E-COMMERCE COMPETITION ENFORCEMENT GUIDE

THIRD EDITION

Editor
Claire Jeffs

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Publisher's Note

E-commerce has changed our homes – replacing books, CDs, DVDs and satellite dishes with downloads and streaming; automobiles with app-hailed rides; shopping bags with postal delivery boxes. It is changing our language too, adding terms such as 'phygital' for blending online and offline business. Yet, as noted by Claire Jeffs, Nele Dhondt and Jack Dickie in their introduction, competition authorities are evolving their existing tools to address e-commerce, not revolutionising how they apply antitrust law. Practical guidance for both practitioners and enforcers in navigating this challenging environment is critical.

This third edition of the *E-Commerce Competition Enforcement Guide* – published by Global Competition Review – provides such detailed guidance and analysis. It examines both the current state of law and the direction of travel for the most important jurisdictions in which international businesses operate. The Guide draws on the wisdom and expertise of distinguished practitioners globally, and brings together unparalleled proficiency in the field and provides essential guidance for all competition professionals.

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PART II
AMERICAS

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07

United States – E-commerce and Big Data: Merger Control

Daniel S Bitton and Leslie C Overton[1]

Introduction

Digital markets and big data are fashionable topics these days, not only in the antitrust community, but also in the mainstream media and among politicians. They are also increasingly part of a debate about merger control policy and industry consolidation.[2]

In the United States, there are schools of thought receptive to the idea of merger complaints or theories of harm based on the aggregation or use of data sets, initiated in circles sometimes referred to as the New Brandeisians.[3] Some among them have argued, for example, that large companies can use data as a 'radar system' to 'track competitive threats shortly after they take off' and then 'acquire new entrants before they become significant competitive threats'.[4] Politicians in those circles have proposed what they call 'Better Deal' legislation to change the

1 Daniel S Bitton and Leslie C Overton are partners at Axinn. The authors wish to thank Brandon Boxbaum, Jetta Sandin and Komal Patel, associates at Axinn, who helped prepare the chapter and conducted legal research in support of it.

2 See, e.g., 'Too Much of a Good Thing', *The Economist* (26 Mar. 2016), https://www.economist.com/briefing/2016/03/26/too-much-of-a-good-thing; Diane Coyle, 'Digital Platforms Force a Rethink in Competition Theory', Financial Times (17 Aug. 2017), https://www.ft.com/content/9dc80408-81e1-11e7-94e2-c5b903247afd; Caroline Holland, 'Taking on Big Tech Through Merger Enforcement', Medium (26 Jan. 2018), https://medium.com/read-write-participate/taking-on-big-tech-through-merger-enforcement- f15b7973e37; Maurice E Stucke & Ariel Ezrachi, 'The Rise, Fall and Rebirth of the U.S. Antitrust Movement', Harvard Business Review (15 Dec. 2017), https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement.

3 The 'New Brandeis movement' is a school of thought that represents concerns voiced by Justice Brandeis to President Wilson in 1912, over 'bigness' and in favour of breaking up large companies. See e.g., David Dayen, 'This Budding Movement Wants to Smash Monopolies' (4 Apr. 2017), https://www.thenation.com/article/this-budding-movement-wants-to-smash-monopolies/.

4 Maurice E Stucke and Allen P Grunes, 'Debunking the Myths over Big Data and Antitrust', CPI Antitrust Chronicle (May 2015 (2)), https://www.competitionpolicyinternational.com/assets/Uploads/StuckeGrunesMay-152.pdf.

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standard of US merger review. In particular, their bill proposes both to: reduce the burden of proof on the agencies to intervene in mergers with anticompetitive potential; and to shift the burden of proof to the parties to prove that a merger will not be anticompetitive in cases of large-size mergers and mergers that cause significant increases in market concentration.[5] The bill also proposes to broaden merger reviews to include considerations other than price, like wages and employee welfare.[6] Notably, although the bill would change merger review for all industries, it is also clearly intended to address big data issues in digital markets; the bill's proponents explain, for example, that 'in an increasingly data-driven society, merger standards must explicitly consider the ways in which control of consumer data can be used to stifle competition or jeopardise consumer privacy'.[7]

More recently, some proponents of the Better Deal introduced another bill, the Anticompetitive Exclusionary Conduct Prevention Act (AECPA), that would amend the Clayton Act to shift the burden of proof in exclusionary conduct cases. Companies with a market share over 50 per cent, or 'significant market power', have to prove that exclusionary conduct does not cause 'an appreciable risk of harming competition'.[8] The bill would also eliminate the need to prove a 'relevant market' when evaluating a merger if the agency offers 'direct evidence' that 'the effect of an acquisition . . . may be substantially to lessen competition or tend to create a monopoly.'[9]

Another draft bill would go even further in establishing barriers to mergers in general. Senator Elizabeth Warren and Representative David Cicilline, Chair of the antitrust subcommittee of the House Judiciary Committee, are reportedly drafting similar legislation, tentatively named the Anti-Monopoly and Competition Restoration Act (AMCRA).[10] The legislation, among other things, would ban all mega mergers (involving companies with over US$40 billion in sales), impose additional procedural requirements on large mergers (involving companies with other US$15 billion in sales), and, for all mergers, shift the burden of proof on to the merging parties.

While the Better Deal bill and the AECPA, introduced in 2017 and 2020 respectively, have not passed and are not expected to do so, and the AMCRA has yet to be introduced, their proponents seem to have gained some traction with the issues raised in the bills, even at the US agencies. The Federal Trade Commission (FTC), for example, covered a number of Better Deal and New Brandeisian topics during its hearings on 'Competition and Consumer Protection in the 21st Century' (FTC Hearings), a series of public discussions spanning 22 days and covering 14 separate topics between autumn 2018 and spring 2019. The FTC's Chairman, Joseph Simons, has also suggested that the FTC will be doing retrospective studies to evaluate whether merger enforcement has been too lax, and the Bureau of Competition launched its Technology Task Force (which is now the Technology Enforcement Division) to focus on investigation and enforcement

5 S.B. 1812, at § 2(b)(4), https://www.congress.gov/bill/115th-congress/senate-bill/1812/text.

6 See generally Senate Democrats, 'A Better Deal: Cracking Down on Corporate Monopolies', https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf.

7 id. at 2.

8 S.B. 3426, at § 26A (C)(1), https://www.congress.gov/bill/116th-congress/senate-bill/3426/text?format=xml.

9 id. at § 6(b).

