[25] how media consolidation allegedly reduces diversity of ideas and voices,[26] the impact of e-commerce on local brick-and-mortar businesses such as bookstores,[27] and employers sending more work overseas and purportedly not offering sufficient pay to certain employees.[28]

Chair Khan summarised the featured speakers' comments as describing 'how dominant platforms and apps can increasingly serve as key gatekeepers in gateways for finding products' and 'determine whether a business sinks or survives in the digital economy,' giving them 'significant if not complete control over the terms of access to those pathways' that can 'enable the platform to dictate the terms of commerce and eat up a lion's share of the profits from the small businesses sales'.[29]

Market definition

Two-sided markets

In its decision in *Ohio v. American Express* (*Amex*),[30] the Supreme Court held that 'courts must include both sides of the platform' in the analysis of market definition and competitive effects in two-sided markets characterised by strong indirect network effects[31] because in such markets, a platform 'cannot raise prices on one side without risking a feedback loop of declining demand'.[32]

In 2020, this concept was applied in a merger case for the first time in *United States v. Sabre Corp*.[33] In that case, the district court rejected DOJ's challenge to the acquisition by Sabre, a global distribution system (GDS) connecting travel agencies and airlines for bookings and other purposes, of Farelogix Inc., whose technology allegedly threatened to disintermediate Sabre. The *Sabre* court interpreted *Amex* to mean that '[o]nly other two-sided platforms can compete with a

25 'FTC and Justice Department Listening Forum on Firsthand Effects of Mergers and Acquisitions- Technology', FTC, at 3–4 (12 May 2022): www.ftc.gov/system/files/ftc_gov/pdf/FTC%20and%20Justice%20Department%20Listening%20Forum%20on%20Firsthand%20Effects%20of%20Mergers%20and%20Acquisitions-%20Technology%20-%20May%2012%2C%202022_0.pdf (Transcript).

26 Transcript at 8–9, 16.

27 Transcript at 9–10.

28 Transcript at 12.

29 Transcript at 13–14.

30 138 S.Ct. 2274, 2287 (2018).

31 *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018).

32 id. (internal citations omitted).

33 452 F.Supp.3d 97 (D. Del. 2020), vacated, 2020 WL 4915824 (3rd Cir. 20 July 2020).

two-sided platform for transactions' as a matter of law. The fact that Sabre was a two-sided platform and Farelogix was not was, in the court's view, a 'dispositive flaw' in DOJ's challenge.[34] The court found that even if Farelogix could, as a matter of law, be considered a competitor to Sabre in the relevant market on one side of the platform (the airline side), it would need to show that the anticompetitive effects in that side of the market were so substantial as to 'reverberate throughout the Sabre GDS' and affect both sides of the market.[35] The court found that DOJ did not make this showing.

DOJ appealed the decision. Despite the victory at the district court, the parties ultimately abandoned their deal because the UK's Competition and Markets Authority (CMA) prohibited the transaction.[36] Afterwards, DOJ asked the Third Circuit Court of Appeals to vacate the lower court's decision. The court granted the motion, although it noted that its decision was not to be construed as commentary on the merits:

> *We also express no opinion on the merits of the parties' dispute before the District Court . . . As such, this Order should not be construed as detracting from the persuasive force of the District Court's decision, should courts and litigants find its reasoning persuasive.*[37]

DOJ's November 2020 complaint challenging the *Visa/Plaid* acquisition took care to discuss harms on both sides of the relevant two-sided market. In *Visa/Plaid*, Visa, Inc. sought to acquire Plaid Inc., a company that provides financial data aggregation technology used by financial technology companies like Venmo to plug into consumers' financial accounts to perform functions like looking up account balances. Although the parties didn't compete directly, Plaid was planning to enter the market for online debit transactions, whereby consumers purchase goods with money debited from their bank accounts.[38]

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34 id. at 136–138.

35 id. at 72–73.

36 Press Release, Sabre Corp., 'Sabre Corporation Issues Statement on its Merger Agreement with Farelogix' (1 May 2020): https://www.sabre.com/insights/releases/sabre-corporation-issues-statement-on-its-merger-agreement-with-farelogix.

37 *United States v. Sabre Corp.*, 2020 WL 4915824, at *1.

38 Complaint, *US v. Visa, Inc. and Plaid Inc.*, No. 4:20-cv-07810, at 3 (N.D. Cal. 5 November 2020).

DOJ alleged that Visa controlled 70 per cent of the existing online debit transactions market, with the only other material competitor being Mastercard with a 25 per cent share.[39] DOJ's complaint stated that Visa was acquiring a potential competitor, and the agency was particularly concerned about Plaid's plan to begin offering pay-by-bank services.[40] Pay-by-bank is a type of online debit 'that uses a consumer's online bank account credentials . . . rather than debit card credentials . . . to . . . facilitate payments to merchants directly from the consumer's bank account'.[41]

The online debit transaction platforms at issue in the merger are two-sided transaction platforms that serve as intermediaries between merchants on one side and consumers on the other.[42] DOJ alleged that the merger of Visa and Plaid would hurt both merchants and consumers. For example, the complaint alleges that the pay-by-bank services that Plaid planned to offer would have much lower merchant fees than Visa's traditional debit service and, therefore, that the merger would eliminate this lower cost option for merchants.[43]

On the other side of the market, DOJ alleged that consumers would be harmed because Plaid's entry would mean that merchant savings would likely be passed on to consumers, and merchants might even offer rewards or other incentives to induce them to use Plaid's pay-by-bank debit service.[44] The parties ultimately abandoned the deal in January 2021.[45]

The pitfalls of pleading narrow digital markets

Defining the product market in tech mergers has also presented other types of challenges, especially where services to consumers are free of charge and the services offered are delineated in a way that makes them difficult to distinguish from other online services. A key case to watch in this regard is the FTC's suit against Meta Platforms in relation to its acquisitions of Instagram and WhatsApp.

39 id. at 3.
40 id. at 10, 12–13.
41 id. at 10.
42 id. at 15–16.
43 id. at 17.
44 id. at 18.
45 Press Release, DOJ, 'Visa and Plaid Abandon Merger After Antitrust Division's Suit to Block' (12 January 2021): www.justice.gov/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block.

In June 2021, the district court dismissed the FTC's original December 2020 complaint for failure 'to plead enough facts to plausibly establish' monopoly power, a necessary element of the agency's claims under Section 2 theories[46] that typically requires a dominant share of a properly defined relevant product market.[47]

The FTC had alleged a relevant product market for 'personal social networking (PSN) services', defined as 'online services that enable and are used by people to maintain personal relationships and share experiences with friends, family, and other personal connections in a shared social space'.[48] The agency alleged that PSN services have three distinguishing characteristics – a social graph of personal connections, features to interact and share personal experiences with personal connections, and features for finding and connecting with other users – and argued, in turn, that mobile messaging services (e.g., WhatsApp), specialised social networking services (e.g., LinkedIn and dating apps) and 'online services that focus on the broadcast or discovery of content based on users' interests rather than personal connections' (e.g., Twitter, Reddit, and Pinterest), and 'online services focused on video or audio consumption' (e.g., YouTube and TikTok) were not reasonably interchangeable.

While the district court found the PSN market's contours 'plausible', it also suggested that the dearth of factual allegations supporting the market definition meant that the agency's market share allegations would need to carry more weight. The primary failing of the complaint was that the FTC had alleged only that 'Facebook has "maintained a dominant share of the U.S. personal social networking market (in excess of 60%)" since 2011 . . . and that "no other social network of comparable scale exists in the United States"'.[49] The court found this insufficient and suggested that the FTC's burden on market share allegations was

46 The FTC brings its enforcement actions under the FTC Act, but the Supreme Court has interpreted that statute's ban on unfair methods of competition as prohibiting all conduct that would violate the Sherman Act. The FTC has typically pleaded its cases based on the prevailing standards under the Sherman Act, the Clayton Act and other antitrust laws, and courts typically apply precedent concerning these laws in presiding over FTC competition cases. See FTC Guide to Antitrust Laws: www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.

