Platform Mergers in the Digital Age: Economics, Regulation, and Enforcement

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Summary

- Digital platforms are distinguished by several key economic features, including interactions with customers on multiple sides, asymmetric pricing, network effects, economies of scale and scope, and the generation and use of large amounts of data.
- These features shape the economics of mergers involving digital platforms, and competition authorities in the US, the EU, and the UK have begun to adapt their regulatory approaches accordingly.
- In recent digital mergers, competition authorities on both sides of the Atlantic have grappled with questions of nascent competitors and issues related to "big data."
- As these cases and regulatory evolutions illustrate, the US, the EU, and the UK are taking somewhat different regulatory approaches to digital mergers, and they do not appear poised to converge on common rules and enforcement practices.

Digital platforms, which allow parties to connect or transact with one another online, have evolved tremendously over the past two decades—transforming communication, advertising, and the ways that people and businesses buy and sell products, content, and

services. A number of economic features influence competition among digital platforms, setting digital-platform markets apart from more traditional product and labor markets. As the digital-platform marketplace has grown, competition authorities have grappled with the implications of these features for mergers and acquisitions, and regulations and guidance have begun to reflect features and issues that are particularly prominent in the digital marketplace.

Economics of Digital Platforms

The economics of digital platforms is distinguished by several key features, including interactions with customers on multiple sides, asymmetric pricing, network effects, economies of scale and scope, and the generation and use of large amounts of data. These features have the potential to shape competition and influence the effects of consolidations via mergers and acquisitions.

Platforms serve multiple user bases

A digital platform typically has customers or stakeholders on two or more sides. A rideshare platform, for example, provides matchmaking services to riders seeking transportation services on one side and drivers seeking to connect with nearby riders on the other side. Similarly, a digital-app marketplace connects software developers and users, facilitating app downloads, app updates, and in-app purchases. The digital platform's role as a connector between other parties means that it serves multiple constituencies—and that a merger can potentially have price and non-price effects on multiple sides of the platform.

Asymmetric price structures

When deciding its pricing structure, a platform may consider the sensitivity of users on either side to prices as well as non-price attributes, such as quality. Ultimately, the platform operator might have incentives to trade off revenue from one side in order to increase revenue from the other.[1] That is, the platform might charge less to users on the more price-sensitive side of the platform—or even allow them to use the platform's services for free—while charging more to users on the less price-sensitive side. As a result, one side of the platform may effectively subsidize the participation of the other side. For example, eBay allows consumers to shop without paying an access fee or a fee per transaction, whereas it charges sellers listing fees and a commission on each sale.[2] Such asymmetric pricing structures are common among digital platforms, and the asymmetry may influence a merger's effects on users on either side of the platform.

Network effects

The value that a consumer derives from many traditional products is unrelated to the size of the user base for that product. The value of an apple or a carwash, for example, does not generally depend on how many other people are eating apples or having their

cars washed. But for some products and services, including digital platforms, the user's value changes as the user base increases in size. Relationships between user-base sizes and product values are known as "network effects," and they can be categorized into "direct" and "indirect" varieties.

- *Direct network effects* occur when the value a user derives from a product or service changes with the number of other users—in particular, with the number of users *on the same side* of the platform. A canonical example of a product with direct network effects is the telephone: A telephone's value to any particular user increases with the number of people he or she can call. Similarly, a social network's value to a given user increases with the number of other users to whom he or she can connect on the network.
- *Indirect network effects* occur when the value a user derives from a product or service changes with the provision of complementary products or services or with the size of the user base on *another* side of a platform. The value that a customer derives from visiting a mall, for example, would be expected to increase with the number and variety of stores available in the mall, and a store's benefit from a mall location would be expected to increase with the number of visitors to the mall. In the digital context, indirect network effects typically arise in platforms that link sellers with buyers, where buyers benefit from more product options and/or better availability associated with more sellers, and sellers benefit from the reach to a larger base of potential customers. For example, Amazon customers benefit from the platform's large seller base, and sellers on Amazon benefit from the platform's large customer base. Similarly, riders on rideshare apps benefit from access to a large pool of drivers, and drivers benefit from access to a large pool of riders.[3]

Network effects can play an important role in shaping competition among digital platforms, reinforcing the incumbent's position and making entry more difficult for newcomers with small, still-developing user bases. At an extreme, network effects can "tip" the market to a single platform.[4] This tipping is not a foregone conclusion, however. One way that competition among platforms may persist despite strong network effects is "multihoming," in which users on one or more sides of a platform adopt and use more than one platform for a similar service. For example, Lyft and Uber compete for customers at the ride level, because many customers have both apps installed on their phones and decide which app to use for each ride.[5] Drivers, too, sometimes utilize both apps. Multihoming may open room for new entrants to grow—and potentially overtake an incumbent—as it allows users to adopt new platforms without giving up the benefits of the incumbent's large network when those benefits are particularly important.