10 See, e.g., https://www.cnbc.com/2019/12/07/warrens-antitrust-bill-would-boost-government-control-over-biggestcompanies.html.

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in markets where online platforms compete. As part of these initiatives, the FTC recently issued Special Orders under section 6(b) to five large technology companies (Alphabet Inc, Amazon.com, Inc, Apple Inc, Facebook, Inc, and Microsoft Corp). The Special Orders required them to provide information about prior acquisitions over the last 10 years that were not reportable to the antitrust agencies under the Hart-Scott-Rodino (HSR) Act.[11] Moreover, in the last year, the US House of Representatives' Committee on the Judiciary held a six-part hearing on Online Platforms and Market Power, which examined the alleged dominance of Facebook, Apple, Google and Amazon, among other things. The majority released their report summarising their findings from the investigation on 6 October 2020.

On the other hand, several enforcement officials at the FTC and the Department of Justice (DOJ) have expressed scepticism about antitrust theories of harm based on being too big generally, and aggregation of large user data sets specifically.[12] DOJ Antitrust Chief Makan Delrahim has cautioned antitrust enforcers not to penalise success of digital platforms and, in what many view as a direct response to Senator Elizabeth Warren's (Democratic Senator of Massachusetts) proposal to break up big tech companies based on a US$25 billion global revenue threshold alone, Delrahim reportedly gave the following remarks at a March 2019 Telecom Policy Conference:

> *[O]utside of the merger context, the antitrust division doesn't seek to break up a monopoly that has been lawfully acquired and maintained and that does not engage in any exclusionary or predatory conduct.*

In digital markets, concerns have been raised about platforms' access to important data, but the key question is whether it is scarce and valuable as an input. If the data 'plays an important role in designing products or services for the consumer, and is available only to a platform service because, for instance, the data is created by the user's interaction with that service, then there might be an ability to raise rivals' costs downstream'. Still, antitrust enforcers must remember that there is a different standard for anticompetitive acquisitions.

He suggested that penalising companies if they, for example, built a better or cheaper mousetrap, could harm investment and economic growth.

Delrahim further suggested that the world is watching and entrepreneurs are deciding where to invest, and that the DOJ will recognise the benefits of vertical integration and maintaining incentives to innovate.[13]

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11 FTC, FTC to Examine Past Acquisitions by Large Technology Companies, https://www.ftc.gov/news-events/press- releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

12 See, e.g., Commissioner Wilson, Keynote Address at FTC Hearings Session #11, 'Promoting Sound Policies for the Next Decade', (26 Mar. 2019) at 3-6, https://www.ftc.gov/system/files/documents/public_statements/1509103/wilson_remarks_at_ftc_intl_hearing_11_march_26_2019_1. pdf; Commissioner Wilson, Address at the American Enterprise Institute 'Why We Should All Play By the Same Antitrust Rules, from Big Tech to Small Business' (4 May 2019), https://www.ftc.gov/system/files/documents/public_statements/1527497/wilson_remarks_aei_5-4-19.pdf ('Do we need special antitrust rules for every situation, and especially high tech markets? I answer with a resounding "no". Rather, we should stick to the same sound, economically-driven analysis that has served us well for many years. We should focus on conduct that we can properly tie to a cognizable antitrust harm, including a reduction in output or an increase in price.').

13 Jenna Ebersole, 'DOJ's Delrahim urges caution on question of breaking up monopolies', MLEX (26 Mar. 2019), https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1077654&siteid=191&rdir=.

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Thus, whether merger enforcement activity on these issues ultimately will materially change in the US remains to be seen.

This chapter reviews several past merger enforcement matters covering digital markets and big data issues, identifies trends that emerge from those cases, and discusses whether there is reason to believe that US enforcement in such matters will materially change in the future.

When data is the product

The US agencies have on multiple occasions intervened in mergers involving commercially valuable data, but primarily when that data was the actual competitive overlap product.

Examples of such cases include the FTC's 2014 challenge of Corelogic's proposed acquisition of DataQuick; its 2013 challenge of Nielsen's proposed acquisition of Arbitron; its 2010 challenge of Dun & Bradstreet's already consummated US$29 million acquisition of Quality Education Data (QED); its 2009 challenge of Reed Elsevier's US$4.1 billion proposed acquisition of ChoicePoint; and the DOJ's 2008 challenge of Thomson's proposed US$17 billion acquisition of Reuters. In each of those cases, the merging parties were the top competitors in highly concentrated markets for a specific data service.

Notably, however, none of these deals involved e-commerce, or even really big data. Rather, each of these deals involved more traditional business-to-business database services involving data that was difficult and costly to replicate for remaining rivals and new entrants because of the extensive and often manual effort required to collect the data.

For example, the relevant product in *Corelogic/DataQuick* was a database of 'national assessor and recorder bulk data'.[14] Collection of that data involved a rather manual process of extracting public information (such as 'parties to the transaction, transfer tax, and purchase price') from transactional documents like deeds, mortgages, liens, assignments and foreclosures available through local government offices.[15] The relevant product in *Nielsen/Arbitron* was a database of audience measurement data.[16] That was difficult for future rivals to replicate because only the parties had the capability to measure consumers' radio and television consumption on a national level given the survey panels that they had put together over many years.[17] The relevant product in *Dun & Bradstreet/QED* was a database of 'contact, demographic and other information' relating to Kindergarten through twelfth grade teachers, administrators, schools

14 Complaint, *In the Matter of CoreLogic, Inc*, File No. 131-0199, at ¶ 5 (24 Mar. 2014), https://www.ftc.gov/system/files/documents/cases/140324corelogiccmpt.pdf.

15 id. at ¶ 7.

16 See, Complaint, *In the Matter of Nielsen Holdings NV and Arbitron, Inc*, Doc No. C-4439 (20 Sept. 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/09/130920nielsenarbitroncmpt.pdf.

17 Statement of the Federal Trade Commission, *In the Matter of Nielsen Holdings NV and Arbitron, Inc*, File No. 131-0058 (20 Sept. 2013) ('Nielsen maintains a national panel of 20,000 households . . . Arbitron's panel covers 48 local markets and consists of approximately 70,000 people whose exposure to programming is captured by its proprietary Personal People Meter (PPM) technology.'); see also Complaint, *In the Matter of Nielsen Holdings NV and Arbitron, Inc*, Doc No. C-4439, at ¶10 ('Nielsen and Arbitron are the best-positioned firms to develop (or partner with others to develop) a national syndicated cross-platform audience measurement service because only Nielsen and Arbitron maintain large, representative panels capable of measuring television with the required individual-level demographics').

