

# How the Debate about Multi-Sided Platform Regulation is Shaping Merger Enforcement



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## Introduction

In recent years, many digital platforms have come under increased antitrust scrutiny, first in the European Union and the United Kingdom and more recently in the United States. Some of the scrutiny is specific to mergers. Certain policymakers and regulators have been concerned that platforms may be growing through strategic acquisitions rather than merit,<sup>[2]</sup> and that mergers may be used to entrench or expand market power to the detriment of users or to foreclose competitors.

The US Federal Trade Commission (FTC) has taken actions that illustrate how some US regulators believe that past acquisitions by platforms should not have been cleared so easily. For instance, in February 2020, the FTC ordered Google, Amazon, Facebook, Apple and Microsoft to provide information about acquisitions they made between 2010 and 2020 that were below reporting thresholds. Later, in August 2021, the agency refiled a complaint seeking to unwind Facebook's acquisitions of Instagram and WhatsApp on the grounds that they were anticompetitive acquisitions, even though the agency had originally allowed them to proceed in the early 2010s.<sup>[3]</sup>

Experts and academics have called for measured enforcement of merger policy, highlighting the risk of too strict a policy and emphasising the potential efficiencies from non-horizontal mergers, notably in terms of allocating risk and incentivising asset-specific investments.<sup>[4]</sup> However, the recent proposal for updated Merger Guidelines published by the FTC and the US Department of Justice (DOJ) in July 2023 signals an intent to strengthen enforcement, and reflects concerns surrounding mergers involving digital platforms.<sup>[5]</sup>

One of the proposed guidelines is dedicated to mergers involving multi-sided platforms, stressing: 'Mergers involving platforms can give rise to competitive problems, even when a firm merging with the platform has a relationship to the platform that is not strictly horizontal or vertical.'<sup>[6]</sup> The agencies propose to pay particular attention to mergers involving a multi-sided platform,<sup>[7]</sup> expressing that, in such cases, the agencies will examine competition 'between platforms, on a platform, or to displace a platform'.<sup>[8]</sup>

Economists widely agree that certain characteristics of multi-sided platforms warrant special consideration. Network effects, the role of data, zero pricing and economies of scale and scope across different services are factors that affect platforms' market performance as well as the competitive dynamics they face. However, there is far less agreement as to whether the tools that have been used to gauge competitive effects for traditional businesses can be adapted to analyse digital multi-sided platform business models.

In this chapter, we discuss ways in which the characteristics of multi-sided platforms inform the analysis of several topics central to merger reviews, including market definition, price and non-price competition, barriers to entry and lessening of competition, foreclosure and raising rivals' costs, and dynamic effects and nascent competition. We conclude by discussing the challenges in structuring effective remedies for digital platforms. In each section, we provide excerpts from case rulings, policy statements and academic literature to illustrate the nature of enforcers' potential concerns and the analytical tools appropriate to conducting an assessment of mergers involving digital ecosystems.

## Market definition after Amex

*Amex* offered the US Supreme Court an opportunity to lay out its reasoning behind market definition in competition analyses of two-sided markets. The *Amex* decision posited that for transaction markets where both sides transact simultaneously, the relevant market consists of both sides of the two-sided transaction. Assessing just one side in isolation would lead to incorrect conclusions. It also highlighted the existence of indirect network effects and their consequences in terms of interconnected pricing and demand.<sup>[9]</sup>

The *Amex* decision has informed other courts' reasoning in subsequent antitrust investigations of two-sided platforms, including merger reviews. For example, in the proposed merger between Sabre and Farelogix, the US District Court for the District of Delaware decided that the Sabre global distribution system connecting airlines to travel agents was a two-sided platform, and although Farelogix provided competing services on one side of that platform by providing airlines with an offer and order management technology solution, it was not included in the same relevant market under *Amex*.<sup>[10]</sup>

However, economists and antitrust practitioners have noted that a narrow approach to market definition focused exclusively on the platform-based transaction may ignore some commercial realities.<sup>[11]</sup> Firms that are not two-sided platforms may put competitive pressure on two-sided platforms.<sup>[12]</sup> In particular, competition may come from business models that disintermediate the provision of the service. For instance, an electric scooter rental firm could constrain a ride-sharing platform and its drivers by competing for their riders, even though the scooter rental firm is not a two-sided platform. How the *Amex* decision may be applied going forward continues to be debated.