Even when a digital platform has tipped into a dominant position, it may face real danger of losing this position—as evidenced, for example, by Facebook's supplanting of Myspace as the most popular social network.[6]

Economies of scale

Not only does a digital platform's value to its users often increase with the size of its user base, but its average costs often *decline* as its user base grows. The latter effect, in which higher levels of production are associated with lower average costs per unit, is known as an "economy of scale."[7] Economies of scale can arise if, for example, large fixed costs are necessary to enter a market, but the subsequent marginal cost of expanding production or service is low.[8] Such a scenario is typical when a platform provides infrastructure to facilitate interactions among or transactions between users. The costs of creating warehousing and delivery systems such as Amazon's, for example, are high, whereas the marginal cost of delivering an order through those systems is relatively low. Similarly, the costs of creating the infrastructure for a digital marketplace such as Apple's App Store, TaskRabbit, or Uber is high, whereas the marginal cost of facilitating an individual transaction is relatively low. Economies of scale, like network effects, may create advantages for large firms, and some suggest that these advantages may create barriers to entry for potential newcomers.[9]

Economies of scope

In addition to seeing its average costs for a particular product or service decline with increased production of that product or service, a digital platform may also parlay its production of one product or service into lower costs for production of a *different* product or service.[10] The platform may realize such "economies of scope" by, for example, taking knowledge it built up while developing one product and applying that knowledge to a related product.[11] In markets with strong network effects and/or economies of scale, economies of scope may help newcomers to scale entry barriers using their experience and productivity in related markets.[12] For example, the technical capacity that Google built up with the development of its internet search service potentially helped it in the development of other online services, such as Gmail and Google Maps; meanwhile, Uber's expertise and infrastructure for ridesharing likely helped its venture into the market for restaurant delivery.

"Big data"

Another prominent feature of digital markets is the sheer amount of data they produce and use. According to one estimate, for example, Walmart creates 60,000 TB of data per day[13]—or about 0.8 trillion times the digital storage of the guidance computer that took Apollo 11 to the moon and back.[14] "Big data" can potentially allow firms to better understand and economize their own production processes,[15] target advertising, or predict a consumer's willingness to pay, among myriad other potential uses.[16]

Some argue that "big data" conveys an important competitive edge[17] and creates barriers to entry for potential entrants that have not amassed their own large caches of data.[18] Others do not perceive "big data" as crucial to competitive success because, for example, new entrants may be able to purchase relevant data rather than gathering their own, or because big data itself may be relatively uninformative, with the value arising only from effective data analysis.[19]

Selected Examples of Digital-Platform Mergers and Acquisitions

In recent years, competition authorities around the world have reviewed a number of digital-platform mergers and acquisitions, and in doing so, encountered and considered the unique economic features of digital platforms. Although competition authorities do not always arrive at the same decisions, their reviews often grapple with common themes. Two frequent such themes have been nascent competitors and "big data."

Mergers and Acquisitions Involving Nascent and Other Potential Competitors

A "nascent competitor" is a new or small firm with the potential to grow into a serious competitive challenger to market incumbents. As economists and regulators consider proposed mergers and acquisitions involving nascent or other potential competitors, their attention has turned increasingly to the effects of such transactions on future competition. In some situations, a particular concern has been the potential for an incumbent to mitigate future competition either by absorbing a would-be future competitor or by "killing" the would-be competitor after the acquisition.[20] Competition authorities in the U.S., the EU, and the UK have now considered a number of potential transactions in which such concerns have featured prominently.[21]

Amazon Investment in Deliveroo. In 2019, restaurant-delivery firm Deliveroo opened a $575 million funding round, raising money from Amazon, Fidelity, Greenoaks, and T. Rowe Price.[22] Amazon's investment corresponded to a 16% stake in Deliveroo, and in the UK, where Deliveroo was founded, the CMA launched an investigation of the transaction. One of the CMA's concerns was whether a 16% stake in Deliveroo would discourage Amazon from re-entering the restaurant delivery market, which it had exited with the shutdown of Amazon Restaurants in 2019.[23] Similarly, the CMA raised a concern that Amazon might seek to re-enter this market via a strategic partnership with Deliveroo, as opposed to launching its own service. Despite these concerns that the investment might discourage Amazon as a potential competitor in the restaurant-delivery market, the CMA concluded that it was not "sufficiently likely that the Transaction [would] have a material impact on Amazon's incentives to re-enter, or a material impact on Amazon's incentives to compete with Deliveroo in the event of re-entry, such as to result in a substantial reduction in potential competition on the balance of probabilities."[24] Ultimately, the CMA approved the investment.[25]