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and school districts[18] used for 'direct marketing mail and email marketing efforts'.[19] Matching the merged entity's database involved a rather manual effort of collecting and verifying schools' and educators' contact information for many schools and teachers across the country.[20] The relevant product in *Reed Elsevier/ChoicePoint* was databases of a 'wide array of public and non-public records about individuals and businesses, including credit header data, criminal records, motor vehicle records, property records, and employment records'.[21] The parties 'compile[d] these records, either by going directly to the source or by purchasing these records from third parties'.[22] The relevant products in *Thomson/Reuters* were three types of financial databases,[23] that were difficult to replicate, among other reasons, because it involved: 'harvesting' and 'normalizing' information from the financial statements of 'thousands of companies' spanning 'many years'; 'obtaining the research report from a wide range of brokerage houses and other financial institutions' in some cases 'going back years or decades'; and 'aggregat[ing]' research reports from 'hundreds of investment banks and brokerages'.[24]

In contrast to the types of discrete but hard-to-collect data sets in these cases, the challenge with big data typically is not that it is difficult or costly to collect. Quite the opposite.[25] Owing to the widespread and prolific consumer use of countless online and offline services and the increasingly low cost of computing power (in part due to cloud services), the challenge with big data is typically that it is so voluminous, fast-growing and ubiquitous that many companies

18 Complaint, *In the Matter of The Dun & Bradstreet Corporation*, ¶¶ 1, 14, 17.

19 Analysis of Agreement Containing Consent Order to Aid Public Comment at 1, *In the Matter of the Dun & Bradstreet Corporation*, Docket No. 9342, https://www.ftc.gov/sites/default/files/documents/cases/2010/09/100910dunbradstreetanal.pdf.

20 The full methodology for collecting data is not entirely clear, but involved at least frequently directly contacting educational institutions, MDR, Education Data, https://mdreducation.com/connected-data/education-data ('We contact these institutions several times during the year so you have the most complete and up-to-date information'), categorising the data along various factors, see generally MDR, Education, https://mdreducation.com/wp-content/uploads/2018/08/MDR_ed_catalog.pdf, and bringing in third-party auditors to verify data. See id. at 2 ('You can trust MDR to[] Conduct third-party audits on their data').

21 Analysis of Agreement Containing Consent Order to Aid Public Comment, *In the Matter of ReedElseiver NV, et al.*, FTC File No. 081-0133, at 2 (16 Sept. 2008), https://www.ftc.gov/sites/default/files/documents/cases/2008/09/080916reedelseviercpanal.pdf.

22 id.

23 Competitive Impact Statement, *United States v. The Thomson Corp*, 1:08-cv-00262, at § I (19 Feb. 2008), https://www.justice.gov/atr/case- document/competitive-impact-statement-207.

24 id. at 5, 6, 7; see also Complaint at ¶ 50, *United States v. The Thomson Corp* ('[o]ther firms lack the requisite relationships with hundreds of investment banks and brokerage firms and a comprehensive collection of research topics…which is extremely costly to duplicate.').

25 See, e.g., 'Oracle, What Is Big Data', https://www.oracle.com/big-data/guide/what-is-big-data.html ('Recent technological breakthroughs have exponentially reduced the cost of data storage and compute, making it easier and less expensive to store more data than ever before.'); id. ('Cloud computing has expanded big data possibilities even further. The cloud offers truly elastic scalability, where developers can simply spin up ad hoc clusters to test a subset of data.').

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collect it in spades but struggle with what to do with and make of it.[26] As reported by several data analytics companies, it is the advanced technologies that extract actionable information from large data sets in which the key differentiator and value lies in big data.[27]

Cases like *Corelogic/DataQuick* thus suggest that the agencies typically have had fewer concerns about two companies merging big user data sets than two parties merging specialised, manually collected (and therefore difficult to replicate) databases. This was reinforced during the FTC Hearings where the then-Acting Deputy Director of FTC's Bureau of Competition, Haidee Schwartz, discussed the particular features of the data in that case: 'So it is public information, but it is not standardized, it is not easy to collect, and you need both historical and going forward.'[28] Deputy Director Schwartz particularly highlighted the complexities involved in attempting to remedy the situation by positioning another player to be an effective competitor:

> *[T]he breadth, detail, and the complexity of the data created barriers to entry . . . You would think it is a database, it is not that hard to transfer, but here, the buyer's due diligence may not necessarily uncover missing or unnecessary data in a timely fashion, and the Commission had difficulty initially identifying the exact universe of data required to effectively compete and required additional work by the buyer, the monitor, and the Commission to determine what data was missing, how it needed to be delivered, and how it needed to be continuously updated.*[29]

Big data as an essential input and entry barrier

The agencies have also evaluated the theories of harm on big data currently in vogue. So far, however, those theories of harm have not led to merger challenges or remedies.

For example, when Google looked to acquire DoubleClick (a digital ad serving business) in 2007, several competitors apparently complained, among other things, that 'the combination of Google's database of user information and the data respecting users and competitive

26 See, e.g., Vangie Beal, 'Big Data', https://www.webopedia.com/TERM/B/big_data.html (last visited on 6 Sept. 2019) (defining big data as 'a massive volume of both structured and unstructured data that is so large it is difficult to process using traditional database and software techniques'); 'SAS, Big Data: What it is and why it matters', https://www.sas.com/en_us/insights/big-data/what-is-big- data.html (last visited on 6 Sept. 2019) ('The amount of data that's being created and stored on a global level is almost inconceivable, and it just keeps growing.'); 'Oracle, What Is Big Data', https://www.oracle.com/big-data/guide/what-is-big-data.html ('big data is larger, more complex data sets, especially from new data sources. These data sets are so voluminous that traditional data processing software just can't manage them.').

27 'SAS, Big Data: What it is and why it matters', (last visited on 6 Sept. 2019), https://www.sas.com/en_us/insights/big-data/what-is-big- data.html ('The importance of big data doesn't revolve around how much data you have, but what you do with it.'); 'Oracle, What Is Big Data', https://www.oracle.com/big-data/guide/what-is-big-data.html ('Finding value in big data isn't only about analysing it (which is a whole other benefit). It's an entire discovery process that requires insightful analysts, business users, and executives who ask the right questions, recognise patterns, make informed assumptions, and predict behavior.').