## Price competition

The analysis of prices and pricing behaviour has traditionally been at the core of merger assessments, and pricing, both actual and predicted, is often a key factor in merger review in the United States.<sup>[13]</sup> However, pricing in the context of multi-sided platforms is more complex compared with more standard settings where there is generally a clear relation between the price and the product or service exchanged.

Multi-sided platform settings are often characterised by different prices for each side, multiple types of prices (e.g., membership and transaction prices) and a pricing structure that is purposefully designed to promote transactions on the platform.<sup>[14]</sup> Indirect network effects often result in asymmetric prices, whereby only some participants pay for the platform's services.<sup>[15]</sup> Academics have extensively studied the way multi-sided platforms rely on a variety of pricing mechanisms or structures to generate revenue, depending on the platform's business model and the characteristics of users on each side.<sup>[16]</sup> For instance, the restaurant reservation platform OpenTable charges fees to restaurants, whereas diners can use it for free and even benefit from rewards. Asymmetric pricing is also the foundation of business models for ad-supported digital platforms that provide free content to one set of users to attract paying advertisers that seek access to users' 'eyeballs'.<sup>[17]</sup> These types of businesses include social and professional networking platforms such as Instagram, TikTok and LinkedIn, as well as internet search (e.g., Google) and review websites (e.g., Yelp and TripAdvisor).

Platform economists also emphasise the importance of understanding pricing in two-sided platforms as part of a dynamic platform development strategy that may both set lower prices initially to grow the platform and set different prices on the two sides of the platform.<sup>[18]</sup> As a result, many economists recognise that pricing may be less informative than in more

traditional settings, and that if pricing is to be used as a proxy for market power or competitive pressure, it must be done considering both sides of the platform and with the life cycle of the platform in mind.

## Non-price competition

In addition to a more complex assessment of price competition, mergers involving digital multi-sided platforms raise additional challenging questions relating to assessing the nature and extent of possible harm and efficiencies. Much of the harm considered in the digital space concerns loss of choice, quality or privacy or reduced innovation, especially in the context of platforms that offer 'zero-price' services to one side of users.<sup>[19]</sup> For platforms that offer free services to one of its sides, competition for the non-paying users of the platform must involve other attributes such as service quality and innovation. In such cases, effects of mergers occur in non-price dimensions, complicating the assessment of competitive effects.

Changing quality was a relevant dimension in the assessment of competitive effects in the proposed acquisition of the online food delivery service Postmates by Uber (completed in December 2020). Both companies claimed that all users of the multi-sided platform (consumers, restaurants and drivers) would benefit from an improved platform with an expanded list of restaurants.<sup>[20]</sup> The merger was cleared by the DOJ in November 2020 after a request for more details, suggesting that the benefits from improved search and transaction efficiencies were favourably weighted against the reduction in the number of competing platforms in any of the localised markets.<sup>[21]</sup>

Quality also mattered in the FTC's November 2020 challenge of the proposed merger of CoStar and RentPath – two internet listing service (ILS) platform businesses that match owners of large residential apartment complexes with qualified renters. The FTC noted that they:

“ . . . compete fiercely to attract prospective renters through their marketing efforts and by improving their ILS websites' features, ease of use, and quality of information. The Acquisition will eliminate this head-to-head rivalry and reduce competitive pressure on the ILSs to improve their offerings to renters, leading to lower quality and forgone innovation.<sup>[22]</sup> ”

Recently, mergers have also raised privacy concerns, another non-price characteristic. For instance, in the context of Amazon's acquisitions of robot vacuum manufacturer iRobot<sup>[23]</sup> and primary care provider One Medical,<sup>[24]</sup> civil society organisations were concerned that Amazon's access to new sources of data via iRobot and One Medical would raise privacy concerns due to the potential new insights they would provide to Amazon. While the FTC did not challenge the Amazon and One Medical transaction, the FTC commissioners expressed their concerns with regard to the sensitive health data that both companies own, and noted that they would hold the companies responsible for their publicly stated commitment to not share health data for marketing and advertising purposes without users' clear permission.<sup>[25]</sup>

The frameworks that authorities use to assess and measure non-price characteristics will likely continue to develop, including how to determine the extent to which non-price characteristics drive consumer demand and how these characteristics are likely to be affected by a given transaction.