47 Memorandum Opinion, *FTC v. Facebook, Inc.*, Civil Action No. 20-3590, at 2, 19 (D.D.C. 28 June 2021).

48 Complaint, *FTC v. Facebook, Inc.*, No. 1:20-cv-03590, at ¶ 52 (D.D.C. 9 December 2020).

49 *FTC v. Facebook*, Memorandum Op., at 27.

'more robust' because its product market was 'somewhat "idiosyncratically drawn" to begin with' and the complaint was 'undoubtedly light on specific factual allegations regarding consumer-switching preferences'.[50]

At several points in the opinion, the court implied that the nature of Meta Platforms' products and the fact that this was 'no ordinary or intuitive market' heightened the FTC's pleading burden. For example, the court indicated that the FTC's 'naked' assertions 'might (barely) suffice' for a 'more traditional good market, in which the Court could reasonably infer that market share was measured by revenue, units sold, or some other typical metric'.[51] But PSN services are 'free to use, and the exact metes and bounds of what even constitutes a PSN service – i.e., which features of a company's mobile app or website are included in that definition and which are excluded – are hardly crystal clear.' This 'unusual context' made its vague market share assertions 'too speculative and conclusory to go forward'.

Elsewhere in the opinion, the court again contrasted PSN services with 'familiar consumer goods like tobacco or office supplies', noting that 'there is no obvious or universally agreed-upon definition of just what a personal social networking service is.'[52]

The FTC subsequently filed an amended complaint, and Meta Platforms' motion to dismiss that complaint was denied. This time, the district court said the 'FTC [had] done its homework,' including by citing market share data from the media analytics firm ComScore. That data indicated at least a 60 per cent market share using measurements of daily average users, monthly average users and time users spent online, and the court concluded that these were 'common sense' indicators of social media competitiveness. The court further noted the FTC allegation that Meta Platforms and its competitors use precisely those metrics when analysing their own performance.

The *Meta Platforms* case, which will now proceed towards trial, illustrates the challenges of defining a relevant product market in the digital age. Market definition can become more complicated when there are many providers competing for consumer attention with differentiated, free-of-charge online services monetised through advertising, especially when consumers use a broad array of such online services at any given time. But the opinion gives a sense of the different tools courts (and agencies) might use to analyse market power in the 'attention economy'.

50 id.

51 id. at 2.

52 id. at 21.

The *Meta Platforms* case is not the only time the FTC has recently alleged narrow markets for tech products. In July 2022, the FTC sued to prevent Meta Platforms from acquiring Within Unlimited, Inc., a virtual reality (VR) studio.[53] Meta has previously acquired the leading VR headset, formerly known as Oculus and rebranded as the Meta Quest, and operates a leading VR app platform. The FTC proposed a narrow product market for 'VR dedicated fitness apps' whose primary purpose is physical fitness and a broader market for 'VR fitness apps' also including apps with incidental fitness or exercise benefits, such as sports apps and Meta's Beat Saber dance app. Meta competes only in the latter market, but the FTC alleged that the threat of Meta entering the narrower dedicated fitness market spurred innovation and competition by current market participants.

Horizontal theories of harm

Unilateral effects theories

Antitrust analysis of tech mergers is a dynamic area with some investigations involving novel or less common theories of harm; however, many tech merger investigations have involved traditional horizontal theories, such as unilateral effects theories.

Taboola's planned 2019 merger with Outbrain received regulatory attention in both the US, in the form of a Second Request,[54] and the UK.[55] Taboola and Outbrain both provided advertisement-based content recommendations. In announcing the merger, Taboola's CEO claimed that it would allow for the creation of a more robust competitor to Meta Platforms and Google for advertising.[56]

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53 Complaint, *Meta Platforms, Inc. et al.*, FTC Docket No. 1 (27 July 2022): www.ftc.gov/system/files/ftc_gov/pdf/221%200040%20Meta%20Within%20TRO%20Complaint.pdf.

54 Press Release, Davis Polk & Wardwell LLP, T' Taboola secures DOJ approval of merger with Outbrain' (1 September 2020): www.davispolk.com/experience/taboola-secures-doj-approval-merger-outbrain.

55 The Israel Competition Authority also investigated the merger. The Authority even launched a criminal investigation against Taboola for failure to submit complete information during the course of the investigation. Taboola ultimately agreed to pay a fine of 5 million shekels. See Press Release, Israel Competition Authority, 'The Competition Authority reaches an agreed consent decree with Ynet' (22 August 2021): www.gov.il/en/Departments/news/consentdecree-ynet.

56 'Taboola and Outbrain to Merge to Create Meaningful Advertising Competitor to Facebook and Google', *Business Wire* (19 October 2019): www.businesswire.com/news/home/20191003005479/en/Taboola-and-Outbrain-to-Merge-to-Create-Meaningful-Advertising-Competitor-to-Facebook-and-Google ; see also Ingrid Lunden, 'Taboola and Outbrain call off their $850M merger', *Tech Crunch* (8 September 2020), https://techcrunch.com/2020/09/08/taboola-and-outbrain-call-off-their-850m-merger.

In the US, DOJ ultimately approved the deal,[57] and in the UK, the CMA continued to investigate to see if the merger would create a substantial loss of competition in the market for the 'supply of content recommendation platform services to publishers in the UK'.[58] In particular the CMA was interested in whether the merger would reduce competition through unilateral effects.[59] The parties ultimately abandoned the deal in September 2020. There were a few reasons given for why the deal was abandoned, including changing conditions from the covid-19 pandemic;[60] however, the ongoing antitrust investigations in the UK and Israel could have played a part as well.

In 2017, the FTC sued to block the merger of DraftKings and FanDuel, the two leading online platforms for daily fantasy sports, on the basis that the merger would have resulted in a 'near monopoly'.[61] According to the complaint, the parties competed on commission rates, discounts, contest prizes and non-price factors, such as contest size, product features and contest offerings.[62] While the industry was unique and relatively new, the FTC pursued a familiar unilateral effects case based on closeness of competition.[63] The parties abandoned the deal a month after the FTC's complaint.[64]

In 2015, after an extensive investigation, the FTC unconditionally cleared Zillow's US$3.5 billion acquisition of Trulia. The parties were the first and second largest consumer-facing online portals for home buying.[65] Internal documents suggested that they competed head-to-head to offer users home sales

57 'DOJ Won't Challenge Taboola & Outbrain Merger', Competition Policy International (22 July 2020): www.competitionpolicyinternational.com/doj-wont-challenge-taboola-outbrain-merger.

58 Issues Statement, 'Anticipated Acquisition by Taboola.com td of Outbrain inc.', Competition and Markets Authority (4 August 2020), https://assets.publishing.service.gov.uk/media/5f27e1d7e90e0732d865d713/Issues_Statement_-_Taboola_Outbrain.pdf.

59 id. at 6.

60 Lunden, see footnote 56.

61 Complaint, *DraftKings, Inc and FanDuel Limited*, FTC Docket No. 161-0174, at ¶ 1 (19 June 2017).

62 id. at ¶¶ 17, 60–75.

63 id. at ¶¶ 49–57.

64 Chris Kirkham and Ezequiel Minaya, 'DraftKings, FanDuel Call Off Merger', *The Wall Street Journal* (13 July 2017): www.wsj.com/articles/draftkings-fanduel-call-off-merger-1499976072.

