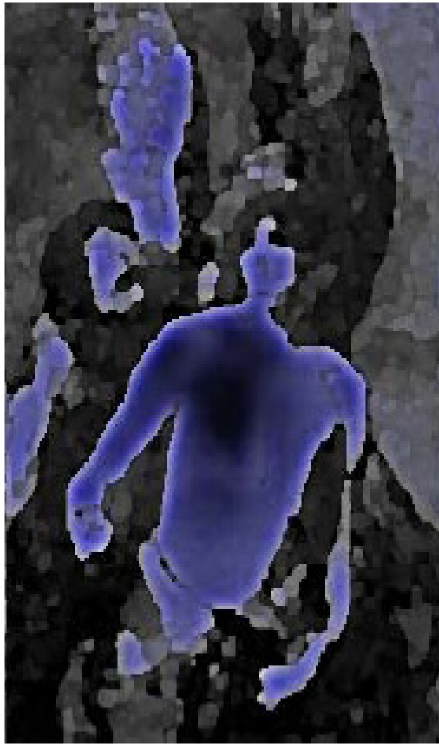

icarus

Media and Technology Committee
ABA Section of Antitrust Law

Summer 2020

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From the Editors

The Media and Technology Committee of the ABA Section of Antitrust Law is pleased to present the Summer 2020 issue of *icarus*, our publication focusing on competition and consumer protection issues in media and technology industries.

In this issue, we continue our trend of including topical articles followed by Q&As with a prominent member of the Section. We start with two articles looking at the future of tech mergers. First, an article by Andrew Black, Nicholas Putz & Daniel Huerta Garcia evaluating how the 2020 Vertical Merger Guidelines could impact tech mergers. Then, Meredith Mommers & Sarah Melanson dive into the topic of "killer acquisitions" of tech competitors.

Shifting gears, Morten C. Skroejer provides a robust comparison of antitrust law in Europe and the United States in the next article. And then, Kenneth S. Reinker & William Segal consider the antitrust issues that can arise when barring a rival from web scraping by analyzing *HiQ v. LinkedIn*.

We finally conclude with a Q&A of Jon Jacobson, partner at Wilson Sonsini and former Chair of the ABA Antitrust Law Section, by Courtney Armour.

We hope you enjoy this edition, and any prospective authors interested in appearing in future editions should email the editors.

Future Tech Mergers:
The Potential Impact of the 2020 Vertical Merger Guidelines

Andrew Black, Nicholas Putz, and Daniela Huerta Garcia[1]

On June 30, 2020, the United States Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") (together the "Agencies") published their Vertical Merger Guidelines ("VMGs"),[2] following their January 10, 2020 release of their Draft Vertical Merger Guidelines ("DVMGs").[3] The FTC approved the VMGs in a 3-2 vote, with Commissioners Rebecca Kelly Slaughter and Rohit Chopra dissenting.[4] As anticipated, the VMGs largely reflect the existing practices of the Agencies with respect to vertical mergers. Several of the theories of harm advanced by the VMGs—e.g., foreclosure and raising rivals' costs; access to competitively sensitive information; and coordinated effects—are embodied in the Agencies' enforcement approach to recent mergers such as *AT&T/Time Warner*,[5] *CVS/Aetna*,[6] and *Cigna/Express Scripts*.[7]

The VMGs represent a long-overdue update to the 1984 Non-Horizontal Merger Guidelines (the "1984 Guidelines"). The 1984 Guidelines were widely criticized as outdated and not reflective of the Agencies' current approach to vertical merger enforcement. At 36 years old, the 1984 Guidelines were grossly out of date.[8] The VMGs replace the 1984 Guidelines, which have been withdrawn and superseded in their entirety.[9] The VMGs' issuance was delayed due to the COVID-19 pandemic outbreak.[10]

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[1] Andrew Black and Nicholas Putz are associates, and Daniela Huerta Garcia is a law clerk at White & Case LLP.

[2] U.S. Dep't of Justice & Federal Trade Comm'n, Vertical Merger Guidelines, June 30, 2020, https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf [hereinafter *Vertical Merger Guidelines*].

[3] U.S. Dep't of Justice & Federal Trade Comm'n, Draft Vertical Merger Guidelines, Jan. 10, 2020, https://www.ftc.gov/system/files/documents/public_statements/1561715/p810034verticalmergerguidelinesdraft.pdf [hereinafter *Draft Vertical Merger Guidelines*].

[4] *See* Dissenting Statement of Commissioner Rebecca Kelly Slaughter, FTC-DOJ Vertical Merger Guidelines, FTC File No. P810034 (June 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577499/vmgslaughterdissent.pdf [hereinafter *Commissioner Slaughter's Dissent*]; Dissenting Statement of Commissioner Rohit Chopra, Regarding the Publication of Vertical Merger Guidelines, FTC File No. P810034 (June 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577503/vmgchopradissent.pdf [hereinafter *Commissioner Chopra's Dissent*].

[5] Complaint, *United States v. AT&T*, No. 1:17-cv-02511 (D.D.C. Nov. 20, 2017).

[6] Complaint, *United States v. CVS Health Corp.*, No. 1:18-cv-02340 (D.D.C. Oct. 10, 2018).

[7] Reed Abelson, *Merger of Cigna and Express Scripts Gets Approval From Justice Dept.*, N.Y. TIMES, Sept. 17, 2018, https://www.nytimes.com/2018/09/17/health/cigna-express-scripts-merger.html.

[8] *Compare with, e.g.*, "Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings," (EU) No. 2008/C 265/07, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC1018(03)&from=EN [hereinafter *EU Guidelines*]; Merger Assessment Guidelines, UK Competition Commission and the Office of Fair Trading, September 2010, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284449/OFT1254.pdf.

[9] Vertical Merger Guidelines, *supra* note 2, at 1 n.1.

[10] A group of Senators, led by Senator Amy Klobuchar, recently wrote to the Agencies to urge resumption of public consideration of the DVMGs, notwithstanding the ongoing COVID-19 pandemic. Senator Amy Klobuchar et al., Letter to Makan Delrahim and Joseph Simons (June 18, 2020) ("Going forward, the economic chaos caused by the pandemic may lead to profound structural changes in many industries and a sharp rebound in mergers and acquisitions activity, as cash-rich companies and investors seek to acquire struggling businesses and assets at bargain prices. Many of these transactions will be vertical mergers, and inevitably, some will raise significant antitrust issues.").

That the Reagan-era Guidelines had lost their relevance as appropriate tools for merger enforcement is not controversial. The fix, however, is. The earlier publication of the DVMGs were criticized both for what they included as well as what they left out. Commissioners Slaughter and Chopra abstained from voting to issue the DVMGs. Both Commissioners acknowledged, in separate statements, the need to replace the outdated 1984 Guidelines; however, each criticized the DVMGs, arguing that the DVMGs were too permissive of vertical mergers, and that the DVMGs did not reflect the realities of modern markets.[11] Among the loudest critics of the DVMGs were the healthcare and tech industries. Both industries have seen increased enforcement attention in recent years. But, the DVMGs, these industries argued, provided insufficient guidance as to how the Agencies will approach mergers in these sectors in coming years.

As the VMGs largely track the earlier DVMGs, the criticisms of the DVMGs are likely to persist with respect to VMGs. But, the VMGs do differ in a few key respects. The statement issued by the majority Commissioners highlights three key differences from the earlier draft version.[12] First, the VMGs no longer include the soft 20 percent safe harbor. Second, the VMGs clarify how the Agencies will assess the elimination of double marginalization. Third, the VMGs explain that they look beyond vertical mergers to harms from diagonal mergers and mergers of complements.

This article specifically focuses on how the VMGs may affect mergers in the tech industry. Section I of this article provides a brief background of the 1984 Guidelines and examines the Agencies' approach to several prominent tech mergers leading up to the issuance of the VMGs. Section II discusses some of VMGs' key updates and the guidelines' approach to theories of harm. Section III examines the potential impact on tech mergers of these updated theories of harm and discusses some of the review challenges tech mergers will likely face under the VMGs.

I. Tech Mergers Under the 1984 Non-Horizontal Merger Guidelines

A. Brief Overview of the 1984 Guidelines

The 1984 Guidelines were issued as part of the DOJ's 1984 Merger Guidelines.[13] The 1984 Guidelines classified non-horizontal mergers as mergers that: (1) involve firms that do not operate in the same market; and (2) produce no immediate change in the level of concentration in any relevant market.[14] Non-horizontal mergers were inherently viewed as unlikely to create

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11 *See* Statement of Commissioner Rebecca Kelly Slaughter, FTC-DOJ Draft Vertical Merger Guidelines, FTC File No. P810034 (Jan. 10, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561721/p810034slaughtervmgabstain.pdf [hereinafter *Commissioner Slaughter's Statement*]; Statement of Commissioner Rohit Chopra, Regarding the Request for Comment on Vertical Merger Guidelines, FTC File No. P8100034 (Jan. 10, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561727/p810034chopravmgabstain.pdf [hereinafter *Commissioner Chopra's Statement*].

12 *See* Statement of Chairman Joseph Simons, Commissioner Noah Joshua Phillips, and Commissioner Christine S. Wilson, Regarding Joint Department of Justice and Federal Trade Commission Vertical Merger Guidelines, (June 30, 2020), at 2, https://www.ftc.gov/system/files/documents/public_statements/1577507/vmgmajoritystatement.pdf [hereinafter *Majority Statement*].

13 U.S. Dep't of Justice, Non-Horizontal Merger Guidelines, § 4 (1984), https://www.justice.gov/archives/atr/1984-merger-guidelines [hereinafter *Non-Horizontal Merger Guidelines*].

14 *Id.*

competitive problems.[15] But, the 1984 Guidelines acknowledged that potential harms could arise and set out to protect against competitive concerns such as: (1) harm resulting from the acquisition of potential entrants; (2) creation of barriers to entry; (3) facilitation of collusion in the upstream market; and (4) the evasion of rate regulation.[16] Noticeably absent from the 1984 Guidelines were concerns over potential input foreclosure and raising competitors' costs, which were among the theories of harm alleged in 75 percent of non-horizontal merger challenges brought by the DOJ and FTC between 1994 and 2015.[17]

Eliminating potential entrants via acquisition, according to the 1984 Guidelines, can enable the maintenance of high prices and a decrease in product quality.[18] To determine whether such harms are likely to result from a non-horizontal acquisition, the 1984 Guidelines required the Agencies to consider market concentration, ease of entry, the acquiring firm's entry advantage, and the market share of the acquired firm.[19] Some of these factors have become increasingly irrelevant in non-horizontal tech mergers because acquired firms are often start-ups with little to no market share or potential entrants are considered horizontal competitors.[20]

Non-horizontal mergers can create or enhance barriers to entry when entrance into both the upstream and downstream market is required to enter either market, entrance at the secondary level makes entrance at the primary level significantly more difficult, and increased barriers to entry are likely to affect performance.[21] Non-horizontal tech mergers, however, are rarely located in directly adjacent vertical markets (e.g., *Microsoft/Linkedin*) and non-horizontal mergers, generally, rarely involve firms with monopolies "protected by prohibitive entry barriers."[22]

In addition, non-horizontal mergers may facilitate collusion in an upstream market where an acquisition makes it easier to monitor price.[23] The 1984 Guidelines, however, included a safe harbor that prevented a challenge on this ground unless the HHI in the upstream market was above 1800 and large percentages of the upstream product were sold through vertically-integrated retail outlets after the transaction.[24] Also, where a disruptive buyer (a buyer that upstream sellers view as important enough to deviate from the terms of collusion for) vertically merges with an upstream seller, upstream sellers may be able to collude more effectively.[25] Again, the safe harbor in the 1984 Guidelines prevented a challenge on this ground unless the HHI in the upstream market was above 1800 and the disruptive firm differed substantially in volume of purchases.[26] The 1984

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15 *Id.*

16 *Id.*

17 *See* Steven C. Salop & Daniel P. Culley, Revising the US Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners, 4 J. ANTITRUST ENFORCEMENT 1, 16-17 (2015).

18 *See* Non-Horizontal Merger Guidelines, *supra* note 13, § 4.1.

19 *See id.*

20 *See Start-ups, Killer Acquisitions and Merger Control*, Note by the European Union, OECD Directorate for Financial and Enterprise Affairs, at 8, https://one.oecd.org/document/DAF/COMP/WD(2020)24/en/pdf, ("A firm with a relatively small market share may be such an important competitive force if it has promising pipeline products.").

21 *See* Non-Horizontal Merger Guidelines, *supra* note 13, § 4.21.

22 *See* Salop & Culley, *supra* note 17, at 8.

23 *See* Non-Horizontal Merger Guidelines, *supra* note 13, at § 4.22.

24 *See id.* § 4.221.

25 *See id.* § 4.222.

26 *See id.*

Guidelines enacted these quasi-safe harbors because the Agencies were largely concerned with collusion between wholesale and retail markets—a line that is frequently blurred or absent in non-horizontal tech mergers.[27]

Finally, the 1984 Guidelines provided that monopoly public utilities subject to rate regulation may use non-horizontal acquisitions as a tool for regulatory circumvention, which is not an area of concern in the antitrust analysis of non-horizontal tech mergers.[28]

B. Recent Non-Horizontal Tech Mergers

A look at a few recent non-horizontal mergers reveals the divergence that grew between the 1984 Guidelines and the enforcement practice among the Agencies. This increased divergence highlighted the need for reform. Indeed, at a workshop recently held to discuss the DVMGs, Assistant Attorney General Makan Delrahim commented that the 1984 Guidelines were "woefully out of date" and did not reflect the current economic thinking about vertical mergers nor the practice of the Agencies.[29]

1. Google/DoubleClick (2007) and Google/ITA (2011)

The FTC's 2007 clearance of *Google/DoubleClick*[30] and the DOJ's 2011 clearance of *Google/ITA Software*,[31] which was subject to various remedies, highlight how the Agencies have applied, grappled with, and at times, ignored the 1984 Guidelines. In *Google/DoubleClick*, a link to the 1984 Guidelines could still be seen in the FTC's analysis, but four years later when the DOJ cleared the *Google/ITA* merger subject to various remedies, none of the DOJ's allegations tracked the 1984 Guidelines. Three areas of inquiry by the Agencies highlight this point specifically.

One – Combination of Big Data. In 2007, many urged the FTC to block the *Google/DoubleClick* transaction because of the privacy implications resulting from the combination of two extremely rich consumer data sets.[32] The FTC, however, refused to act on the expressed privacy concerns because it "lack[s] legal authority to require conditions to this merger that do not relate to antitrust, regulating the privacy requirements of just one company could itself pose a serious detriment to competition in this vast and rapidly evolving industry."[33] In 2011, the

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[27] *See* James Langenfeld*, Non-Horizontal Merger Guidelines in the United States and the European Commission: Time for the United States to Catch Up*, 16 GEO. MASON L. REV. 851, 874 (2009) ("The U.S. 1984 Guidelines identify two areas in which vertical mergers may facilitate collusion. The first is when integration occurs between wholesalers and retailers. Since retail prices are more visible than wholesale prices, integrated wholesalers (upstream) may be able to collude on downstream prices because of their ability to monitor the market.").

[28] *See* Non-Horizontal Merger Guidelines, *supra* note 13, § 4.23.

[29] Makan Delrahim, Assistant Attorney General, U.S. Dep't of Justice Antitrust Division, Opening Remarks for the Workshop on the Proposed Vertical Merger Guidelines, Mar. 11, 2020, https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-opening-remarks-workshop-proposed.

[30] Statement of the Federal Trade Comm'n Concerning Google/DoubleClick, FTC File No. 071-0170 (Dec. 20, 2007), https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf.

[31] Final Judgment, *United States v. Google Inc. & ITA Software Inc.*, No. 1:11-cv-00688 (D.D.C. Oct. 5, 2011).

[32] *See* Eric Auchard, *Privacy Groups Challenge Google's DoubleClick Deal*, REUTERS, Apr. 20, 2007, https://www.reuters.com/article/us-doubleclick-advertising/privacy-groups-challenge-googles-doubleclick-deal-idUSN2040687820070421.