Microsoft Acquisition of Activision Blizzard. In January 2022, Microsoft announced its intent to purchase video game firm Activision Blizzard for $69 billion.[26] Activision develops video games that can be played on multiple platforms, and its catalog includes popular games such as Candy Crush, Call of Duty, Diablo, and World of Warcraft.[27] Microsoft, meanwhile, developed and owns Xbox, a video-game platform, game-streaming service, and game-development studio. The proposed merger attracted attention from regulators on both sides of the Atlantic, with the European side particularly concerned about potential effects on the "nascent market" of game streaming (also called "cloud gaming").[28]

In the U.S., the Federal Trade Commission ("FTC") sued to block the acquisition, arguing that preferential access to Activision games could give the Xbox platform an unfair advantage over other gaming platforms, especially Microsoft's chief platform rival, Sony PlayStation.[29] In its complaint, the FTC alleged that it would be consistent with Microsoft's past behavior in the gaming sphere to withhold Activision games from other platforms and streaming services or reduce the quality of Activision games licensed to rivals.[30] The FTC failed to secure a preliminary injunction preventing the acquisition, but it quickly filed a notice of appeal.[31]

In the UK, the Competition and Markets Authority (CMA) also moved to block the acquisition, focusing on the effect of the acquisition in a proposed market for game streaming.[32] The CMA alleged that, despite the nascency of game streaming as a service, Microsoft held a dominant position.[33] To assuage the CMA's concerns about the effect of the acquisition on nascent competitors in the game-streaming market, Microsoft proposed to "commit[] to license Activision games [...] royalty-free to certain cloud gaming providers for a period of 10 years," allowing users to buy Activision games in "online stores designated by Microsoft" and then stream those games from any of the designated streaming services.[34] When the CMA rejected this proposal,[35] Microsoft proposed to sell Ubisoft 15-year streaming rights for existing and new Activision games.[36] On October 13, 2023, the CMA "grant[ed] consent [...] for Microsoft to acquire Activision, excluding Activision's non-EEA cloud streaming rights."[37]

In the EU, the European Commission also investigated the proposed acquisition. Like the CMA, its main concern was the acquisition's effect on the nascent game-streaming market. In contrast to the CMA, however, the European Commission deemed its concerns "fully address[ed]" by Microsoft's proposed 10- year commitment to allow users to buy Activision game licenses and then stream those games from other game-streaming services, and it approved the acquisition in May 2023.[38]

Adobe Acquisition of Figma. In September 2022, Adobe announced its intent to purchase Figma, a firm that provides collaborative design tools, for $20 billion. Figma's online platforms allow users to brainstorm and iterate together on the design of digital products such as websites and apps.[39] Adobe's suite of products, meanwhile, includes creative design tools such as Illustrator and InDesign, and its focus is more heavily on creative design than on "screen design" or collaboration—though its less- successful Adobe XD does allow for users to work together on the design of website and app interfaces.[40]

The proposed acquisition has attracted regulatory attention in the U.S., the EU, and the UK in part because of a hypothesis that Adobe could potentially otherwise make a serious foray into the market for screen design collaboration, and/or Figma could potentially otherwise develop creative design tools to rival Adobe Photoshop.[41]

Both the European Commission and the CMA issued their provisional findings in November 2023, finding that Adobe's proposed acquisition of Figma may be expected to result in a "substantial lessening of competition" in the "global markets for the supply of product design software" and the "supply of vector editing software" and

"raster editing software." In the product design software market, the CMA claimed that "the Merger would remove a [...] competitive constraint [...] both in relation to current products and in relation to product development and innovation," while the European Commission referenced a potential for a "reverse killer acquisition" in the form of "the discontinuation of Adobe's own design tool, Adobe XD." In the vector and raster editing software markets, both the CMA and European Commission expressed concerns over the loss of potential competition from Figma.[42] The CMA also strongly signaled that "no remedy package that preserve[d] the benefits of the Transaction [would] be sufficient to resolve [its] competitive concerns."[43]

On December 18, 2023, Adobe and Figma "announced that they [had] entered into a mutual agreement to terminate their previously announced merger agreement" "based on a joint assessment that there is no clear path to receive necessary regulatory approvals from the European Commission and the UK Competition and Markets Authority."[44]

Mergers and Acquisitions Involving Big Data

The prominence of "big data" in some digital platforms' business models, as described above, has also contributed to regulatory interest in the data-driven effects of mergers and acquisitions. EU Commissioner Margrethe Vestager, for example, has called data the "new currency of the Internet."[45]

Since the late 2000s, competition authorities in the U.S. and Europe have considered a number of proposed mergers and acquisitions in which data-related concerns—and sometimes potential data-related benefits—have played a role.