65 'Statement of Commissioner Ohlhausen, Commissioner Wright, and Commissioner McSweeny Concerning Zillow, Inc./Trulia, Inc.', FTC File No. 141-0214 (19 February 2015): www.ftc.gov/system/files/documents/public_statements/625671/150219zillowmko-jdw-tmstmt.pdf.

information and sell advertising to real estate agents.[66] The FTC nevertheless cleared the transaction without remedies based on data showing that the platforms represented 'only a small portion of agents' overall spend on advertising' and that their portals did not generate a higher return on investment for agents than other forms of advertising used by the agents.[67] This finding meant that the parties could not realistically increase advertising prices post-merger without losing too much agent spend to other forms of advertising. The FTC also found that the companies competed with a number of other portals to offer home buyers relevant information.

The *Zillow/Trulia* acquisition is a good reminder to always look closely at the parties' data, because it may prove to be an important reality check on documents that paint an unhelpful but inaccurate or incomplete picture. *Zillow/Trulia* also illustrates an important point to remember in mergers between online advertising businesses: even if the merging parties attract consumers with similar online content, they often compete with a much broader array of (online) companies in selling advertising, given that the same consumers can typically be targeted through many different advertising media.

This point is reinforced by DOJ's 2018 clearance of WeddingWire's acquisition of XO Group. Both WeddingWire and XO Group connected engaged couples to wedding service vendors, who paid a fee to advertise on the platform.[68] Despite the apparent close competition between the companies, the deal never received a Second Request.[69]

DOJ's successful 2014 challenge of Bazaarvoice's consummated acquisition of PowerReviews shows that a merger defence that online markets are dynamic only goes so far and that unhelpful documents still can kill deals.[70] Bazaarvoice's documents showed that its intent behind the acquisition was to eliminate its closest and only competitor in the sale of 'product ratings and reviews platforms'.[71] Following trial, the district court ruled for DOJ, pointing to 'the overwhelming

66 id. at 2.

67 id.

68 Scott Sher, Michelle Yost Hale and Robin Crauthers, 'United States: Digital Platforms', *Americas Antitrust Review 2020* (30 September 2019), https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2020/article/united-states-digital-platforms.

69 id.

70 Memorandum Opinion at 140–41, *United States v. Bazaarvoice, Inc.*, No. 13-cv-133, Doc. No. 244 (N.D. Cal. 18 January 2014).

71 Complaint at ¶¶ 1–9, 18, *United States v. Bazaarvoice, Inc.*, No. 13-cv-133 (N.D. Cal. 10 January 2013).

market share Bazaarvoice acquired when it purchased PowerReviews, the stark premerger evidence of anticompetitive intent and the merger's likely effects, [and] the actual lack of impact competitors have made since the merger', which had closed in June 2012.[72] Bazaarvoice was ordered to divest the PowerReviews business in a way that would re-establish PowerReviews as an independent competitor as strong as if it had never been acquired (taking into account how it would have developed on its own but for the acquisition).[73]

Nascent competition and maverick theories

The antitrust agencies have recently shown an increased interest in pursuing theories of harm in tech mergers around the concept of nascent competition, at times in conjunction with 'maverick' theories, to investigate or challenge acquisitions of recent entrants or small players by incumbent firms with large alleged market shares. There likewise has been an increased focus on nascent competition in Congress.[74]

The 2020 House Judiciary Antitrust Subcommittee report on Competition in Digital Markets included references to alleged threats that 'dominant' digital platforms posed to nascent competitors. For example, the report alleges that Meta Platforms 'used its data advantage to create superior market intelligence to identify nascent competitive threats and then acquire, copy, or kill these firms'.[75] The report also recommended that Section 7 of the Clayton Act be tightened to include greater protections for nascent competitors.[76]

Some have noted that protecting nascent competition is not always easy in practice. For example, in 2018, then-FTC Chair Joe Simons stated that acquisitions of nascent competitors in the high-tech space are 'particularly difficult for

72 *United States v. Bazaarvoice, Inc.*, Memorandum Op. at 10.

73 Third Amended Final Judgment, *United States v. Bazaarvoice, Inc.*, 13-cv-133, Doc. No. 286, § IV.A (N.D. Cal. 2 December 2014).

74 Concerns regarding nascent competition are likely a focus of the Executive Branch as well. Tim Wu, current member of President Biden's National Economic Council, along with C Scott Hemphill, penned the article 'Nascent Competitors' in the *University of Pennsylvania Law Review* in 2020. In the article, Wu argues that antitrust has an important role to play in protecting nascent competition, even when the competitive significance of a given company is uncertain. See C Scott Hemphill and Tim Wu, 'Nascent Competitors', *University of Pennsylvania Law Review*, Vol. 168, p. 1879 (2020).

75 Staff of H. Subcomm. on Antitrust, Commercial and Admin. Law of the Comm. on the Judiciary, 116th Cong., Investigation of Competition in Dig. Mkts., at 14 (2020).

76 id. at 20.

antitrust enforcers to deal with because the acquired firm is by definition not a full-fledged competitor' and 'the likely level of competition with the acquiring firm is frequently, maybe more than frequently, not apparent.'[77]

A prominent example of a nascent competitor case is the FTC's challenge of Meta Platforms' acquisition of WhatsApp and Instagram. The FTC had initially declined to challenge these mergers back in 2012 for Instagram and 2014 for WhatsApp.[78] In its 9 December 2020 complaint against Meta Platforms, however, the FTC alleged that Meta Platforms violated Section 2 of the Sherman Act, and claimed that these acquisitions were designed to eliminate nascent competitors that could grow to challenge Meta Platforms, especially if they were acquired by someone else.[79] For example, the FTC alleged that CEO Mark Zuckerberg 'recognized that by acquiring and controlling Instagram, Meta Platforms would not only squelch the direct threat Instagram posed, but also significantly hinder another firm from using photo-sharing on mobile phones to gain popularity as a provider of personal social networking'.[80] The complaint further alleged that employees internally celebrated the acquisition of WhatsApp, which they viewed as 'probably the only company which could have grown into the next FB purely on mobile'.[81] The FTC complaint also quoted an analyst report wherein the analyst wrote that 'WhatsApp and Facebook were likely to more closely resemble each other over time, potentially creating noteworthy competition, which can now be avoided'.[82]

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77 Leah Nylen, 'FTC to focus on "non-partisan", "aggressive" enforcement, Simons says', *MLex* (25 September 2018): www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1025909&siteid=191&rdir=1; see also 'Prepared Remarks of Chairman Joseph Simons', Georgetown Law Global Antitrust Enforcement Symposium, 5 (25 September 2018): www.ftc.gov/system/files/documents/public_statements/1413340/simons_georgetown_lunch_address_9-25-18.pdf.

78 See Press Release, FTC, 'FTC Closes Its Investigation Into Facebook's Proposed Acquisition of Instagram Photo Sharing Program' (22 August 2012): www.ftc.gov/news-events/press-releases/2012/08/ftc-closes-its-investigation-facebooks-proposed-acquisition; Alexei Oreskovic, 'Facebook says WhatsApp deal cleared by FTC', *Reuters* (10 April 2014): www.reuters.com/article/us-facebook-whatsapp/facebook-says-whatsapp-deal-cleared-by-ftc-idUSBREA391VA20140410.

79 *FTC v. Facebook*, Compl. at *5.

80 id.

81 id. at 7.

82 id.

The FTC's challenge relies on a course-of-conduct theory: the idea that a series of individually lawful acts, transactions or practices can combine to form an antitrust violation in the aggregate.[83] This approach has been questioned by some commentators. For example, Judge Douglas Ginsburg and Koren Wong-Ervin have suggested that this theory is akin to other 'monopoly broth' theories[84] because this sort of approach could act as an end run around established conduct-specific tests.[85] Judge Ginsburg and Wong-Ervin also point out that the agencies should not need to have to rely on a Section 2 course of conduct theory to challenge serial acquisitions, because they could just seek to block or undo 'the last merger in the series that tipped the market into undue monopoly power'.[86]

The FTC's initial complaint was dismissed for failure to adequately allege market power, but their amended complaint survived the motion to dismiss. In seeking to dismiss the amended complaint, Meta Platforms argued that it was too speculative to assert that Instagram and WhatsApp would have generated improved product quality had they remained independent from Meta Platforms.