[33] The FTC rejected privacy concerns raised by Google's competitors, because the privacy concerns simply amounted to "a fear that the transaction [would] lead to Google offering a superior product to its customers," and the data was not "an essential input to a successful online advertising product." Statement of the Federal Trade Comm'n Concerning

DOJ alleged that Google could use competitively sensitive information obtained via its provision of a pricing and shopping system ("P&S system") to other online travel intermediaries, to compete with those very same intermediaries.[34] Further, the DOJ's input foreclosure concerns focused on whether Google might restrict or raise the price of ITA's travel data to Google's competitors.[35] The potential anticompetitive effects of data acquisition is not contained within the 1984 Guidelines, and the absence has been a prominent critique of the 1984 Guidelines as data has become increasingly important.[36]

Two – Expanding Foreclosure Analysis. In its inquiry into the *Google/DoubleClick* transaction, the FTC assessed the potential elimination of direct competition between Google and DoubleClick and found that the transaction would not eliminate direct competition between the parties because Google and DoubleClick competed in different product markets.[37] In reaching this conclusion, the FTC rejected an "all online advertising" market, but failed to consider other potential non-horizontal anticompetitive effects of the transaction in an "all online advertising" market.[38] In 2011, the DOJ, however, looked beyond direct competition between Google and ITA, shifting focus to potential non-horizontal affects, in part because Google had not yet entered the comparative flight search market.[39] Instead, the DOJ went a step further and alleged that Google's acquisition of ITA—which it planned to use for development of its comparative flight search services—would enable Google to foreclose competitors' access to ITA's P&S system.[40] According to the DOJ, Google could foreclose or disadvantage travel service rivals by refusing to renew or enter licensing agreements, decreasing the quality of its licensed QP, or offering less favorable licensing terms.[41]

Three – Eliminating Potential Competition. In *Google/DoubleClick*, the FTC also examined whether Google would eliminate itself as a potential competitor.[42] The FTC determined

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Google/DoubleClick, FTC File No. 071-0170 (Dec. 20, 2007), at 2, https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf.

[34] Complaint ¶ 40, *United States v. Google Inc. & ITA Software Inc.*, No. 1:11-cv-00688 (D.D.C. Apr. 8, 2011); *see also* Competitive Impact Statement at 13, *United States v. Google Inc. and ITA Software Inc.*, No. 1:11-cv-00688 (D.D.C. Apr. 8, 2011), https://www.justice.gov/atr/case-document/file/497671/download, ("Defendants could use information and data gained through contracts with OTIs to then compete with those OTIs. Section VI of the proposed Final Judgment requires Defendants to establish a firewall at the company to prevent the misappropriation of competitively sensitive information and data.").

[35] Competitive Impact Statement at 9, *United States v. Google, Inc.*, No. 1:11-cv-00688 (D.D.C. Apr. 8, 2011); *see also* Salop & Culley, *supra* note 17, at 25.

[36] Commissioner Chopra's Statement, *supra* note 11, at 2.

[37] Google sold advertising through its search engine whereas DoubleClick sold third-party ad-serving products but did not buy or sell advertisements. Statement of the Federal Trade Comm'n Concerning Google/DoubleClick, FTC File No. 071-0170 (Dec. 20, 2007), at 7, https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf ("Because Google and DoubleClick do not presently compete in the same relevant market these two companies do not act as significant competitive restraints on one another.").

[38] *Id.* at 7.

[39] Complaint ¶ 42, *United States v. Google Inc. and ITA Software Inc.*, No. 1:11-cv-00688 (D.D.C. Apr. 8, 2011) ("Google looked at developing its own P&S system as an alternative to acquiring ITA but concluded it would take several years and require numerous engineers due to the complexity of the algorithms.").

[40] *Id.* ¶ 29.

[41] *Id.* ¶ 38.

[42] Non-Horizontal Merger Guidelines, *supra* note 13, § 4.112 ("By eliminating the possibility of entry by the acquiring firm in a more procompetitive manner, the merger could result in a lost opportunity for improvement in market performance

that DoubleClick did not have market power in the third-party ad-serving market, and there was no evidence that Google would have had a significant effect on competition, had it competed in the third-party ad-serving market, absent the transaction.[43] In 2011, the DOJ did not allege that Google's acquisition would eliminate Google as a perceived potential competitor. Instead, the DOJ took a more nuanced approach in its competitive effects analysis. The DOJ alleged that Google's acquisition of ITA would raise entry barriers because of the time and resources required for third parties to develop a comparable P&S system.[44]

2. AT&T/Time Warner (2017)

Yet another example of the Agencies' movement away from the 1984 Guidelines is the *AT&T/Time Warner* merger. In 2017, the DOJ challenged AT&T's acquisition of Time Warner.[45] At the time, AT&T was the nation's largest distributor of traditional television, via AT&T U-verse and DirecTV and had an over-the-top television streaming service, DIRECTV NOW. Time Warner owned many of the nation's most popular television networks, such as TNT, TBS, CNN, and HBO. Largely ignoring the 1984 Guidelines, the DOJ focused on input foreclosure and the raising of competitors' costs.[46] In particular, the DOJ alleged that AT&T would have the ability and incentive to increase the prices of Time Warner's networks to other television distributors, which would, in turn, enable AT&T to increase DirecTV's prices.[47]

Notably, the DOJ did not allege increased entry barriers or the elimination of potential entrants via acquisition. Instead, the DOJ was concerned that AT&T's competitors would be forced to raise prices (due to Time Warner network price increases), and AT&T would in turn be able to increase its prices.[48] The DOJ's reliance on input foreclosure, however, may ultimately have been fatal to the DOJ's challenge, as the district court found that AT&T would not have an incentive to sacrifice profits through foreclosing competitors' access to Time Warner content.[49]

II. Key Changes in the 2020 Vertical Merger Guidelines

At twelve pages, the VMGs are conspicuously short. The brevity of the VMGs could be suggestive of the Agencies' intent to continue to allow many vertical mergers to go unchallenged.

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resulting from the addition of a significant competitor. The more procompetitive alternatives include both new entry and entry through a 'toehold' acquisition of a present small competitor.").

[43] Statement of the Federal Trade Comm'n Concerning Google/DoubleClick, FTC File No. 071-0170 (Dec. 20, 2007), at 8, https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf ("In this case, Google's entry is unlikely to have a significant procompetitive effect because the evidence shows that the third party ad serving markets are competitive despite relatively high levels of concentration in both markets.").

[44] Complaint ¶¶ 41-42, *United States v. Google Inc. & ITA Software Inc.*, No. 1:11-cv-00688 (D.D.C. Apr. 8, 2011).

[45] Complaint, *United States v. AT&T*, No. 1:17-cv-02511 (D.D.C. Nov. 20, 2017).

[46] *See id.* ¶¶ 34, 38.

[47] *See id.* ¶ 10 ("A vertical merger may violate the antitrust laws where the merging parties would—by means of their control of an input that their competitors need—have the incentive and ability to substantially lessen competition by withholding or raising the price for that input. The competitive conditions in this industry and specific facts of this vertical merger make it unusually problematic.").

[48] *See id.* ¶ 38 ("But whether the effect of these increased costs for rival video distributors results in higher prices or a form of reduced service, the effect would be to substantially lessen competition by rendering these competitors less able to compete effectively with the merged company. As a result of the merger, the merged company would also have the power to raise its own prices relative to what it could have, had the merger not reduced competition from competing MVPDs.").

[49] *See United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 242-50 (D.D.C. 2018).

Indeed, prior to the release of the VMGs, the AT&T/Time Warner merger was the first significant non-horizontal merger litigation brought by the Agencies in decades.[50] But, the VMGs' brevity may also indicate a desire for more flexibility in vertical merger enforcement. That flexibility for the Agencies, however, may (and likely will) lead to uncertainty for businesses. The review of certain prominent changes in the VMGs reveals several areas where uncertainties may arise, especially with regard to tech mergers. Prior to discussing those uncertainties, however, this Section examines the those changes.

A. Removal of Any Safe Harbor

The VMGs remove the safe harbor based on the HHI of the upstream market and do not replace it with any new safe harbor provision.[51] Previously, the DVMGs proposed that the Agencies were "unlikely to challenge" a vertical merger if the merging parties have less than a 20% share of the relevant market and the related product is used in less than 20% of the relevant market.[52] But, the safe harbor was not a hard line, and the DVMGs noted that a merger presenting less than the 20% threshold may still be subject to review.[53] Conversely, the DVMGs also indicated that a merger presenting more than this 20% could be determined procompetitive, depending on whether specific circumstances "give rise to competitive concerns."[54] This proposed soft safe harbor was, however, the subject of significant criticism—as too lenient by some and too aggressive by others.[55] These criticisms ultimately contributed to the removal of the soft safe harbor by the Agencies.[56] Notably, other enforcement regimes contain safe harbor provisions that are not only more rigid than DVMGs' provisions but also are triggered at higher levels of concentration.[57] Because the VMGs abandon any safe harbor provision, determining when the Agencies may scrutinize vertical mergers, even among smaller market players, will likely become less predictable.

B. The "Related Product" Concept

The VMGs also introduce the concept of a "related product." The VMGs clarify that the Agencies generally use the methodology set forth in Sections 4.1 and 4.2 of the 2010 Horizontal Merger Guidelines (the "Horizontal Guidelines") to define the relevant market for vertical

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[50] Commissioner Chopra's Statement, *supra* note 11, at 3.

[51] *See* Vertical Merger Guidelines, *supra* note 2; Majority Statement, *supra* note 12, at 2.

[52] The 1984 Guidelines state that that the Agencies are unlikely to challenge a potential merger when the acquired firm had a market share of five percent or less. Non-Horizontal Merger Guidelines, *supra* note 13, § 4.134.

[53] Draft Vertical Merger Guidelines, *supra* note 3, at 3.

[54] *Id.*

[55] For example, Commissioner Slaughter has criticized the safe harbor in favor of a more stringent enforcement standard for vertical mergers. She has also argued for the inclusion of a presumption of harm for mergers involving highly concentrated markets. *See* Commissioner Slaughter's Statement, *supra* note 11, at 3. In contrast, Commissioner Christine S. Wilson argued that vertical mergers are often procompetitive, and therefore invited comments specifically discussing whether the threshold should only concern oligopoly markets. Concurring Statement of Christine S. Wilson, Publication of FTC-DOJ Draft Vertical Merger Guidelines for Public Comment, FTC File No. P810034, (Jan. 10, 2020), at 1, https://www.ftc.gov/system/files/documents/public_statements/1561709/p810034wilsonvmgconcur.pdf.

[56] *See* Majority Statement, *supra* note 12, at 2.

[57] The EU non-horizontal guidelines, for example, provide a safe harbor "where the market share post-merger of the new entity in each of the markets concerned is below 30% and the post-merger HHI is below 2000." *See* EU Guidelines, *supra* note 8, ¶ 25.

mergers.[58] Accordingly, when the Agencies identify a competitive concern in a relevant market, they will (generally) follow the same methodology as laid out in the Horizontal Guidelines to define the market and specify one or more related products. The VMGs define a related product as a product or service that is (1) "supplied or controlled by the merged firm" and (2) "is positioned vertically or is complementary to the products and services in the relevant market."[59] The VMGs state that a related product could be an input, a means of distribution, access to a set of customers, or a complement.[60]

The introduction of the "related product" has been viewed as a replacement for the Agencies having to define both the upstream and downstream markets.[61] For example, the Agencies would only need to define the market at one level, then investigate the selected related products that could impact competition in those upstream or downstream markets. The measure would be the extent to which such related product is used in the relevant market.

The new concept of "related product" is considered particularly important in tech mergers, because the concept more properly captures the nature of products or services in the industry, which are often vertically adjacent or complements. Moreover, using the related product concept better aids in defining and assessing the competitive benefits of tech mergers.[62] But, how the related product concept will be employed in practice is not entirely clear. Many DVMGs' commenters asked the Agencies for further guidance on the new concept, such as to define upstream and downstream markets in data-driven markets, and how and when data will be viewed as a related product.[63] The VMGs, however, add little in the way of guidance on the related product concept other than to make clear that related products can be in either the upstream or downstream markets.[64]

C. Updated Theories of Harm

Some theories of anticompetitive harm present in the 1984 Guidelines have been omitted from the VMGs. For example, the VMGs do not discuss how vertical mergers could lead to barriers to entry, the elimination of potential competition, or the acquisition of nascent competitors,

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58 Vertical Merger Guidelines, *supra* note 2, at 3; U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines, Aug. 19, 2010, https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 [hereinafter *Horizontal Guidelines*].

59 Vertical Merger Guidelines, *supra* note 2, at 3. Interestingly, the definition of a related product was updated from the earlier DVMG definition. In the DVMGs, related product was defined as "a product or service that is (1) supplied by the merged firm, (2) is vertically related to the products and services in the relevant market, and (3) to which access by the merged firm's rivals affects competition in the relevant market." Draft Vertical Merger Guidelines, *supra* note 3, at 2.

60 Vertical Merger Guidelines, *supra* note 2, at 3.

61 *See, e.g.*, Jonathan Baker, Nancy Rose, Steven Salop, & Fiona Morton, *Recommendations and Comments on the Draft Vertical Merger Guidelines*, Feb.24, 2020, at 6, https://media.justice.gov/vod/atr/comments-draft-vmg/dvmg-0017.pdf.

62 *See* State Attorneys General, Public Comments of 28 State Attorneys General on Draft Vertical Merger Guidelines, Feb. 26, 2020, at 3, https://www.justice.gov/atr/page/file/1258786/download.

63 *See* Center for Democracy & Technology, Comments on the Draft Vertical Merger Guidelines, Feb. 24, 2020, at 4, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg19_cdt_comments.pdf [hereinafter *Center for Democracy & Technology Comments*]; Verizon, Comments to the U.S. Department of Justice and the Federal Trade Commission Draft Vertical Merger Guidelines, Feb. 26, 2020, at 4-5, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/verizon_comments_to_draft_vmg_2-26-2020.pdf [hereinafter *Verizon Comments*].

64 Vertical Merger Guidelines, *supra* note 2, at 3.

which are seen as important factors in tech markets.[65] Some commentators have argued that lack of guidance in these areas leaves unanswered questions regarding the best measures for market power in emerging tech markets where nascent firms may have few users or revenues, and whether the Agencies have special concerns about vertical mergers involving large tech companies and nascent potential competitors.[66] While leaving these theories out, the VMGs discuss new theories of anticompetitive harm such as access to and control of competitively sensitive information and vulnerability of the market.

1. Access to and control of competitively sensitive information

Access to and control of sensitive business information is a new theory of harm that will likely be of particular importance in the tech industry. The VMGs state that a vertical merger may "give the combined firm access to and control of sensitive business information about its upstream or downstream rivals that was unavailable to it before the merger."[67] Prior to the VMGs, the Agencies addressed such concerns only on an *ad hoc* basis, and primarily through the creation of information firewalls and compliance monitors.[68] According to the VMGs, access to and control of competitively sensitive information could lead to both unilateral and coordinated effects theories of harm.

The VMGs do not discuss how the Agencies will approach vertical mergers of firms operating in data-heavy markets. This lack of guidance, commentators argue, leaves the tech industry in the dark about how such mergers would be evaluated, potentially subjecting tech firms to more enforcement than necessary, delaying or completely halting technology innovation, or even prompting a chilling effect on the startup economy.[69] During the drafting process, commentators also urged the Agencies to provide further details on challenges specifically associated with vertical tech mergers, including whether data privacy or protection will play a role in vertical merger analysis.[70] The VMGs, however, provide no such clarity.

2. Coordinated effects – concerns of market vulnerability

The VMGs state that the Horizontal Guidelines represent the Agencies' approach to coordinated effects in both horizontal and vertical mergers, but that the VMGs elaborate on ways vertical mergers specifically may result in certain coordinated effects.[71]

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[65] There is also no longer discussion about rate regulation. In his statement regarding the DVMGs, Commissioner Rohit Chopra argued for the inclusion of a broader set of theories of harm, including regulatory evasion. *See* Commissioner Chopra's Statement, *supra* note 11, at 4.