Google's Acquisition of Fitbit. In 2019, Google proposed to acquire the fitness-device producer Fitbit for $2.1 billion.[46] In the U.S., the Department of Justice ("DOJ") conducted an investigation but did not pursue any enforcement action, leading Google to complete the acquisition in 2021.[47] In the EU, the European Commission also conducted an investigation and ultimately approved the proposed transaction "conditional on [...] a commitments package offered by Google."[48]

In its statement approving the proposed acquisition, the European Commission raised concerns that "the transaction, as initially notified, would have harmed competition in certain markets."[49] For example, in the Commission's view, Google's acquisition of Fitbit's data on "users' health and fitness" would expand "the amount of data that Google could use for personalization of ads," "rais[ing] barriers to entry and expansion for Google's competitors" in this space.[50] The Commission also expressed a concern that "Google might restrict competitors' access to the Fitbit Web API," which could harm start-ups and others "in the nascent European digital healthcare space."[51] To address these concerns, Google offered a commitments package that included, among other considerations, agreements (i) not to use the Fitbit data of EEA-based users for Google Ads, (ii) to "silo" Fitbit data from "any other Google data that is used for advertising," and (iii) to allow other Fitbit-like devices to operate in the Android operating system.[52]

The Commission's investigation also assessed and dismissed competitors' "concern" that the combination of Google and Fitbit data would give Google a "competitive advantage" with which others "would no longer be able to compete."[53] In dismissing this concern, the Commission cited Fitbit's "limited user community" and the nascency of the "smartwatch segment."[54] Ultimately, Margrethe Vestager noted that Google's "commitments will ensure that the market for wearables and the nascent digital health space will remain open and competitive."[55]

Bazaarvoice Acquisition of PowerReviews. In 2012, Bazaarvoice, a product rating and review ("PRR") platform, purchased PowerReviews, another PRR platform, for $162 million.[56] PRR firms produce technical infrastructure to collect consumer feedback and display it on websites, providing this infrastructure to businesses for a negotiated fee.[57] After the acquisition, the DOJ sued to carve a PowerReviews-equivalent entity off of the merged firm,[58] arguing that the merger represented "the removal of [Bazaarvoice's] most significant rival" and gave Bazaarvoice "the ability to profitably raise the price of its platform above pre-merger levels."[59] The DOJ argued, moreover, that the value of consumer feedback data in the PRR marketplace created barriers to entry: because Bazaarvoice "syndicated" feedback, allowing retailers to display product feedback collected on websites other than their own, the value of its service increased with its customer base and the associated pool of potential display feedback.[60] Ultimately, the court ruled for the DOJ,[61] and among other remedies, Bazaarvoice was made to divest PowerReviews.[62]

Non-Platform Cases Involving Big Data. Although "big data" concerns have been considered in a number of mergers involving digital platforms, such concerns have not been limited to platforms. In 2022 the DOJ challenged UnitedHealth Group ("UHG")'s acquisition of claims processor Change Healthcare, for example, on the theory that the acquisition would give UHG access to the competitively sensitive claims data of its competitors in the health insurance market.[63] The merger was ultimately cleared after the merging parties' expert, Catherine Tucker,[64] showed that the information in this claims data was also available in public sources.[65]

Adaptations of Competition and Merger Regulations to Digital Platforms

As proposed mergers such as those described above have raised the salience of digital-platform competition, legislators and competition authorities on both sides of the Atlantic have begun to adapt their regulatory approaches to the particular economic features of digital platforms. In the U.S., that adaptation is apparent in new merger guidelines issued by the DOJ and the FTC. In the EU and the UK, such adaptation is apparent in newly enacted legislation. Although all three jurisdictions are grappling with the new world of digital-platform competition, they are doing so from different angles, and they do not appear poised to converge on common rules and enforcement practices.

Digital Platforms and the 2023 US FTC/DOJ Merger Guidelines. In December 2023, the DOJ and FTC ("Agencies") released new Merger Guidelines that specifically account for the realities associated with platform competition.[66] While many of the 11 guidelines apply to markets irrespective of whether they are one-sided or multi-sided, Guideline 9 specifically considers "competition *between* platforms, competition *on* a platform, and competition to *displace* the platform."[67] The Guideline notes that network effects on platforms may "create a tendency toward concentration," and it clarifies that the agencies may seek to prevent not only mergers between platforms, but also mergers between platforms and their users (*e.g.*, between an online marketplace and a "major seller" in that marketplace) and mergers between platforms and producers of inputs to platforms (*e.g.*, between a platform and a data or analytics service) in order to protect competition.[68]