## Barriers to entry and lessening of competition

Economists have found that digital platforms often exhibit economies of scale and scope and network effects, which make platforms more efficient and attractive as they grow.<sup>[26]</sup> However, if greater efficiencies and attractiveness cannot be easily matched by smaller players, a concern could be that they may present a barrier to entry, therefore providing platforms with increased market power and the ability to act unilaterally to the detriment of users.<sup>[27]</sup> A merger that aggregates users or data, or both, or creates economies of scale and scope would generate efficiencies that benefit users, but it could also raise concerns if it resulted in higher barriers to entry that would lessen competition.

Assessing contestability typically includes assessing the strength of network effects. Direct network effects exist when the number of users of a platform makes the platform more attractive for more users to join on the same side of the platform. Indirect network effects arise when a growing number of users on either side of the platform increases the value of the platform for users on the other side. Indirect network effects can create a feedback loop; an increase in users on one side spurs an increase on the other, which in turn attracts more users on the first side, and so forth.<sup>[28]</sup> Growing one of the platform sides (e.g., via a merger) may help entrench a large platform, making entry more difficult as new platforms may struggle to attract enough users to jump-start their growth.

However, the ability of users to 'multi-home' – that is, use competing platforms concurrently – and the extent to which they do so act as a constraint on indirect network effects and lower barriers to entry.<sup>[29]</sup> For example, as shoppers typically carry multiple credit cards, and merchants almost always accept multiple types of credit cards, the different card issuers have to compete to entice cardholders to use their cards, for instance through rewards. Similarly, ad-supported digital platforms compete for users' attention.<sup>[30]</sup>

Combining data sources and increasing the diversity of data have also generated concerns that mergers could provide a platform, particularly a smaller entrant, with an advantage over its competitors. For example, some experts and regulators have commented on how the amount of data that Google and Meta gather from their services can act as an effective barrier to entry for rival advertising services.<sup>[31]</sup> Newly gained access to data can also be scrutinised in a platform's acquisitions of complementary services when the data is important for the development of complementary services or services downstream. Concerns around privileged access to data were raised in the proposed acquisition of Change Healthcare, the largest electronic data interchange (EDI) clearinghouse for payment and revenue management, by UnitedHealth Group, one of the largest US health insurers.<sup>[32]</sup> The merger, announced in 2021, was challenged by the DOJ in 2022.<sup>[33]</sup> Among other concerns, the DOJ claimed that by owning Change Healthcare and its EDI, UnitedHealth would have an incentive to share competitors' claims data with United Healthcare, its health insurer subsidiary, and thereby gain an undue advantage.<sup>[34]</sup>

Mergers can, in principle, be scrutinised if they result in newly gained access to data that may lessen competition and put competitors at a disadvantage that they cannot overcome and that does not result in sufficient improvement driven by the increased volume or diversity of data available. So far, no acquisition has been blocked on those grounds, as concerns raised regarding access to and combination of personal data have focused on possible harm to privacy, as in the case of the aforementioned Amazon and iRobot and Amazon and One Medical mergers.

However, enforcers might become more inclined to focus on barriers to entry, as suggested by the new proposed Merger Guidelines, which state that 'mergers should not entrench or extend a dominant position' by creating barriers to entry.<sup>[35]</sup> Network effects, economies of scale and 'control of necessary inputs' are all considered susceptible of creating barriers to entry and lessening competition. How the balance is struck between the possible efficiencies to users from network effects or economies of scale and a related lessening of competition will be interesting to watch.

## Foreclosure and raising rivals' costs

We examine the extent to which theories of harm in the digital merger space combine traditional elements of unilateral foreclosure or 'raising rivals' costs' conduct and multi-sided platform considerations.

Platforms often provide platform technology or other services to their business users. When platforms have competed downstream with their business users, concerns have emerged that platforms may supply themselves at more favourable terms through various 'self-preferencing' strategies. Third-party business users would then face less advantageous conditions in accessing platform technology compared with the platform's own services, or be foreclosed altogether, potentially increasing their costs or resulting in an inferior-quality service. Such an advantage might hold the potential to impair competitors to the point of distorting competition.<sup>[36]</sup>