In rejecting the second motion to dismiss, the district court acknowledged that the FTC would eventually need to prove that the acquisitions harmed competition in the relevant market and that 'expert testimony or statistical analysis' would likely be necessary to meet that burden, but that the FTC's allegations – including that Meta Platforms historically saw Instagram and WhatsApp as threats, that Meta Platforms has been able to provide lesser data privacy and security than in a competitive market and that Meta Platforms shut down projects after acquiring Instagram and WhatsApp – was sufficient for the court to conclude that the complaint was not too speculative to proceed to discovery.

Continuing its crusade against acquisitions by large tech companies, in July 2022 the FTC sued to prevent Meta Platforms from acquiring Within Unlimited, as described earlier in this Chapter. The FTC alleged that the merger would give Meta additional control over the VR 'ecosystem', reduce competition between Within's dedicated fitness app and Meta's Beat Saber dance app and reduce

83 Amended Complaint at 26, *FTC v. Facebook, Inc.*, No. 1:20-cv-03590 (D.D.C. 19 August 2021).

84 Douglas H Ginsburg and Koren Wong-Ervin, 'Challenging Consummated Mergers Under Section 2', *Competition Policy International*, 8–9 (21 May 2020) (Challenging Consummated Mergers): https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3590703; see also Timothy Snyder and James Moore, 'Another Way to Skin the Cat? Perspectives on Using Section 2 to Challenge the Acquisition of Nascent Competitors', *The Threshold*, Vol. XXI, No. 1 (Fall 2020): https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668026&download=yes.

85 id.

86 Ginsburg and Wong-Ervin at 9, see footnote 84.

Meta's incentive to enter and compete in dedicated fitness apps. The third and most novel theory hinges on the idea that the threat of entry by Meta contributes to competition and innovation in dedicated fitness apps. The trial for this case has been set for December 2022.

Another recent example of an FTC merger case based on nascent competition theories was its challenge of Illumina's planned 2019 acquisition of Pacific Biosciences of California, Inc. (PacBio).[87] Illumina was described by the FTC as the dominant provider of short-read DNA sequencers, and PacBio as the dominant provider of a nascent technology: long-read gene sequencers.[88] Long-read DNA sequencers can read longer individual DNA sequences, but have lower throughput overall and are more expensive.[89]

The FTC was concerned that, because advances in long-read gene sequencers could put pricing pressure on Illumina's short-read product, the two markets could converge, making PacBio a nascent competitor. In addition, there was already significant overlap in the two companies' customer base.[90] The FTC initiated administrative proceedings before the Commission to block the merger in December 2019. A few weeks later, the companies abandoned the transaction.[91]

Prior to that, in 2018, the FTC challenged CDK's acquisition of Auto/Mate, based on a maverick theory that the target company, while small, put disruptive competitive pressure on the acquirer and other incumbent players in the market.[92] CDK was the largest provider of dealer management systems (DMS).[93] DMSs are software platforms that are used to run various aspects of auto dealerships'

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87 Illumina's recent acquisition of GRAIL also involves an acquisition of a nascent competitor. GRAIL did not earn any revenue at the time that the FTC issued an administrative complaint, but instead had just raised private funding. This acquisition is discussed along with other vertical mergers later in this Chapter. See Complaint at 8, *Ilumina, Inc. and GRAIL, Inc.*, FTC Docket No. 9401 (30 March 2021): www.ftc.gov/system/files/documents/cases/redacted_administrative_part_3_complaint_redacted.pdf.

88 Administrative Complaint, *Illumina, Inc. and Pacific Biosciences of California, Inc.*, FTC Docket No. 9387 (17 December 2019): www.ftc.gov/system/files/documents/cases/d9387_illumina_pacbio_administrative_part_3_complaint_public.pdf.

89 id.

90 id.

91 Joint Motion to Dismiss Complaint, *Illumina, Inc. and Pacific Biosciences of California, Inc.*, FTC Docket No. 9387 (3 January 2020): www.ftc.gov/system/files/documents/cases/d09387_jt_mtn_to_dismisspublic.pdf.

92 Administrative Complaint, *CDK Global and Auto/Mate*, FTC Matter No. 171 0156, Docket No. 9382 (20 March 2018): www.ftc.gov/enforcement/cases-proceedings/171-0156/cdk-global-automate-matter.

93 Sher et al., see footnote 68.

businesses, including accounting, payroll and vehicle inventory.[94] CDK, along with the second largest provider Reynolds and Reynolds, had about 70 per cent of the market. Auto/Mate, by contrast, was the fifth largest provider, with less than one-third of 30 per cent of the market.[95]

Despite Auto/Mate's small share, the FTC filed a complaint, citing the fact that the combination resulted in a presumption of illegality under the Herfindahl-Hirschman Index thresholds laid out in the Merger Guidelines and because Auto/Mate appeared to be a maverick, disrupting the DMS market with its improved DMS functionality and low prices.[96] Ultimately, the parties abandoned the deal.[97]

Several recent DOJ actions follow a similar trend of challenges to acquisitions of nascent competitors. In its complaint challenging the proposed *Visa/Plaid* merger, DOJ alleged that the transaction would result in the elimination of a nascent competitor that was uniquely positioned to disrupt the market and erode Visa's 70 per cent market share.[98] Quoting *United States v. Microsoft Corp.*,[99] the complaint alleges the following: 'Monopolists cannot have "free reign to squash nascent, albeit unproven competitors at will." Acquiring Plaid would eliminate the nascent but significant competitive threat Plaid poses, further entrenching Visa's monopoly in online debit.'[100]

DOJ's challenge of the *Sabre/Farelogix* merger was also based on a nascent competition theory. Sabre is a GDS that assists airlines in marketing and distributing their fares to travel agents, including online travel agencies that market to consumers. There were three legacy GDSs, including Sabre.[101] Farelogix was not a GDS but had developed a 'direct connect' API solution that enabled airlines to sell tickets directly to travel agents and travellers, removing GDSs as intermediaries for many bookings.[102] DOJ alleged that the merger would eliminate a competitor

94 id.
95 id.
96 id.
97 See Commission Order Dismissing Complaint, *CDK Global and Auto/Mate*, FTC Matter No. 171 0156, Docket No. 9382 (26 March 2018).
98 Complaint at 5, *US v. Visa Inc. and Plaid Inc.*, No. 4:20-cv-07810 (N.D. Cal. 5 November 2020).
99 253 F.3d 34, 79 (D.C. Cir. 2001).
100 id.
101 Complaint at 6, *US v. Sabre Corp.*, No. 1:19-cv-01548-UNA (20 August 2019).
102 id. at 9.

whose presence airlines used as a bargaining chip to negotiate for lower prices with the GDSs.[103] DOJ argued that Farelogix was 'poised to grow significantly' as the industry shifted towards a newer standard that it had pioneered.[104]

Finally, in its 2020 challenge of Credit Karma's acquisition of Intuit, DOJ seems to have combined a theory of nascent competition with a maverick theory of disruption (as well as a unilateral effects theory). This acquisition raised concerns in the same product market – digital-do-it-yourself (DDIY) tax preparation – defined in *United States v. H&R Block*. In that 2011 case, DOJ blocked a merger between the No. 2 and No. 3 DDIY competitors, H&R Block and TaxAct, based on a loss of direct competition and increased potential for coordination with Intuit, which owns the leading DDIY product, TurboTax. That successful challenge by DOJ involved a more traditional maverick theory of harm.