With regard to the issue of nascent competitors—which, as discussed above, has featured in a number of recent digital-platform mergers—Guideline 9 states the Agencies' intent to prevent "dominant platforms" from "systematically acquiring firms competing with one or more sides of a multi-sided platform while they are in their infancy."[69]

EU Legislation on Digital Platforms. Unlike the U.S., which continues to rely on existing legislation to address competition among digital platforms, the EU has also passed new legislation to complement its existing competition laws and rules.[70] The Digital Markets Act ("DMA"),[71] which was enacted in 2022 and required compliance by March 2024,[72] stipulates that "gatekeeper" platforms—i.e., large digital platforms with "an entrenched and durable position in the market")[73]—give the European Commission advance notice of "all of their intended acquisitions" of digital firms "or other services that enable the collection of data."[74] Beyond that, it does not affect the assessment of potential mergers and acquisitions in the digital-platform space. Rather, it proactively outlaws and addresses certain "unfair practices and conditions" that the EU has deemed likely to arise among gatekeeper platforms.[75]

Among the practices outlawed by the DMA are certain types of data-collection on end users, use of a gatekeeping platform to promote the gatekeeper's products over competitors', and actions that "prevent consumers from linking up to businesses outside their platforms."[76] In addition to these prohibitions, the DMA also imposes positive responsibilities on gatekeeping platforms, such as the responsibility to allow users on different sides of the platform to interact outside the platform for some purposes, to "allow business users to access the data that they generate in their use of the gatekeeper's platform," and to "allow third parties to inter-operate with the gatekeeper's own services in certain specific situations."[77]

Although the DMA does not include any rules or guidelines for mergers and acquisitions beyond the advance notification requirement, its assessment of the nature of competition among digital platforms has ostensible implications for the evaluation of proposed transactions' competitive effects. In particular, the DMA describes a number of features of digital platforms, such as "extreme scale economies," "very strong network

effects, an ability to connect many business users with many end users through the multisidedness of these services, a significant degree of dependence of both business users and end users, lock-in effects, a lack of multi-homing for the same purpose by end users, vertical integration, and data driven-advantages," which it says can "substantially undermin[e] the contestability of the core platform services."[78]

UK Legislation on Digital Platforms. The UK, like the EU, has enacted new legislation to regulate digital platforms. The Digital Markets, Competition and Consumers Act 2024 ("DMCC") gives the CMA the "[p]ower to impose conduct requirements"[79] on large digital platforms akin to requirements in the EU's DMA, but with some key differences. The DMCC also, like the EU's DMA, introduces new notification requirements for digital mergers—again, with some differences.

The new UK conduct requirements for digital platforms with "strategic market status"—the analogue to the EU DMA's prohibitions and responsibilities for gatekeeper platforms—are to be tailored to each specific digital platform, and may include, for example, stipulations to prevent the platform from "restricting interoperability" with competing firms, "using data unfairly," or disfavoring competitors' products or content on its platform.[80] The UK legislation also empowers the CMA to "make a pro-competition intervention," imposing specific requirements on a particular firm, when it deems that "a factor or combination of factors relating to a relevant digital activity is having an adverse effect on competition" in the UK.[81]

In the realm of mergers and acquisitions, the new UK legislation requires advance notification of certain transactions, depending on the financial value of the transaction and whether the transaction increases the acquiring firm's voting rights in the acquiree by given thresholds.[82]

A Comparison of US, EU, and UK Approaches to Digital-Platform Mergers

Although the U.S., the EU, and the UK have all taken steps to acknowledge and adapt merger review to the economics of digital platforms, their approaches have been fundamentally different. The U.S. has adapted not with new legislation, but with updated Merger Guidelines that introduce relevant economic principles to consider in individual cases. The EU and the UK, by contrast, have taken a legislative approach and introduced specific notification requirements for proposed mergers involving firms that meet certain criteria. Within Europe, the EU and the UK diverge in their approaches to regulating digital platforms' behavior, with the EU's DMA imposing blanket rules on how "gatekeeper" platforms must behave, and the UK's DMCC allowing the CMA to tailor rules to individual platforms. Given the different frameworks that the U.S., the EU, and the UK have put in place, it does not appear that the jurisdictions are on a path to common enforcement practices.

Conclusion

Recent years have brought an increasing role for digital platforms in the modern economy, and with this has come increasing and evolving scrutiny of mergers and acquisitions involving digital platforms. Recent regulatory developments—such as the FTC and DOJ's attention to the particular economic features of digital platforms in their new Merger Guidelines, the EU's enactment of the DMA, and the UK's enactment of the DMCC—suggest that both sides of the Atlantic are adapting to this new competitive playing field, albeit with varying approaches. The variation in these approaches suggests that differences in regulatory actions involving digital platforms, including decisions on mergers and acquisitions, may persist.