Such concerns regarding access to services provided by platforms have been raised as early as 2011, in the context of Google's acquisition of ITA Software, the owner of a leading airfare pricing and shopping system called QPX. The DOJ was concerned that Google's acquisition would result in Google foreclosing access to an 'essential input' for potential competitors in the travel search market.<sup>[37]</sup> More recently, similar concerns emerged during Meta's acquisition of the customer relation management (CRM) company Kustomer. The acquisition was cleared in 2021 after a year-long investigation by the FTC due to concerns that other CRM companies would be precluded from equal access to Meta's messaging systems.<sup>[38]</sup> Similarly, Meta's now-abandoned acquisition of the graphics interchange format (GIF) library Giphy raised concerns that other digital services would no longer be able to access Giphy's GIF library, negatively affecting user engagement with its products. This was one of the concerns behind the UK Competition and Market Authority (CMA) prohibition of the acquisition.<sup>[39]</sup> As at August 2023, Microsoft's acquisition of game publisher Activision/Blizzard is being challenged by the FTC due to concerns that other console producers and cloud gaming services would not be able to distribute Activision's popular games such as Call of Duty, thereby making its consoles less attractive.<sup>[40]</sup>

In other cases, data is at the core of concerns raised by regulators regarding potential self-preferencing or foreclosure, as data has been described by some as a 'key input' in digital markets. For instance, in its July 2023 challenge to the IQVIA merger with Propel Media, the FTC expressed concerns that 'The merger would also increase IQVIA's incentive to withhold key information to prevent rival companies and potential entrants from effectively competing' in the market for programmatic advertising for healthcare products.<sup>[41]</sup>

The assessment of acquisitions of new digital services, whether complementary or along the value chain, will have to balance the potential harm from foreclosure or raising rivals' costs with the possible efficiencies that users may get from ecosystem integration. Integrated ecosystems may generate efficiencies and potential benefits to consumers in terms of convenience or lower transaction costs. The decision to enter a complementary service may have procompetitive justifications. In particular, complementary services that gain value from integration with other services may be more susceptible of becoming part of the core services of the platform. This, for example, may be the case for maps or photo capabilities.

Despite the idiosyncrasies of platform businesses, the US courts have so far assessed competitive concerns around access and foreclosure with traditional tools, analysing incentives and ability to foreclose a market, rather than focusing exclusively on the functioning of a particular ecosystem. The bar for intervention continues to be high. However, the proposed Merger Guidelines may lower the threshold for intervention, as they highlight that 'mergers should not substantially lessen competition by creating a firm that controls products or services that its rivals may use to compete' and propose to evaluate the incentive and ability to degrade terms for rivals' access to these resources.<sup>[42]</sup>

## Dynamic competition: acquisitions of nascent or potential competitors

The fast-changing nature of competition in the digital world has also led to concerns by certain economists, antitrust practitioners and regulators that purchases of start-ups by 'dominant' digital companies may be thwarting competition, even though the transactions fall under the notification thresholds.<sup>[43]</sup> In this view, some of the acquisitions by large technology companies may be motivated by the desire to eliminate nascent competition via 'killer acquisitions' or integrate nascent competition via 'reverse killing acquisitions'.<sup>[44]</sup> In May 2022 remarks, Assistant Attorney General Jonathan Kanter clarified that 'nascent competitor acquisitions do not have to be purely horizontal or vertical' and could apply to adjacent markets too.<sup>[45]</sup>

In a dynamic industry governed by network effects, a successful disruptive entrant has the potential to grow suddenly and quickly, causing an incumbent to lose its user base. While the proposed Merger Guidelines acknowledge that 'technological transitions can render existing entry barriers less relevant', they express the concern that 'a dominant firm might seek to acquire firms to help it reinforce or recreate those entry barriers so that its dominance endures past the technological transition', and ultimately suggest that 'agencies take particular care to preserve opportunities for deconcentration during technological shifts'.<sup>[46]</sup>

Already, in its review of the now-abandoned merger between Visa and Plaid (a company that connects consumers' online bank accounts with merchants' banks to make direct payments), the FTC raised concerns that Visa would have the incentive to degrade the quality of Plaid's offering following the acquisition, or even kill it entirely.<sup>[47]</sup>

