Organisation for Economic Co-operation and Development

DAF/COMP/WP3/WD(2024)10

Unclassified **English - Or. English**

10 June 2024

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Cancels & replaces the same document of 10 June 2024

Working Party No. 3 on Co-operation and Enforcement

Monopolisation, Moat Building and Entrenchment Strategies – Note by United States

11 June 2024

This document reproduces a written contribution from United States submitted for Item 2 of the 139th meeting of Working Party 3 on 11 June 2024.

More documents related to this discussion can be found at
www.oecd.org/competition/monopolisation-moat-building-and-entrenchment-strategies.htm

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JT03545722

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United States

1. The Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission (collectively, the "Agencies") submit this paper to describe analysis of monopolization, moat building, and entrenchment strategies in the United States.

2. The Agencies are committed to vigorous enforcement of the antitrust laws, which rest on the premise that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."[1] U.S. antitrust law prohibits dominant firms from exploiting their power through exclusionary tactics, tools, and business models, as well as unfair methods of competition. Nor can they engage in mergers "that would entrench or extend a dominant position through exclusionary conduct, weakening competitive constraints, or otherwise harming the competitive process."[2] Protecting a free and fair competitive process means that all firms will have the opportunity to compete on the merits, resulting in greater innovation, consumer choice, improved quality, higher growth, and lower prices.

3. Firms may gain sales and grow organically by competing on the merits, such as by continually improving and expanding their products and services to the benefit of the consumers that use them. But firms can also become dominant by excluding rivals and depriving them of the ability to grow and succeed themselves. For example, firms may engage in anticompetitive "moat-building" tactics that create barriers to protect their core products or services from outside threats. This can be done in myriad ways,[3] but this note focuses on moat building and entrenchment by dominant firms through mergers. As Assistant Attorney General Jonathan Kanter has explained, "Moat building uses exclusionary strategies in combination to ensure the deepest and widest barrier around the economic castle of the core monopoly service."[4]

4. This paper first discusses analysis of mergers that may harm competition by entrenching or extending an already dominant position. We describe the modern approach

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[1] *NCAA v. Board of Regents*, 468 U.S. 85, 104 n.27 (1984) (quoting Northern Pac. R. Co. v. United States, 356 U.S. 1, 4-5 (1958)).

[2] U.S. Dept. of Justice and Fed. Trade Comm'n, Merger Guidelines § 2.6 (2023) (2023 Merger Guidelines).

[3] A small sample of the Agencies' non-merger conduct work shows that dominant firms use multiple tactics to insulate their products from competition. For example, in the pharmaceutical industry, branded pharmaceutical companies have sought to protect their monopolies by paying generic pharmaceutical companies to delay bringing lower-cost alternatives to market. *See* FTC v. Actavis, Inc., 570 U.S. 136 (2013). Other branded pharmaceutical companies have sought to build moats by preventing would-be generic competitors from obtaining drug samples needed to conduct the bioequivalence tests necessary for regulatory approval. *See* FTC v. Shkreli, 581 F. Supp. 3d 579, 634 (S.D.N.Y. 2022). Monopolists also seek to protect their dominance by imposing exclusivity agreements on their customers. *See* McWane, Inc. v. FTC, 783 F.3d 814, 842 (11th Cir. 2015); see also Shkreli, 581 F. Supp. 3d 636 (exclusive supply agreements can also be unlawful monopolization).

[4] Kanter, Jonathan, Keynote Speech, CRA Conference (Mar. 31, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-cra-conference.

to entrenchment, as set forth in the recently released 2023 Merger Guidelines issued by the Agencies, and we then discuss the history and evolution of entrenchment theories in the United States. We next address moat-building and entrenchment tactics that can arise in digital platform markets. Finally, we describe recent case experience in the United States.

1. Analysis of Mergers that Entrench or Extend a Dominant Position

5. The Agencies' 2023 Merger Guidelines reflect the Agencies' experience with modern economics and changing market realities in our economy. Recognizing that acquisitions can be a key strategy that monopolists in today's markets use to fortify a dominant position, the 2023 Merger Guidelines include a framework for identifying mergers that can violate the law by entrenching or extending a dominant position.[5] The Agencies examine whether one of the merging firms already has a dominant position that the merger may reinforce. The Agencies also examine whether the merger may extend that dominant position to substantially lessen competition or tend to create a monopoly in another market.

