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Theories of Harm for Digital Mergers – Note by the United States

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More documents related to this discussion can be found at https://www.oecd.org/competition/theories-of-harm-for-digital-mergers.htm

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United States

1. Introduction

1. Several aspects of contemporary digital technologies have resulted in market dynamics and business strategies that merit particular attention for antitrust enforcers. For example, low marginal production costs have enabled digital firms to grow larger and more quickly than many conventional businesses. Network effects and high entry barriers in some markets may lead certain markets to "tip" towards a few powerful firms while also serving to protect incumbents. Meanwhile, network effects stemming from the collection and use of large amounts of data provide advantages to early movers, which incentivize firms to prioritize expanding and quickly securing a large user base. Further, the ability to digitally track and surveil users has enabled firms to offer zero-price services to consumers while monetizing their data. Those firms can then deploy surveillance techniques to detect and insulate themselves against competitive threats.

2. While digital markets have the potential to yield great benefits, they are also susceptible to anticompetitive practices by incumbents that lock-in dominance, block rivals, and harm competition. Thus, it is especially important for enforcers to be vigilant about potentially anticompetitive mergers or conduct in digital markets. Moreover, a loss of competition at an early stage in a market's development can both hamper and distort the path of future innovation. Thus, it is imperative that enforcers be prepared to act quickly to preserve open and fair competition *before* markets lose vitality due to harmful consolidation.

3. Mergers and acquisitions involving digital markets can lessen competition or tend to create, maintain, or entrench monopolies through a variety of mechanisms. Technology companies often operate across a variety of interrelated areas, and often maintain multi-sided platforms that provide different products or services to two or more different groups who benefit from each other's participation. Moreover, dominant technology firms can use strategic acquisitions as part of an interrelated course of monopolistic conduct. For example, technology firms have engaged in "buy-or-bury" strategies against actual or potential rivals; they have also attempted to buy or control adjacent products or services that might be used to steer customers to their other products or exclude competing platforms. While a clearer picture has begun to emerge, continued learning remains essential to fully understanding the many ways that digital firms may use mergers to maintain their position and insulate themselves from competitive challenges.

4. This submission describes the application of United States antitrust laws to digital mergers, how existing legal doctrines can be used to pursue more robust enforcement in digital markets, the issues that digital mergers are more likely to raise, the federal antitrust enforcement agencies' recent experiences with digital mergers, and how the agencies will address them going forward.

2. Application of United States Antitrust Laws to Digital Mergers

5. The longstanding principles of antitrust law remain applicable to mergers involving digital technologies. The United States Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") (collectively, "the Agencies"), state and district attorneys general, and private parties can challenge mergers and acquisitions under the federal

antitrust laws. Most merger challenges are brought under Section 7 of the Clayton Act, which prohibits mergers and acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[1] This Act, as amended by the Celler–Kefauver Anti-Merger Act of 1950, is designed to stop threats to competition or tendencies toward monopoly in their incipiency. The Agencies, state and district attorneys general, and private parties can also challenge monopolistic mergers under Section 2 of the Sherman Act.[2] These same enforcers can also challenge mergers under Section 1 of the Sherman Act as an unreasonable restraint of trade.[3] The FTC can also challenge mergers under Section 5 of the FTC Act as an unfair method of competition.[4]

3. The Agencies Rely on Existing Antitrust Principles to Pursue Robust Enforcement in Digital Markets

6. While digital technologies have ushered in new market dynamics and business strategies in the United States, the same federal antitrust laws apply to digital mergers as to any other type of merger. The Agencies seek to fully utilize existing statutes and case law to challenge digital mergers when appropriate. This effort entails the robust application of existing law, accounting for the particular facts raised by digital mergers.

7. Certain aspects of U.S. antitrust laws are especially relevant in the digital merger context. This includes, in particular, the recognition that Section 7 of the Clayton Act is meant to "arrest anticompetitive tendencies in their incipiency."[5] As Congress and later, the Supreme Court observed, markets can consolidate rapidly. Therefore, the antitrust agencies are statutorily mandated to break those trends at their outset, well before they gather great momentum.[6] The Celler–Kefauver amendments to Section 7 equipped the Agencies to block mergers where there is an incipient trend towards concentration or reduced competition.