28 Transcript of FTC Hearings Session #6 –Day 1, Presentation on 'FTC Experience with Data Markets', (6 Nov. 2018) at 268, https://www.ftc.gov/system/files/documents/public_events/1418633/ftc_hearings_session_6_transcript_day_1_11-6-18.pdf.

29 id. at 270.

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intermediaries collected by DoubleClick on behalf of its customers would give Google an overwhelming advantage in the ad intermediation market'.[30] The FTC rejected that and other arguments against the acquisition. It closed its investigation of this transaction without any remedies, concluding (among other things) that there was no support for the proposition that the combination of these data sets would give Google market power, and that:

> *At bottom, the concerns raised by Google's competitors regarding the integration of these two data sets – should privacy concerns not prevent such integration – really amount to a fear that the transaction will lead to Google offering a superior product to its customers. Yet, the evidence indicates that neither the data available to Google, nor the data available to DoubleClick, constitutes an essential input to a successful online advertising product. A number of Google's competitors have at their disposal valuable stores of data not available to Google.*[31]

Big data complaints seemingly have continued to be unsuccessful in US merger reviews since *Google/DoubleClick*.

For example, some raised similar concerns in Facebook's 2014 acquisition of WhatsApp,[32] and the European Commission evaluated (though rejected) data monopoly theories in that deal.[33] But the FTC cleared the transaction unconditionally on antitrust grounds within two months.

Then when Microsoft won the bid to acquire LinkedIn in 2016, Salesforce.com reportedly expressed concerns to US agencies and the European Commission that:

> *by gaining ownership of LinkedIn's unique dataset of over 450 million professionals in more than 200 countries, Microsoft will be able to deny competitors access to that data, and in doing so obtain an unfair competitive advantage.*[34]

This concern was based on a more traditional vertical foreclosure theory, and in part also featured more traditional 'data as the product' theories like the ones at issue in *Dunn & Bradstreet/QED*, since LinkedIn did in fact sell its data as part of a sales intelligence solution to customer relationship management software providers like Salesforce.

30 Statement of Federal Trade Commission Concerning Google/DoubleClick, FTC File No. 071-0170, at 12, https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf.

31 id.

32 Sam Schechner and Tom Fairless, 'EU Begins Questioning Facebook Rivals Over WhatsApp Deal', The Wall Street Journal (9 Jul. 2014), https://www.wsj.com/articles/eu-begins-questioning-facebook-rivals-over-whatsapp-deal-1404910724 ('Some lawyers and privacy advocates have also pushed for a novel antitrust argument to be considered as part of the review: that a Web giant like Facebook could become a "data monopolist."').

33 Case No. COMP/M.7217 – Facebook/WhatsApp, at ¶¶ 184-89 (10 Mar. 2014), http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf.

34 'Salesforce argues the Microsoft-LinkedIn deal will hurt innovation', Bloomberg News (3 Oct. 2016), https://www.digitalcommerce360.com/2016/10/03/salesforce-microsoft-linkedin-deal-hurts-innovation/.

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However, the theory of harm was similar to the one advanced in *Google/DoubleClick*, in that LinkedIn's data was alleged to be an essential input for rivals. The FTC cleared the transaction without any remedies, apparently declining to challenge the deal on this basis.[35] The European Commission did impose conditions in the transaction but not related to the data aggregation theory.

Third parties apparently also raised concerns about data aggregation (such as the ones raised in *Google/DoubleClick* and *Facebook/WhatsApp*) in the FTC's 2017 investigation of Amazon's acquisition of Whole Foods. But the FTC cleared the transaction without a second request. In discussing this transaction at an event, the then-Director of the FTC's Bureau of Competition addressed another emerging and popular big data antitrust theory – that users sharing their data with online service providers is a form of paying for those providers' services when they are otherwise free and that therefore aggregation of user data through a merger could have an effect equating to a price increase if it leads users to share more data with the merged company. He explained that there are several challenges with such concepts and theories of harm. One of the complicating factors is that not every consumer values his or her data the same way or at all (in economic terms). Another is that users sharing their data with online services often directly leads to the improvement of the service that they consume. Accordingly, the aggregation of user data through a merger, by enabling improvement of user services, could well lead to a price decrease – rather than increase – on a quality-adjusted basis (i.e., the quality of the service increases while the price does not).[36]

The European Commission previously launched an in-depth investigation of Apple's proposed US$400 million acquisition of Shazam, on the theory that Shazam's trove of data would give Apple an unfair competitive advantage over its music streaming rivals by enabling Apple to target users of rival services to encourage them to switch to Apple.[37] In contrast, no such investigation or concerns appeared to exist at the US agencies insofar as we can tell. Even the European Commission eventually cleared the *Apple/Shazam* deal unconditionally.[38]

Thus, while the European Commission has seemingly entertained theories of harm based on big data concepts to a greater degree than the US agencies,[39] we are not aware of either the European Commission or US antitrust agencies intervening in mergers based on such theories. That is not surprising because, even if there were merit to such theories in a particular case, tailored remedies for such theories – typically some sort of forced sharing of user data with rivals – would often be fraught with peril given the privacy implications.

35 April Glaser, 'Marc Benioff says companies buy each other for the data, and the government isn't doing anything about it', Vox (16 Nov. 2016), https://www.recode.net/2016/11/15/13631938/benioff-salesforce-data-government-federal-trade-commission-ftc-linkedin- microsoft.

36 Bruce Hoffman, 'Competition Policy and the Tech Industry – What's at stake?' at 6, https://www.ftc.gov/system/files/documents/public_statements/1375444/ccia_speech_final_april30.pdf.

37 Anita Balakrishnan, 'Apple's Deal for Shazam draws "in-depth investigation" from Europe', CNBC (23 Apr. 2018), https://www.cnbc.com/2018/04/23/european-commission-annouces-in-depth-investigation-into-apples-shazam-deal.html.

38 Press Release, 'Mergers: Commission clears Apple's acquisition of Shazam' (6 Sept. 2018), http://europa.eu/rapid/press-release_IP-18- 5662_en.htm.

39 Though, admittedly, the EC's process provides greater transparency into their considerations than does the US process, and it also forces the EC to spend more ink on these issues in its decisions (to withstand third-party appeals) than in the case of the US agencies.

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Such remedies would also likely be unappealing to Trump administration antitrust officials for yet another reason: because they would force sharing of intellectual property between rivals, something that they are not naturally incentivised to do, and thrust enforcement agencies and courts into a regulatory role. The Trump administration officials at the FTC and DOJ have expressly said they will always look to avoid such remedies, if at all possible.[40] That policy position, combined with agency officials' recent scepticism about big data theories and the apparent rejection of such theories in *Amazon/Whole Foods*, would seem to suggest that this topic is unlikely to rank high on the merger enforcement agenda for the Trump administration.