In 2017, Credit Karma launched its own DDIY tax preparation product.[105] Credit Karma's offering had a very small share compared to Intuit, with only around 3 per cent of the market compared with Intuit's 66 per cent;[106] however, Credit Karma was unique in the market because its offerings are completely free, even for more complex filings, whereas Intuit and all other DDIY tax preparation providers charge fees for anything beyond the most basic filings.[107]

In a complaint accompanying a consent decree, DOJ alleged that 'Credit Karma has constrained Intuit's pricing, and has also limited Intuit's ability to degrade the quality and reduce the scope of the free version of TurboTax . . . If the proposed transaction proceeds . . . consumers are likely to pay higher prices, receive lower quality products and services, and have less choice'. [108] The consent decree required the parties to divest Credit Karma's tax business to Square, Inc., including all the relevant software and intellectual property.[109]

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103 id. at 10 ('For over a decade, Farelogix's airline customers have successfully used the threat of switching to Farelogix's booking services solutions to negotiate better rates and terms with Sabre and the other GDSs for bookings through both traditional and online travel agencies.').

104 id. at 13.

105 Complaint at 2, *US v. Intuit Inc. and Credit Karma, Inc.*, No. 1:20-cv-03441 (D.D.C. 25 November 2020).

106 id. at 2–3.

107 id. at 3.

108 id. at 3–4.

109 Press Release, DOJ, 'Justice Department Requires Divestiture of Credit Karma Tax for Intuit to Proceed with Acquisition of Credit Karma' (25 November 2020): www.justice.gov/opa/pr/justice-department-requires-divestiture-credit-karma-tax-intuit-proceed-acquisition-credit.

Non-price theories: privacy

US agency officials have acknowledged that privacy conceptually could be one quality parameter on which companies compete.[110] Traditionally, however, the agencies seemed disinclined to use antitrust merger review to protect user privacy, instead dealing with user privacy protections as part of the FTC's consumer protection enforcement efforts.[111] FTC Chair Khan's recent announcements and the FTC's suit against Meta Platforms suggest that this could be changing, however, as the FTC framed data privacy as an element of consumer choice that could be harmed by loss of competition.

When the FTC first investigated and then declined to challenge Meta Platform's acquisition of WhatsApp, for example, the FTC's Bureau of Consumer Protection (separate from the Bureau of Competition) sent Meta Platforms a letter reminding them to abide by WhatsApp's privacy commitments to users.[112] In contrast, in its 2021 amended antitrust complaint against Meta Platforms, the FTC alleged that the harm to competition, in part from the acquisition of WhatsApp and Instagram, results in loss of consumer choice, which includes 'enabling users to select a personal social networking provider that more closely suits their preferences, including, but not limited to, preferences regarding the amount and nature of advertising, as well as the availability, quality, and variety of data protection privacy options for users, including but not limited to, options regarding data gathering and data usage practices'.[113]

Non-horizontal theories of harm

Vertical foreclosure

With the FTC's withdrawal from the Vertical Merger Guidelines, and both agencies' plan to modernise their merger guidelines, increased challenges to vertical mergers are likely. This continues a trend of increased vertical enforcement that

110 DOJ, 'Assistant Attorney General Makan Delrahim Delivers Keynote Address at the University of Chicago's Antitrust and Competition Conference' (19 April 2018): www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-university-chicagos.

111 'Statement of FEDERAL TRADE COMMISSION Concerning Google/DoubleClick', FTC File No. 071-0170, at 2 (stating the Commission 'lack[s] legal authority to require conditions to this merger that do not relate to antitrust,' like privacy concerns): www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf.

112 Press Release, FTC, 'FTC Notifies Facebook, WhatsApp of Privacy Obligations in Light of Proposed Acquisition' (10 April 2014): www.ftc.gov/news-events/press-releases/2014/04/ftc-notifies-facebook-whatsapp-privacy-obligations-light-proposed.

113 Amended Complaint at 73, *FTC v. Facebook*.

began before the Guidelines were published in 2020. For example, in 2013, DOJ investigated ASML's acquisition of Cymer. ASML makes lithography machines, which are used to make semiconductors, and Cymer produces the light sources used in those lithography machines. The parties stated that the acquisition was intended to help accelerate the development of 'Extreme Ultraviolet semiconductor lithography technology', which will help to create new and improved microchips.[114] Despite the purely vertical relationship between the two parties, the deal received a Second Request.[115] DOJ ultimately declined to challenge and cleared the merger in April 2013.[116] In 2011, DOJ sought behavioural commitments to clear Google's acquisition of airfare pricing and shopping software developer ITA Software. The remedies were designed to ensure that Google would continue to provide rival online travel websites such as Bing and Kayak access to ITA Software's airfare pricing and shopping engine to power their flight search.[117]

During the Trump administration, DOJ challenged AT&T's acquisition of Time Warner, which was also based on vertical foreclosure concerns. While that acquisition was not entirely in the digital markets sphere, the rationale for the transaction and states' bases for challenging it involved online video and digital advertising. AT&T claimed it pursued the transaction to gain a stream of data and content that would enable it to compete better for advertising dollars against online companies such as Google and Meta Platforms. DOJ alleged that once part of AT&T, Time Warner would have the incentive and ability to extract higher rents for its marquee programming (e.g., CNN and Turner Sports programming such as March Madness, NBA, and MLB games) from rivals of AT&T's DirecTV video distribution business, weakening their ability to compete effectively with

114 Press Release, ASML, 'ASML to acquire Cymer to accelerate development of EUV technology' (17 October 2012): www.asml.com/en/news/press-releases/2012/asml-to-acquire-cymer-to-accelerate-development-of-euv-technology.

115 Press Release, Cymer, Inc., 'ASML and Cymer provide transaction status update' (14 December 2012): www.prnewswire.com/news-releases/asml-and-cymer-provide-transaction-status-update-183464381.html.

116 'U.S. Department of Justice clears ASML acquisition of Cymer', *Business Wire* (5 April 2013): www.businesswire.com/news/home/20130405005784/en/U.S.-Department-of-Justice-clears-ASML-acquisition-of-Cymer.

117 Complaint, *United States v. Google, Inc.*, 1:11-cv-688 (D.D.C. 8 April 2011).

AT&T. DOJ lost its challenge both at the district court and appellate court levels, allowing the merger to proceed,[118] but in April 2022, AT&T spun off most of the Time Warner assets in a transaction with Discovery Inc.

On 1 September 2022, the FTC lost its vertical challenge to Illumina's acquisition of GRAIL before an administrative law judge. Illumina is the largest provider of next generation sequencing (NGS) in the US and globally. NGS platforms allow for DNA sequences to be read and analysed.[119] GRAIL is a pre-commercial diagnostics company that makes NGS cancer tests. This includes multi-cancer early detection (MCED) tests, which use NGS to broadly screen for multiple types of cancer before patients even exhibit systems.[120]

The FTC's concern about this transaction is fundamentally vertical in nature: it is concerned that Illumina could reduce competition in the US MCED market by raising the costs for GRAIL competitors and by otherwise hindering their ability to sell competing tests.[121] For example, the FTC is concerned that Illumina could raise the price of its NGS systems or of necessary chemical reagents that it provides to competitors of GRAIL.[122] This case is also noteworthy because at the time of the complaint, GRAIL was pre-commercial and had not yet earned any revenue, making this another example of the FTC seeking to protect nascent competition.[123]

Despite the ongoing FTC investigation, the parties closed the deal on 18 August 2021, and the administrative trial began on 24 August 2021.[124] Illumina had made an open offer to sign 12-year contracts with anyone interested in securing their supply of its DNA sequencing products, but the FTC

118 See Memorandum Opinion, *United States v. AT&T Inc.*, 1:17-cv-2511, Doc. No. 18-5214 (D.C. Cir. 26 February 2019): www.lit-antitrust.shearman.com/siteFiles/27063/USCA%20DCA%20 18-5214%20-%20USA%20v%20AT&T%20-%20Opinion.pdf.