[66] *See* Center for Democracy & Technology Comments, *supra* note 63, at 4-5.

[67] Vertical Merger Guidelines, *supra* note 2, at 10.

[68] A recent example of this is the Staples acquisition of Essendant. *See* Federal Trade Comm'n Consent Order *In re Sycamore Partners II, Staples, Inc. & Essendant Inc.*, Jan. 28, 2019, https://www.ftc.gov/system/files/documents/cases/1810180_staples_essendant_agreement_1-28-19.pdf.

[69] *See* TechFreedom, Comments of TechFreedom In the Matter of DOJ/FTC Draft 2020 Vertical Merger Guidelines, Feb. 26, 2020, at 9-13, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/tf_comments_on_draft_vertical_merger_guidelines_022620.pdf; Consumer Technology Association, Comment on DOJ/FTC Draft Vertical Merger Guidelines (P810034), Feb. 26, 2020, at 3-4, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/cta_letter_on_ftc_doj_guidelines_2262020.pdf.

[70] *See* Center for Democracy & Technology Comments, *supra* note 63, at 4; Verizon Comments, supra note 63, at 4-5.

[71] *See* Vertical Merger Guidelines, *supra* note 2, at 10; Horizontal Merger Guidelines, *supra* note 58, § 7.

For example, the VMGs discuss how vertical mergers could be subject to challenge "when the relevant market shows signs of vulnerability to coordinated conduct" and the Agencies "conclude that the merger may enhance that vulnerability."[72] A vertical merger could enhance the market's vulnerability by either eliminating or weakening a "maverick firm" that already plays or could play a role in preventing or limiting anticompetitive coordination. Of note is that the VMGs also discuss that vertical mergers may actually make a market less vulnerable to coordination if the merger results in elimination of double marginalization (discussed below).[73]

3. Foreclosure and raising rivals' costs

As discussed, foreclosure and raising rivals' costs is a theory of harm already employed by the Agencies, so its inclusion in the VMGs is merely a codification of their enforcement actions, and not a departure from practice. Notably, the VMGs spend far longer discussing foreclosure and raising rivals' costs than on any other topic. Nearly six full pages—half the total length of the VMGs—is dedicated to this topic.[74] The substantial length dedicated to foreclosure and raising rivals' costs suggests that this anticompetitive theory will likely be the primary area of inquiry by the Agencies going forward.

The VMGs state that "[a] vertical merger may diminish competition by allowing the merged firm to profitably use its control of the related products to weaken or remove the competitive constraint from one or more of its actual or potential rivals in the relevant market."[75] For example, by refusing to supply competitors, a merged firm would effectively lead to the foreclosure of competitors' access to a necessary product or service, or access to a necessary group of customers.

The VMGs lay out two conditions that the Agencies will consider in identifying whether a vertical merger is likely to result in foreclosure or raising rivals' costs: (1) ability and (2) incentive.[76] The first condition, ability, is satisfied when the merged firm, by altering its supply for a related product, can cause its rivals to lose significant sales or to otherwise compete less aggressively.[77] The second condition, incentive, occurs when the merged firm would likely find it profitable to foreclose rivals because the firm would obtain a net benefit in the relevant market by doing so.[78]

D. Procompetitive Effects

The VMGs explicitly recognize that vertical mergers can lead to efficiencies, such as streamlined production, inventory management or distribution, and innovation.[79] The Agencies, in particular, focus on the procompetitive effect of the elimination of double marginalization ("EDM"). EDM occurs when a vertically merged firm profits from a lower price in the downstream market, which in turn benefits both the firm and the consumers. The VMGs do not

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72 Vertical Merger Guidelines, *supra* note 2, at 10.

73 *Id.* at 10-11.

74 *Id.* at 4-10.

75 *Id.* at 4.

76 *Id.* at 4-5.

77 *Id.* at 4.

78 *Id.* at 5.

79 *Id.* at 11.

discuss whether EDM applies differently in vertical tech mergers where marginal costs are often low,[80] but do recognize that innovation can override antitrust concerns.[81]

The Agencies suggest that they will not challenge mergers where the net effect of EDM is large enough that the merger is unlikely to be anticompetitive.[82] The burden to prove that the merged firm will benefit from EDM, however, remains on the merging parties.[83]

III. Potential Impact of the Vertical Merger Guidelines on Tech Mergers

Presently, the tech industry is undergoing widespread antitrust scrutiny in the United States (and worldwide) with Congressional inquiries and investigations by the FTC, DOJ, and state attorneys general, including an FTC inquiry into past acquisitions of certain big tech companies.[84] Consolidation in the tech industry in recent years has led to calls for antitrust intervention and even reform of the antitrust regime itself. At the same time, tech industry mergers present many atypical challenges, complicating the merger review analysis. For example, defining the appropriate market has proven a consistent challenge for enforcers as a result of the industry's characteristics. Rapid innovation, multi-sided markets, and frequent market disruption renders defining tech markets difficult. Indeed, enforcers may struggle frequently with simply determining the type of merger: is the merger horizontal; is it vertical; is it diagonal?[85] The VMGs, however, provide little clarity on how enforcement practices regarding tech mergers will be implemented going forward.

A. Review Challenges for Tech Mergers Under the Vertical Merger Guidelines

Many of the new concepts in the VMGs are likely to create continued uncertainties for the tech industry. For example, while the related product concept may allow enforcers to avoid defining the upstream and downstream markets, what constitutes a related product is less clear. The VMG's definition is not particularly helpful to understanding what products in the tech industry will be classified as related products. Will data be included? If so, how?

The removal of any safe harbor adds to the uncertainty. Many of the tech mergers that may have avoided scrutiny, under even a relatively low safe harbor, will be exposed to potential review by the Agencies. This may be particularly impactful in mergers with nascent competitors or market disrupters in so-called "killer acquisitions." The lack of any safe harbor will likely open up these acquisitions to new scrutiny. This could impact even such acquisitions that fall under the safe harbor umbrella of other enforcement regimes, such as that of the European Union.[86]

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[80] *See* Center for Democracy & Technology Comments, *supra* note 63, at 5.

[81] Vertical Merger Guidelines, *supra* note 2, at 11.

[82] *Id.* at 11.

[83] *Id.* at 12.

[84] *See* Press Release, Fed. Trade Comm'n, FTC to Examine Past Acquisitions by Large Technology Companies, Feb. 11, 2020, https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

[85] For example, in the Google/DoubleClick antitrust enforcers struggled to determine how the merger should be classified. *See, e.g.*, Penelope Papandropoulos, European Commission, DG Competition, Chief Economist Team, Non-horizontal mergers: recent EC Cases, IMEDIPA, 3rd International Conference on Competition Law and Policy, (May 29, 2009), https://ec.europa.eu/dgs/competition/economist/non_horizontal_mergers.pdf.

[86] *See* EU Guidelines, *supra* note 8, ¶ 25.

Indeed, the title of the VMGs themselves contribute to the uncertainty of how tech mergers will be reviewed. Classifying the guidelines as "vertical" rather than "non-horizontal" is suggestive of a more restrictive approach as to the guidelines' application. On its face, the term non-horizontal is broader in scope than the term vertical. Cognizant of this fact, the Agencies removed the restrictive definition of vertical mergers from the VMGs that was previously found in the DVMGs and added language to explain that the term vertical should not be read as narrowing the applicability of the VMGs.[87] Indeed, the statement issued by the Commission majority calls out this change as one of the three most prominent ones from the earlier DVMGs.[88] Further, the Agencies attempt to provide some guidance as to potential scrutiny of diagonal mergers by adding an example of how manipulating a related product might be used to foreclose a rival.[89] For the tech industry, this broadened scope suggests that the Agencies will scrutinize an increased number of mergers, as many tech mergers cannot neatly be classified as vertical or horizontal. Whether this will hold true in practice remains unclear.

B. Impact of the Vertical Merger Guidelines' New Theories of Harm

Many of the theories of harm set out in the VMGs, such as foreclosure and raising rivals' costs (as discussed above) are already regularly applied in tech merger reviews. The VMGs have added enforcement tools to these familiar theories of harm that are likely to be of particular relevance to tech mergers.

The VMGs state that a vertical merger may diminish competition by denying rivals access to a related product. For tech mergers, two potential related products stand out as new tools that might be employed by enforcers: (1) access to a set of customers; and (2) data. Tech mergers are often motivated by gaining access to a new set of customers. Whether the combined company will later deny a rival firm access to those same customers, is a question that tech companies entering into a merger will likely face going forward. In the tech industry, access to a set of customers and access to data often go hand-in-hand. It is reasonable to anticipate that enforcers will increasingly question whether merging tech companies will foreclose or raise costs for rivals to access competitively necessary data.

IV. Conclusion

The issuance of the VMGs brings the Agencies' guidance regarding vertical mergers in line with the Agencies' current practices. But, the vagueness and lack of detail of the VMGs are likely to compound (or at least maintain) the uncertainties that surround tech merger reviews. These uncertainties will likely push the tech industry and practitioners to examine prior reviews of similar mergers, rather than rely on the Agencies' guidelines. At the same time, the lack of safe harbors and the addition of the related product concept in the VMGs are likely to lead to greater scrutiny of tech mergers going forward.

[87] Vertical Merger Guidelines, *supra* note 2, at 1.

[88] Majority Statement, *supra* note 12, at 2.

[89] Vertical Merger Guidelines, *supra* note 2, at 9-10.

Acquiring an Existing or Potential Competitor? Increased Concern over "Killer Acquisitions" Could Affect Tech Mergers

Meredith Mommers & Sarah Melanson[1]

The anticompetitive risk posed by the elimination of a nascent or potential competitor is not a recent development and has been reviewed by the U.S. Federal Trade Commission ("FTC") and the U.S. Department of Justice ("DOJ") for years.[2] At the same time, merger challenges involving head-to-head competitors traditionally have been more common than challenges of acquisitions involving nascent or potential competitors. The focus on the latter has increased in recent years, subjecting transacting parties in some cases to greater scrutiny as the U.S. antitrust agencies seek to identify and prevent the removal of a nascent competitor or an impediment to potential entry (*i.e.*, "killer acquisitions"). The U.S. antitrust agencies' recent challenges of those transactions, as well as other challenges based on a potential-competition theory of harm, provide valuable insight for companies considering acquisitions of start-ups, growing companies, and other potential entrants about the types of evidence the agencies may rely on to support a challenge and actions that might mitigate the risk of such a transaction being investigated and successfully challenged in court.

I. Background

Evaluating whether the acquisition of a potential or nascent competitor is likely to substantially lessen competition presents U.S. antitrust agencies with a number of challenges.[3] For example, in *FTC v. Steris Corp.*,[4] the FTC unsuccessfully challenged Steris's proposed acquisition of Synergy based on an "actual potential competition" theory, alleging loss of potential competition for sterilization services.[5] The FTC later explained that the *Steris/Synergy* case "is a reminder that future competition cases pose challenges in weighing and assessing evidence, since predictions about entry can often be called into question."[6] In addition, current economic analysis

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1 Meredith Mommers is a senior associate and Sarah Melanson is an associate at Freshfields Bruckhaus Deringer. The views in this article are the authors' alone and do not necessarily reflect the views of Freshfields or its clients.

2 In fact, the DOJ challenged Microsoft nearly 20 years ago over anticompetitive conduct that included threats to potential and nascent competitors in order to maintain a monopoly in violation of Section 2. *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

3 Joseph Simons, Chairman, Fed. Trade Comm'n, Remarks at Georgetown Law Global Antitrust Enforcement Symposium at 5, Sept. 25, 2018, ("One of our interests in this area will be with mergers of high-tech platforms and nascent competitors. These types of transactions are particularly difficult for antitrust enforcers to deal with because the acquired firm is by definition not a full-fledged competitor, and the likely level of future competition with the acquiring firm often is not apparent. But the harm to competition can nonetheless be significant.") https://www.ftc.gov/public-statements/2018/09/prepared-remarks-chairman-joseph-simons-georgetown-law-global-antitrust.

4 133 F. Supp. 3d 962 (N.D. Ohio 2015).

5 *Id.* at 963–66.

6 *Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms: Hearing Before the Subcomm. on Antitrust, Competition Pol'y & Consumer Rights of the S. Comm. on the Judiciary*, 116th Cong. 11 (2019) at 11, https://www.ftc.gov/system/files/documents/public_statements/1545208/p180101_testimony_-_acquisitions_of_nascent_or_potential_competitors_by_digital_platforms.pdf; *see also* Brian Baker & Dave Perera, *US FTC Expects More Merger Challenges Involving Nascent Competitors, Wilson says*, MLEX, Apr. 23, 2020, https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1181298&siteid=190&rdir=1 ("As we saw from the Commission's failed challenge in Steris-Synergy, there can be significant challenges when a potential competition case is litigated") (quoting FTC Commissioner Christine Wilson).

in merger review often focuses on diversions and margins, rather than on estimating likelihood of entry or repositioning and their corresponding consumer benefits, which are more difficult to estimate.[7]

In transactions where one party does not completely overlap with the other (which may be the case in an acquisition of a potential or nascent competitor), it may be difficult for the U.S. antitrust agencies to delineate the relevant market. If an agency challenges the transaction, it may have a harder time persuading a court that the government has met its burden of proof that the transaction will substantially lessen competition in a relevant product and geographic market. For example, in *United States v. Sabre Corp.*,[8] the DOJ challenged Sabre's acquisition of Farelogix by alleging that the transaction would result in a lessening of competition for "booking services" at U.S. points of origin.[9] The court, however, disagreed with the DOJ's market definition as a matter of fact and law, resulting in the DOJ losing the case in district court.[10]

In spite of these challenges, however, transactions involving nascent or potential competition—especially in big tech—are facing increased pressure from vocal politicians saying that "big is bad" and drumming up debates over the need for increased government intervention.[11] In response, the U.S. antitrust agencies have signaled their commitment to identify and prevent so-called "killer acquisitions" that threaten to eliminate a nascent or potential competitor. For example, in the FTC's unanimous decision to close its investigation into Roche's acquisition of Spark Therapeutics, the agency stated: "The FTC strives to closely scrutinize incumbents' acquisitions of current, potential, and nascent competitors, particularly where the incumbent has market power. The Commission will seek to block or require divestitures in transactions where such acquisitions diminish competition and harm consumers."[12] Commissioner Christine Wilson recently reiterated that the FTC is focused on challenging transactions that could eliminate potential competition.[13]

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7 *See* Jeffrey M. Wilder, Acting Deputy Ass't Attorney Gen., U.S. Dep't of Justice, Antitrust Div., Remarks at Hal White Antitrust Conference: Potential Competition in Platform Markets at 2, June 10, 2019, https://www.justice.gov/opa/speech/file/1176236/download.

8 Complaint, United States v. Sabre Corp., No. 19-cv-01548 (D. Del. filed Aug. 20, 2019) [hereinafter *Sabre* Complaint].

9 *Id.* ¶¶ 45–47.

10 Opinion at 69–80, United States v. Sabre Corp., No. 19-cv-01548 (D. Del. Apr. 7, 2020) [hereinafter *Sabre* Opinion]. Following the district court's decision, the parties ultimately abandoned the transaction and the DOJ is seeking to vacate the decision.

11 For example, Senator Elizabeth Warren has called for the breakup of Big Tech companies by unwinding some of their acquisitions. *See* Matt Stevens, *Elizabeth Warren on Breaking Up Big Tech*, N.Y. TIMES, June 26, 2019, https://www.nytimes.com/2019/06/26/us/politics/elizabeth-warren-break-up-amazon-facebook.html.

12 Statement of the Federal Trade Commission, Roche Holding/Spark Therapeutics, at 1 (Dec. 16, 2019), https://www.ftc.gov/system/files/documents/public_statements/1558049/1910086_roche-spark_commission_statement_12-16-19.pdf [hereinafter FTC Statement]. *See also* Press Release, Fed. Trade Comm'n, FTC Challenges Illumina's Proposed Acquisition of PacBio (Dec. 17, 2019), https://www.ftc.gov/news-events/press-releases/2019/12/ftc-challenges-illuminas-proposed-acquisition-pacbio (when announcing the FTC's unanimous decision to challenge Illumina's proposed acquisition of PacBio, FTC Bureau of Competition Deputy Director Gail Levine explained: "When a monopolist buys a potential rival, it can harm competition. . . . These deals help monopolists maintain power. That's why we're challenging this acquisition.").