8. The first prong of Section 7 prohibits acquisitions, "the effect of [which] may be substantially to lessen competition . . . ." in a relevant market.[7] The second prong of Section

[1] 15 U.S.C. § 18.

[2] 15 U.S.C. § 2.

[3] 15 U.S.C. § 1.

[4] 15 U.S.C. § 45. The Federal Trade Commission also enforces Section 5 of the FTC Act, which prohibits "unfair methods of competition in or affecting commerce." Section 5 is central to the agency's legislative mandate. *See generally* FTC, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act 13-14 (Nov. 10, 2022) (Commission File No. P221202), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf. *See also* Substitute Amended Complaint for Injunctive and Other Equitable Relief, *FTC v. Facebook, Inc.*, No. 1:20-cv-03590 79-80 (D.D.C. Sept. 8, 2021), https://www.ftc.gov/system/files/documents/cases/2021-09-08_redacted_substitute_amended_complaint_ecf_no._82.pdf and *Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

[5] *See Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208, 1213–14 (11th Cir. 2012) (quoting *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362 (1963)).

[6] *FTC v. Brown Shoe Co.*, 384 U.S. 316, 317, 322 (1966).

[7] 15 U.S.C. § 18.

7 prohibits acquisitions, "the effect of [which] may be . . . to tend to create a monopoly."[8] Although case law on this second prong has not been as fully developed, it may be particularly important as a means of prohibiting certain mergers that otherwise may not be prohibited by the first prong of the Clayton Act. The second prong, in contrast to the first prong, lacks the limiting qualifier "substantially." Consequently, a less-than-substantial contribution to the creation of a monopoly can render a merger illegal based only on a tendency towards monopoly.[9] Thus, the second prong may be especially relevant to digital mergers involving a monopolist or near-monopolist acquiring a very small competitor, a nascent competitor, or potential competitor. Moreover, if a transaction is part of a pattern or strategy of multiple acquisitions, the cumulative effect of the pattern or strategy may need to be considered.

9. In order to ensure that the Agencies are best positioned to exercise their full authority in digital markets, including addressing competition concerns in their incipiency, they have been building their in-house capacity and expertise to keep pace with developments in those markets. The FTC recently launched a new Office of Technology to help contend with technological challenges in the digital marketplace and to support the agency's law enforcement and policy work.[10] The DOJ's Antitrust Division similarly has been building its in-house capabilities by expanding its Expert Analysis Group to include experts in digital markets and new technologies. The size of DOJ's civil litigation section dedicated to digital markets has doubled the number of attorneys in recent years. Importantly, these teams collaborate and share their expertise with relevant personnel throughout the Antitrust Division to ensure staff are equipped to analyze and identify problematic mergers and acquisitions involving digital markets.

4. Limitations of Premerger Reporting of Digital Mergers

10. One key to preventing harm from digital mergers is taking action as soon as evidence of the risk of competitive harm emerges. Learning about these mergers is crucial to that effort. The Hart-Scott-Rodino Act ("HSR Act") requires premerger notification to the Agencies and imposes a mandatory waiting period for certain acquisitions.[11] The HSR Act provides the Agencies with the opportunity to investigate the potential for harm and, in appropriate circumstances, bring a legal action to block a merger prior to consummation. Most of the Agencies' merger investigations and enforcement take place under our pre-merger enforcement authority, and these efforts address illegal mergers before physical assets, intellectual property, and human capital are combined and assets are allowed to deteriorate.

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[8] *Id*.

[9] The Supreme Court has framed the standard as follows: any acquisition that would bring the acquirer "measurably closer" to a monopoly can violate this prong of § 7. *United States v. E. I. Du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957) ("Obviously, under Section 7 it was not necessary . . . to find that [the defendant] has actually achieved monopoly power but merely that the stock acquisitions under attack have brought it measurably closer to that end. For it is the purpose of the Clayton Act to nip monopoly in the bud.").