119 Complaint at 2-3, *Ilumina, Inc. and GRAIL, Inc.*

120 id. at 2, 8.

121 id. at 16–24.

122 id.

123 id. at 8.

124 Mike Scarcella, 'Illumina-Grail deal heads to FTC trial, as EU weighs penalty', *Reuters* (23 August 2021): www.reuters.com/legal/litigation/illumina-grail-deal-heads-ftc-trial-eu-weighs-penalty-2021-08-23; Jonathan Wosen, 'FTC trial kicks off, with fate of Illumina's acquisition of Grail hanging in the balance', *The San Diego Union-Tribune* (27 August 2021): www.sandiegouniontribune.com/business/story/2021-08-27/ftc-trial-kicks-off-with-fate-of-illuminas-acquisition-of-grail-hanging-in-the-balance.

contested the adequacy of this offer as a remedy to competitive harm.[125] The administrative trial ended in June 2022, with the FTC arguing that Illumina should have to divest itself of GRAIL until it retained just the 12 per cent it owned prior to the challenged acquisition. Illumina, on the other hand, stood by its offer to sign long-term supply contracts and argued that sequencing is its most profitable business, making allegations it would limit the sale of its sequencing products untenable. In July 2022, Illumina and GRAIL successfully reopened the administrative record to introduce evidence that Ultima Genomics will soon offer next-generation sequencing in the US. Illumina and GRAIL pointed to the entry as showing that the sequencing market remains competitive.[126]

In December 2021, the FTC brought a complaint to enjoin NVIDIA, a manufacturer of microprocessors, from acquiring Arm, which develops and licenses microprocessor designs and architectures. The FTC alleged that NVIDIA would have an incentive to restrict licensing of Arm designs to competing manufacturers because the benefits to its processor business would outweigh any losses stemming from curtailing Arm's licensing.

According to the FTC, competitors would also be wary to share proprietary information with Arm, as was necessary and routine in Arm's pre-merger business model, because of the risk it could be used against them by NVIDIA. The complaint further alleged that those competitors' inability to work with Arm to incorporate Arm designs into their processors would limit competition even if NVIDIA didn't formally limit design licensing. In February 2022, NVIDIA and Arm abandoned the transaction because of the 'significant regulatory challenges' the transaction faced, including investigations from the UK's CMA and the European Commission.[127]

In February 2022, DOJ brought suit to prevent UnitedHealth from acquiring Change Healthcare, which controls an electronic data interchange (EDI) transaction platform used by insurers, pharmacies and healthcare providers to transmit sensitive claims data to one another. In addition to a typical foreclosure theory and alleged horizontal overlap in the first-pass claims market, DOJ has focused on how UnitedHealth could allegedly use its access to sensitive insurance data flowing

125 Bryan Koenig, 'Illumina "Wasting Court Time" With Deal Overtures, FTC Says', *Law360* (21 July 2021): www.law360.com/articles/1405296/illumina-wasting-court-time-with-deal-overtures-ftc-says.

126 Order at 2–3, *Ilumina, Inc. and Grail, Inc.*

127 NVIDIA, 'NVIDIA and SoftBank Group Announce Termination of NVIDIA's Acquisition of Arm Limited' (7 February 2022): https://nvidianews.nvidia.com/news/nvidia-and-softbank-group-announce-termination-of-nvidias-acquisition-of-arm-limited.

across Change's platform to benefit its own products and reduce competition among health insurers, calling Change's data the real 'prize in the merger', allowing UnitedHealth to peer into rivals' strategies and prices.[128] The trial concluded in August 2022, and the judge ruled against the DOJ in September 2022.

Conglomerate effects

Merger conglomerate effects have been defined as:

> *a distinct category of competitive effects arising from transactions in which the parties' products are not in the same antitrust product market and the products are not inputs or outputs of one another, but in which the products are complementary or in closely related markets.*[129]

The United States noted in its June 2020 submission to the Organisation for Economic Co-operation and Development regarding conglomerate effects, that the agencies 'typically do not view such mergers through a distinct lens, finding that our standard theories of horizontal and vertical harm capture most modern, economically-sound theories of . . . "conglomerate" effects'.[130]

This approach appears to be changing under Khan and other current Democratic commissioners, however. In July 2021, the FTC reportedly opened an investigation into Amazon's planned acquisition of Metro-Goldwyn-Mayer (MGM). According to an article in the publication *The Information*, 'the FTC [was] wary of whether the deal [would] illegally boost Amazon's ability to offer a wide array of goods and services, and [was] not just limited to content production

128 Leah Nylen and John Tozzi, 'UnitedHealth and DOJ trial begins: handling sensitive data', Benefits Pro (3 August 2022): www.benefitspro.com/2022/08/03/unitedhealth-and-doj-trial-begins-handling-sensitive-data.

129 See 'Conglomerate effects of mergers – Note by the United States', Organisation for Economic Co-operation and Development, Directorate for Financial and enterprise Affairs Competition Committee, 2 (4 June 2020): www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-conglomerate_mergers_us_submission.pdf.

130 id.

and distribution.'[131] Senator Elizabeth Warren also sent a letter to FTC Chair Khan calling for a broad investigation into the transaction, including beyond just the effects in the video streaming market.[132]

The transaction closed in March 2022 without a vote or challenge by the FTC, which was split 2–2 between Democrats and Republicans from October 2021 to May 2022, while the third Democratic Commissioner, Alvaro Bedoya, awaited Senate confirmation. This meant that Chair Khan could not file a complaint without the support of at least one Republican Commissioner. Chair Khan warned that the investigation would continue, and after the deal closed, the FTC released a statement reminding parties that the agency may challenge a deal 'at any' time if determined to be in violation of law.[133]

The FTC has been investigating Amazon on a variety of issues since 2019, and after Bedoya's confirmation, the FTC pursued additional questions about the MGM acquisition.[134] The European Commission approved the transaction, finding limited overlap between the companies and that Amazon faced strong competition in the video streaming market.[135]

The FTC's apparent contemplation of conglomerate effects in the *Amazon/MGM* acquisition represents a divergence from the investigation into Amazon's acquisition of Whole Foods in 2017. There, the FTC rejected a host of non-horizontal theories of harm put forth by opponents of the transaction. Critics expressed concern, for example, that Amazon's acquisition of Whole Foods would allow it to leverage its scale, logistics and buyer power in other retail areas to

131 Josh Sisco, 'FTC Opens Probe of Amazon's MGM Purchase, Signaling a Lengthy Inquiry, *The Information* (9 July 2021): www.theinformation.com/articles/ftc-opens-probe-of-amazons-mgm-purchase-signaling-a-lengthy-inquiry.

132 Letter from Senator Elizabeth Warren to Lina M Khan, Chair, FTC (29 June 2021): www.warren.senate.gov/imo/media/doc/Letter%20to%20FTC%20re%20Amazon-MGM%20Deal.pdf.

133 Todd Spangler, 'Following Amazon's MGM Acquisition Close, FTC Warns It May "Challenge a Deal at Any Time"', *Variety* (17 March 2022): https://variety.com/2022/biz/news/ftc-may-challenge-amazon-mgm-deal-1235208241.

134 Leah Nylen, 'FTC's Antitrust Probe of Amazon Picks Up Speed Under New Boss', *Bloomberg* (31 May 2022, 4:01pm): www.bloomberg.com/news/articles/2022-05-31/ftc-s-antitrust-probe-of-amazon-picks-up-speed-under-new-boss.