1.1. Modern Approach to Entrenchment in the United States

6. Guideline 6 of the 2023 Merger Guidelines presents a flexible and economically sound — and current — framework for the Agencies to evaluate transactions involving dominant firms. The Agencies start the analysis of a proposed merger involving a dominant firm by assessing whether one of the firms has a dominant position in the market. To do so, the Agencies may observe direct evidence (e.g., evidence that one of the firms has restricted output in the market) or indirect evidence. Indirect evidence includes documents or data indicating that at least one of the firms has a high share in a market affected by the transaction, and that share is protected by barriers to entry (e.g. high costs associated with entering the market). Further entrenchment may tend to create a monopoly or forestall substantial benefits from the emergence of new competitive constraints. Guideline 6 reflects the Agencies' desire to "distinguish anticompetitive entrenchment from growth or development as a consequence of increased competitive capabilities or incentives."[6]

7. A merger can result in long-term harm to competition even when it initially provides short-term benefits to some market participants. Thus, the Agencies may also consider the longer-term consequences of the merger on market power and industry dynamics. If the merger will protect or preserve dominance by limiting opportunities for rivals, reducing competitive constraints, or preventing competitive disruption, then the Agencies will approach the merger with a heightened degree of scrutiny. The degree of scrutiny and concern will increase in proportion to the strength and durability of the dominant firm's market power.

8. As the U.S. Supreme Court has explained, a merger involving an "already dominant[] firm may substantially reduce the competitive structure of the industry by raising entry barriers."[7] Examples of ways in which a merger may raise barriers to entry

[5] 2023 Merger Guidelines, §2.6.

[6] Id.

[7] *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577-578 (1967).

include increasing switching costs, interfering with customers' use of competitive alternatives, or depriving rivals of scale economies or network effects.[8]

9. The Agencies also consider whether the merger involves a dominant firm eliminating a nascent threat. Concerns may arise not only with respect to emerging threats within its core market but also with actions directed at threats emerging in related or adjacent markets, such as new component technologies, key intellectual property, or complementary assets.

10. In addition to assessing whether a merger violates Section 7 of the Clayton Act,[9] which is the principal antitrust law governing mergers, the Agencies consider whether mergers that entrench or extend a dominant position may also violate Section 2 of the Sherman Act, which prohibits monopolization, attempted monopolization, and conspiracy to monopolize.[10] That said, Section 7 provides an important prophylactic tool in combatting monopoly maintenance that may result from mergers. Section 7 was designed to "arrest anticompetitive tendencies in their incipiency."[11] Preventing anticompetitive conduct at the outset can be a far more effective remedy than attempting to address such conduct after it has taken root. The FTC also may consider whether a merger that entrenches or extends a dominant position may violate Section 5 of the Federal Trade Commission Act, which prohibits "unfair methods of competition."[12] As the legislative history of the FTC Act shows, Congress wanted the FTC to use Section 5 to stop monopolies in their "incipiency."[13] Established precedent and prior actions show that unfair methods of competition can take the form of individual mergers, series of mergers, or acquisitions of nascent competitors,[14] each of which may be used to build moats or maintain dominance. While these strategies may not necessarily involve disadvantaging or excluding rivals, their effects can still be to build moats or maintain dominance. As FTC Chair Khan has recognized:

- [T]he particular business strategies that digital markets reward require us to look beyond concepts like foreclosure and exclusion when trying to cognize harm, especially in the context of merger investigations. For example, when a dominant platform pursues an acquisition as a way to overtake emerging rivals in still-nascent markets, foreclosure may not be a likely tactic. Instead of cutting off access, the strategy requires swift integration and rapid scaling of the acquired product so that the firm can quickly establish a strong foothold. The deal can still facilitate the maintenance of a monopoly—and therefore be illegal—but the precise mechanism

[8] 2023 Merger Guidelines, §2.6.

[9] 15 U.S.C. § 18.

[10] 15 U.S.C. §§ 1, 2.

[11] *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 318 nn.32-33 (1962). The incipiency standard requires the Agencies to assess whether mergers present risk to competition, but does not require the Agencies to predict the future or calculate precise effects of a merger with certainty.

[12] 15 U.S.C. § 45(a)(1).

[13] FED. TRADE COMM'N, FILE NO. P221202, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, at 4 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

[14] FED. TRADE COMM'N, FILE NO. P221202, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, at 12-16 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

may look different from some of the traditional concepts that antitrust enforcers look to.[15]

11. If the Agencies determine that a merger raises concerns that its effect may be to entrench or extend a dominant position, then merging parties may contend that procompetitive efficiencies will mean that the merger will not result in a substantial lessening of competition.[16] When assessing this argument, the Agencies will not credit vague or speculative claims, nor will they credit benefits outside of the market where the merger may substantially lessen competition. Rather, the Agencies examine whether the evidence presented by the merging parties shows that any claimed benefits (1) could not be achieved without the merger under review, (2) are verifiable using reliable methodology and evidence not dependent on the subjective predictions of the merging parties or their agents, and (3) prevent the risk of a substantial lessening of competition in the relevant market.