Endnotes

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9. *See, e.g.,* Charles A. Miller, Note, *Big Data and the Non-Horizontal Merger Guidelines*, 107 CAL. L. REV. 309, 341 (2019); Gawer and Srnicek, *supra* note 8, at 26, 28.
10. See, for example, WILLIAM F. SAMUELSON AND STEPHEN G. MARKS, MANAGERIAL ECONOMICS, 252-53 (7th ed. 2012).
11. Samuelson and Marks, *supra* note 10, at 252-53; Gawer and Srnicek, *supra* note 8, at 12.
12. *See* Section "Selected Examples of Digital-Platform Mergers and Acquisitions" for examples in which a firm's technical expertise in one area was weighed as a potential factor in the likelihood of its entry to another market.
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16. *See, e.g.,* Miller, *supra* note 9, at 312, 324, 327.

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19. *See, e.g.,* Anja Lambrecht and Catherine E. Tucker, *Can Big Data Protect a Firm from Competition?*, COMPET. POL'Y INT'L 1-8 (2017), https://www.competitionpolicyinternational.com/wp-content/uploads/2017/01/CPI-Lambrecht- Tucker.pdf. For further discussion of economists' varying opinions on "big data," *see, e.g.,* Kristof Zetenyi and Dheeraj Chaudhary, *Data in the Digital Economy: The 'Anti-Hero' of Antitrust or Just 'Bad Reputation?'* CPI ANTITRUST CHRON. (February 2024), https://www.pymnts.com/wp-content/uploads/2024/02/2-DATA-IN-THE- DIGITAL-ECONOMY-THE-ANTI-HERO-OF-ANTITRUST-OR-JUST-BAD-REPUTATION-Kristof-Zetenyi-Dheeraj-Chaudhary.pdf.

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27. Activision Blizzard, *2022 Annual Report* 5, 8, 23 (Feb. 2023), https://investor.activision.com/static- files/01d1f04d-1c00-4a17-8743-4e6a20e17335.

28. CMA, Anticipated acquisition by Microsoft of Activision Blizzard, Inc., Final report ¶ 4.32 (April 26, 2023), https://assets.publishing.service.gov.uk/media/644939aa529eda000c3b0525/Microsoft_Activision_Final_Report_.pdf.

29. Complaint ¶ ¶ 10-11, 27-33, In the Matter of Microsoft Corp. and Activision Blizzard, Inc., FTC Docket No. 9412 (Dec. 8, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/D09412MicrosoftActivisionAdministrativeComplaintPublicVersionFinal.pdf.

30. *Id.* at ¶ ¶ 103-117.

31. *See* Preliminary Injunction Opinion, Fed. Trade Comm'n v. Microsoft, No. 23-cv-02880-JSC (N.D. Cal. July 10, 2023); Plaintiff's Notice of Appeal, Fed. Trade Comm'n v. Microsoft, No. 23-cv-02880-JSC (N.D. Cal. July 12, 2023).

32. CMA, *supra* note at ¶ ¶ 2-4; CMA, Press release, CMA narrows scope of concerns in Microsoft—Activision review (March 24, 2023), https://www.gov.uk/government/news/cma-narrows-scope-of-concerns-in-microsoft- activision-review.

33. According to the CMA, "Microsoft already accounts for an estimated 60-70% of global cloud gaming services." CMA, Press release, Microsoft—Activision deal could harm UK gamers (Feb. 8, 2023), https://www.gov.uk/government/news/microsoft-activision-deal-could-harm-uk-gamers.

34. CMA, *supra* note at ¶ 73.

35. The CMA objected to "two significant limitations" of this proposal: It limited streaming rivals' business models by requiring users to purchase rights to Activision games as opposed to, e.g., renting rights from a competing streaming service; and it did not apply to non-PC computer versions of games, thereby reducing Activision's incentive to create such versions. CMA, *supra* note at ¶ ¶ 75-79.

36. Brad Smith, *Microsoft and Activision Blizzard restructure proposed acquisition and notify restructured transaction to the UK's Competition and Markets Authority*, Microsoft (Aug. 21, 2023), https://blogs.microsoft.com/on-the-issues/2023/08/21/microsoft-activision-restructure-acquisition.

37. CMA, Microsoft / Activision Blizzard merger inquiry (Oct. 13, 2023), https://www.gov.uk/cma-cases/microsoft- slash-activision-blizzard-merger-inquiry.

38. Eur. Comm'n, Mergers: Commission clears acquisition of Activision Blizzard by Microsoft, subject to conditions (May 15, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2705.