135 Press Release, European Commission, 'Mergers: Commission approves acquisition of MGM by Amazon' (15 March 2022): https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1762.

quickly dominate the grocery business (as they claim it did with book retailing).[136] They also raised the concern that Amazon would be able to squeeze certain food suppliers.[137]

The FTC let the acquisition proceed without a Second Request,[138] rejecting these conglomerate monopoly leveraging theories for lack of cognisable antitrust harms.[139] Both Amazon and Whole Foods had modest footprints in the online and offline grocery retail business.[140] The transaction has since offered consumers many benefits, including reduced prices at Whole Foods, the ability to return Amazon orders at Whole Foods and low-cost delivery of Whole Foods groceries via Amazon, among other things.

Another deal that may have involved a conglomerate effects analysis was Salesforce's US$27.7 billion acquisition of Slack in 2021. Salesforce is the world's largest provider of customer relationship management products,[141] and Slack offers a channel-based messaging system that is used for communication and collaboration. Investors reportedly expected early clearance of the deal because of the fact that it was positioned as helping create a stronger competitor to Microsoft Teams.[142]

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136 Diane Bartz, 'Critics say Whole Foods deal would give Amazon an unfair advantage', *Reuters* (22 June 2017): www.reuters.com/article/us-whole-foods-m-a-amazon-com-antitrust/critics-say-whole-foods-deal-would-give-amazon-an-unfair-advantage-idUSKBN19D2Q8.

137 id.

138 Press Release, FTC, 'Statement of Federal Trade Commission's Acting Director of the Bureau of Competition on the Agency's Review of Amazon.com, Inc.'s Acquisition of Whole Foods Market Inc.' (23 August 2017): www.ftc.gov/news-events/news/press-releases/2017/08/statement-federal-trade-commissions-acting-director-bureau-competition-agencys-review-amazoncom-incs.

139 Interview of Bruce Hoffman, Director, Bureau of Competition, FTC, *The Threshold*, Vol. XVIII, No. 3, at 15–16 (25 July 2018).

140 Bartz, see footnote 135.

141 Press Release, Salesforce, 'Salesforce Signs Definitive Agreement to Acquire Slack' (1 December 2020): https://investor.salesforce.com/press-releases/press-release-details/2020/Salesforce-Signs-Definitive-Agreement-to-Acquire-Slack/default.aspx.

142 Flavia Fortes, Salesforce, 'Slack Refiled Transaction in US to Give Regulators Extra Time', *MLex* (28 January 2021): https://content.mlex.com/#/content/1260577.

Despite the seemingly complementary nature of the two companies' offerings, however, Salesforce announced that it had received a Second Request from DOJ on 16 February 2021;[143] however, DOJ concluded the investigation on 19 July 2021, allowing the parties to complete the merger without remedies.[144]

Remedies

Divestitures

Divestitures continue to be the primary and preferred merger remedy of the US agencies, and several of the transactions discussed above resolved competitive concerns with simple structural remedies. For example, the consent decree entered into by the parties to the Intuit-Credit Karma merger required the parties to divest Credit Karma's DDIY tax business to Square, Inc.[145]

In divestiture remedies, the US agencies historically have strongly preferred divestiture of a stand-alone business, or assets that already comprised a single business. Mixing and matching of different assets to create a new divestiture business, typically, is disfavoured by US agencies.

DOJ's approach to the *Sprint/T-Mobile* merger is a notable deviation from that policy. T-Mobile's US$26 billion acquisition of Sprint, announced in 2018, involved a more complicated remedy package comprising both structural and behavioural terms.[146] To prevent competitive effects in the market for retail mobile wireless services, DOJ negotiated a consent decree designed to enable Dish Network, a satellite TV distributor that had been accumulating wireless spectrum, to build an internet-of-things 5G network to replace Sprint as a fourth national wireless competitor.[147] T-Mobile agreed to divest Sprint's prepaid brands,

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143 Jordan Novet, 'Justice Department seeks more information on Salesforce's $27 billion deal for Slack', *CNBC* (16 February 2021): www.cnbc.com/2021/02/16/salesforce-slack-deal-doj-requests-more-info.html.

144 'DOJ Drops Probe Into $27.7B Salesforce/Slack Merger', Competition Policy International (19 July 2021): www.competitionpolicyinternational.com/doj-drops-probe-into-27-7b-salesforce-slack-merger; Press Release, Slack, 'Salesforce Completes Acquisition of Slack' (July 21 2021): https://slack.com/blog/news/salesforce-completes-acquisition-of-slack.

145 Press Release, DOJ, 'Justice Department Requires Divestiture of Credit Karma Tax for Intuit to Proceed with Acquisition of Credit Karma' (25 November 2020): www.justice.gov/opa/pr/justice-department-requires-divestiture-credit-karma-tax-intuit-proceed-acquisition-credit.

146 Kori Hale, 'T-Mobile Closes $26 Billion Sprint Deal, Budget Conscious Consumers Beware' (6 April 2020): www.forbes.com/sites/korihale/2020/04/06/t-mobile-closes-26-billion-sprint-deal-budget-conscious-consumers-beware/?sh=7e59ab366785.

147 Competitive Impact Statement at 6, *US v. Deutsche Telekom AG, et. al.*, No. 1:19-cv-02232-TJK (D.D.C. 30 July 2019).

Boost Mobile and Virgin Mobile, to Dish Network, as well as an array of spectrum assets, and provide an opportunity to acquire any redundant retail stores and wireless cell sites.[148]

To help Dish compete while it built out its own national 5G network over the span of several years, the consent decree also required T-Mobile to provide Dish wholesale access to its network for seven years without discrimination against Dish subscribers or preferential treatment of its own subscribers.[149] The remedy was, therefore, unusual in:

- creating a new competitor out of a mix of different assets that did not comprise a stand-alone business, as well as
- being a hybrid between structural and long-term behavioural relief: certain assets were divested, but Dish will also rely on the T-Mobile network and service agreements for years to come.

Another noteworthy aspect of the *Sprint/T-Mobile* merger was that a number of state attorneys general sued to block the merger, despite DOJ indicating its approval for the deal subject to a consent decree and other states joining with DOJ as part of the settlement. They claimed that DOJ had only done a 'cursory investigation' and that the acquisition still violated the Clayton Act, even subject to the settlement with DOJ.[150] The court ultimately ruled in favour of the merging parties, however, giving 'some deference' to DOJ and the Federal Communications Commission and finding that the federal remedy package resolved any likelihood of harm from the merger.[151]

Behavioural remedies

In the early to mid-2010s, behavioural remedies were more common and accepted, particularly for vertical mergers. For example, in 2011, DOJ required Google to agree to certain commitments to provide rivals access to ITA Software's airfare pricing and shopping engine to clear the deal.[152] It also required behavioural

148 Final Judgment at 3-4, 13-18, *US v. Deutsche Telekom AG, et. al.*, No. 1:19-cv-02232-TJK (D.D.C. 20 August 2020).

149 id. at 19–20.

150 Marguerite Reardon, 'DOJ's backing of T-Mobile, Sprint merger challenged by state attorneys general', *CNET* (9 January 2020): www.cnet.com/tech/mobile/states-urge-court-to-disregard-doj-backing-of-t-mobile-sprint-merger.

151 Makena Kelly, 'T-Mobile and Sprint win lawsuit and will be allowed to merge', *The Verge* (11 February 2020): www.theverge.com/2020/2/11/21132924/tmobile-sprint-merger-approved-federal-court-antitrust-lawsuit.