13 Brian Baker & Dave Perera, *US FTC Expects More Merger Challenges Involving Nascent Competitors, Wilson says*, MLEX, Apr. 23, 2020, https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1181298&siteid=190&rdir=1.

As a result, we may see more challenges of, or at least investigations into, mergers that do not involve traditional head-to-head competition. Recent challenges provide some insight into what could make a transaction vulnerable to an inquiry or even an enforcement action, which we address in turn.

II. Transaction value

As a threshold matter, a transaction's value directly impacts the likelihood of detection by an antitrust agency. In the United States, a transaction is subject to a mandatory reporting requirement if the transaction's value exceeds the thresholds set out in the Hart-Scott-Rodino ("HSR") Act, and no exemption applies. By design, the HSR Act's reporting thresholds capture transactions in which the deal value is disproportionately higher than the value of the target's tangible assets or sales and therefore captures acquisitions of many start-ups or new entrants. Although merger control notification thresholds in many other jurisdictions typically are tied to the value of the parties' assets or sales, some jurisdictions are considering ways to expand the scope of notified transactions in an effort to capture those acquisitions.[14]

Even if a transaction is not reportable in the United States, the U.S. antitrust agencies can and do open investigations into transactions, regardless of whether they have been consummated. After recent criticism by lawmakers and activists that big tech has gotten too big,[15] the FTC initiated a study into non-reportable transactions made by five large technology companies between 2010 and 2019 to evaluate whether any were anticompetitive.[16] Depending on the outcome of this study, the U.S. antitrust agencies may place greater emphasis on the detection of non-reportable transactions, especially those in the technology sector.

Ultimately, a transaction's value may raise red flags to the U.S. antitrust agencies if the buyer appears to be paying an excessive premium. Where the transaction value dwarfs its market value,[17] the agencies will investigate the rationale behind the transaction value and whether the buyer can recoup the deal value once the target has been eliminated as an independent competitor. Because a transaction's value can be used as evidence of a potential killer acquisition,[18] transacting

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[14] For example, in 2017, Germany introduced a new merger control threshold to include the transaction's value as well as whether the target has "significant operations" in Germany. *See* Dr. Frank Röhling & Christoph Hinrichsen, *Germany Merger Control Update: New Merger Control Threshold Will Take Into Account the Size of the Transaction*, FRESHFIELDS, https://www.freshfields.com/en-us/our-thinking/campaigns/digital/media--internet/germany-merger-control-update/. More recently, the Furman Report recommended that the U.K. Competition and Markets Authority consider implementing a transaction value threshold in the context of the big tech industry. UNLOCKING DIGITAL COMPETITION; REPORT OF THE DIGITAL COMPETITION EXPERT PANEL 94-95 (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf [hereinafter FRUMAN REPORT]). Commissioner Margrethe Vestager of the European Commission has signaled that the European Commission may adopt transaction value merger thresholds in an effort to capture more digital mergers. Charley Connor, *Vestager: EU is Considering Value-Based Thresholds*, GLOBAL COMPETITION REV., June 19, 2019, https://globalcompetitionreview.com/article/1194225/vestager-eu-is-considering-value-based-thresholds.

[15] Louise Matsakis, *Break Up Big Tech? Some Say Not So Fast*, WIRED, June 7, 2019, https://www.wired.com/story/break-up-big-tech-antitrust-laws/.

[16] Press Release, Fed. Trade Comm'n, FTC to Examine Past Acquisitions by Large Technology Companies, Feb. 11, 2020, https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

[17] The United States is not the only jurisdiction looking at purchase price premiums. The Furman Report recommends that the CMA pay attention to a transaction's value compared to its market value. *See* FURMAN REPORT, *supra* note 14, at 96.

[18] For example, the FTC has cited a transaction's premium as support for its challenge. *See, e.g.*, Complaint ¶ 8, Illumina/Pacific Biosciences, Dkt. No. 9387 (FTC Dec. 17, 2019) ("Per an agreement executed November 1, 2018,

parties should consider carefully documenting the accounting behind the purchase price and procompetitive (or at least competitively benign) deal rationales.

III. Document creation and strategy plans

As in all merger control matters, the U.S. antitrust agencies will rely on the parties' ordinary course and transaction-related documents, including formal and informal communications, for evidence of the deal rationale. Contemporaneous documents, particularly a transacting party's long-term strategy plans, carry more weight than interrogatory responses and legal briefs drafted by the parties' lawyers. Where the documents include unhelpful statements, the parties will have an uphill battle trying to rebut or reframe the documents' context and meaning.

In transactions where the U.S. antitrust agencies believe the buyer is motivated by the desire to eliminate a nascent or potential competitor, they may use the parties' contemporaneous documents and executive statements to depict the deal as a killer acquisition. This was the approach taken by the DOJ in its challenge of the Sabre/Farelogix transaction.[19] According to the DOJ's complaint, Sabre's internal documents described the efforts it took to "shut down" Farelogix and emphasized that the acquisition would "[m]itigate risk from potential" substitutes, such as Farelogix.[20] This aligned with statements the DOJ cited from Farelogix's own internal documents, which described efforts by GDS's to "[u]ndermine and delay [Farelogix's technology] even if embracing it on the surface."[21] Although the defense attempted to argue that the parties did not compete and there were no anticompetitive motives, the judge felt it necessary to note the defense witnesses' lack of credibility when it came to addressing whether the parties competed, whether the buyer perceived the target as a threat, where the buyer stood to lose revenue, and the motivation behind the transaction.[22]

Documentary and testimonial evidence is also important in cases in which the agencies allege that the transaction will eliminate a likely entrant into the buyer's market. In *FTC v. Steris Corp.*,[23] the court denied the FTC's preliminary injunction to enjoin Steris's acquisition of Synergy based on documentary and testimonial evidence casting doubt on the FTC's actual potential entry theory. The court's analysis focused on the issue of whether Synergy would have likely entered the United States but for its acquisition by Steris and found the FTC had not met its burden.[24] In reaching that conclusion, the court relied upon party documents, customer and party witness testimony, and other evidence suggesting Synergy faced significant challenges entering the United States and was unlikely to revive or continue its previous attempts to enter with x-ray technology.[25]

Illumina will pay $1.2 billion for PacBio, a 71% premium over PacBio's share price at the time.") [hereinafter *Illumina* Complaint].

19 *See also Illumina* Complaint, *supra* note 18, ¶ 4 ("Respondents' internal documents show that PacBio and Illumina consistently and routinely refer to each other as competitors."), ¶¶ 61–66.

20 *Sabre* Complaint, *supra* note 8, ¶¶ 7, 10.

21 *Id.* ¶ 6.

22 *Sabre* Opinion, *supra* note 10, at 91–92. The judge went so far as to say that "the Court does not believe Sabre's story about why it seeks to acquire Farelogix." *Id.* at 60.

23 133 F. Supp. 3d 962 (N.D. Ohio 2015).

24 *Id.* at 966.

25 *Id.* at 977–84.

IV. Customer support

Customer support can make or break a transaction's success, particularly where the U.S. antitrust agencies are concerned that the transaction will eliminate a nascent or potential competitor. When challenging a potential killer acquisition, the agencies will rely on customer testimony and documents to bolster arguments that the parties can or will compete,[26] as customers are often best placed to understand the likelihood of entry, the viability of a potential competitor, and the ability to switch between the incumbent and the nascent or potential entrant. To the extent a customer supports a transaction, its testimony and documents can help shape market definition[27] and rebut arguments that the transaction will reduce competition.[28]

To preempt potential customer complaints, transacting parties may consider ways in which they can reassure customers that the transaction will not result in fewer options or supracompetitive prices. One way to alleviate customer concern is to offer customers a long-term supply agreement at current pricing, which was the approach taken by Sabre in connection with its proposed acquisition of Farelogix.[29] While the DOJ was investigating the transaction, Sabre's CEO sent letters to current Sabre and Farelogix customers to offer continuity of service and pricing for three years, which the judge believed would give customers sufficient time to find alternative suppliers before their next negotiation with Sabre.[30]

V. Evidence of competition

Where a U.S. antitrust agency is concerned that the acquisition of a nascent or potential competitor will substantially reduce competition, the agency may bring a claim under the Clayton Act. The challenging agency typically will rely on the Herfindahl-Hirschman Index and market shares to establish the presumption that the transaction is anticompetitive, although the presumption is more difficult to establish where the target is a potential or nascent competitor with no or limited market share. The transacting parties can undermine the agency's position by presenting evidence that there are other meaningful competitors and/or that entry is easy.[31] If the target company is viewed by customers as a maverick, this will be difficult for the parties to overcome absent evidence of other competitors or potential entrants, or evidence that the merger will create a stronger maverick.[32]

The presence of other viable competitors is the best defense and may be enough for parties to avoid the cost of litigation if they are able to present evidence of other viable competitors. For

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[26] For example, in *Sabre*, the DOJ cited customers' use of Farelogix as leverage in contract negotiations with Sabre as evidence that Farelogix and Sabre compete. *See Sabre* Complaint, *supra* note 8, ¶¶ 4, 37.

[27] In *Sabre*, certain customer testimony went against the DOJ's market definition. *See Sabre* Opinion, *supra* note 10, at 60–62, 79.

[28] For example, the *Sabre* judge found that the DOJ failed to prove barriers to entry would prevent adequate competition in part because certain customers had already self-supplied. *Id.* at 85–86.

[29] *Id.* at 59–60.

[30] *Id.* at 60.

[31] In *Sabre*, the transacting parties attempted to argue that they did not compete in the same market. As noted above, however, the judge did not find this argument and supporting witness testimony credible. *Id.* at 91–92.

[32] *See, e.g.*, New York v. Deutsche Telekom AG, 2020 WL 635499, at *49, *51 (S.D.N.Y. 2020) ("T-Mobile has redefined itself over the past decade as a maverick . . ." and "[t]he Proposed Merger would allow the merged company to continue T-Mobile's undeniably successful business strategy for the foreseeable future.").

example, the FTC opened an investigation into Roche's acquisition of Spark Therapeutics to determine whether Roche would delay or discontinue Spark Therapeutics' hemophilia A gene therapy development following the transaction. The FTC ultimately closed its investigation, in part because other companies were also developing gene therapy solutions for hemophilia A, ensuring that Roche would be incentivized to continue its gene therapy development.[33]

If the parties intend to argue that entry is easy, the potential entry must be timely and likely.[34] In challenges of transactions involving a nascent competitor, the U.S. antitrust agencies may cite the difficulty of entry due to intellectual property, complexity of development, and the need for significant resources.[35] However, the court in *United States v. Sabre Corp*. found these arguments unpersuasive where "[t]he record does not establish that building an adequate [competing product] is particularly difficult," numerous companies have recently entered and bid against the target, and customers have begun to self-supply.[36]

VI. Monopolization Claims

Although Sherman Act Section 2 claims in the context of a merger challenge are less prevalent, U.S. antitrust authorities can bring a Section 2 challenge where the potential buyer enjoys a significant market share and intends to acquire a current or potential competitor. Leadership at both the DOJ and FTC have recently discussed the application of Section 2 to acquisitions of nascent competitors. For example, DOJ's Acting DAAG Jeffrey Wilder has suggested applying Section 2 to acquisitions of nascent competitors in platform industries. DAAG Wilder explained the benefits of bringing a monopolization claim for enforcement, including that "[t]he immediate implication of using Section 2 to evaluate potential competition is that it allows us to step back and put greater emphasis on a pattern of conduct, including past acquisitions."[37] Similarly, an FTC representative explained before the Senate Judiciary Committee's Subcommittee on Antitrust, Competition Policy, and Consumer Rights that "acquisitions by monopolists of nascent competitive threats may violate Section 2 of the Sherman Act when they are 'reasonably capable of contributing significantly to the defendant's monopoly power,' unless outweighed by procompetitive justifications."[38]

As a result, transacting parties may find themselves facing challenges under both the Clayton Act and the Sherman Act in deals involving a buyer with significant market share. For example, in its challenge of Illumina's proposed acquisition of PacBio, the FTC brought claims under Section 2 in addition to claims under Section 7 of the Clayton Act and Section 5 of the FTC

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[33] FTC Statement, *supra* note 12, at 1.

[34] *See Steris*, 133 F. Supp. 3d at 966 ("The FTC asserts that the acquisition of an actual potential competitor violates Section 7 if (1) the relevant market is highly concentrated, (2) the competitor 'probably' would have entered the market, (3) its entry would have had pro-competitive effects, and (4) there are few other firms that can enter effectively.").

[35] *See, e.g.*, *Illumina* Complaint, *supra* note 18, ¶¶ 52–55.

[36] *Sabre* Opinion, *supra* note 10, at 85–86.

[37] Wilder, *supra* note 7, at 4.

[38] *Competition in Digital Technology Markets*, *supra* note 6, at 5 (quoting United States v. Microsoft Corp., 253 F.3d 34, 59, 72 (D.C. Cir. 2001)); *see also* Flavia Fortes, *Courts, Agencies Differ in Analysis of Acquisitions of Potential Competitors, Complicating Enforcement, FTC Official Says*, MLEX, Feb. 27, 2020, https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1166697&siteid=191&rdir=1 (explaining the agencies' use of abuse of dominance law when assessing acquisitions of nascent competitors).

Act.[39] The FTC alleged that Illumina was a monopolist in the relevant market and that "[t]he Acquisition, if consummated, would eliminate the nascent competitive threat that an independently owned PacBio poses to Illumina's monopoly power."[40]

VII. Procompetitive Benefits

Finally, it is worth noting that parties should highlight the procompetitive benefits generated by transactions involving investments in nascent or growing companies. Larger, more established companies can offer smaller players the capital and network needed to develop or scale up. Many emerging technologies and start-ups rely on the prospect of future capital investment to achieve their strategy or exit plan. Over-enforcement in this space may reduce innovation if start-ups believe they are unlikely to find an investor willing to take on the antitrust scrutiny that will accompany the acquisition of, or investment in, a potential or nascent competitor.

VIII. Conclusion

The increased focus on acquisitions of potential or nascent competitors suggests that parties can expect greater scrutiny when acquiring start-ups, growing companies, or other potential entrants. Recent challenges to those types of acquisitions also provide valuable insight into evidence that the U.S. antitrust agencies may use to support a challenge, including the transaction's value, contemporaneous strategy and deal documents, customers' views, evidence of a lack of competition, and the acquirer's market power. Involving counsel early in deal analysis can assist parties in assessing the risk that a transaction may be challenged and prepare advocacy to explain why the deal may not be a killer acquisition.

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39 *See Illumina* Complaint, *supra* note 18.

40 *Id.* ¶¶ 1, 80–81. Similarly, the European Commission is focused on companies that may become dominant, as evidenced by its recently initiated assessment into a new competition tool that would remedy structural problems in markets that are "tipping" towards one player. Press Release, Eur. Comm'n, Antitrust: Commission Consults Stakeholders on a Possible New Competition Tool (June 2, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_977. *See also* Lewis Crofts, *"Tipping" Tech Markets Warrant New Antitrust Tool, Vestager Says*, MLEX (Apr. 24, 2020), https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1181666&siteid=190&rdir=1.

Antitrust in the United States and the European Union – A Comparative Analysis

Morten C. Skroejer[1]

I. Introduction

Technological innovation has had a profound impact on the way we live, communicate, and work. The dawn of the Fourth Industrial Revolution has opened immense opportunities but also created significant challenges.[2] Questions about cybersecurity, disinformation, and privacy, for example, vex businesses, governments, and private citizens alike. A different set of issues are related to the sheer size, reach, and power of the companies that comprise Big Tech and how to deal with them.