The Assistant Attorney General of the DOJ made some of these points in a speech, among other things, expressing reservations about the proposition that large user data sets are likely to create entry barriers or market power; highlighting that use and aggregation of such data in fact often significantly improves online services and advertising; and that forced data-sharing remedies can lead to undesirable policy outcomes.[41]

Data privacy considerations

From time to time the agencies have also been asked to include privacy considerations in the antitrust analysis of mergers involving big data, as they have been in the *Google/Fitbit* merger. While US agency officials have acknowledged that privacy conceptually could be one quality parameter on which companies compete, they have generally rejected, both in speeches and in matters like *Google/DoubleClick*, the suggestion that antitrust merger review should be used to protect user privacy.[42] The FTC's Bureau of Consumer Protection has shown it is willing to raise consumer protection concerns about privacy in the merger context, when merited. It did so, for example, when the FTC cleared Facebook's acquisition of WhatsApp, by sending Facebook a letter reminding it to abide by WhatsApp's privacy commitments to users.[43]

40 See, e.g., Acting Deputy Director Schwartz, Transcript of FTC Hearings Session #6 – Day 1 (6 Nov. 2018) at 279-281, https://www.ftc.gov/system/files/documents/public_events/1418633/ftc_hearings_session_6_transcript_day_1_11-6-18.pdf ('structural is always preferred, including in data cases'); Bernard (Barry) A Nigro, Jr ,'"Big Data" and Competition For the Market', Remarks as Prepared for Delivery at the Capitol Forum & CQ (13 Dec. 2017) (discussing the 'many reasons to be skeptical of using the antitrust laws to force the sharing of data'), https://www.justice.gov/opa/speech/file/1017701/download; see generally 'Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Fall Forum' (16 Nov. 2017) ('I expect to . . . return to the preferred focus on structural relief'), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers- keynote-address-american-bar.

41 Makan Delrahim, Assistant Attorney General, Antitrust Div, US Dep't of Justice, '"Start Me Up": Start-Up Nations, Innovation and Antitrust Policy', remarks delivered at University of Haifa (17 Oct. 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-university-haifa-israel.

42 See Statement of Federal Trade Commission Concerning Google/DoubleClick, FTC File No. 071-0170, at 2 (stating the Commission 'lack[s] legal authority to require conditions to this merger that do not relate to antitrust,' like privacy concerns), https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf.

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

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More recently, the Assistant Attorney General of the DOJ reiterated that privacy concerns can play a role in antitrust analysis.[44] Shortly after the announcement of Google's US$2.1.billion acquisition of Fitbit, the Assistant Attorney General of the DOJ stated that, 'Although privacy fits primarily within the realm of consumer protection law, it would be a grave mistake to believe that privacy concerns can never play a role in antitrust analysis.'[45] He went on to say that privacy can be 'an important dimension of quality' and that '[w]ithout competition, a dominant firm can more easily reduce quality – such as by decreasing privacy protections – without losing a significant number of users.' That, AAG Delrahim said, is something that deserves the DOJ's attention.[46] However, it is unclear what role, if any, privacy concerns will play in the Department's evaluation of the *Google/Fitbit* acquisition. Nearly a year later, the DOJ's investigation is still pending, but little information has been made public.[47]

The role that privacy concerns will play in US merger review remains uncertain. At least two of the FTC Commissioners have made clear their views that data privacy considerations when rooted in consumer protection concerns alone have no place in merger review. For example, Commissioner Christine Wilson has stated, 'If firms compete on the basis of privacy or data policies to attract customers, we might properly consider those aspects of non-price competition. But if firms do not compete that way, then they are appropriately omitted from our competition assessment.'[48] At the FTC Hearings, Commissioner Noah Phillips voiced concerns over enforcement from the FTC with respect to privacy considerations during antitrust review and stated that the proper balance between competition and privacy goals should be left to Congress.[49] Former Acting Chairman Maureen Ohlhausen similarly provided that she has 'concerns . . . with proposals to use antitrust to stop mergers or acquisitions by data-rich companies simply to address privacy concerns, not where the transaction or the behavior reduces privacy as a nonprice attribute of competition'.[50]

44 Makan Delrahim, '"Blind[ing] Me With Science": Antitrust, Data, and Digital Markets' (8 Nov. 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-harvard-law-school-competition.

45 id.

46 id.

47 The European Commission has launched a full-scale investigation into the deal. Although Google promised that it will not use the health data collected from Fitbit users for targeted advertising purposes, when it announced the investigation, the European Commission expressed concern 'that the proposed transaction would further entrench Google's market position in the online advertising markets by increasing the already vast amount of data that Google could use for personalisation of the ads it serves and displays.' Press Release, 'Mergers: Commission opens in-depth investigation into the proposed acquisition of Fitbit by Google,' (4 Aug. 2020), https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1446. The European Commission Executive Vice-President Margrethe Vestager commented, 'Our investigation aims to ensure that control by Google over data collected through wearable devices as a result of the transaction does not distort competition.' id.

48 Commissioner Wilson, Address at the American Enterprise Institute, 'Why We Should All Play By the Same Antitrust Rules, from Big Tech to Small Business' (4 May 2019), https://www.ftc.gov/system/files/documents/public_statements/1527497/wilson_remarks_aei_5-4-19.pdf.

49 See Transcript of FTC Hearings Session #12 – Day 1 (9 Apr. 2019) at 138-143, https://www.ftc.gov/system/files/documents/public_events/1418273/ftc_hearings_session_12_transcript_day_1_4-9-19.pdf.

50 Transcript of FTC Hearings Session #6 – Day 3 (8 Nov. 2018) at 84-85, https://www.ftc.gov/system/files/documents/public_events/1418633/ftc_hearings_session_6_transcript_day_3_11-8-18.pdf.

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Nascent competition theories

Some have suggested that the agencies should use the potential competition doctrine more aggressively to prevent incumbent online companies from acquiring tech start-ups that might challenge them in the future.[51] They have cited the FTC's challenge of Questcor's[52] acquisition of the rights to Synacthen from Novartis as a model for such an approach.[53] There certainly are scenarios conceivable when that would be justified – for example, if the acquirer is an incumbent with market power and the start-up forms a unique competitive threat to that market power, unlikely to be replicated by others. Though, unlike in *Questcor/Novartis*, which apparently involved pharmaceuticals that were very difficult to develop and commercialise, establishing that a tech start-up did something unique and not replicable may prove challenging. The agencies have already investigated start-up acquisitions on that basis. Such concerns were raised about Facebook's 2014 acquisition of WhatsApp, and prior to that, in 2012, Instagram. In each case, however, both the US and EU agencies that investigated such transactions ultimately cleared them without conditions.