1.2. Evolution of the U.S. Approach to Entrenchment Theories

12. The U.S. approach to entrenchment theories has evolved over time. In the 1960s and 1970s, the Agencies successfully challenged mergers that would entrench the position of an already dominant firm.[17] Over time, however, the Agencies moved away from it, omitting theories for evaluating the entrenchment of power in Merger Guidelines issued in the 1980s and 1990s.

13. In recent years, however, current marketplace realities have called for further reevaluation. There is growing recognition that antitrust enforcement has inadequately forestalled the harm to competition that has resulted when dominant firms acquire nascent competitive threats to entrench their dominant positions, particularly in the digital economy.[18] Thus, in the 2010 update to the Horizontal Merger Guidelines, entrenchment was incorporated as part of the "unifying theme" of the Guidelines, which stated that "mergers should not be permitted to create, enhance, or *entrench* market power or to facilitate its exercise" (emphasis added).[19] The 2023 Merger Guidelines have further clarified and modernized the U.S. approach in recognition of current market realities, incorporating a specific framework for reviewing dominance-preserving mergers. The

[15] Lina Khan, Chair, Fed. Trade Comm'n, Remarks at the Charles River Associates Conference, at 2 (Mar. 31, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/CRA%20speech.pdf.

[16] The framework for evaluating rebuttal evidence is described in Section 3 of the Guidelines.

[17] *See, e.g., FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577-578 (1967); *Stanley Works v. FTC*, 469 F.2d 498, 505 (2d Cir. 1972) (affirming order blocking a merger under Section 7 that would "entrench" an "already dominant position"); *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506, 518 (3d Cir. 1969) ("The potential entrenchment of … market power… may be anticompetitive and violative of § 7."); *Fruehauf Corp. v. FTC*, 603 F.2d 345, 353 (2d Cir. 1979) (the "entrenchment of a large supplier or purchaser" can be an "essential" showing of a Section 7 violation).

[18] *See, e.g.*, Subcom. on Antitrust, Com. and Admin. Law of the House Comm. on the Judiciary, Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations (Oct. 6, 2020) https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf (noting that the "significant and durable market power" held by dominant platforms at least in part can be attributed to a large volume of acquisitions by those firms).

[19] U.S. Dep't of Just. Antitrust Div. & Fed. Trade Comm'n, Horizontal Merger Guidelines, 2 (2010) https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

Agencies have also brought a number of cases incorporating entrenchment theories, as discussed below.

2. Considerations in Digital Platform Markets

14. Platform markets present distinct competitive considerations that can exacerbate the exclusionary effects of moat-building and entrenchment tactics. For example, platform markets are especially likely to involve scale and network effects, gatekeeping, leveraging, consumer lock-in, market tipping, and data-driven advantages.[20] Multiple anticompetitive acts can often work together to strengthen network effects and further entrench a dominant firm by making it more challenging for rivals to achieve the scale necessary to compete effectively. As demonstrated by the durable monopolies that have arisen in the digital sector, these strategies are often highly successful.

15. Guideline 9 of the 2023 Merger Guidelines describes the distinctive characteristics and considerations that arise when platforms are part of an acquisition.[21] The 2023 Merger Guidelines explicitly address the issues inherent in platform merger analysis and explain the ways in which the Agencies scrutinize a proposed merger's possible effects on competition *between* different digital platforms, competition to offer products and services *on* a digital platform controlled by one of the merging firms, and competition to *displace* or disintermediate a digital platform controlled by one of the firms.[22] It describes several ways an acquisition can entrench a dominant platform's position. For example, a dominant platform may systematically acquire nascent platform operators that compete for customers on one or more sides of the dominant firm's multi-sided platform. Additionally, a platform operator may acquire a platform participant, thereby entrenching the operator's position by depriving rivals of participants and, in turn, depriving them of network effects.