[10] *See* Press Release, FTC, FTC Launches New Office of Technology to Bolster Agency's Work (Feb. 17, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-launches-new-office-technology-bolster-agencys-work.

[11] 15 U.S.C. § 18.

11. While the HSR Act facilitates the Agencies' ability to review and challenge unconsummated mergers, the Agencies can also challenge consummated mergers. Thus, the Agencies have full authority to investigate and challenge any acquisition of stock or assets, without regard to whether the transaction was notifiable or notified, unconsummated or consummated.[12]

12. Because not all mergers are reportable under the HSR Act, firms may engage in strategic avoidance of mandatory filing requirements to evade detection, especially in certain sectors.[13] This can present unique challenges in digital markets.

13. In 2019, the FTC conducted industry-wide studies to collect information about the unreported acquisitions of five large technology companies.[14] The study focused on 819 non-reported acquisitions made by Apple, Amazon, Facebook (now Meta), Google, and Microsoft over the course of 2010-2019, and provided a comprehensive overview of all the acquisitions these companies made during that time period. The studied acquisitions fell in several categories: acquisition of control; assets; hiring events, patents, minority stakes; licenses; or other economic interests. Importantly, a large portion (39.3%) of the acquisitions were of firms that were less than 5 years old, and most (65%) were valued at between $1 million and $25 million, well below the HSR filing threshold. From this study, the FTC gained insight into these companies' practices and acquisition strategies, including how they structured acquisitions, sectors of interest, and how these acquisitions figured into the companies' overall business strategies.[15]

14. It remains important for enforcement agencies to consider the acquisition strategies of digital companies to fully account for all the ways in which the companies grow through acquisitions—including those that are unreported. Enforcement agencies may also consider other ways to detect small but potentially competitively significant acquisitions, such as collecting more information about prior unreported acquisitions, or requiring prior approval or prior notice for future mergers that might otherwise go undetected.[16]

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[12] *See, e.g.*, Note by the United States, Disentangling Consummated Mergers – Experiences and Challenges DAF/COMP/WD (2022), 42, https://one.oecd.org/document/DAF/COMP/WD(2022)42/en/pdf.

[13] Statement of Rohit Chopra, https://www.ftc.gov/system/files/documents/public_statements/1596340/20210915_final_chopra_remarks_non-hsr_reported_acquisitions_by_big_tech_platforms.pdf; Thomas G. Wollmann, *Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act*, 1 AM. ECON. REV: INSIGHTS 77-94 (2019), https://www.aeaweb.org/articles?id=10.1257/aeri.20180137.

[14] FTC STAFF, NON-HSR REPORTED ACQUISITIONS BY SELECT TECHNOLOGY PLATFORMS, 2010-2019 (Sept. 15, 2021) https://www.ftc.gov/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study [hereinafter Non-HSR Technology Acquisitions Report].

[15] *See* Press Release, FTC, FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies (Sept. 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-staff-presents-report-nearly-decade-unreported-acquisitions-biggest-technology-companies and accompanying statements.

[16] *See* Press Release, FTC, FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers (Jul. 21, 2021) (returning to practice of requiring prior approval or prior notice in merger orders), https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter-problematic-mergers.

5. Digital Mergers, Particularly Those Involving Multi-Sided Platforms, May Raise Unique Facts

15. While digital mergers can raise the same concerns as mergers in more traditional industries, consolidation in digital markets is more likely to implicate innovation concerns, as well as factual issues relating to novel, complex, or evolving technologies.

16. In particular, digital markets might raise certain competition issues that include harm to innovation and other forms of non-price competition; the role of network effects and switching costs in raising entry barriers and potentially "tipping" a market; and the collection and use of data, including within zero-price markets.