39. *See*, Figma, "Homepage," https://www.figma.com; Patrick Moorehead, *3 Things Regulators Need To Understand About The Adobe-Figma Deal*, FORBES May 17, 2023, https://www.forbes.com/sites/patrickmoorhead/2023/05/17/3-things-regulators-need-to-understand-about-the-adobe-figma-deal/.

40. Adobe has drastically scaled back its XD workforce, and in revenue terms, the product is insignificant compared to its other products. Moorehead, *supra* note 39.

41. Possible theories of harm that the CMA has laid out for investigation include (a) that the acquisition might affect Adobe's "ability and incentive to expand its screen design offering," and (b) that the acquisition might reduce the firms' incentives to develop "software that would encompass both screen design software and creative design software used for screen design." CMA, Anticipated Acquisition by Adobe Inc. of Figma, Inc., Issues Statement ¶ ¶ 31, 41 (July 26, 2023), https://assets.publishing.service.gov.uk/media/64bfed1a1e10bf000d17ce6b/Issues_statement.pdf. One of the European Commission's concerns is that the acquisition might "prevent[] Figma's potential growth into an effective competitor to Adobe's asset creation tools." Eur. Comm'n, Mergers: Commission opens in-depth investigation into the proposed acquisition of Figma by Adobe (Aug. 7, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4082.

42. Eur. Comm'n, Commission sends Adobe Statement of Objections over proposed acquisition of Figma (Nov. 17, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_5778; CMA, Anticipated Acquisition by Adobe Inc. of Figma, Inc. Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups (Nov. 28, 2023), https://assets.publishing.service.gov.uk/media/6565c0e362180b0012ce82c8/Notice_of_Possible_Remedies_pdfa.pdf.

43. Adobe Inc. and Figma, Inc., Anticipated Acquisition by Adobe Inc. of Figma, Inc. Parties' Response to the CMA's Remedies Notice (Dec. 14, 2023), https://assets.publishing.service.gov.uk/media/658008d395bf65001071912f/Adobe-Figma Response_to_Remedies_Notice.pdf.

44. Adobe, "Adobe and Figma Mutually Agree to Terminate Merger Agreement" (Dec. 18, 2023), https://news.adobe.com/news/news-details/2023/Adobe-and-Figma-Mutually-Agree-to-Terminate-Merger- Agreement/default.aspx.

45. Lewis Crofts and Robert McLeod, *Margrethe Vestager*, MLEX INTERVIEW 5, Jan. 2015, https://mlexmarketinsight.com/db_images/special-reports-pdf/MLex-Interview-with-Margrethe-Vestager-Jan- 2015.pdf.

46. Daisuke Wakabayashi and Adam Satariano, *Google to Buy Fitbit for $2.1 Billion*, N.Y. TIMES, Nov. 1, 2019, https://www.nytimes.com/2019/11/01/technology /google-fitbit.html.

47. David McLaughlin, *Google closes Fitbit deal despite ongoing DOJ review*, FORTUNE, Jan. 14, 2021, https://fortune.com/2021/01/14/google-closes-fitbit-deal-doj-review.

48. Eur. Comm'n, Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions (Dec. 17, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id. See also*, Rick Osterloh, *Google completes Fitbit acquisition*, Google (Jan. 14, 2021), https://blog.google/products/devices-services/fitbit-acquisition/.

53. Eur. Comm'n, Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions (Dec. 17, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484.

54. *Id.*

55. *Id.*

56. Dep't of Justice, Justice Department Files Antitrust Lawsuit Against Bazaarvoice Inc. Regarding the Company's Acquisition of PowerReviews Inc., (Jan. 10, 2013), https://www.justice.gov/opa/pr/justice-department-files- antitrust-lawsuit-against-bazaarvoice-inc-regarding-company-s.

57. Complaint ¶ ¶ 18-29, United States v. Bazaarvoice, No. 13-cv-00133-WHO (N.D. Cal. Jan. 10, 2013), https://www.justice.gov/atr/case-document/file/488911/download, *See also*, Bazaarvoice, "Amplify the voice of your customer with Ratings & Reviews," https://www.bazaarvoice.com/products/ratings-and-reviews; PowerReviews, "Ratings and Reviews," https://www.powerreviews.com/products/ratings-reviews.

58. Complaint ¶ 63, United States v. Bazaarvoice.

59. *Id.* at ¶ 32; *see also*, *id.* at ¶ ¶ 33-49.

60. *Id.* at ¶ ¶ 56-57 ("Bazaarvoice's syndication network is a formidable barrier to entry in the market for PRR platforms. As more manufacturers purchase Bazaarvoice's PRR platform, the Bazaarvoice network becomes more valuable to retailers because it will allow them to gain access to a greater volume of ratings and reviews. Similarly, as more retailers purchase Bazaarvoice's PRR platform, the Bazaarvoice network becomes more valuable for manufacturers because it will allow them to syndicate content to a greater number of retail outlets. The feedback between manufacturers and retailers creates a network effect that is a significant and durable competitive advantage for Bazaarvoice. Bazaarvoice has acknowledged the importance of its syndication network as a substantial barrier to entry that protects its dominant position.").