In *Facebook/WhatsApp*, the European Commission did so because the parties' messenger apps were not close substitutes, faced several other messenger apps, and barriers to entry and expansion were not significant since users use multiple messenger apps at the same time and thus switch easily, such that anticompetitive effects were unlikely.[54] In *Facebook/Instagram*, the UK Office of Fair Trading (OFT) concluded that the transaction did not raise concerns because there were more significant photo app competitors to Instagram than Facebook at that time, and that Instagram in turn was not a likely significant future competitor to Facebook in online advertising, in which Facebook faced more significant players.[55]

While the FTC's considerations for clearing these were not public,[56] they presumably reached the same conclusions as the European Commission and OFT. The agency may be reconsidering its decision; the FTC recently opened an antitrust investigation into Facebook's motives behind its acquisitions of Instagram and WhatsApp – almost five years after the latter deal closed. The FTC is reportedly investigating whether Facebook purchased the nascent

51 See, e.g., Terrell McSweeny & Brian O'Dea, 'Data, Innovation, and Potential Competition in Digital Markets – Looking Beyond Short- Term Price Effects in Merger Analysis', Antitrust Chronicle (February 2018), at 2, 5-7 ('Enforcers should also look closely for evidence that mergers in digital markets may eliminate potential competition and pursue cases aggressively in this area, including under Section 2 of the Sherman Act where appropriate'), https://www.ftc.gov/system/files/documents/public_statements/1321373/cpi-mcsweeny-odea.pdf; see also Koren Wong-Ervin & James Moore, 'Acquisitions of Potential Competitors: The U.S. Approach and Calls for Reform,' Competition Law and Policy Debate (Fall 2020) at 1-4, https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3677443.

52 Questcor was acquired by Mallinckrodt, so the defendant in this case ended up being Mallinckrodt.

53 See Complaint, *In the Matter of Mallinckrodt Ard Inc*, Civil Action No. 1:17-cv-00120 ¶¶ 1, 8 (18 Jan. 2017), https://www.ftc.gov/system/files/documents/cases/170118mallinckrodt_complaint_public.pdf.

54 Regulation (EC) No. 139/2004, Case No COMP/M.7217 – *Facebook/WhatsApp*, at ¶¶ 101-07.

55 Office of Fair Trading, Anticipated Acquisition by Facebook Inc of Instagram Inc, at ¶¶ 21, 29, https://assets.publishing.service.gov.uk/media/555de2e5ed915d7ae200003b/facebook.pdf.

56 Letter from April J Tabor, Acting Secretary of the Federal Trade Commission to Thomas O Barnett re: Proposed Acquisition of Instagram, Inc. by Facebook, Inc. File No. 121-0121 (22 Aug. 2012), https://www.ftc.gov/sites/default/files/documents/closing_letters/facebook-inc./instagram-inc./120822barnettfacebookcltr.pdf.

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social media platforms to prevent them from becoming competitors.[57] Notably, the US agencies have not been skittish about taking enforcement action based on the potential competition doctrine either. They did so, for example, in *Nielsen/Arbitron* and *Steris/Synergy*, and even litigated (though lost) in the latter matter. And, unlike in the incumbent/start-up scenario, in both of those cases, the merging parties were not even competing with each other yet with a live product.

In the start-up acquisitions, however, it seems that the agencies simply concluded that the facts at hand did not support a potential competition concern. In reaching those conclusions, the agencies undoubtedly considered the speculative nature of potential competition predictions in dynamic and fast-moving digital markets, in which the success of a start-up itself on the one hand suggests relatively low barriers to entry, while on the other hand is no guarantee that it (rather than another, more established player or new entrant) will become a significant or unique rival to an incumbent. But, as the FTC's challenge of the *Questcor/Novartis* transaction shows, the nascent nature of markets certainly has not deterred the agencies from closely investigating and challenging mergers in the past.

Recently, the FTC challenged Illumina's acquisition of PacBio. According to the FTC, Illumina is the dominant provider of short-read gene sequencers, and PacBio of long-read gene sequencers, a separate market. The FTC was concerned that, because advances in long-read gene sequencers could result in a drop in price, the two markets could converge, making PacBio a nascent competitor. In addition, there was already significant overlap in the two companies' customer base. The FTC initiated an administrative proceeding before the Commission to block the merger in December 2019.[58] A few weeks later, the companies abandoned the transaction.[59]

Some have suggested that Section 2 of the Sherman could provide the agencies with a way to bring nascent and potential competition cases that would present less obstacles than Section 7 of the Clayton Act.[60] In a 2019 speech, Acting Deputy Assistant Attorney General Jeffrey Wilder explained that the DOJ 'is concerned about acquisitions of nascent competitors in platform industries because these markets are prone to tipping, and with tipping comes the potential for durable market power and substantial barriers to entry'.[61] He went on to say that using Section 2 to challenge acquisitions in platform markets is a potential 'solution' because it would allow the agencies to 'put greater emphasis on a pattern of conduct'.[62]

57 Laura Feiner, 'Facebook drops on report FTC is looking at Instagram, WhatsApp acquisitions in antitrust probe,' CNBC (1 Aug. 2019), https://www.cnbc.com/2019/08/01/ftc-reportedly-scrutinizing-facebooks-purchase-of-instagram-whatsapp.html.

58 Complaint, *In re matter of Illumina, Inc. and Pacific Biosciences of California, Inc.,* FTC (17 Dec. 2019), https://www.ftc.gov/system/files/documents/cases/d9387_illumina_pacbio_administrative_part_3_complaint_public.pdf.

59 Joint Motion to Dismiss Complaint, *In re matter of Illumina, Inc. and Pacific Biosciences of California, Inc.,* FTC (3 Jan. 2020), https://www.ftc.gov/system/files/documents/cases/d09387_jt_mtn_to_dismisspublic.pdf.

60 Douglas H. Ginsburg & Koren W. Wong-Ervin, 'Challenging Consummated Mergers Under Section 2,' *Competition Policy International* (May 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3590703.