17. Mergers may raise competitive issues when they involve multi-sided platforms and products or services, even when the acquired firm's relationship to the platform is not strictly horizontal or vertical. The Agencies consider the various attributes of multi-sided platforms when evaluating mergers that involve platform operators, and carefully scrutinize the risk those mergers will lessen competition between platforms, on the platform, or to disintermediate the platform. In addition to considering impacts on market structure and vertical supply chains, the Agencies examine whether digital mergers have the potential to entrench firms' dominant positions in violation of Section 7 of the Clayton Act.

18. Digital mergers may also implicate competitive concerns due to the potential that such mergers would substantially lessen competition by giving the firm control over a product or service that its rivals use to compete. When analyzing digital mergers, the Agencies will examine, for example, whether the merged firm may have the ability and incentive to weaken or exclude rivals, for example by foreclosing access to a competitively significant related product.

19. Additionally, the nature of digital platforms and ecosystems, and the associated business strategies that they reward, may require looking beyond concerns that typically characterize more conventional markets, such as foreclosure and exclusion, in order to identify the full range of potential harms from digital mergers. These issues may require a broader analytical lens to fully account for all aspects of competition, and a closer look at all types of mergers, including those in which the participants do not compete directly with one another, requiring the Agencies to focus on non-horizontal theories of harm.

20. Within digital ecosystems, it is important to be vigilant about the loss of potential competition. Acquisitions involving a potential competitor or a nascent threat warrant close scrutiny from the Agencies. These types of acquisitions include acquisitions that eliminate a potential entrant in a concentrated market; acquisitions that eliminate a potential entrant in a future market; acquisitions that eliminate or raise the costs of a nascent threat to a powerful incumbent; and acquisitions that eliminate current competitive pressure from a perceived potential entrant. These mergers can distort the entire developmental trajectory of the relevant technology and deprive the public of the full fruits of marketplace innovation. Strong and vigorous competition is a vital catalyst of rapid economic progress. Any lessening of competition is therefore even more harmful in a new industry since its inevitable effect is to slow down the growth rate of the industry.[17] Halting illegal mergers in emerging or nascent markets is critical because of the outsized beneficial effects that

[17] *See In re Union Carbide Corp.*, 59 F.T.C. 614, 1961 WL 65409 *35 (F.T.C. 1961); *see also United States v. Bazaarvoice*, Inc., 2014 WL 203966 *76 (N.D. Cal. 2014) ("[R]apid technological progress may provide a climate favorable to increased concentration of market power rather than the opposite." (quoting *Greyhound Computer Corp. v. IBM Corp.*, 559 F.2d 488, 497 (9th Cir. 1977)).

healthy competition in these markets can yield over the long-term. For example, competition will provide consumers with real choices about how and to what extent they are willing to hand over personal data in exchange for goods and services across industries that are becoming increasingly more digitized. A competitive marketplace can dilute the power of any monopolist or oligopoly of firms over the apps, connected devices, and digital tools that power American life and the economy today.

6. Recent Experiences with Digital Mergers

21. The Agencies recognize that our shared statutory mandate is to prevent digital markets from becoming concentrated in the first place. Otherwise, it may be necessary to address the harm from undue concentration later through post-consummation antitrust enforcement. The Agencies' recent experiences with digital mergers such as *Google/DoubleClick* and *Google/Admeld*, and *Facebook/WhatsApp* and *Facebook/Instagram* are examples of this. The Agencies are challenging these transactions post-consummation as part of broader strategies to achieve or maintain durable, industry-wide dominance.

22. In 2007, the FTC investigated but ultimately declined to challenge Google's acquisition of DoubleClick, which at the time offered the industry-leading publisher ad server.[18] In 2011, DOJ also declined to challenge Google's acquisition of Admeld, Inc., an online display advertising provider.[19] On January 24, 2023, DOJ and eight state Attorneys General filed a civil antitrust suit against Google for monopolizing multiple digital advertising technology products in violation of Sections 1 and 2 of the Sherman Act.[20] The complaint requests, among other things, divestment of DoubleClick, structural relief, and the restoration of competitive conditions in multiple relevant markets.[21] This request for relief is the logical conclusion to a complaint that puts into context, with the benefit of hindsight and a fuller picture of the ad tech market as it exists today, the competitive harm that resulted from Google's acquisitions and other course of exclusionary conduct.