Being a large corporation, and being in the vanguard of a far-reaching and ever-expanding industry, is, by itself, neither good nor bad, but it will often lead to increased scrutiny. In some instances, this might result in attempts to either block certain companies from entering a market, or, alternatively, make it more difficult for them to operate in it. In 2015, for example, President Obama alluded to this when he accused the European Union of digital protectionism in its investigations of American tech companies— "[i]n defense of Google and Facebook, sometimes the European response … is more commercially driven than anything else."[3] But to chalk scrutiny of large tech companies and their business practices up to mere protectionism would miss the mark. The many benefits of modern technology notwithstanding, there are powerful economic factors within digital markets that limit competition and stifle innovation, and as a result can hurt consumers.[4]

Concerns about Big Tech are also not confined to Europe. In fact, there seems to be a growing consensus in both the United States and the European Union of the need to, at a minimum, explore ways to check certain actions and the broader influence of the largest tech companies.[5]

To be sure, there are differences in how Big Tech is viewed in the United States and Europe. At a basic level, many Europeans are viscerally suspicious of the market and the power of big corporations. This clearly also applies to the tech sector, as evidenced by a poll conducted in the run-up to the European Parliament elections last year. Fully 64 percent of voters thought

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[2] Klaus Schwab, *The Fourth Industrial Revolution: What it means, and how to respond*, WORLD ECONOMIC FORUM, Jan. 14, 2016, https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/.

[3] Kara Swisher, *White House. Red Chair. Obama Meets Swisher*, VOX, Feb. 15, 2015, https://vox.com/2015/2/15/11559056/white-house-red-chair-obama-meets-swisher/.

[4] Unlocking Digital Competition, Report of the Digital Competition Expert Panel (2019), at 17 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

[5] *See* Press Release, U.S. Dep't of Justice, Justice Department Reviewing the Practices of the Market-Leading Online Platforms (Jul. 23, 2019), https://justice.gov/opa/pr/justice-department-reviewing-practice-market-leading-online-platforms; *see also* Adam Satariano & Martina Stevis-Gridneff, *Silicon Valley's Biggest Foe Is Getting Even Tougher*, N.Y.TIMES, Nov. 19, 2019, Sec. B, Page 1; *see also* Jack Nicas & David McCabe, *Tech Inquiry by Congress Widens Net*, N.Y. TIMES, Sep. 21, 2019, Sec. B, Page 1.

that the European Union had been too lax in its regulation of U.S. tech giants.[6] By contrast, most Americans believe in the power of the market to self-correct and are warier of government overreach. Whether consciously or not, it is hardly a stretch to assume that these different attitudes inform thinking about competition policy and enforcement decisions on both sides of the Atlantic.

The focus of this article is on single-firm conduct, and the transatlantic divide over how best to use antitrust and competition policy to navigate this new and exciting world. Section 2 looks at what makes Big Tech unique from an antitrust perspective. Section 3 provides an overview of U.S. and EU competition law as it relates to single-firm conduct, as well as their respective institutional structures. Section 4 assumes a more prospective posture, looking at possible future trends and what steps Big Tech can take to protect its own interests in this environment.

II. What makes Big Tech unique?

Digital markets present a number of unique features that are relevant to any type of antitrust investigation. This section will highlight a few, although by no means an exhaustive list, of those characteristics.

First, the sheer size and reach of Big Tech. Amazon, Apple, Facebook, Google, and Microsoft, have a combined market capitalization of $5.1 trillion.[7] In January of 2020, Apple alone had a market cap of $1.3 trillion, which according to data from the World Bank exceeded the GDP of all but the 14 wealthiest countries in the world.[8] Facebook has 2.5 billion active monthly users worldwide.[9] Google operates the most popular search engine, which processes over 3.5 billion searches every day,[10] and has a global market share of over 70 percent.[11] In addition, it licenses Android, which has the largest market share among mobile operating systems globally.[12] Apple popularized the smartphone, and it has dominated the global tablet market since the first version of the iPad was released in 2010.[13] And while Amazon may not have an overwhelming share of any one market, its footprint is felt almost everywhere.[14] By itself, size may not be a

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[6] Jean-Daniel Levy & Pierre-Hadrien Bartoli, Copyrights & Tech Giants, Harris Interactive 5 (Mar. 2019),https://www.akm.at/wp-content/uploads/2019/03/Harris-presentation-Copyright-Tech-Giants-in-Europe.pdf.

[7] As of market close on April 20, 2020.

[8] *GDP (current US$)*, THE WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD (last visited Apr. 20, 2020.)

[9] *Number of Monthly Active Facebook Users Worldwide as of 1st Quarter 2020*, Statista, https://statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide (last visited Apr. 22, 2020).

[10] *Google Search Statistics*, Internet Live Stats, https://internetlivestats.com/google-search-statistics (last visited Apr. 22, 2020).

[11] *Top 10 Search Engines In The World*, Reliablesoft.net, https://reliablesoft.net/top-10-search-engines-in-the-world (last visited Apr. 22.2020).

[12] As of December 2019, Android had a market share of 74 pct. in the market for mobile operating systems. *See Mobile operating systems' market share worldwide from January 2012 to December 2019,* STATISTA, https://statista.com/statistics/272698/global-market-share-held-by-mobile-operating=-systems-since-2009/ (last visited Apr. 22, 2020).

[13] *Apple's iPad market share of global tablet shipments from 1st quarter 2012 to 4th quarter* 2019, STATISTA, https://statista.com/statistics/268711/global-market-share-of-the-apple-ipad-since-2010 (last visited Apr. 22. 2020).

[14] Matt Day & Jackie Gu, *The Enormous Numbers Behind Amazon's Market Reach*, BLOOMBERG, Mar. 27, 2019 https://www.bloomberg.com/graphics/2019-amazon-reach-across-markets/.

concern, although it is an area where U.S. and EU competition law differ, but it does raise the specter of potentially anticompetitive conduct.

Second, a proper definition of the relevant market is usually the *sine qua non* to prevail on any antitrust claim. It is, after all, difficult to prove abuse of dominance without showing that the company in question does, in fact, have a dominant position in whichever market it operates. As traditionally understood, the definitions of the relevant *product* market in the United States and the European Union are essentially the same. The U.S. Supreme Court has applied a "reasonable interchangeability of use" test,[15] whereas the European Court of Justice has held that there must be "a sufficient degree of interchangeability between all the products forming part of the same market…."[16] The U.S. Department of Justice and the Federal Trade Commission have elaborated on the *Brown Shoe* test in their Horizontal Merger Guidelines, where they use a "hypothetical monopolist" test to define the relevant market.[17] Specifically, the test requires that the "hypothetical monopolist" likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market.[18]

The challenge with applying the "SSNIP" test to digital markets is fairly obvious, though. If a customer is paying $0 for a service, as is the case with Google's search engine, for instance, a price increase of 3 percent or 5 percent is still zero. This does not necessarily mean that the service is "free," however. While it might be possible to opt-out of certain data collection practices when using a search engine or watching something on YouTube, the customer will still often have to "pay" by watching ads, for example.[19] And it is also quite normal for customers to have no choice but to furnish the service provider with extensive data to use a platform. When shopping online, it is rarely, if ever, possible to decline to provide a name, contact, and payment information. And one of the consequences of joining a social network is that the user will need to divulge a substantial amount of personal information to connect with other users, who do the same.

The above notwithstanding, some commentators argue that the current framework is more than capable of dealing with these challenges on a case-by-case basis.[20] Others contend that the digital world has unique attributes, which render traditional market definition tools more or less obsolete.[21] Because of this, less focus should be devoted to the market definition part of the analysis. Instead, more weight ought to be given to theories of harm and the identification of anti-competitive strategies.[22]

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[15] *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

[16] Case 85/76, *Hoffman-La Roche & Co. v. Comm'n*, 1979 E.C.R. 461 ¶ 28.

[17] U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines, § 4 (2010), http://ftc.gov/os/2010/08/100819hmg.pdf.

[18] *Id*.

[19] *Big Data: Bringing Competition Policy to the Digital Era,* OECD, at 25, Oct. 27, 2016, https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf.

[20] *Common Issues Relating to the Digital Economy and Competition*, Report of the International Developments and Comments Task Force on Positions Expressed by the ABA Antitrust Law Section between 2017 and 2019, at 5, Feb. 27, 2020, https://ourcuriousamalgam.com/wp-content/uploads/SAL-Report-on-Common-Issues-Relating-to-the-Digital-Economy-and-Competition_Final_4.16.2020.pdf.

[21] *See* Jacques Crèmer et al., *Competition policy for the digital era*, EUROPEAN UNION, 2019, at 46 https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

[22] *Id*.

Third, *The Economist*, in a frequently cited article, has argued that (big) data has replaced oil as the world's most valuable resource, and that this calls for a fundamentally new antitrust approach to Big Tech.[23] Like oil, data clearly is a source of power for those who have the means and the ability to process it. But there are also substantial differences between them, and the comparison might therefore not be as apt as it might seem at first blush. First, the value of data is dependent on context, and the type of knowledge that can be extracted from it.[24] Second, some data has limited scope, can go stale quickly, or see its value decline over time, whereas other types of data can be quite durable, such as a name, gender, and date of birth of a person.[25]

III. An overview of U.S. and EU competition law

The antitrust laws of the United States and the European Union share many similarities. Their overarching goal is to maintain competitive markets, and the language employed by competition authorities and courts in both jurisdictions is similar.[26] But there are distinct differences, which sometimes leads to different outcomes in identical cases. The following contains an outline of these differences.

As mentioned, the basic structures of the regulatory frameworks are fairly similar. Section 1 of the U.S. Sherman Act of 1890 prohibits anti-competitive concerted action; Article 101 of the Treaty on the Functioning of the European Union (TFEU)[27] likewise prohibits anti-competitive concerted practices.[28] And Section 7 of the U.S. Clayton Act governs mergers in much the same way as the Merger Regulation[29] does in the European Union.[30]

Of greater interest in this context, is Section 2 of the Sherman Act and Article 102 TFEU, and while there are some similarities between them, they are quite different. The wording of Section 2 is vague: "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire … to monopolize any part of the trade or commerce … shall be punished…." [31]Section 2, in other words, prohibits attempts to *increase* market power, if it is done through anticompetitive conduct. By contrast, Article 102 is concerned with companies that *abuse* their position in the market, explicitly prohibiting "[a]ny abuse by one or more undertakings of a dominant position within the internal market or a substantial part of it…."[32] In addition, it provides a non-exhaustive list of what such abuse might look like, including "directly or indirectly imposing unfair purchase

23 *The world's most valuable resource is no longer oil, but data*, THE ECONOMIST, May 6th, 2017 edition https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data.

24 *Competition Law and Data*, Autoritè de la concurrence & Bundeskartellamt, May 10, 2016, at 42 https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf;jsessionid=24E51800C94A994A3A310F82E42CD35A.1_cid362?__blob=publicationFile&v=2.

25 *Id*. at 40.

26 DANIEL J. GIFFORD & ROBERT T. KUDRLE, THE ATLANTIC DIVIDE IN ANTITRUST: AN EXAMINATION OF US AND EU COMPETITION POLICY 1 (2015).

27 Consolidated Version of the Treaty on the Functioning of the European Union, O.J. 2008/C115/88-89.

28 GIFFORD & KUDRLE, *supra* note 25, at 2.

29 Council Regulation No. 139/2004, 2004 O.J. (L24) 1.

30 GIFFORD & KUDRLE, *supra* note 25, at 2.

31 15 U.S.C. § 2 (1997).

32 *Supra* note 26.

or selling prices or other unfair trading conditions," and "limiting production, markets or technical developments to the prejudice of consumers." Unlike Section 2 of the Sherman Act, possessing or strengthening a dominant position would seem to fall outside the scope of Article 102.

At the time of its enactment, the goal of the Sherman Act was to protect small businesses from the inappropriate actions of larger companies.[33] But the way it has been interpreted by the courts has changed over time. From 1890 until around 1974, American antitrust law cycled through numerous iterations without settling on any overriding policy or enforcement goal. That all changed in the mid-1970s with the so-called "antitrust revolution," when a consensus formed around efficiency, grounded in microeconomic analysis, as the sole goal of the antitrust laws.[34]

Due to the devastation wrought by the Second World War, as well as the subsequent revival of the German economy, European thinking about economic issues at the time of the formation of the European Coal and Steel Community (an early precursor to today's European Union) was markedly different. Because of the dominance of the *Freiburg School*, and its belief that concentrated economic power inevitably leads to concentrated political power and a breakdown of liberal society, the focus was on allowing the state to play a substantial role in defining the rules of competition and their enforcement.[35] As a result, the overriding goal of competition policy in Europe was not efficiency so much as the economic integration of its own internal market.[36] Like its American counterpart, EU competition policy has evolved since the 1950s. But unlike in the United States, efficiency and consumer welfare are only two of a multitude of goals pursued in the European Union. They also include, but are not limited to, promotion of economic freedom and fairness toward other market participants.

This has led some U.S. practitioners and politicians to accuse the European Union of using its competition policy for protectionist ends. Historically, the criticism seems to be the result of a few high-profile merger cases, like the GE/Honeywell decision in 2001, and more recently because of a perceived bias toward large U.S. tech companies. While it would be foolhardy to suggest that concerns other than those strictly related to competition never have played a role, a recent study does not support the broader claim.[37] Looking at over 5,000 cases over a 25-year period, a group of scholars found no evidence that the EU Commission was more likely to intervene where a non-EU or U.S.-based company was involved; in fact, if anything, the opposite was true. To be fair, the study was merger-focused. But, as the authors surmise, it would be fairly odd for an enforcement agency to engage in blatantly protectionist practices in one area but not in others.

As far as single-firm dominance is concerned, this dichotomy in competition policy goals has led to significantly different results. In the United States, a minimum market share of between 70 percent and 75 percent is usually required for a court to find dominance. And a market share

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33 *Id*. at 4.

34 *Id*. at 7.

35 *Id*. at 9.

36 *Id*. at 13.

37 *See* Anu Bradford, Robert Jackson, Jr., & Robert Zytnick, *Does the European Union Use Its Antitrust Power for Protectionism?*, PROMARKET , Apr. 3, 2018 https://promarket.org/european-union-use-antitrust-power-protectionism/.

of 50 percent or less is almost always insufficient.[38] By contrast, the usual threshold in the EU is 40-50 percent.[39] And the European Court of Justice has held that even though there is nothing inherently suspect about holding a dominant position, "the [dominant] undertaking…has a special responsibility not to allow its conduct to impair genuine undistorted competition on the Common Market."[40] No such obligation exists under U.S. law.[41]

When it comes to the role of economic analysis in enforcement decisions there has been some convergence between the United States and the European Union. Over the last couple of decades, the EU Commission has become more reliant on economics as an integral part of its investigations.[42] But while the U.S. antitrust "revolution" was heavily influenced by the *Chicago School*, and its only focus on efficiency, the market for those ideas has always been limited in the European Union.[43]

As alluded to earlier, the notion that it is possible to draw a distinction between a clearly defined "pure" competition policy governed solely by economics and an "impure" one that is tainted by politics is wrong, however. While economics is an integral part of any serious antitrust analysis, it is hardly an exact science—economic experts have been known to vociferously disagree from time to time—and competition policy, moreover, cannot be viewed in a vacuum. As any public policy, by necessity, it must reflect the political choices of decision makers.[44]

Finally, the different institutional structures in the United States and European Union bear mentioning.

It is said that the American antitrust system is more insulated from political pressures than many of its counterparts around the world.[45] The weight given to economic factors in stateside antitrust analysis certainly lends some credence to this argument. As does the important role of private litigation in the enforcement of the antitrust laws.[46] That is not to say that antitrust enforcement is walled off from political influences, however. The president, after all, nominates Department of Justice leadership and the commissioners of the Federal Trade Commission, who ultimately decide whether to initiate investigations and pursue violations. Moreover, there have been instances where high-profile politicians have weighed in publicly in favor of or against proposed mergers, for example. In 2016, then-candidate Trump vowed to block the AT&T/Time Warner merger if he was elected.[47] After he took office, the DOJ went to court to do just that.