16. Dominant digital platforms may seek to build their competitive moats through a variety of other tactics in addition to acquisitions. For example, a firm that owns a dominant platform may set the rules for using the platform in ways that disadvantage other firms and increase the dominant firm's market power (e.g., a digital shopping platform might require that a business selling on the platform use its delivery services). Or, if the dominant digital platform plays the role of a gatekeeper, it may, for example, preference its own products or other favored firms' products in terms of the prominence in which they appear to users on the platform.[23] Even the threat of facing such self-preferencing can discourage firms from competing aggressively or even entering the market in the first place for fear that they may be targeted by the dominant platform. In addition, the firm owning the dominant platform may limit interoperability between the dominant platform and other firms' products and services after initially operating an open platform that invited

[20] *See, e.g.*, Lina Khan, Chair, Fed. Trade Comm'n, Remarks at the Charles River Associates Conference, at 2 (Mar. 31, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/CRA%20speech.pdf ("Digital platforms can also deploy surveillance techniques to spot and monitor potential threats, equipping incumbents to defend and maintain their dominance in a highly targeted manner.").

[21] 2023 Merger Guidelines, § 2.9.

[22] 2023 Merger Guidelines, § 2.9.

[23] Lina Khan, Chair, Fed. Trade Comm'n, Remarks at the Charles River Associates Conference, at 2 (Mar. 31, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/CRA%20speech.pdf ("[W]e've also seen gatekeepers use their privileged position to advantage additional parts of their business, be it through self-preferencing, tying, or a range of other tactics.").

interoperability.[24] As another example, a large digital platform owner may acquire smaller technology firms with a goal of removing a potential future competitor from the market.

17. In order to assess the impact on competition of such tactics, it is important to consider the entire course of conduct of a monopolist as a whole rather than separately analyzing each element.[25] As Assistant Attorney General Kanter has explained:

- The moat analogy is particularly helpful here. A moat does not work if it's only built in front of the castle — the attackers just go around the side. For the same reason you can't just build it to the left or the right. The entire point is to build a complete defensive barrier. In the same way, enforcers cannot just look at one aspect of a firm's conduct, leaving the others to separate consideration. You have to look all around the moat to see it for what it is.[26]

3. Case Experience

18. The Agencies recently have brought several enforcement actions involving monopolization, moat building, and entrenchment strategies. Cases pending in U.S. courts will not be discussed in detail here. We note, however, the following filed and pending cases:

- the Antitrust Division and 13 state attorneys general sued Google, alleging that Google monopolized online search and search advertising markets through a series of anticompetitive practices, including by entering into exclusionary agreements requiring that Google be set as the preset default general search engine on billions of mobile devices and computers worldwide;[27]
- the Antitrust Division and 17 state attorneys general sued Google, alleging that Google monopolized the digital advertising market through, among other things,

[24] Lina Khan, Chair, Fed. Trade Comm'n, Remarks at the Charles River Associates Conference, at 2 (Mar. 31, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/CRA%20speech.pdf ("[T]he imperative to scale quickly and build a large user base can lead a platform to encourage and lure third parties to interconnect with its network, only to later impose restrictive conditions or cut them off entirely. This type of 'open first, closed later' scheme does not quite fit a traditional 'refusal to deal' framework, and the tactic can be anticompetitive even if the platform did not have a duty to deal.").

[25] See *LePage's Inc. v. 3M*, 324 F.3d 141, 162 (3d Cir. 2003) (en banc) (emphasizing that the anticompetitive course of conduct by a monopolist must be considered "as a whole rather than considering each aspect in isolation."). For a discussion of the proper legal standards for analyzing Facebook's alleged exclusionary conduct for building a "moat" around its monopoly in personal social networking services, see Brief of the United States as Amicus Curiae Supporting Plaintiffs-Appellants, State of New York, et. al. v. Facebook, Inc., D.C. Cir. (No. 21-7078), Jan. 28, 2022.

[26] Kanter, Jonathan, "Solving the Global Problem of Platform Monopolization," Fordham Competition Law Institute's 49th Annual Conference on International Antitrust Law and Policy, (Sep. 16, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-keynote-fordham.

[27] Press Release, "Justice Department Sues Monopolist Google for Violating Antitrust Laws," Oct. 20, 2020, https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws;

engaging in a pattern of acquisitions to obtain control over key digital advertising tools used by website publishers to sell advertising space;[28]