23. Similarly in 2012, the FTC closed its investigation of Facebook's acquisition of Instagram without challenging the deal.[22] Nor did the FTC challenge Facebook's

[18] *See generally* Press Release, FTC, Federal Trade Commission Closes Google/DoubleClick Investigation (Dec. 20, 2007), https://www.ftc.gov/news-events/news/press-releases/2007/12/federal-trade-commission-closes-googledoubleclick-investigation.

[19] *See generally* Press, Release, DOJ, Statement of the Dep't of Justice's Antitrust Div. on Its Decision to Close Its Investigation of Google Inc.'s Acquisition of Admeld Inc. (Dec. 2, 2011), https://www.justice.gov/opa/pr/statement-department-justices-antitrust-division-its-decision-close-its-investigation-google.

[20] *See generally* Press Release, DOJ, Justice Dep't Sues Google for Monopolizing Digital Advertising Technologies (Jan. 24, 2023), https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies.

[21] Complaint, *United States v. Google LLC*, No. 1:23-cv-00108 139-40 (E.D. Va. Jan. 24. 2023), https://www.justice.gov/opa/press-release/file/1563746/download.

[22] *See generally* Press Release, FTC, FTC Closes Its Investigation Into Facebook's Proposed Acquisition of Instagram Photo Sharing Program (Aug. 22, 2012), https://www.ftc.gov/news-events/news/press-releases/2012/08/ftc-closes-its-investigation-facebooks-proposed-acquisition-instagram-photo-sharing-program.

acquisition of WhatsApp in 2014.[23] The FTC subsequently filed a civil complaint in 2021 alleging that these acquisitions were part of a series of anticompetitive acts that constitute unlawful monopolization in violation of Section 2 of the Sherman Act and thus unfair methods of competition in violation of Section 5(a) of the FTC Act.[24] The complaint requests, among other things, divestment of Instagram and/or WhatsApp and any other necessary divestitures.[25] Forty-eight states and districts also previously filed a separate lawsuit alleging that these acquisitions were illegal.[26]

24. Ideally, an illegal merger would be blocked outright before consummation, to prevent harm *before* it occurs and also avoid the protracted litigation sometimes required to undo prior acquisitions and attempt to restore competition. This requires activating—and sometimes reactivating—the Agencies' entire statutory toolkit to account for all the ways in which digital mergers may lead to harmful concentration.

25. In *Meta/Within*, the FTC sought to enjoin Meta's acquisition of Within in order to prevent harm resulting from the loss of potential competition in the relevant market for virtual reality dedicated fitness applications.[27] The complaint alleged a violation of Section 7 of the Clayton Act and Section 5 of the FTC Act.[28] Although the district court's decision ultimately denied the FTC's request for a preliminary injunction, it agreed with the FTC on the legal issues in the case and denied the defendants' motion to dismiss the case, providing useful precedent on digital mergers.[29]

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[23] *See generally* Press Release, FTC, FTC Notifies Facebook, WhatsApp of Privacy Obligations in Light of Proposed Acquisition (Apr. 10, 2014), https://www.ftc.gov/news-events/news/press-releases/2014/04/ftc-notifies-facebook-whatsapp-privacy-obligations-light-proposed-acquisition.

[24] *See generally* Press Release, FTC, FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme to Crush Competitor After String of Failed Attempts to Innovate (Aug. 19, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/08/ftc-alleges-facebook-resorted-illegal-buy-or-bury-scheme-crush-competition-after-string-failed.

[25] Substitute Amended Complaint for Injunctive and Other Equitable Relief, *FTC v. Facebook, Inc.*, No. 1:20-cv-3590 79-80 (D.D.C. Sept. 8, 2021), https://www.ftc.gov/system/files/documents/cases/2021-09-08_redacted_substitute_amended_complaint_ecf_no._82.pdf.