152 *United States v. Google, Inc.*, see footnote 117.

commitments that year from Comcast in its acquisition of video programming provider NBCUniversal. Additionally, DOJ accepted behavioural remedies to resolve concerns with the 2010 merger of Live Nation and Ticketmaster, although issues with this decree and ongoing violations led DOJ to pursue modification and extension of the decree in 2019.[153]

Under the Trump administration, DOJ suggested it was less likely to rely on ongoing behavioural remedies, as there was a strong preference for structural remedies, even in vertical mergers. Makan Delrahim, in a keynote address at the American Bar Association's 2017 Antitrust Fall Forum, stated that he would 'cut back on the number of long-term consent decrees' in place and favour structural remedies over behavioural relief.[154]

A week later, DOJ demonstrated its commitment to Delrahim's position by challenging AT&T's acquisition of Time Warner, rejecting a remedy similar to what was accepted in the 2011 *Comcast/NBCUniversal* merger. DOJ further memorialised this position in its 2020 Merger Remedies Manual, which states that 'remedies should not create ongoing government regulation of the market', and that conduct remedies are typically 'difficult to craft and enforce', making them 'inappropriate except in very narrow circumstances'.[155]

While some expected that the AT&T/Time Warner loss would deter future challenges to vertical mergers and make agencies more open to behavioural remedies in such cases, that is not necessarily the case. In fact, Khan and the Democratic wing of the FTC have taken a similarly strong stance against behavioural remedies while also expressing scepticism towards the widely accepted approach to analysing vertical mergers. In a letter to Senator Elizabeth Warren dated 6 August 2021, FTC Chair Lina Khan wrote that she shared Senator Warren's concerns about behavioural remedies, writing that 'both research and experience suggest that behavioral remedies pose significant administrability problems and have often failed to prevent the merged entity from engaging in anticompetitive

153 Press Release, DOJ, 'Justice Department Will Move to Significantly Modify and Extend Consent Decree with Live Nation/Ticketmaster' (19 December 2019): www.justice.gov/opa/pr/justice-department-will-move-significantly-modify-and-extend-consent-decree-live.

154 Makan Delrahim, Assistant Attorney General, US Department of Justice Antitrust Division, Keynote Address at American Bar Association's Antitrust Fall Forum (16 November 2017).

155 DOJ, Antitrust Division, Merger Remedies Manual, 4 (September 2020). The 2020 Manual replaced the Antitrust Division Policy Guide to Merger Remedies (June 2011), which was enacted under Obama appointee Christine Varney and expressed more openness to behavioural remedies: www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf.

tactics enabled by the transaction.'[156] The Khan FTC is expected to be more open to vertical and conglomerate theories of harm while also eschewing behavioural remedies, but the ability to succeed in the courts, where case law and economics will challenge this agenda, remains to be seen.

Momentum against vertical mergers and behavioural remedies has grown over the past year with challenges to numerous vertical mergers and with the agencies arguing in each case that the remedies offered were inadequate to prevent competitive effects. In *NVIDIA/Arm*, discussed above, the defendants offered a 'comprehensive set of commitments' to address concerns that NVIDIA would disadvantage or harm its rivals through control of Arm's licensing operation or chill innovation through its access to sensitive competitor information shared with Arm.[157] Defendants offered to:

- create a separate entity dedicated to licensing Arm's intellectual property;
- erect firewalls between that entity and NVIDIA to protect competitors' sensitive information;
- license Arm intellectual property on non-discriminatory term;
- maintain pre-merger levels of technical support at Arm;
- provide access to Arm intellectual property at the same time it is given to NVIDIA design teams;
- continue offering licensees the opportunity to participate in the Arm technical advisory board;
- publish all Arm instruction set architecture modifications and instructions shared with NVIDIA's design teams; and
- enable interoperability between Arm-based products and any other product requested by licensees, without discrimination in favour of NVIDIA.[158]

The transaction was abandoned before the FTC had to litigate the fix and identify the perceived flaws in this package. The CMA found five-year commitments insufficient given the long development cycles in the industry.[159]

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156 Letter from Lina M Khan, Chair, FTC, to Senator Elizabeth Warren (6 August 2021): www.warren.senate.gov/imo/media/doc/chair_khan_response_on_behavioral_remedies.pdf.

157 Answer and Defences, *NVIDIA Corp. et. al*, FTC Docket No. 9404 (21 December 2021).

158 id.

159 Andrea Coscelli, 'A report to the Secretary of State for Digital, Culture, Media & Sport on the anticipated acquisition by NVIDIA Corporation of Arm Limited', Competition & Mkts. Auth., § 12 (20 July 2021): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1033732/GOV.UK_-_NVIDIA_Arm_-_CMA_Report_to_DCMS__Web_Accessible_.pdf.

DOJ also rejected behavioural remedies in *UnitedHealth/Change Healthcare*, discussed above, which went to trial in August 2022. The parties sought to resolve DOJ's vertical concerns with commitments to Change customers that UnitedHealth would:

- maintain firewalls that UnitedHealth's Optum Insight subsidiary already has in place for handling data from UHG competitors;
- continue to process EDI transactions according to industry standards; and
- make available in the market any innovations developed using Change's EDI data.[160]

The parties argued that it would be 'economic suicide' for Optum to deviate from its long-standing firewall preventing it from sharing external claims data with UnitedHealth, as it would risk losing a sophisticated consumer base that is highly attuned to issues of data protection. At trial, the defence economic expert testified that any benefit from using Change's sensitive data would be outweighed by the resulting loss of customers.[161] DOJ's rebuttal expert argued that Optum does not have enough external business to make losing customers a sufficient disincentive to UnitedHealth using the Change data gained in the acquisition.[162] DOJ emphasised that the preferred remedy for an anticompetitive merger is a 'full stop injunction'[163] and that the parties' proposed remedies carry risks that could be avoided by blocking the merger outright.[164]

Along the lines of blocking a merger being better than alternative remedies, DOJ rejected UnitedHealth and Change's proposal to divest ClaimsXTen, Change's first-pass claims editing software, to a private equity firm. DOJ argued that a private equity firm would not be able to market first-pass claims editing with the same 'competitive intensity' Change can when integrated into its suite of payment accuracy products, and that a private equity firm would lack the incentive to innovate.[165]

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160 ECF 74, Defendants' Pretrial Statement, at 2–3 (13 July 2022).

161 Bryan Koenig, 'UnitedHealth Can't Afford To Misuse Rivals' Data, Judge Told', *Law360* (15 August 2022): www.law360.com/articles/1521150/unitedhealth-can-t-afford-to-misuse-rivals-data-judge-told.

162 id.

163 ECF 70, Plaintiffs' Pretrial Statement, at 4 (13 July 2022).

164 Nylen & Tozzi, see footnote 128.

165 ECF 101, Plaintiff's Pretrial Brief at 64–67 (22 July 2022)

APPENDIX 1

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Daniel Bitton heads Axinn's West Coast antitrust practice. Trained in the EU and the US, Daniel navigates clients through antitrust litigation, government investigations and merger clearance processes across the globe. He is regular antitrust counsel to major Fortune 500 companies including Google, McKesson and Stanley Black & Decker.

His recent matters include representing Google in highly publicised litigation and various investigations of its advertising technology business in the US and other jurisdictions; defending McKesson subsidiary RelayHealth in antitrust class actions and representing it in a related FTC litigation against Surescripts; defending three Danfoss Group companies in cartel litigation; securing global clearance for Johnson Controls' US$2 billion sale of Scott Safety to 3M; securing clearance for several significant deals by McKesson, including its US$3.4 billion healthcare technology joint venture with Change Healthcare and its US$1.4 billion acquisition of CoverMyMeds; securing global clearance for Dell's US$67 billion acquisition of EMC; securing global clearance for Thermo Fisher Scientific's US$13.6 billion acquisition of Life Technologies; and securing clearance for Google's US$2.35 billion sale of Motorola Home to ARRIS, and its US$700 million acquisition of ITA Software.

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While serving as deputy assistant attorney general for civil enforcement at DOJ during the Obama administration, Leslie managed merger challenges and supervised litigation and civil non-merger investigations, as well as several criminal antitrust matters. Additionally, she oversaw the Antitrust Division's international engagement and healthcare policy work. During the Bush administration, she served as counsel to the assistant attorney general, where she contributed to investigations, litigation and the seminal healthcare hearings and report with the FTC.

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