However, predicting the future of a company in an innovative space is speculative and potentially subjective. For example, while Meta's acquisition of Giphy did not raise any issues in the United States, it was blocked in the United Kingdom. The CMA acted on the basis that the GIF repertory business was 'making efforts towards entry and expansion' and noted that even if entry might ultimately be unsuccessful, the acquisition of such a firm amounted to a significant lessening of competition.<sup>[48]</sup> The proposed Merger Guidelines illustrate such speculation and subjectivity when stating that the acquisition of a firm that is just 'perceived by market participants as a potential entrant' can substantially lessen competition by eliminating or relieving competitive pressure if this potential entrant has no more than 'a likely influence on existing competition'.<sup>[49]</sup>

In Meta's acquisition of Within, the FTC alleged that the transaction would have a detrimental effect on competition and innovation because Meta would not develop its own virtual reality (VR) fitness app to compete with Within's app, Supernatural. In its decision to deny the motion for a preliminary injunction, the judge found the FTC had not demonstrated reasonable probability that Meta would have entered the market with its own VR fitness app, in part because Meta did not need to develop its own app to obtain the economic benefits from the VR fitness app market.<sup>[50]</sup>

## Remedies

Defining appropriate remedies can be more complex in digital markets. Although the DOJ and the FTC prefer structural remedies (such as asset or line-of-business divestitures) to behavioural remedies,<sup>[51]</sup> divestitures may not be practical if competition is national or global, or they may not be a good option if they limit indirect network effects or efficiencies.<sup>[52]</sup> As a result, behavioural remedies may, in some cases, be preferable. US regulatory agencies have acknowledged this dilemma in the remedies they have imposed on past mergers of two-sided digital platforms, which have included access remedies.

The consent decree in the aforementioned 2011 Google acquisition of ITA Software required Google and ITA to continue to renew existing contracts and enter into new contracts with other travel service providers at fair and reasonable terms. In addition, it required the merged entity to continue to invest in research and development for improving ITA's QPX airfare pricing and shopping system.<sup>[53]</sup>

The Google and ITA consent decree is also an early example of authorities' emerging view of data as a competitive asset and a dimension to consider during merger reviews. ITA had been doing business with many companies through which it had amassed pricing, financial and strategic data on Google's potential competitors. The DOJ required Google to build a firewall around the competitor data it acquired through ITA and prevent it from being used by Google's own team that was developing flight search capabilities. The use of a competitor's data to favour one's service is a practice highlighted as being presumably anticompetitive by the agencies' new proposed Merger Guidelines.<sup>[54]</sup>

Access remedies and data ‘siloining’ may become the next best alternatives to structural remedies or a blanket prohibition. When such remedies are impractical, regulators may turn more often to behavioural remedies, such as those used in the acquisition of Postmates by Uber in 2020. There, the DOJ required Uber to waive exclusivity provisions between Postmates and about 800 restaurants in certain regions for a period of six months after the merger.<sup>[55]</sup>

## Conclusion

Digital platforms have changed the ways we work, communicate, make purchases, get our news and information and socialise. They have also raised debates over the most effective ways to evaluate competition and enforce antitrust policies to account for complicating factors such as indirect network effects, ‘zero-price’ services and the speed of change in digital markets.

In merger reviews, regulators historically aimed to protect competition to ensure consumer welfare. The debate now is primarily over whether the nature and dynamics of competition in digital markets require regulators to lower the bar for intervention and use different tools to assess competition.

The ongoing debate will not be over soon, as economists and regulators line up to either support or oppose the use of traditional merger review processes and methodologies in the context of digital platforms. As they do so, it is important to keep in mind that many of the questions being raised in 2023 have also been raised before, as traditional software and point-of-sale payment solutions arose in the 1980s and 1990s.

What we can say with more confidence is that continued innovation in the marketplace, as well as in economic analyses and thinking, is certain to keep this discussion lively for years to come.

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## Notes

<sup>1</sup> Juliette Caminade is a vice president, Emily Cotton is a managing principal and Eliana Garces is a senior adviser at Analysis Group, Inc. We thank Johanna Posch, Rohit Harlalka and Laurianne Despeghel for their assistance. The opinions expressed are our own and do not necessarily reflect the views of Analysis Group, its affiliates or its clients.

<sup>2</sup> See, for example, ‘Executive Order on promoting Competition in the American Economy’, The White House (9 July 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>. See also ‘Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks at the Keystone Conference on Antitrust, Regulation & the Political Economy’, *US Department of Justice (DOJ)* (2 March 2023), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-keystone>.

<sup>3</sup> *Federal Trade Commission v. Facebook, Inc.*, Complaint, No. 1:20-cv-03590 (19 August 2021).