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38 Filippo Maria Lancieri, *Digital protectionism? Antitrust, Data Protection, and the EU/US Transatlantic Rift*, Journal of Antitrust Enforcement, May 10, 2018, 7, 27-53, at 34 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3075204.

39 GIFFORD & KUDRLE, *supra* note 25, at 10.

40 *NV Nederlandsche Banden-Industrie-Michelin v. Comm'n*, 322/81, EU:C:1983:313 ¶ 57.

41 James Keyte, *Why the Atlantic Divide on Monopoly/Dominance Law and Enforcement Is So Difficult to Bridge*, ANTITRUST, Fall 2018, at 116.

42 *Id.* at 113.

43 *Id.* at 115.

44 *See e.g.*, Ariel Ezrachi, *Sponge*, Journal of Antitrust Enforcement, 2017, 5, 49-75 https://academic.oup.com/antitrust/article/5/1/49/2525569.

45 GIFFORD & KUDRLE, *supra* note 25, at 17.

46 *Id.* at 18.

47 Steven Overly & John Hendel, *With AT&T-Time Warner ruling, courts again thwarts Trump*, POLITICO, Jun. 12, 2018 https://politico.com/story/2018/06/12/att-time-warner-ruling-trump-623211/.

Whether direct or indirect pressure from the White House played a role in the Department's decision to bring that case is unclear, but it is noteworthy that the judge found that "the DOJ had failed to provide sufficient evidence to bolster any of the reasons it provided for bringing the case."[48]

The institutional setup in the EU is different and more complex. More importantly, some have argued that, because of this, the Commission may be more susceptible to political influence.[49] In one sense, this is undoubtedly correct. The Commission is not bashful about the fact that it sees itself as an institution whose job is to uphold and promote the political values and principles that undergird the European Union as a whole. But it is also adamant that political considerations play no role in individual enforcement decisions.[50] Put differently, the question of whether to pursue an investigation will be made in light of the overall political priorities of the European Union as the Commission sees them. But that is not unique to the European Union. Rather, it is similar to the type of prosecutorial discretion that all enforcement agencies employ every day, and with which U.S. lawyers are quite familiar. When it comes to specific enforcement decisions, on the other hand, the Commission is keenly aware that its decisions must be able to pass legal muster with the courts. And because of that, it is scrupulous about keeping this part of the decision-making process apolitical.

Some commentators have also raised concerns about due process issues in the European Union because of the Commission's, from a U.S. perspective, unusual structure in competition cases.[51] There is no question that the Commission's powers differ from those of the DOJ and the FTC. But whether those differences raise due process concerns is a different matter. The U.S. Supreme Court has held that "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss'…."[52] The imposition of a substantial fine would certainly qualify as a "grievous loss," but what are the concerns more specifically?

The objections seem to center around issues related to 1) the combination of investigatory, prosecutorial, and adjudicatory functions in the same decision-making body; 2) the absence of a hearing before the actual decision maker; and 3) that decisions are made by the College of Commissioners, which is comprised of 27 political appointees.[53] It also seems to rankle that the Commission can impose hefty fines unilaterally.[54]

Article 41 of the Charter of Fundamental Rights of the European Union provides that "[e]very person has a right to have [their] affairs handled impartially and within a reasonable

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48 *Id*.

49 GIFFORD & KUDRLE, *supra* note 25, at 17.

50 Margrethe Vestager, *The values of competition policy*, keynote at CEPS corporate breakfast – "One year in office," (Oct. 13, 2015) https://wayback.archive-it.org/12090/20191129202939/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/values-competition-policy_en.

51 Ian S. Forrester, *Due process in EC competition cases: A distinguished institution with flawed procedures*, 34 EUROPEAN L. R., 817-843, Dec. 2009 https://www.biicl.org/files/5749_forrester_25-06-11_biicl_1.pdf.

52 *Goldberg v. Kelly*, 397 U.S. 254, 262-263 (1970) (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

53 Forrester, *supra* note 48, at 822-823.

54 Keyte, *supra* note 38, at 116.

time."[55] This includes the right to be heard before an adverse decision is taken, the right to confront the evidence and arguments that the Commission relies on to make a decision, and an obligation for the Commission "to give reasons for its decisions."[56] In addition, the Commission has put in place a number of procedural safeguards. Among them are a Hearing Officer, an independent institution within the Commission, whose role it is to secure the impartiality and objectivity in competition proceedings.[57]

There is no question that the EU's institutional structure, where the Commission combines the roles of investigator, prosecutor, and adjudicator in competition cases, at a minimum, can give rise to the *appearance* of a conflict. After all, it is not unreasonable to think that an agency that decides to investigate something, and expends substantial resources on that effort, is more likely to reach an ultimate decision that confirms its initial suspicions.[58] Any concerns about potential confirmation bias on the part of enforcement agencies are not specific to the EU, though. The commissioners of the FTC, for example, at one point went 20 years without dismissing a single administrative complaint that they had previously authorized.[59]

The counterargument is that similar-type administrative enforcement systems are fairly common in the civil law systems that predominate in the vast majority of the EU's Member States, and in practice rarely give rise to due process concerns. It is also worth keeping in mind that an important corollary to this setup is that there is a right of appeal to the EU courts. And while, from a company perspective, it clearly is preferable not to have to deal with an investigation or adverse decision, the Commission is, as mentioned, acutely aware of the need for its decisions to withstand judicial scrutiny.

This is also one of the reasons why there are a number of checks built into the system. These include the active participation of the Commission's own independent Legal Service, as well as consultations with an Advisory Committee made up of representatives from the competition authorities of each of the Member States before making decisions in an individual case.[60] And while enforcement decisions need formal sign-off from the entire Commission, it is very rare for individual commissioners, let alone the College as a whole, to weigh in on or try to influence the outcome in specific cases.

As to the Commission's power to unilaterally impose fines, which is a huge departure from what the American enforcement agencies have the authority to do, it is worth noting that this is an area where the level of judicial review by the European courts is at its most intense. As far as the substance of a case, the Commission enjoys some discretion in how it weighs the facts and

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55 Charter of Fundamental Rights of the European Union, O.J. 2000/364/01.

56 *Id*. Article 41(2).

57 Decision of the President of the European Commission on the function and terms of reference of the hearing officer in certain competition proceedings, O.J. 2011/L275/29.

58 Douglas H. Ginsburg & Taylor M. Owing, *Due Process in Competition Proceedings*, COMPETITION LAW INTERNATIONAL, Vol. 11, No. 1, 39-49, 46 https://webcache.googleusercontent.com/search?q=cache:zLSmu6NZfhkJ:https://www.ibanet.org/Document/Default.aspx%3FDocumentUid%3DC45C4020-65E8-48B8-8336-7E67ADC3480B+&cd=1&hl=en&ct=clnk&gl=us.

59 *Id*.

60 *See* Article 14(1) of Council Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1.

interprets the relevant law. As a result, the courts will be reluctant to overturn the Commission's assessment unless it is clearly defective.[61] The role of the courts is to review the legality of the Commission's decisions, not to become a competing competition authority.[62] When it comes to reviewing decisions where the Commission has imposed a penalty, on the other hand, the court's jurisdiction is "unlimited."[63] In other words, where penalties are involved, the court will provide a check not just on the legality of the decision, but on the merits of the fine, as well.

IV. Looking to the future

Some have speculated about the possibility of greater convergence between the U.S. and EU antitrust enforcement systems.[64] One of the advantages would be that it presumably would lead to more predictable outcomes in cases that are investigated in both jurisdictions. Would it, in other words, help avoid a repeat of the markedly different results in the Google cases and GE/Honeywell?

As an initial matter, it is worth noting that while this article has focused on differences between the two jurisdictions, the chasm between them often appears greater on paper than it is in practice. The DOJ, FTC and Directorate-General for Competition communicate frequently about cases of mutual interest, and the majority of these investigations usually have very similar outcomes.

Differences remain, though, and for a number of reasons a more profound convergence seems doubtful. First, it would require a fairly fundamental re-think of the current framework in either or both jurisdictions. Absent a congressionally mandated re-write of the antitrust laws in the United States, any changes would have to be made by the federal courts. Even under the most favorable circumstances that would be an arduous endeavor which would be unlikely to yield quick results. And this assumes a desire to change current law in some meaningful way, which, at present, does not seem to exist. The same is true for the European Union. Having significantly impacted competition laws in such disparate places as China, India, and a number of Latin American countries, some argue that the European Union has the most dominant competition law system in the world today.[65] Whether that is true, it definitely is a force to be reckoned with, and it is not readily apparent why they would want to change that. Second, another complicating factor is that the broader transatlantic relationship is at one of its lowest points in recent history. Over the last decade, there has been a marked shift in how many Americans view their role in the world, and European trust in the global leadership of the United States has suffered substantial, if not irreparable, harm as a result.[66] Against this backdrop, it seems unlikely that now would be the moment for increased convergence and cooperation in the antitrust space.

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[61] *See* Josè Carlos Laguna de Paz, *Judicial Review in European Competition Law* 10 https://law.ox.ac.uk/sites/files/oxlaw/judicial_review_in_european_competition_law.pdf/.

[62] *Id*. at 19.

[63] *Supra* note 59, Article 31.

[64] *See* Keyte, *supra* note 38, at 118; GIFFORD & KUDRLE, *supra* note 25, at 2.

[65] Anu Bradford et al., *The Global Dominance of European Competition Law Over American Antitrust Law* (2019) https://scholarship.law.columbia.edu/faculty_scholarship/2513/.

[66] Erik Brattberg & David Whineray, *How Europe Views Transatlantic Relations Ahead of the 2020 U.S. Election*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, Feb. 20, 2020 https://carnegieendowment.org/2020/02/20/how-europe-views-transatlantic-relations-ahead-of-2020-u.s.-election-pub-81049.

That is not to say that changes to the current antitrust frameworks in either jurisdiction will not happen. The FTC has created a task force whose job is to monitor tech markets,[67] and the European Union is in the process of reviewing its competition rules as they relate to digital markets.[68] Although not related to competition policy specifically, there also seems to be an emerging appreciation of the benefits of more regulation of the tech industry from some of the major companies themselves.[69] That said, being open to having a conversation is not the same as agreeing to what, if anything, the problem is, let alone what an appropriate solution might be.

In the United States, the DOJ antitrust chief has indicated that the current framework is flexible enough to catch any concerns that are related to the digital economy, and that policing Big Tech should be left to the DOJ and FTC.[70] On Capitol Hill, there are bipartisan voices that have not entirely bought into that conclusion. But whether the political will and bandwidth truly exists to tackle an issue this complicated and controversial in an election year, with everything else that is going on, remains to be seen. The bottom line, though, is that any major substantive changes to how U.S. antitrust is enforced against Big Tech, at least in the near term, does not seem likely.

The situation in the European Union is different. And there are at least three different reasons why. First, as discussed, there is greater distrust in Europe in the ability of markets to self-correct than in the United States, and, therefore, greater acceptance of the need for the state to regulate how markets work. Second, the overall competition policy framework is more flexible than in the United States and therefore provides more avenues for the Commission to act. Third, the European Union, under the leadership of the new Commission, is looking to bolster its own role in the digital economy.[71] Because of this, the Commission has a fairly strong incentive to do something.

To this end, the Commission on June 2, 2020, announced some initial steps following an internal review. In addition to the continued vigorous enforcement of its existing antitrust arsenal in Articles 101 and 102 TFEU, the Commission launched parallel public consultations on two potentially new ways of regulating the digital economy. The first prong could lead to the introduction of some type of ex ante regulation of digital platforms. The second prong would be "a possible new competition tool" that would give the Commission the authority to address structural competition problems across markets without finding fault with any one company or group of companies.[72]

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[67] Press Release, Fed. Trade Comm'n, FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets, Feb. 26, 2019, https://ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology/.

[68] *See e.g.,* Crèmer et al., *supra* note 20.

[69] *See e.g.*, Mark Zuckerberg, *Big Tech needs more regulation*, FINANCIAL TIMES, Feb. 16, 2020, https://www.ft.com/content/602ec7ec-4f18-11ea-95a0-43d18ec715f5; Sundar Pichai, *Why Google thinks we need to regulate AI*, FINANCIAL TIMES, Jan. 19, 2020, https://www.ft.com/content/3467659a-386d-11ea-ac3c-f68c10993b04.

[70] Steve Lohr, *What, if Anything, Should Be Done to Rein in Big Tech?*, N.Y. TIMES, Nov. 11, 2019, https://nytimes.com/2019/11/11/business/dealbook/makan-delrahim-kevin-systrom-bill-gates-regulation-technology.html/.

[71] *See* Commission President-elect von der Leyen's Mission Letter to Competition Commissioner-designate Vestagerhttps://ec.europa.eu/commission/sites/beta-political/files/mission-letter-margrethe-vestager_2019_en.pdf/.

[72] Commission press release of June 2, 2020: Antitrust: Commission consults stakeholders on a possible new competition tool https://ec.europa.eu/commission/presscorner/detail/en/ip_20_977/.

It is not entirely clear what the exact contours of the new ex ante regulation would be, but it could take the form of a list of general dos and don'ts for gatekeeper companies in the digital sector. The scope of the new competition tool is even more uncertain. So, for both sets of possible new rules it is fair to say that at this point they raise more questions than they answer. Responses to the consultations are due in early September, and the tentative goal is to present a legislative proposal by the end of 2020.

Even assuming this timeline holds, any substantive changes are a ways off and will likely happen incrementally, if at all. Like United States, the European Union is an administrative colossus that is not geared toward revolutionary change and tends to move at a glacial pace. And one thing that will not change is the mix of factors that have guided EU competition policy so far, as well as the Commission's singular role in their enforcement.

As it looks at updating its rulebook, the Commission would be well-advised to guard against the temptation to employ antitrust to try to solve problems that have little, if anything, to do with competition. One example is the Facebook decision by Germany's *Bundeskartellamt*, which found that a violation by a dominant firm of the EU's General Data Protection Regulation by itself constituted abuse of a dominant position under German competition law.[73] It is one thing to have a system that allows some degree of flexibility in the factors that an enforcement agency can consider as part of its investigation, but if it ventures too far afield, any resulting decision can easily be seen as arbitrary, and therefore will carry less weight and could lead to a loss of legitimacy.

Where does this leave Big Tech? In the short term, the coronavirus pandemic has afforded the tech giants an opportunity to, in some ways, reset the clock. They have provided valuable services to both citizens and governments, and the EU's Internal Market Commissioner has been effusive in his praise in return.[74] That said, it is unlikely to materially change the underlying concerns that led to the launch of probes in the first place. And in a post-Covid world, a number of those concerns may actually be exacerbated.[75]

From the perspective of companies and their advisors, there seems to be, more than the content of any one rule, a desire for legal certainty and predictability. There is nothing wrong with that, of course, but the question is whether it is attainable.[76] No one wants to see antitrust, or any other area of law, enforced arbitrarily. But it is also impossible to fashion a rulebook with such precision that it captures everything. Some degree of flexibility in how rules are written and enforced therefore seems both necessary and appropriate, especially for an industry whose

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[73] *See Bundeskartellamt prohibits Facebook from combining user data from different sources* https://bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html/.

[74] Laura Kayali, *EU industry chief: Coronavirus crisis could be turning point for Big Tech*, POLITICO, Mar. 25, 2020 https://www.politico.eu/article/eu-industry-chief-coronavirus-crisis-could-be-turning-point-for-big-tech-google-netflix-facebook/.

[75] *See e.g.,* Steven Overly, Leah Nylen & Gabby Orr, *Why Silicon Valley's virus-era D.C. glow may not last*, POLITICO, Mar. 25, 2020 https://www.politico.com/news/2020/03/25/silicon-valley-virus-era-dc-glow-147178; Javier Espinoza, *EU restarts work on Regulating Big Tech*, FINANCIAL TIMES, Apr. 27, 2020 https://www.ft.com/content/1711b919-7699-4f5c-8881-113ac107601b.