[26] Complaint, *New York v. Facebook, Inc.*, No. 1:20-cv-3589 (D.D.C. Dec. 9, 2020), https://ag.ny.gov/sites/default/files/court-filings/state_of_new_york_et_al._v._facebook_inc._-_filed_public_complaint_12.11.2020.pdf. The United States District Court for the District of Columbia initially dismissed the complaint, and the D.C. Circuit affirmed. *New York v. Facebook, Inc.*, 549 F.Supp.3d 6 (D.D.C. 2021), *aff'd sub nom. New York v. Meta Platforms, Inc.*, 2023 WL 3102921 (D.C. Cir. 2023) (affirming dismissal based on laches (not applicable to the FTC) and allegations related to Facebook's conduct (which the district court had already dismissed in the FTC's case)).

[27] *See generally* FTC, Press Release, FTC Seeks to Block Virtual Reality Giant Meta's Acquisition of Popular App Creator Within (July 27, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-seeks-block-virtual-reality-giant-metas-acquisition-popular-app-creator-within.

[28] Amended Complaint, *FTC v. Meta Platforms Inc*., No. 5:22-cv-04325 2, 6, 8, 25 (N.D. Cal. Oct. 7, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/221_0040_amended_complaint_-_usdc_-_10.07.22.pdf.

[29] *FTC v. Meta Platforms Inc*., No. 5:22-cv-04325 (N.D. Cal. 2023) (slip op.).

26. First, the district court accepted the FTC's market definition based on the practical indicia articulated in the Supreme Court's *Brown Shoe* decision.[30] The district court's endorsement of practical methods for defining a digital relevant market bolsters the Agencies' ability to challenge illegal digital mergers, including in instances where quantitative data might be less available, such as in nascent or rapidly evolving markets.[31] Second, the *Meta/Within* decision affirms the continuing vitality of actual potential competition (entry effects) and perceived potential competition ("edge" effects) theories as ways to block harmful mergers.[32]

27. The court's opinion also includes other useful holdings that could help support future merger challenges in digital markets. According to the opinion, concentrated markets are presumed not to be competitive—even when they are relatively new and even if they are experiencing some entry—unless the defendants can prove that the markets are exhibiting meaningful deconcentration.[33] The court confirmed that a transaction may be challenged based on very narrow relevant product markets.[34] The court also explained that the fact that many companies do not (yet) generate profits in a market does not necessarily change the analysis of potential harm to competition.[35]

28. The U.S. Agencies' recent challenges to digital mergers reflect their efforts to use existing, but not recently utilized, theories in order to prevent harm to competition or tendencies toward monopoly. For example, the DOJ's complaint filed against Google in January 2023 specifically alleges that Google monopolized the digital advertising market through, among other things, engaging in a pattern of acquisitions to obtain control over key digital advertising tools used by website publishers to sell advertising space.[36]

29. Even in instances where a court declines to enjoin a merger, the Agencies may obtain a decision that otherwise provides a beneficial interpretation of applicable law. Such decisions can serve as useful roadmaps on how to challenge potentially anticompetitive digital mergers in the future. This precedential guidance can enhance the Agencies' enforcement capabilities over the long-term, even when they do not prevail in the short-term.

30. The Agencies' efforts to prevent harm to competition as digital technologies evolve are illustrated by their challenges to Visa/Plaid, UnitedHealth Group/Change Healthcare, Microsoft/Activision, and ICE/Black Knight.

31. In 2020, DOJ successfully sued to stop Visa, a monopolist in online debit services, from acquiring Plaid, an innovative fintech firm developing an alternative online payments

[30] *Id.* at 16-32. *See also Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

[31] The FTC has also obtained similar useful precedent on market definition for digital markets based on monopolization claims not involving a merger. *See FTC v. Surescripts, LLC*, 2023 WL 2707866 *2, 12, 17-19 (D.D.C. 2023) (Mem. Op.) (granting FTC partial summary judgment on market definition regarding two alleged violations of Section 2, and using *Brown Shoe* practical indicia to conclude the relevant markets are two-sided platforms for electronic prescription routing and electronic eligibility, which do not include analog methods of routing and eligibility).