61 id. citing Jeffrey M. Wilder, Potential Competition in Platform Markets, Remarks as Prepared for the Hal White Antitrust Conference (June 10, 2019), https://www.justice.gov/opa/speech/file/1176236/download.

62 id.

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Other recent public statements by the agencies regarding their authority under Section 2 suggest that they see challenges to mergers that eliminate nascent competitors as viable. During an OECD Roundtable, the US agencies stated that to block nascent acquisitions, they need only proof of general anticompetitive effects, not actual or merger-specific anticompetitive effects under Section 2. Rather, in their view, 'Section 2 may apply where a monopolist engages in exclusionary conduct (such as an acquisition) to eliminate the potential competitive threat posed by a technology, product, or service, even if it "is not presently a viable substitute" for the acquirer's own technologies, products, or services.'[63]

Groups such as the New Brandeisians believe that previous administrations did not go far enough in using the potential competition doctrine to investigate and challenge start-up acquisitions, and the FTC's current Chairman has indicated that the agency will spend more resources on acquisitions of nascent competitors by digital platforms, noting that the 'harm to competition' from such acquisitions 'can . . . be significant'.[64] Indeed, FTC Chairman Simons stated that a focus of the new Technology Task Force (now the Technology Enforcement Division) will be 'monopoly maintenance issues', specifically through the acquisition of nascent competitors.[65] Commissioner Rebecca Slaughter and former Acting Chairman Maureen Ohlhausen confirmed their views that the creation of this task force increases the likelihood of enforcement.[66] And, the Commission dedicated two panels and three presentations on nascent competition during the FTC Hearings, signalling to many the importance that the Commission and Chairman Simons specifically place on this issue.[67]

While it is unclear whether the Trump administration will ultimately enforce more aggressively on this particular issue, recently the FTC has not been shy about wielding its authority to investigate such acquisitions. In addition to its ongoing investigation into *Facebook/WhatsApp* and *Facebook/Instagram*,[68] as noted, the FTC also issued requests for information to Alphabet Inc (including Google), Amazon.com, Inc, Apple Inc, Facebook, Inc and Microsoft Corp regarding their past acquisitions.

And it is not only the antitrust agencies that are interested in the tech companies' acquisitions of start-ups.

63 Note by the United States, Start-ups, Killer Acquisitions and Merger Control, ¶ 9, DAF/COMP/WD (2020) 23, https://one.oecd.org/document/DAF/COMP/WD(2020)23/en/pdf.

64 Leah Nylen, 'FTC to focus on "non-partisan", "aggressive" enforcement, Simons says', MLEX (25 Sept. 2018), https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1025909&siteid=191&rdir=1.

65 Max Fillion, 'New FTC task force to focus on Big Tech acquisition of nascent competitors, Simons says', MLEX (29 Mar. 2019), https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1078899&siteid=191&rdir=1.

66 Amy Miller, 'FTC's tech task force expected to lead to probes into mergers, conduct, say former and current Commissioners', MLEX (3 May 2019), https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1088333&siteid=190&rdir=1.

67 See FTC Hearings Session #3 Events Calendar, 'Multi-Sided Platforms, Labor Markets, and Potential Competition', https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century; Transcript of FTC Hearings Session #3 – Day 3 (17 Oct. 2018) at 168, https://www.ftc.gov/system/files/documents/public_events/1413712/ftc_hearings_session_3_transcript_day_3_10-17-18_0.pdf.

68 Cecelia Kang, 'F.T.C.'s Facebook Investigation May Stretch Past Election,' *The New York Times* (17 Jul 2020), https://www.nytimes.com/2020/07/17/technology/ftc-facebook-investigation.html.

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The founder and CEO of Facebook, Mark Zuckerberg, recently faced questioning from Congress regarding Facebook's motives behind acquiring Instagram during a hearing by the House Judiciary Committee. Representative Jerrold Nalder suggested that Facebook's acquisition of Instagram violated the antitrust laws because the intent of the acquisition was to eliminate a potential competitor.[69] In response, Mr Zuckerberg admitted that the two companies were competitors but reasoned that at the time of acquisition, '[i]t was not a guarantee that Instagram was going to succeed.'[70] But, according to Representative Nalder: 'Facebook saw Instagram as a threat that could potentially siphon business away from Facebook. So rather than compete with it, Facebook bought it. This is exactly the type of anticompetitive acquisition that the antitrust laws were designed to prevent.'[71]

Despite the Congressman's comments, reviewing mergers between established companies and potential competitors remains a challenge for the antitrust agencies. While the FTC is apparently spending more resources investigating such acquisitions, the FTC Chairman has also acknowledged that acquisitions of nascent competitors in the high-tech space are 'particularly difficult for antitrust enforcers to deal with because the acquired firm is by definition not a full-fledged competitor' and 'the likely level of competition with the acquiring firm is frequently, maybe more than frequently, not apparent'.[72] The agencies may be cautious about litigating cases in such speculative circumstances. Moreover, this administration has shown sensitivity to preserving investment incentives (e.g., in IP)[73] and therefore may be also hesitant to intervene in mergers based on relatively speculative theories of harm as a matter of policy – after all, for many entrepreneurs the prospect of being acquired by a large tech company is one important incentive to invest in a start-up in the first place. The following statement by the DOJ's Assistant Attorney General for Antitrust is instructive in this respect (though it ostensibly was not about mergers):

69 "Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google," at 1:05 (29 Jul. 2020), https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=3113.

70 id. at 1:06.

71 id.

72 Leah Nylen, 'FTC to focus on "non-partisan", "aggressive" enforcement, Simons says', MLEX (25 Sept. 2018), https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1025909&siteid=191&rdir=1; see also Prepared Remarks of Chairman Joseph Simons, Georgetown Law Global Antitrust Enforcement Symposium (25 Sept. 2018) at 5, https://www.ftc.gov/system/files/documents/public_statements/1413340/simons_georgetown_lunch_address_9-25-18.pdf.

73 John D Harkrider, 'Antitrust in the Trump Administration: A Tough Enforcer That Believes in Limited Government', *Antitrust*, Vol. 32, No. 3 (Summer 2018), at 14 ('Regarding SEPs, the administration is concerned that implementers will "hold out" and use SEPs without a license, which the DOJ has claimed reduces incentives for innovators to invest in foundational essential technology.'); see also Makan Delrahim, 'Assistant Attorney General Makan Delrahim Delivers Remarks at the US Embassy in Beijing' (1 Feb. 2018) ('[S]ome enforcers have strayed too far in the direction of accommodating the concerns of technology implementers, to the potential detriment of IP creators, who must be appropriately rewarded for break-through technologies if technological innovation is to continue.'), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-us-embassy-beijing.