[76] Ezrachi, *supra* note 41, at 67.

business model is to innovate and exploit—in the best sense of the word—rapid changes in the broader economy. The nature of digital markets, in other words, reinforces the need for enforcement agencies, and the rules they apply, to be at least somewhat nimble.

Business decisions are often about mitigating and managing risk with imperfect information, and this is no different. And a lack of complete legal certainty hardly means that it is impossible to develop a pretty good sense of where enforcement agencies are likely to come down in individual cases. While a dearth of case law in some areas can be a complicating factor, the EU Commission, for example, almost always relies on traditional antitrust principles. That is not to say that surprises never happen. And where an agency treads new legal ground, the interests of fairness, if nothing else, would seem to dictate a lighter touch. It is one thing to fine a corporation that knew or should have known that its actions were running afoul of well-established law. But it is another to fault a company for breaking a rule that they had no reasonable way of knowing existed or could be applied to them.

With all that in mind, what can Big Tech companies and their advisors do to avoid future issues or, failing that, ameliorate those that do arise?

First, look at company actions through the eyes of enforcement agencies, and do not be shy about seeking informal guidance. Not only can this help anticipate potential problems and ward them off before they snowball into full-fledged investigations, it can also provide a chance to educate agency personnel about misunderstandings or misconceptions about the tech industry or what a particular company is doing or planning to do. To put a finer point on it: build trust and keep the lines of communication open. Second, if a more conciliatory approach fails, companies should always be prepared to vigorously defend their decisions and business model. The agencies charged with enforcing the antitrust rules in the United States and the European Union are populated by smart and highly capable people, but from time to time they, like everybody else, get things wrong, just as there are situations where reasonable people simply disagree. Third, do not suspect some unseemly political agenda or bias against U.S. tech companies behind the European Commission's actions. It might strike a chord with some in Silicon Valley and Washington, but, as mentioned earlier, the available data does not back it up, and it is unlikely to win much favor in Brussels. Finally, while the United States and the European Union share many things in common, there are also profound differences in legal approach and culture. Being mindful and respectful of those differences is likely to help mitigate potential conflicts.

HiQ v. LinkedIn: Antitrust Issues with Barring Rivals from Web Scraping

Kenneth S. Reinker & William Segal[1]

Many websites have terms and conditions that purport to restrict who can access the site and how they can use the data, and sometimes a website will seek to prevent rivals from scraping data from its webpages. For example, Amazon and Wal-Mart provide information on product prices, and rivals might seek to scrape data from their webpages on pricing, product availability, or product features. Recent decisions in litigation between hiQ Labs, Inc., and LinkedIn illustrate the antitrust issues that can arise when an allegedly dominant website seeks to prevent its rivals from scraping generally available data.[2]

I. Background

LinkedIn is a professional social media website founded in 2002.[3] It is "the world's largest professional network with over 690 million users in more than 200 countries and territories worldwide."[4] LinkedIn users post their resumes and can connect with other users. Users control what parts of their profiles are publicly available to those not logged in.

hiQ is a data science company founded in 2012 that sells analyses of the public profiles of LinkedIn users.[5] hiQ scrapes information from LinkedIn's website using automated bots,[6] and it does not pay LinkedIn or its users for the data. hiQ claims that LinkedIn was aware of its conduct for years and that LinkedIn participated in hiQ-sponsored conferences where hiQ's data collection methods were discussed.[7]

LinkedIn has developed its own business to sell analyses of LinkedIn user data. In 2015, LinkedIn's CEO said that it planned to offer products analyzing LinkedIn profiles.[8] In 2017, LinkedIn's CEO again said that it planned to leverage user data.[9] In September 2018, LinkedIn launched "Talent Insights," which sells analysis of LinkedIn user data.[10]

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1 Kenneth S. Reinker is partner and William Segal is an associate in the antitrust practice at Cleary Gottlieb. This article reflects their own views and does not necessarily reflect the view of the firm or any of its clients.

2 *See hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985 (9th Cir. 2019); *hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F. Supp. 3d 1099 (N.D. Cal. 2017). LinkedIn has petitioned the Supreme Court to review this decision, although not on antitrust-related grounds. As of July 2020, that petition was pending.

3 *About LinkedIn*, LinkedIn Corp., https://about.linkedin.com/.

4 *Id.*

5 *hiQ Labs*, 938 F.3d at 991.

6 Scraping is "extracting data from a website and copying it into a structured format, allowing for data manipulation or analysis" and "is typically done by a web robot or 'bot.'" *hiQ Labs*, 273 F. Supp. 3d at 991 n.3. A bot is "an application that performs automated tasks such as retrieving and analyzing information." *Id*. at 990 n.2.

7 *Id.*

8 *LinkedIn Corp. FQ4 2014 Earnings Call Transcript* at 13, S&P Global Market Intelligence (Feb. 5, 2015).

9 *hiQ Labs*, 938 F.3d at 991-92.

10 Eric Owski, *LinkedIn Talent Insights Gives You the Real-Time, Accurate Talent Data You Need*, LINKEDIN: TALENT BLOG, Sept. 25, 2018, https://business.linkedin.com/talent-solutions/blog/product-updates/2018/linkedin-talent-insights-now-available.

On May 23, 2017, LinkedIn sent a cease and desist letter to hiQ demanding that hiQ stop scraping its website.[11] LinkedIn asserted that hiQ had violated LinkedIn's User Agreement and that if hiQ continued to access LinkedIn, hiQ would be violating the Computer Fraud and Abuse Act ("CFAA"), the Digital Millennium Copyright Act ("DMCA"), California Penal Code § 502(c), and California common law of trespass.[12] LinkedIn also informed hiQ that LinkedIn was taking steps to detect and block hiQ's scraping.[13]

On June 7, 2017, hiQ sued LinkedIn in federal court in the Northern District of California. It requested a declaration that hiQ was not violating CFAA, DMCA, California Penal Code § 502(c), or the California common law of trespass by scraping LinkedIn's website.[14] hiQ also sought injunctive relief barring LinkedIn from restricting hiQ's access to LinkedIn's website, arguing that it had affirmative rights to access under California unfair competition law, California tort and contract law, and the California Constitution's free speech protection.[15]

The District Court granted hiQ a preliminary injunction. hiQ moved for a preliminary injunction and thus had to establish a likelihood of success on the merits, irreparable harm, that the balance of equities was in its favor, and that the public interest supported an injunction.[16] Under Ninth Circuit precedent, where the balance of hardships is strongly in favor of the moving party, the required showing on likelihood of success is lower and "a preliminary injunction could issue where the likelihood of success is such that 'serious questions going to the merits were raised.'"[17]

On irreparable harm, the District Court found that hiQ would "go out of business" absent a preliminary injunction.[18]

On the balance of hardships, the District Court found that they were strongly in hiQ's favor. While LinkedIn argued that LinkedIn and its users' privacy would suffer from the preliminary injunction, the District Court noted that "LinkedIn has not explained why suddenly it has now chosen to revoke its consent (or at least tolerance) of hiQ's" activities.[19]

On likelihood of success, with the District Court finding that the balance of hardships were strongly in hiQ's favor, the question was whether hiQ had raised serious questions going to the merits. The District Court found hiQ's affirmative access claims under unfair competition law and tortious interference with contract, as well as hiQ's claim that its conduct did not violate CFAA, raised serious questions going to the merits.[20]

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[11] *hiQ Labs*, 273 F. Supp. 3d at 1104.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *See, e.g.*, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

[17] *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

[18] *hiQ Labs*, 273 F. Supp. at 1105.

[19] *Id.* at 1107.

[20] *Id.* at 1118 n.14, 1120. The District Court found that hiQ's promissory estoppel and California constitutional claims did not raise serious questions. *Id.* at 1120.

California's unfair competition law prohibits any "unlawful, unfair or fraudulent business act or practice," Cal. Bus. & Prof. Code § 17200, and encompasses federal antitrust violations as well as "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition."[21] hiQ argued that LinkedIn engaged in unfair competition because it (1) unfairly leveraged its "power in the professional networking market to secure an anticompetitive advantage in another market—the data analytics market" and (2) denied access to an essential facility, namely LinkedIn's website and data.[22]

The District Court found that there were serious questions as to whether LinkedIn was unfairly leveraging its alleged market power for an anticompetitive purpose. The District Court explained that the "Sherman Act prohibits companies from leveraging monopoly power to 'foreclose competition or gain a competitive advantage, or to destroy a competitor'."[23] It found that hiQ "plausibly asserts that LinkedIn enjoys a position as the dominant power in the market of professional networking."[24] It further found that hiQ plausibly alleged that LinkedIn sought to block hiQ's access to LinkedIn to prevent hiQ from competing with LinkedIn's own data analytics.[25] The District Court did not address hiQ's argument that LinkedIn was an essential facility.

The District Court also found that there were serious questions on hiQ's tortious interference with contract claim,[26] holding that the "analysis of the tortious interference claim simply overlaps with the analysis of the unfair competition claim: if LinkedIn acted for an improper anticompetitive purpose, then the tortious interference claim may lie."[27]

With respect to CFAA, the District Court had "serious doubt whether LinkedIn's revocation of permission to access the public portions of its site renders hiQ's access 'without authorization' within the meaning of the CFAA."[28]

On the public interest, the District Court found that it favored hiQ's request for a preliminary injunction because hiQ had "raised serious questions that LinkedIn's behavior may be anticompetitive conduct in violation of California's Unfair Competition Law."[29]

The District Court thus issued the preliminary injunction on August 14, 2017.

The Ninth Circuit upheld the District Court's decision. The Ninth Circuit upheld the preliminary injunction based on hiQ's tortious interference claims. While the Ninth Circuit did not directly address hiQ's unfair competition claim, in the course of addressing LinkedIn's

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21 *Cel-Tech Comm., Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999).

22 *hiQ Labs*, 273 F. Supp. at 1117.

23 *Id.* at 1118 (quoting *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973)).

24 *Id.*

25 *Id.*

26 *Id.* at 1118 n.14.

27 *Id.*

28 *Id.* at 1113.

29 *Id.* at 1120.

defenses to the tortious interference claim, the Ninth Circuit addressed a number of the most important issues for the antitrust analysis. The Ninth Circuit also found that hiQ raised a serious question as to LinkedIn's argument that CFAA precluded hiQ's state law claims.[30]

The Ninth Circuit found that hiQ had shown serious questions going to the merits of its tortious interference claim.[31] It noted that the District Court determined that this claim overlapped with the unfair competition claim, although it did not expressly endorse that view.[32] The Ninth Circuit held that hiQ had "shown a sufficient likelihood of establishing" the elements of a tortious inference claim: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage."[33] However, a legitimate business purpose for the defendant's conduct is an affirmative defense to a tortious interference claim.[34]

The key question was whether LinkedIn had a legitimate business purpose. The Ninth Circuit explained that rather than "specifically challenge hiQ's ability to make out any of these elements," LinkedIn instead argued that it had a legitimate business purpose in preventing hiQ's access.[35] The Ninth Circuit rejected this argument. It explained that the legitimate business purpose defense applied only if the "interests advanced by interference with [a] contract outweigh the societal interest in contractual stability" and if the means used "involve no more than recognized trade practices" and were "within the realm of fair competition."[36] The Ninth Circuit rejected LinkedIn's purported purposes of protecting its investments and protecting user privacy as insufficient. *Id.* It also held that LinkedIn's "proactive technical measures to selectively block hiQ's access to the data on its site are not similar to trade practices heretofore recognized as acceptable justifications for contract interference."[37] It further noted that if "companies like LinkedIn, whose servers hold vast amounts of public data, are permitted selectively to ban only potential competitors from accessing and using that otherwise public data, the result—complete exclusion of the original innovator in aggregating and analyzing the public information—may well be considered unfair competition under California law."[38]

The Ninth Circuit found that hiQ would suffer irreparable harm absent a preliminary injunction as "the survival of its business is threatened" and rejected the argument that hiQ could avoid this irreparable harm by finding alternative data sources.[39] It found that the balance of hardships favored hiQ.[40] Finally, it found that the public interest favored a preliminary injunction, explaining that "giving companies like LinkedIn free rein to decide, on any basis, who can collect

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30 *hiQ Labs*, 938 F.3d at 1004.

31 *Id*. at 999.

32 *Id.* at 998 n.9.

33 *Id.* at 996 (quoting Pac. Gas & Elec. Co., v. Bear Stearns & Co., 50 Cal. 3d 1118, 1126 (1990).

34 *Id.* at 997.

35 *Id*.

36 *Id*.

37 *Id*. at 998.

38 *Id*.

39 *Id*. at 993-94.

40 *Id*. at 995.

and use data—data that the companies do not own, that they otherwise make publicly available to viewers, and that the companies themselves collect and use—risks the possible creation of information monopolies that would disserve the public interest."[41]

Subsequent to the Ninth Circuit's decision, hiQ amended its complaint to add federal antitrust claims in addition to its California unfair competition claims.[42]

LinkedIn has filed a petition for a writ of certiorari. LinkedIn has filed a petition for a writ of certiorari with the Supreme Court challenging the Ninth Circuit's conclusion that LinkedIn could not invoke CFAA to deny hiQ access.[43] hiQ has filed a brief in opposition.[44] As of July 2020, the Supreme Court has not decided whether to take the case.

II. Discussion

The antitrust issue raised by this case is whether and when an alleged monopolist can prevent rivals from accessing public data on its websites. hiQ is not the first litigant to argue that the antitrust laws bar alleged monopolists from denying rivals access to public data.[45]

hiQ's antitrust claim is essentially a refusal to deal claim. The refusal to deal doctrine under U.S. antitrust law reflects a balancing of ex ante and ex post efficiency concerns. On the one hand, if the antitrust laws require successful companies to deal with rivals, that could discourage the investments necessary to become successful in the first place and thus could be inefficient ex ante. U.S. antitrust law views the ability to charge monopoly prices as "an important element of the free-market system" that "attracts 'business acumen' in the first place" and "induces risk taking that produces innovation and economic growth."[46] Thus, U.S. antitrust law generally does not impose a duty to deal on monopolists.[47] On the other hand, a refusal to deal by a monopolist that helps it maintain monopoly power could be inefficient ex post. Thus, in limited circumstances, U.S. antitrust law imposes a duty to deal on a monopolist that (1) discriminates against rivals by refusing to deal with them on the same terms that it deals with non-rivals, (2) previously voluntarily engaged in a course of dealing with the rival or controls an essential facility, and (3) lacks a procompetitive justification for the refusal to deal.[48]

Here, given the procedural posture of the case, the Ninth Circuit and District Court largely assumed that LinkedIn discriminating against hiQ could be anticompetitive conduct. But as the case progresses, each of the refusal to deal elements will be important.

In terms of discrimination against rivals, one key issue could be whether it is discriminatory to treat companies that "scrape" data differently than ordinary users. LinkedIn makes much of its data generally available to its users, and thus one could argue that there is discrimination in preventing companies like hiQ from scraping this generally available information. But an ordinary

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41 *Id.* at 1005.

42 Amended Complaint at 2, *hiQ Labs, Inc., v. LinkedIn Corp.*, No. 3:17-cv-03301-EMC (N.D. Cal. Feb. 14, 2020).

43 Petition for a Writ of Cert., *LinkedIn Corp. v. HiQ Labs, Inc.* (U.S. Mar. 9, 2020) (No. 19-1116).

44 Brief in Opp'n, *LinkedIn Corp. v. HiQ Labs, Inc.* (U.S. June 25, 2020) (No. 19-1116).

45 *See, e.g.*, First Amended Counterclaim, *CraigsList, Inc. v. 3Taps, Inc., et. al*, No. CV-12-03816 CRB (N.D. Cal. Dec. 21, 2012), ECF No. 44. This case was settled without a ruling on the antitrust claims.

46 *Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

47 *See, e.g.*, *id.*; *Pac. Bell Tel. Co. v. Linkline Comm., Inc.*, 555 U.S. 438, 444, 448 (2009).