[32] *FTC v. Meta Platforms, Inc.* at 37-64.

[33] *Id*. at 37.

[34] *Id*. at 19-21.

[35] *Id*. at 36-37.

[36] *See* Complaint, *United States v. Google LLC*, No. 1:23-cv-00108 31-36 (E.D. Va. Jan. 24. 2023), https://www.justice.gov/opa/press-release/file/1563746/download.

platform that would allow users to pay online vendors directly from their bank accounts instead of using a debit card.[37] The complaint alleged that Visa viewed the proposed acquisition as a way to eliminate a nascent competitive threat in order to protect its debit business in the United States, and the transaction would therefore violate Section 2 of the Sherman Act and Section 7 of the Clayton Act.[38] Visa and Plaid abandoned the proposed transaction shortly after DOJ filed its complaint.

32. In 2022, DOJ and the Attorneys General of the states of New York and Minnesota sued to block UnitedHealth Group's acquisition of Change Healthcare under Section 7 of the Clayton Act.[39] The proposed transaction raised issues relating to healthcare claims data and the use of, and rights to use, such data, and harm to innovation in health insurance markets. In particular, the complaint applied both horizontal and vertical theories to allege that the acquisition would harm competition in the first-pass claims editing solutions market, a critical input for health insurers.[40] Despite declining to enjoin the acquisition, the district court considered the complaint's theories of harm, found that claims data can have competitive value and can be proprietary in nature, and concluded that United would have inherited both data and use rights post-merger.[41]

33. The FTC filed a complaint challenging Microsoft's $70 billion proposed acquisition of Activision using traditional vertical theories in an evolving gaming landscape.[42] According to the complaint, Microsoft is one of only two makers of high-performance video game consoles and Activision develops and publishes high-quality video games for multiple devices, including video game consoles, PCs, and mobile devices.[43] The complaint alleges that Microsoft's ownership of Activision would provide Microsoft with the ability to withhold or degrade Activision content through various means, including manipulating Activision's pricing, degrading game quality or player experience on rival offerings, changing the terms and timing of access to Activision's content, or withholding content from competitors entirely.[44] The complaint further alleges that resulting harm could occur not just in the high-performance console market, but also in

[37] *See generally* Press Release, DOJ, Justice Department Sues to Block Visa's Proposed Acquisition of Plaid (Nov. 5, 2020), https://www.justice.gov/opa/pr/justice-department-sues-block-visas-proposed-acquisition-plaid and Press Release, DOJ, Visa and Plaid Abandon Merger After Antitrust Division's Suit to Block (Jan. 12, 2021), https://www.justice.gov/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block.

[38] Complaint, *United States v. Visa Inc*., No. 3:20-cv-07810 1-2, 5-6, 13, 17-18, 20-21 (N.D. Cal. Nov. 5, 2020), https://www.justice.gov/opa/press-release/file/1334726/download.

[39] *See generally* Press Release, DOJ, Justice Dep't Sues to Block UnitedHealth Group's Acquisition of Change Healthcare (Feb. 24, 2022), https://www.justice.gov/opa/pr/justice-department-sues-block-unitedhealth-group-s-acquisition-change-healthcare.

[40] Complaint, *United States v. UnitedHealth Group Inc.*, No. 1:22-cv-00481 23 (D.D.C. Feb. 24, 2022), https://www.justice.gov/opa/press-release/file/1476676/download.

[41] *United States v. UnitedHealth Group Inc.*, 2022 WL 4365867 *15-18 (D.D.C. 2022) (Mem. Op.).

[42] *See generally* Press Release, FTC, FTC Seeks to Block Microsoft Corp.'s Acquisition of Activision Blizzard, Inc. (Dec. 8, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-block-microsoft-corps-acquisition-activision-blizzard-inc.