61. Memorandum Opinion, United States v. Bazaarvoice, No. 13-cv-00133-WHO (N.D. Cal. Jan. 8, 2014), https://www.justice.gov/d9/atr/case-documents/attachments/2014/01/08/302948.pdf.

62. Third Amended Final Judgment, United States v. Bazaarvoice, No. 13-cv-00133-WHO (N.D. Cal. Dec. 2, 2014), https://www.justice.gov/d9/atr/case-documents/attachments/2014/12/02/311069.pdf.

63. Complaint, United States v. UnitedHealth Grp. and Change Healthcare, No. 1:22-cv-00481 (D.D.C. Feb. 24 2022), https://www.justice.gov/d9/press-releases/attachments/2022/02/24/filed_uhg_change_complaint_0.pdf.

64. Professor Tucker is the Sloan Distinguished Professor of Management Science and Professor of Marketing at the MIT Sloan School of Management. She is an affiliated expert of and was supported in this matter by a team at Analysis Group, where the authors work.

65. The DOJ announced but then dropped an appeal of the court's decision. *See* Bryan Koenig, *DOJ Quietly Abandons UnitedHealth Merger Appeal*, LAW360, March 20, 2023, https://www.law360.com/articles/1587871/doj-quietly-abandons-unitedhealth-merger-appeal.

66. U.S. Dep't of Just. & Fed. Trade Comm'n, Merger Guidelines (2023) (hereinafter "2023 MG"), www.justice.gov/atr/2023-merger-guidelines.

67. 2023 MG, § 2.9.

68. *Id.*

69. *Id.*

70. The EU's existing competition laws and rules included Articles 101 and 102 of the Treaty on the Functioning of the European Union (which "prohibit[] anticompetitive agreements" and "abusive behaviour by companies holding a dominant position on any given market," respectively; *see* Eur. Comm'n, "Antitrust," https://competition-policy.ec.europa.eu/antitrust_en); Treaty on the Function of European Union art. 101, 102, 2012 O.J. (C 326) 47, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF, and the EC Merger Regulation, Council Regulation (EC) No 139/2004, 2004 O.J. (L 20) 1, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32004R0139. *See also* Eur. Comm'n, "Mergers Overview," https://competition-policy.ec.europa.eu/mergers/mergers-overview_en.

71. Regulation (EU) 2022/1925 (Sept. 14, 2022) ("DMA"), https://eur- lex.europa.eu/eli/reg/2022/1925/oj/eng#:~:text=12/10/2022-,12/10/2022,reg/2022/1925/oj. On a similar timeframe, the EU has also enacted the Digital Services Act (DSA), which focuses on consumer protection and content moderation in the digital arena. *See, e.g.,* Eur. Comm'n, The Digital Services Act: Ensuring a safe and accountable online environment, https://commission.europa.eu/strategy -and-policy/priorities-2019- 2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en.

72. Eur. Comm'n, About the Digital Markets Act, https://digital-markets-act.ec.europa.eu/about-dma_en.

73. DMA at Chapter II, Article 3, ¶ 1 ("An undertaking shall be designated as a gatekeeper if: (a) it has a significant impact on the internal market; (b) it provides a core platform service which is an important gateway for business users to reach end users; and (c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future.").

74. DMA at Preamble, ¶ 71.

75. DMA at Preamble, ¶ 4.

76. Eur. Comm'n, The Digital Markets Act: ensuring fair and open digital markets, https://commission.europa.eu/strategy_-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets- act-ensuring-fair-and-open-digital-markets_en.
77. *Id.*
78. DMA at Preamble, ¶ 2.
79. Digital Markets, Competition and Consumers Act 2024, 2024 UK C. 13 ("DMCC Act"), Part 1, Ch. 3, https://www.legislation.gov.uk/ukpga/2024/13/enacted. For further information on the Act's progress through parliament, *see* UK Parliament, Digital Markets, Competition and Consumers Act 2024, https://bills.parliament.uk/bills/3453.
80. DMCC Act at Part 1, Ch. 3.; Sidley Austin LLP, "New UK Digital Markets Regime: Key Differences With the EU Digital Markets Act" (April 27, 2023), https://www.sidley.com/en/insights/newsupdates/2023/04/new-uk-digital-markets-regime-key-differences-with-the-eu-digital-markets-act.
81. DMCC Act at Part 1, Ch. 4.
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