48 *See, e.g.*, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 588-593 (1985); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973); *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482-83 (1992).

user accesses information by going to individual profiles, accesses far fewer profiles in a day than a bot, and does not copy the information into its own database for other uses. Thus, a policy treating web scraping differently than ordinary users arguably is not discriminatory. In *Aspen Skiing*, the Supreme Court found a duty to deal where the dominant firm refused to sell lift tickets to its rival even at retail as it did to ordinary skiers.[49] Here, LinkedIn could argue that it is not preventing hiQ from gathering data like an ordinary non-rival user. However, if LinkedIn allows web scraping on its website for some purposes but not others, then it could be more difficult for LinkedIn to argue that its policy is non-discriminatory.

With respect to a prior course of voluntary dealing, it appears that LinkedIn knew of hiQ's activities, and the courts suggested that LinkedIn may have consented to them.[50] However, some courts have indicated that the prior course of dealing must also have conveyed a benefit to the monopolist.[51] If the standard is merely that there was a prior course of dealing, LinkedIn seems likely to have a hard time demonstrating that there was not a prior course of dealing. However, if the prior course of dealing must also have conveyed a benefit to LinkedIn, LinkedIn could have a stronger argument. The alleged knowledge, tolerance, or consent by LinkedIn of hiQ's behavior does not necessarily mean that LinkedIn benefited from hiQ's activities. Presumably attempting to preempt this potential argument, hiQ's amended complaint added allegations that hiQ's data analysis help demonstrate to LinkedIn's prospective customers and users that LinkedIn was a valuable professional networking site.[52]

With respect to a procompetitive justification for refusing to deal, the courts so far have rejected LinkedIn's justification of seeking to protect user privacy. The courts questioned LinkedIn's justification because the timing of the refusal to deal coincided with LinkedIn's launching a product that directly competes with hiQ's product. More generally, a privacy-based procompetitive justification is hard to square with making the data generally available.

A duty to deal claim also needs to establish the usual elements of any monopolization claim, including that the defendant is a monopolist and that the conduct helped to obtain or maintain a monopoly.[53] As to the upstream market, the District Court accepted hiQ's proposed market definition and LinkedIn's dominance in the upstream market with limited discussion,[54] but the Ninth Circuit did not rule on either of those issues. As to the downstream "market of data analytics," however, the District Court acknowledged that there were rivals to hiQ that did not rely on scraping data from LinkedIn's site.[55] The irreparable harm analysis did not reject LinkedIn's argument that alternative data sources and business models existed. While the courts held that

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49 *Aspen Skiing Co.*, 472 U.S. at 593.

50 *See hiQ Labs*, 938 F.3d at 998 ("evidence from which it can be inferred that LinkedIn knew about hiQ and its reliance on external data"); *hiQ Labs*, 273 F. Supp. 3d at 1107 ("LinkedIn has not explained why suddenly it has now chosen to revoke its consent (or at least tolerance)").

51 *See, e.g.*, *Trinko*, 540 U.S. at 409 ("The unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end.").

52 Amended Complaint at 3, *hiQ Labs, Inc., v. LinkedIn Corp.*, No. 3:17-cv-03301-EMC (N.D. Cal. Feb. 14, 2020).

53 *See, e.g.*, *Trinko*, 540 U.S. at 407 ("It is settled law that this offense requires, in addition to the possession of monopoly power in the relevant market, 'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'").

54 *hiQ Labs*, 273 F. Supp. 3d at 1118.

55 *Id.* at 1105 n.1.

LinkedIn blocking hiQ would drive hiQ out of business because it was not practical for hiQ to switch business models,[56] that does not necessarily show that there would be a competitive harm, as opposed to harm just to hiQ, if other competitors with different business models still compete. One question could be how significant a competitive constraint the other competitors provide and whether they would provide as close of a competitive constraint on LinkedIn's data analytics offering as hiQ would. The Ninth Circuit explained hiQ was the "original innovator in aggregating and analyzing the public information,"[57] which could perhaps suggest that hiQ is a particularly significant competitor in this space.

As a strategic matter, LinkedIn's litigation strategy appears to have been to contest the preliminary injunction rather than defend its alleged conduct on the merits. But that seems to have put LinkedIn at a disadvantage and resulted in the Ninth Circuit and District Court making statements that could hurt LinkedIn at later stages of the litigation. The courts focused on the fact that hiQ would go out of business without a preliminary injunction. LinkedIn's arguments against irreparable harm, balance of the hardships, and public interest all appeared to be relatively weak given that the harm to hiQ was that it would be driven out of business while the harm to LinkedIn was just the continuation of scraping that had been ongoing for years. As a result, under Ninth Circuit precedent, all hiQ had to do on the merits was raise "serious questions" rather than demonstrate a "likelihood" of success. Whatever the ultimate merits of LinkedIn's arguments, it is hard to say hiQ did not raise "serious questions." An alternative litigation strategy could have been for LinkedIn to stipulate to the preliminary injunction and move quickly to the merits to try to win more quickly and avoid adverse decisions.

hiQ's litigation success could serve as a warning to other potentially dominant firms that seek to prevent rivals or potential rivals from accessing otherwise widely available data. For instance, could Amazon allow the public to access its product and pricing information, but stop others from scraping data so that they could sell it to Amazon's competitors? Potentially dominant firms would be well advised to consider the antitrust implications if they plan to deny access to data scrapers, in particular by considering whether there is discrimination on the basis of rivalry, if they have previously accepted or tolerated data scraping, and if they have procompetitive reasons for preventing the access. Otherwise, the data scraper could potentially bring an antitrust claim asserting an affirmative access right to the website's data.

III. Conclusion

Whether hiQ or similarly situated plaintiffs can successfully prove an antitrust violation based on allegedly dominant websites blocking their web scraping is unclear. But potentially dominant websites should be aware of the U.S. antitrust risks of prohibiting rivals from scraping publicly available data and especially of treating rivals differently than non-rivals.

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[56] *Id.*

[57] *hiQ Labs*, 938 F.3d at 998.

Current Antitrust Enforcement in Media and Technology:
An Interview with Jon Jacobson

Interview by Courtney Armour[1]
June 26, 2020

Jonathan ("Jon") Jacobson is a partner in Wilson Sonsini Goodrich & Rosati's New York office, and served as the Chair of the ABA's Section of Antitrust Law from 2017-2018. Jon has taken a lead role in many high-profile antitrust litigations, investigations, trials, and appeals—including recently arguing a case at the U.S. Supreme Court. Jon has represented a number of media and technology companies in antitrust matters, including defending Google in the Dreamstime, KinderStart, Person, TradeComet, and myTriggers cases; defending Netflix in In re Online DVD Rental Antitrust Litigation; defending Live Nation and Clear Channel in Heerwagen v. Clear Channel; and most recently defending Twitter in a case brought by Freedom Watch. Jon was appointed by Congress to serve on the Antitrust Modernization Commission, responsible for reviewing and recommending potential changes to the nation's antitrust laws. He was also a presenter in the FTC's 2018 Competition Hearings, DOJ's 2018 Roundtable series, the DOJ/FTC Intellectual Property Hearings, the DOJ/FTC Single-Firm Conduct Hearings, the DOJ/FTC Merger Guideline Workshops, the DOJ/FTC Most Favored Nations Clause Workshop, and the DOJ/FTC Conditional Pricing Practices Workshop.

Jon, you have a long history of involvement with the ABA Antitrust Section, even leading the Section as Chair a few years ago. What is your view of how the Section has covered media and technology issues over the years?

We reconstituted what is now the Media and Technology committee a few years ago to focus specifically on media and technology issues. That change has been quite successful. The committee has increased membership, put on excellent programs, and put out great written product too. The Icarus newsletter has been terrific.

The Section also regularly provides of comments on matters of the committee's interest, such as proposed and implemented measures taken inside and outside the US directed at technology companies and technology issues. On the intellectual property issues that are so prevalent in media and technology representations, we have the excellent and regularly-updated Intellectual Property and Antitrust Handbook and Antitrust Counterattack in Intellectual Property Litigation Handbook, plus a full chapter on IP in ALD, and a book on the Federal Antitrust Guidelines for the Licensing of Intellectual Property. And we regularly have programs directed at these issues.

That is not to say we couldn't do more. But given that we are a volunteer organization and also must reach consensus before acting, doing a lot more would be challenging. We have had good success in attracting members and leaders from media and technology companies. And these issues have been front and center at our big meetings, such as the Fall Forum, Spring (even when

[1] Courtney Armour is the Chief Legal Officer for the Distilled Spirits Council and Responsibility.org. Previously, Ms. Armour practiced antitrust law with Mr. Jacobson at Wilson Sonsini Goodrich & Rosati.

virtual), and the IP conference. Playing policy issues "down the middle," as we have always tried to do, makes this effort easier.

You have represented a number of leading technology companies, from Netflix to Google, and most recently successfully representing Twitter in a lawsuit alleging that Twitter, Facebook, Apple, and Google violated the First Amendment and antitrust law by censoring conservative content. What is your take on the perceived or claimed anti-conservative bias of online platforms and how does it factor into modern day antitrust analysis?

The case you mention, called Freedom Watch, was entirely frivolous. The idea that any of these companies "suppress conservative viewpoints" on their platforms is false, and the idea that they conspired to do so is positively ludicrous. The conspiracy claim in the case was based entirely on what Freedom Watch called parallel conduct but, as anyone conscious can easily see, each of the companies has a different policy and implements it differently. The two plaintiffs, Freedom Watch and a provocateur named Laura Loomer, also alleged a shared monopoly claim, which of course is invalid as a matter of law. And they alleged a First Amendment claim against these private actors contrary to all Supreme Court precedent. The district court and court of appeals had no difficulty in throwing the case out.

We have seen over the past several weeks some balanced actions by Twitter in labeling or removing tweets from the President as promoting racial violence and falsely attacking voting-by-mail. YouTube has long had a content moderation policy, especially for children. News reports on June 27 indicate that Facebook may be taking baby steps to enhance is content moderation after previously allowing false or inflammatory posts if offered by political leaders. To label this content moderation "suppressing conservative voices" is nonsense.

There is no indication that the large Internet platforms treat "conservative" comments any differently than "liberal" comments.

The claims around anti-conservative bias are just one side to the technology-political coin. On the other side, some claim that allegations of bias are an attempt to manipulate platforms to favor their point of view and/or that many government investigations are politically motivated to punish a platform for perceived favoritism or to boost a political career. Do you think political motivations are impacting the practice of antitrust law and, if so, do you think it will change the direction of the law?

No one is suggesting political interference at the FTC. I'm certainly not aware of any.

There has been, of course, a lot of news about political interference at the Justice Department, including recently at the Antitrust Division. I will say this: I am one of those exceedingly troubled by what the Attorney General has done across the board, including antitrust. But I draw the line at Division leadership, who I think have been unfortunately tarred with the Attorney General's wide brush. I have not agreed with him on everything, but Makan and his team have handled themselves honorably and professionally throughout. The attacks on them are unfounded in my view.

The cannabis inquiry was one on which both the FTC and DOJ sought clearance and involved difficult issues in assessing the interplay between competition rules and other federal law, under which cannabis is illegal. The auto emissions inquiry was commenced long before it was suggested in a tweet and was supported by an independent analysis at DOJ before any process was served. The DOJ's Office of Professional Responsibility confirmed the appropriate nature of the work.

As for the spate of tech company investigations, much of the conduct and transactions in the current investigations was reviewed carefully before and permitted based on a lack of evidence of consumer harm. That's one of the reasons I believe the tech probes are heavily impacted by political considerations, and I also fear any ensuing litigation will bear that taint. Having said that, the applicable legal standards are well established, e.g., Bayou Bottling v Dr Pepper, 725 F.2d 300, 304 (CA5 1984) (self-preferencing actions "are competitive acts. It ought to be apparent that 'a monopolist's right to compete is not limited to actions undertaken with an altruistic purpose. Even monopolists must be allowed to do as well as they can with their business.'"), and I hope and expect they will be applied consistently when the case or cases get to court. If so, the law won't change.

The current Administration and the Department of Justice have taken a new stance on Section 230 immunity, through an Executive Order and a DOJ Statement recommending reform. What do you make of the ongoing debate over reforming Section 230?

Section 230 is one of the reasons why the Internet has become such an important part of our daily lives. It has propelled some of the greatest expansion of productivity in human history. It should not be repealed or modified.

Much of the attack on § 230 is from the same voices that claim that the large Internet platforms "suppress conservative viewpoints." As I said, that is nonsense.

On the other side, of course, are different calls to amend § 230 in a way that would force Internet platforms to do more to ban false and inflammatory posts. A lot of people don't want to rely on the platforms to prevent harmful misinformation. I'm sympathetic to that concern, but in the end still would not touch § 230. Forcing censorship in the aim of doing good has a way of turning around and later doing very bad. And although the free market may not work as well here as in other areas, it seems to be beginning to work. We are already seeing political and economic (advertiser) pressure brought to bear with some reported positive effects.

It's fair to say that § 230 has allowed companies like Facebook to refrain from tagging or removing dangerous posts – although, as I said, indications are that Facebook is considering more active monitoring. But that seems to me to be a price we should want to pay for freedom of expression. It is not worth gutting § 230. Having the government (including courts) decide (administratively or through litigation) which post should be removed and which should not is fundamentally inconsistent with the First Amendment.

If § 230 were removed, then platforms might just allow only vanilla milquetoast statements on the Internet, for fear if they published anything with an opinion that couldn't be 100% verified, they

would be liable. The natural response would be to pull almost everything. The freedom of expression we have become accustomed to would erode.

Is the current matrix of antitrust laws sufficient to address concerns raised about the largest online platforms or are statutory reforms needed? Relatedly, is there merit to recent legislative proposals addressing platforms and antitrust more generally?

I of course have clients I represent but when I try to look at this wholly objectively, I still come to an answer of "no way" on changes to antitrust to address Internet platforms.

I've opposed modifications to antitrust to address novel market conditions as long as I can remember.

During the Microsoft days 20 years ago, Microsoft was arguing in public and antitrust forums that new economy markets were so different and so fast moving that conduct like Microsoft's should be given a pass. I put out a piece then in Antitrust Magazine opposing that idea and explaining why antitrust analysis is flexible enough to account for changing industry conditions and why similar arguments – like those of the railroads 125 years ago and by many industries since – had been conclusively proven wrong by history. https://www.wsgr.com/images/content/1/8/v1/180/jacobson_neweconomy.pdf

My views today are the same. Although antitrust analysis is adjusting the way we look at two-sided markets and vertical restraints, that is just part of the evolutionary, common-law process of antitrust. Conduct that enhances innovation, generates new and useful products and services, increases productivity, and reduces costs and prices is not made anticompetitive just because the conduct is by an Internet platform. We do not need new legislation to address Internet platforms.

This is not to say that modifications to any antitrust law are all out of bounds. I would never touch the Sherman Act, but there have been proposals to lower the government's burden of proof in merger cases under Clayton § 7, and some aspects of some of those proposals may make sense. Mergers like USAirways/American Airlines a few years might have come out differently under a lower proof burden, and consumers might be better off.

What is the most challenging aspect to representing a media or technology company these days? What is the best part?

Intellectually, of course you love new and different markets and legal challenges. That can be challenging especially since everything is moving so quickly. The one thing that can be really challenging is getting data. Engineers generally don't treat lawyer requests for information as priorities.

The best part is working on the most cutting issues of the day. Wow.

In the current environment, many lawyers are crunched for both time and money. What can the Section, and the ABA more generally, do to continue to deliver value and remain relevant to practicing lawyers?

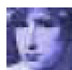
We all need to take steps to increase our commitment to diversity, That's clearly #1.

Separately, I want to commend Brian Henry, the programs teams, and staff, who did a fantastic and heroic job in making Spring work so great virtually, and I know that Gary Zanfagna, Joanne Travis, and Margaret Stafford are working hard on the Post-Annual Meeting and several meetings in the Fall that we hope can happen as planned.

My impression is that antitrust legal practice has not changed too much. Deadlines are being pushed back but courts are warming to Zoom, even for evidentiary hearings and trials. Agencies haven't lost much of a step.

So my one piece of advice is do your best to be normal. We have no idea how long this will really last, but stay in touch by phone or video with your friends and colleagues and make it as normal as you can.

And wear a mask.



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