<sup>4</sup> Carl Shapiro and Herbert Hovenkamp, ‘How Will the FTC Evaluate Vertical Mergers?’, *ProMarket* (23 September 2021), <https://promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp>; Roger D Blair et al, ‘Analyzing Vertical Mergers: Accounting for the Unilateral Effects Tradeoff and Thinking Holistically About Efficiencies’, *The George Mason Law Review*, Vol. 27, No. 3 (2020), pp. 762 and 764.

<sup>5</sup> Guideline 6 prevents mergers from creating market structures that prevent competition; Guideline 8 states that mergers should not further a trend towards concentration. The DOJ and the US Federal Trade Commission (FTC), ‘2023 Draft Merger Guidelines’ (19 July 2023) (Draft Merger Guidelines), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p859910draftmergerguidelines2023.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf).

<sup>6</sup> *id.*, p. 23.

<sup>7</sup> Multi-sided platforms are platforms with multiple types of users, such as food delivery apps (with customers, restaurants and delivery workers).

<sup>8</sup> *id.*, p. 23.

<sup>9</sup> *Ohio et al. v. American Express Co. et al.*, No. 16-1454 (2018), p. 2.

<sup>10</sup> *United States v. Sabre Corp., Sabre Gbl Inc., Farelogix Inc., and Sandler Capital Partners V, L.P.*, 452 F. Supp. 3d 97 (8 March 2020).

<sup>11</sup> See, for example, Michael L Katz and A Douglas Melamed, 'Competition Law as Common Law: American Express and the Evolution of Antitrust', *University of Pennsylvania Law Review*, Vol. 168, No. 2061 (2020), pp. 2087, 2088 and 2102.

<sup>12</sup> *id.*, p. 2102.

<sup>13</sup> 'Horizontal Merger Guidelines', DOJ and FTC (19 August 2010).

<sup>14</sup> Paul Belleflamme and Nicolas Neysen, *Platform Strategies*, Routledge (10 April 2023) (Platform Strategies), pp. 173 and 174.

<sup>15</sup> David Evans, 'Policy Roundtables: Two-Sided Markets', *OECD Competition Law & Policy* (17 December 2009), p. 24.

<sup>16</sup> See, for example, Geoffrey G Parker, Marshall W Van Alstyne and Sangeet P Choudary, *Platform Revolution*, WW Norton & Company (28 March 2016), pp. 106–127.

<sup>17</sup> See, for example, 'Platform Strategies', p. 189.

<sup>18</sup> *id.*, pp. 173–174.

<sup>19</sup> Ilene Knable Gotts, Scott Sher and Michelle Lee, 'Antitrust Merger Analysis in High-Technology Markets', *European Competition Journal*, Vol. 4, No. 2 (2008), p. 463; Elena Argentesi et al, 'Merger Policy in Digital Markets: An Ex Post Assessment', *Journal of Competition Law & Economics*, Vol. 17, No. 1 (2021) (Merger Policy in Digital Markets); John M Newman, 'Antitrust in Zero-Price Markets', *University of Pennsylvania Law Review*, Vol. 164 (2015), p. 198.

<sup>20</sup> 'Uber to Acquire Postmates', Uber Technologies, Inc (6 July 2020), <https://investor.uber.com/news-events/news/press-release-details/2020/Uber-to-Acquire-Postmates/default.aspx>.

<sup>21</sup> '20201244: Uber Technologies, Inc.; Postmates Inc.', FTC (9 November 2020); 'DOJ Clears Uber-Postmates \$2.65B Deal', *Competition Policy International* (10 November 2020), <https://www.competitionpolicyinternational.com/doj-clears-uber-postmates-deal/>.

<sup>22</sup> *In the Matter of CoStar Group, Inc., a corporation and RentPath Holdings, Inc., a corporation*, Complaint, No. 9398 (30 November 2020), ¶ 10, emphasis added.

<sup>23</sup> 'EU Commission – don't let Amazon gobble up iRobot!', *Foxglove* (17 February 2023), <https://www.foxglove.org.uk/2023/02/17/eu-commission-amazon-irobot/>.

<sup>24</sup> Rebecca Pifer, 'Why regulators didn't challenge Amazon-One Medical deal, despite data concerns', *Healthcare Dive* (1 March 2023), <https://www.healthcaredive.com/news/why-regulators-didnt-challenge-amazon-one-medical-deal-data/643316/>.