- the FTC and 17 state attorneys general sued Amazon alleging an ongoing pattern of conduct that has harmed competition in the online superstore market serving shoppers and in the market for online marketplace services purchased by sellers. This conduct includes anti-discounting measures that punish sellers and deter other online retailers from offering prices lower than Amazon, as well as conditioning sellers' ability to obtain "Prime" eligibility for their products—a virtual necessity for doing business on Amazon—on sellers using Amazon's costly fulfillment service, which is the process of preparing items for shipping to "fulfill" orders and includes storing, retrieving from storage, packaging, and preparing items for delivery;[29]
- the FTC sued Meta for allegedly illegally maintaining a monopoly in personal social networking through a multi-year course of anticompetitive conduct, including acquisitions of Instagram and WhatsApp.[30] The allegations recognize the key role of data in tracking potential rivals and that privacy degradation can be a harm to competition;[31]
- the Antitrust Division, joined by 16 state attorneys general, sued Apple, alleging monopolization and attempted monopolization of the national "performance smartphone market" through a course of anticompetitive exclusionary conduct that served to build and reinforce the competitive moat around its smartphone.[32]

19. Turning to some examples of resolved cases, 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 platform that would allow users to pay online vendors directly from their bank accounts instead of using a debit card.[33] 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

[28] Press Release, "Justice Department Sues Google for Monopolizing Digital Advertising Technologies," Jan. 24, 2023, https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies.

[29] Press Release, "FTC Sues Amazon for Illegally Maintaining Monopoly Power," Sept. 25, 2023, https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-sues-amazon-illegally-maintaining-monopoly-power; Amended Complaint at ¶ 111, FTC v. Amazon.com, Inc., No. 23-cv-01495-JHC (W.D. Wash. Mar. 14, 2024).

[30] Press Release, "FTC Sues Facebook for Illegal Monopolization," Dec. 9, 2020, https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization.

[31] Substitute Amended Complaint at ¶¶ 42, 71, 222, FTC v. Facebook, Inc., No. 20-cv-03590-JEB (D.D.C. Sept. 8, 2021).

[32] Press Release, "Justice Department Sues Apple for Monopolizing Smartphone Markets," Mar. 21, 2024, https://www.justice.gov/opa/pr/justice-department-sues-apple-monopolizing-smartphone-markets.

[33] 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.

Clayton Act.[34] The complaint alleged that "[a]cquiring Plaid would give Visa the ability to raise the already high entry barriers faced by competitors seeking to enter or expand into online debit payments, further entrenching Visa's monopoly power in online debit."[35] Visa and Plaid abandoned the proposed transaction shortly after DOJ filed its complaint.

20. The FTC has resolved multiple cases involving monopolization, moat building, and entrenchment strategies in recent months.[36] In 2023, the FTC successfully sued to stop Sanofi from acquiring an exclusive license to Maze's therapy in development for treatment of Pompe disease, a debilitating and potentially fatal genetic disorder. The FTC alleged that the transaction would protect Sanofi's monopoly in the Pompe disease therapy market by eliminating Maze as a nascent competitor poised to challenge the monopoly. Sanofi terminated its proposed acquisition of the exclusive license shortly after the FTC challenged the transaction.[37] Similarly, the FTC sued to block Amgen's acquisition of Horizon Therapeutics due to concerns that Amgen would leverage its large portfolio of blockbuster drugs to pressure insurance companies and pharmacy benefit managers into favoring Horizon's two monopoly products, Tepezza and Krystexxa, or disadvantaging rivals to these two products. The FTC also alleged that the acquisition would entrench Tepezza's and Krystexxa's monopoly positions by substituting Amgen, with its broad and powerful portfolio of blockbuster drugs, for Horizon with its smaller portfolio, thus raising entry barriers and dissuading smaller firms from competing aggressively. The consent order resolves these concerns by broadly prohibiting Amgen from bundling its product with Tepezza or Krystexxa. Though released shortly after finalization of the consent order, the FTC's concerns in this case embody the competitive risks described in Guideline 6 of the 2023 Merger Guidelines.

[34] 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.

[35] Id. at ¶ 69 (alleging that ownership of Plaid would give Visa a "front row seat . . . into which fintechs are more likely to develop competitive alternative payments methods")

[36] The FTC's investigation of the proposed acquisition of iRobot by Amazon focused on some of the moat building and entrenchment strategies discussed in this paper, such as self-preferencing. *See* Press Release, Fed. Trade Comm'n, Statement Regarding the Termination of Amazon's Proposed Acquisition of iRobot (Jan. 31, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/01/statement-regarding-termination-amazons-proposed-acquisition-irobot. Amazon and iRobot abandoned the proposed acquisition.

[37] Press Release, Fed. Trade Comm'n, Statement Regarding the Termination of Sanofi's Proposed Acquisition of Maze Therapeutics' Pompe Disease Drug (Dec. 13, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/12/statement-regarding-termination-sanofis-proposed-acquisition-maze-therapeutics-pompe-disease-drug.