[43] Complaint, *In re Microsoft Corp.*, No. 9412 2-4 (F.T.C. Dec. 8, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/D09412MicrosoftActivisionAdministrativeComplaintPublicVersionFinal.pdf.

[44] *Id*.

multi-game content library subscription services and cloud gaming subscription services, which may represent the future of gaming.[45] The complaint asserts that respondents executed a merger agreement in violation of Section 5 of the FTC Act, which if consummated would violate Section 7 of the Clayton Act.[46]

34. The FTC's recent complaint challenging *ICE/Black Knight* alleges that the proposed combination of the nation's two largest providers of mortgage loan origination systems and other key lender software tools would increase costs, reduce innovation, and reduce lenders' choices for tools necessary to generate and service mortgages.[47] The complaint alleges violations of Section 5 of the FTC Act and Section 7 of the Clayton Act in multiple markets, including for loan origination system ("LOS") software, commercial LOS software, product pricing eligibility engines ("PPEs"), and PPEs for users of ICE's LOS.[48] Reflecting the complexity of digital markets, the complaint contains both horizontal and vertical theories of harm related to the proposed merger.

7. Looking Forward

35. The Agencies will remain vigilant to prevent harm to competition resulting from digital mergers by engaging in robust merger enforcement. The Agencies are especially concerned about mergers that could entrench a dominant firm or allow such a firm to extend its dominance.

36. The Agencies are also especially concerned with any potential labor market harms when evaluating digital mergers. One concerning aspect of labor markets in digital sectors is the high proportion of non-competes in non-reportable big tech acquisitions.[49] The Agencies will continue to evaluate technology companies' use of non-compete clauses in employment agreements that prevent many skilled workers from working at competing firms or starting their own businesses. In addition, given their often close proximity and overlapping workforce needs, technology companies may be prone to enter into collusive agreements with one another that pose a harm to labor market competition. For example, technology companies have run afoul of the antitrust laws by entering into agreements not to hire each other's workers.[50] The Agencies will continue to evaluate the effects of these

[45] *Id*. at 11-16.

[46] *Id*. at 1, 21, 23. The United Kingdom Competition and Markets Authority has recently blocked the proposed *Microsoft/Activision* transaction. *See* Press Release, U.K. CMA, Microsoft / Activision deal prevented to protect innovation and choice in cloud gaming (Apr. 26, 2023), https://www.gov.uk/government/news/microsoft-activision-deal-prevented-to-protect-innovation-and-choice-in-cloud-gaming.

[47] *See generally* Press Release, FTC, FTC Staff Seeks Court Order Preventing ICE from Consummating its Acquisition of Rival Black Knight Pending Agency Administrative Challenge (Apr. 10, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-staff-seeks-court-order-preventing-ice-consummating-its-acquisition-rival-black-knight-pending.

[48] Complaint, *FTC v. Intercontinental Exchange, Inc*., No. 3:23-cv-01710 (N.D. Cal. Apr. 10, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023139iceblackknightfederalcomplaintpitro.pdf.

[49] *See, e.g.,* Non-HSR Technology Acquisitions Report, *supra* note 14, at 8-9, 21, 37 (discussing non-competes).

[50] *See, e.g., United States v. Adobe Systems Inc.*, No. 1:10-cv-01629, 2010 WL 11417874 (D.D.C. Sept. 24, 2010).

types of restrictions on labor markets. Purported consumer benefits in digital product markets from a merger do not offset or neutralize harm to workers in labor markets.

37. The importance of preventing harm before it happens and the importance of preserving open and fair dynamic competition both underlie the Agencies' commitment to robust pre-consummation analysis—wherever possible—of digital mergers. But whether or not a digital merger is consummated, the Agencies are firmly committed to act swiftly and decisively to challenge illegal digital mergers. Enforcement action is essential to prevent critically important digital markets from becoming or remaining unduly concentrated or dominated by a monopolist.