<sup>25</sup> Joint Statement of Chair Khan, Commissioner Slaughter, Commissioner Wilson, and Commissioner Bedoya Regarding [Amazon.com](https://www.ftc.gov/system/files/ftc_gov/pdf/2210191amazononemedicalkhanslaughterwilsonbedoya.pdf), Inc.'s Acquisition of 1Life Healthcare Inc.', FTC (27 February 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2210191amazononemedicalkhanslaughterwilsonbedoya.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2210191amazononemedicalkhanslaughterwilsonbedoya.pdf), p. 2.

<sup>26</sup> 'Platform Strategies', p. 94.

<sup>27</sup> See, for example, *District of Columbia v. Amazon.com, Inc.* (25 May 2021), <https://oag.dc.gov/sites/default/files/2021-05/Amazon-Complaint-.pdf>, ¶ 52.

<sup>28</sup> Kate Collyer, Hugh Mullan and Natalie Timan, *Measuring Market Power in Multi-Sided Markets*, Organisation for Economic Co-operation and Development (2017), p. 2.

<sup>29</sup> See, for example, Catherine Tucker, 'Network Effects and Market Power: What Have We Learned in the Last Decade?', *Antitrust*, Vol. 32, No. 2 (Spring 2018). See also Andrei Hagiu and Julian Wright, 'How Defensible Are Zoom's Network Effects?', *Platform Chronicles* (15 December 2020), <https://platformchronicles.substack.com/p/how-defensible-are-zooms-network>.

<sup>30</sup> See, for example, David S Evans, 'Attention to Rivalry among Online Platforms and Its Implications for Antitrust Analysis', Coase-Sandor Institute for Law & Economics Working Paper, No. 627 (2013).

<sup>31</sup> See, for example, ‘Stigler Committee on Digital Platforms: Final Report’, The University of Chicago Booth School of Business (2019), p. 61, <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf>; *United States of America et al. v. Google LLC*, Complaint, No. 1:23-cv-00108 (24 January 2023), [https://www.justice.gov/d9/press-releases/attachments/2023/01/24/us\\_v\\_google\\_complaint\\_0.pdf](https://www.justice.gov/d9/press-releases/attachments/2023/01/24/us_v_google_complaint_0.pdf), ¶ 94; ‘Online platforms and digital advertising Market study final report’, Competition and Markets Authority (CMA) (1 July 2020), p. 15.

<sup>32</sup> *United States of America, et al., v. UnitedHealth Group Incorporated and Change Healthcare Inc.*, (31 August 2022) (*United States v. UnitedHealth Group and Change Healthcare*), <https://www.justice.gov/atr/case-document/file/1534776/download>, ¶ 1.

<sup>33</sup> Amy Baxter, ‘Judge approves UnitedHealth Group’s planned acquisition of Change’, *Innovate Healthcare* (20 September 2022), <https://healthexec.com/topics/healthcare-management/mergers-and-acquisitions/unitedhealth-groups-planned-acquisition>.

<sup>34</sup> *United States v. UnitedHealth Group and Change Healthcare*, ¶ 61.

<sup>35</sup> ‘Draft Merger Guidelines’, p. 18.

<sup>36</sup> See, for example, ‘Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations’, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary (2020), p. 382.

<sup>37</sup> *United States v. Google Inc.*, No. 1:11-cv-00688 (5 October 2011) (*United States v. Google Inc.*).

<sup>38</sup> Josh Sisco, ‘Facebook’s \$1 Billion Kustomer Acquisition Faces Extensive Antitrust Review’, *The Information* (3 March 2021), <https://www.theinformation.com/articles/facebooks-1-billion-kustomer-acquisition-faces-extensive-antitrust-review>; Kurt Wagner, ‘Meta Closes \$1 Billion Kustomer Deal After Regulatory Review’, *Bloomberg Law* (15 February 2022), <https://news.bloomberglaw.com/mergers-and-acquisitions/meta-closes-1-billion-kustomer-deal-after-regulatory-review>.

<sup>39</sup> ‘Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc.: Final report on the case remitted to the CMA by the Competition Appeal Tribunal’, CMA (18 October 2022) (completed acquisition by Facebook, Inc. of Giphy, Inc.), [https://assets.publishing.service.gov.uk/media/635017428fa8f53463dcb9f2/Final\\_Report\\_Meta.GIPHY.pdf](https://assets.publishing.service.gov.uk/media/635017428fa8f53463dcb9f2/Final_Report_Meta.GIPHY.pdf), ¶ 28–29.

<sup>40</sup> *Microsoft Corp., v. Activision Blizzard, Inc.*, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/D09412MicrosoftActivisionAdministrativeComplaintPublicVersionFinal.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/D09412MicrosoftActivisionAdministrativeComplaintPublicVersionFinal.pdf), ¶¶ 7–11, 115.

<sup>41</sup> ‘FTC Sues to Block IQVIA’s Acquisition of Propel Media to Prevent Increased Concentration in Health Care Programmatic Advertising’, FTC (17 July 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-sues-block-iqvias-acquisition-propel-media-prevent-increased-concentration-health-care>. Similar concerns were raised in the UnitedHealth Group acquisition of Change Healthcare; *In the Matter of IQVIA Holdings Inc., a corporation and Propel Media, Inc., a corporation*, Complaint, No. 9416, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/d09416\\_iqvia-pmi\\_administrative\\_part\\_3\\_complaint\\_-\\_public.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/d09416_iqvia-pmi_administrative_part_3_complaint_-_public.pdf).

<sup>42</sup> ‘Draft Merger Guidelines’, p. 14.

<sup>43</sup> Lina M Khan, ‘Remarks of Chair Lina M Khan Regarding Non-HSR Reported Acquisitions by Select Technology Platforms Commission’, File No. P20120, FTC (15 September 2021), p. 1: ‘First, this study underscores the need for us to closely examine reporting requirements under the Hart-Scott-Rodino Act and to identify areas where the FTC may have created loopholes that are unjustifiably enabling deals to fly under the radar’; ‘Merger Policy in Digital Markets’, p. 2.

<sup>44</sup> Colleen Cunningham, Florian Ederer and Song Ma, ‘Killer acquisitions’, *Journal of Political Economy*, Vol. 129, No. 3 (2021); Cristina Caffarra, ‘“How Tech Rolls”: Potential Competition and “Reverse” Killer Acquisitions’ (6 May 2020), [https://www.pymnts.com/cpi\\_posts/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions/](https://www.pymnts.com/cpi_posts/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions/).

<sup>45</sup> ‘Assistant Attorney General Jonathan Kanter Delivers Keynote at CRA Conference’, DOJ (31 March 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-cra-conference>.

<sup>46</sup> ‘Draft Merger Guidelines’, pp. 20 and 21.



<sup>47</sup> *United States v. Visa Inc. and Plaid Inc.*, Complaint, No. 3:20-cv-07810 (5 November 2020).

<sup>48</sup> 'Completed acquisition by Facebook, Inc. of Giphy, Inc.', p. 172.

<sup>49</sup> 'Draft Merger Guidelines', pp. 12 and 13.

<sup>50</sup> *In the Matter of Federal Trade Commission v. Meta Platforms, Inc.*, Order denying plaintiff's motion for preliminary injunction, No. 5:22-cv-04325-EJD, p. 59: 'the Court finds that it was not "reasonably probable" that Meta would have repositioned their top-selling VR app, Beat Saber, into a dedicated fitness app, even assuming that it could have identified a partner willing to provide VR fitness content'.

<sup>51</sup> *Merger Remedies Manual*, Antitrust Division of the DOJ (September 2020), p. 13; Martha Samuelson, Ishita Rajani and Alex Robinson, 'Economic Analysis of Merger Remedies', *Global Competition Review* (8 November 2021).

<sup>52</sup> Michael R Baye and Jeffrey Prince, 'The Economics of Digital Platforms: A Guide for Regulators', *The Global Antitrust Institute Report on the Digital Economy*, Vol. 34 (11 November 2020), pp. 1279 and 1280.

<sup>53</sup> *United States v. Google Inc.*

<sup>54</sup> 'Draft Merger Guidelines', p. 16.

<sup>55</sup> Tony West, 'Letter from Senior Vice President, Chief Legal Officer, and Corporate Secretary Tony West to Hon. Makan Delrahim Assistant Attorney General' (6 November 2020), [http://edgar.secdatabase.com/2766/155278120000556/e20565\\_ex99-1.htm](http://edgar.secdatabase.com/2766/155278120000556/e20565_ex99-1.htm).

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