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> *We must remember that big platforms were once themselves start-ups, and be cautious in any enforcement decision to not undermine the very innovation incentives that competition aims to protect. At the Antitrust Division, we continue to study this area and believe in a careful application of the antitrust laws that takes into account both the short-term and long-term effects on innovation. We should take action only with credible evidence of harm to competition and not harm to just competitors. We must balance the goals to protect the very incentives to innovate, but at the same time be prepared to intervene when anticompetitive conduct distorts the free market.*[74]

Traditional horizontal theories

The US agencies, in recent years, have also investigated several mergers in the digital space based on straightforward horizontal theories of harm, such as unilateral effects.

For example, in 2015, after an extensive investigation, the FTC cleared unconditionally Zillow's US$3.5 billion acquisition of Trulia, the first and second largest consumer-facing online portals for buying homes.[75] The parties' internal documents suggested that they competed head-to-head to offer users home sale information and sell advertising to estate agents.[76] The FTC nevertheless cleared the transaction without remedies because the data showed that the companies represented 'only a small portion of agents' overall spend on advertising', and that their portals did not generate a higher return on investment for agents than did other forms of advertising used by the agents.[77] This implied that the parties could not realistically increase prices post-merger without losing too much agent advertising spend to other forms of advertising.[78] The FTC also found that the companies competed with a number of other portals to offer home buyers relevant information.

This case illustrates an important point to remember in mergers between online advertising businesses. Even if the merging parties attract consumers with similar online content, they often compete with a much broader array of (online) companies in selling advertising, since the same consumers typically can be targeted through many different advertising media. *Zillow/Trulia* is also a good reminder always to look closely at the parties' data, because it may prove to be an important reality check on documents that paint an unhelpful but inaccurate or incomplete picture.

74 Makan Delrahim, Assistant Attorney General, Antitrust Div, US Dep't of Justice, '"Start Me Up": Start-Up Nations, Innovation and Antitrust Policy', remarks delivered at University of Haifa (17 Oct. 2018), https://www.justice.gov/opa/speech/assistant-attorney- general-makan-delrahim-delivers -remarks-university-haifa-israel.

75 Statement of Commissioner Ohlhausen, Commissioner Wright, and Commissioner McSweeny Concerning *Zillow, Inc./Trulia, Inc.*, FTC File No. 141-0214 (19 Feb. 2015), https://www.ftc.gov/system/files/documents/public_statements/625671/150219zillowmko-jdw- tmstmt.pdf.

76 id. at 2.

77 id. at 2.

78 id. at 2.

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The same year DOJ investigated and cleared without remedies another major consolidation of online names: online travel agency Expedia's US$1.3 billion acquisition of rival Orbitz (after Expedia had earlier acquired Travelocity).[79] DOJ cleared the transaction despite vigorous complaints by hotels that they would have to pay higher prices post-merger to feature on Expedia or Orbitz.[80] DOJ found that: there was no evidence suggesting that consumers would be charged higher fees for using the websites; airlines, hotels and car rental agencies barely received any bookings from Orbitz anymore, such that Orbitz did not exercise a significant constraint on Expedia's commission charges – Priceline was by far Expedia's most significant rival; and there were dynamic changes occurring in the industry with 'the introduction of TripAdvisor's Instant Booking service and Google's Hotel and Flight Finder'.[81] This is an example of a case in which the dynamic nature of digital markets and recent entry developments can be a legitimate reason for agencies not to intervene.

That said, the DOJ's successful challenge of Bazaarvoice's consummated acquisition of PowerReviews the previous year shows that a merger defence that online markets are dynamic only goes so far and that unhelpful documents still can kill deals.[82] Bazaarvoice's documents showed that its intent behind the acquisition was to eliminate its closest competitor in the sale of 'product ratings and review platforms'.[83] Following trial, the District Court found for DOJ, concluding that '[g]iven the overwhelming market share Bazaarvoice acquired when it purchased PowerReviews, the stark premerger evidence of anticompetitive intent and the merger's likely effects, coupled with the actual lack of impact competitors have made since the merger, the government established the Section 7 violation'.[84] Bazaarvoice was ordered to divest the PowerReviews business, notably in a way that re- established PowerReviews as if it had never been acquired (taking into account how it would have developed on its own but for the acquisition).[85]

Two other, more recent, horizontal deals between head-to-head competitors in the online space likewise did not fare well. In 2017, the FTC challenged the combination of Red Ventures' A Place For Mom and Bankrate's Caring.com, and entered a consent decree under which the merging parties agreed to divest one of those two assets (the merging parties' portfolios extended beyond these assets).[86] The overlapping businesses were alleged to be each other's closest competitors in the provision of third-party paid referral services for senior living facilities (refer-

79 Cecilia King & Brian Fung, 'Expedia and Orbitz are merging. Here's what it means for you', *The Washington Post* (16 Sept. 2015), https://www.washingtonpost.com/news/the-switch/wp/2015/09/16/expedia-and-orbitz-are-merging-heres-what-it-means-for- you/?utm_term=.568db948d0a6.

80 id.

81 Press Release, Justice Department Will Not Challenge Expedia's Acquisition of Orbitz (16 Sept. 2015), https://www.justice.gov/opa/pr/justice-department-will-not-challenge-expedias-acquisition-orbitz.

82 Memorandum Opinion, *United States v. Bazaarvoice, Inc.,* 13-cv-133, Doc. No. 244 at 140-41 (N.D. Cal. 18 Jan. 2014).

83 Complaint, *United States v. Bazaarvoice, Inc.,* 13-cv-133 at ¶¶ 2-9, 18 (N.D. Cal. 10 Jan. 2013).

84 Memorandum Opinion, *United States v. Bazaarvoice, Inc.,* 13-cv-133, Doc. No. 244 at 10 (N.D. Cal. 18 Jan. 2014).

85 Third Amended Final Judgment, *United States v. BazaarVoice, Inc.,* 13-cv-133, Doc. No. 286, at § IV.A (N.D. Cal. 2 Dec. 2014).

86 Press Release, 'Parties Agree to Divestiture of Senior Living Facilities Referral Service Caring.com as a Condition of Red Venture's Acquiring Bankrate' (3 Nov. 2017), https://www.ftc.gov/news-events/press-releases/2017/11/parties-agree-divestiture-senior-living- facilities-referral-service.

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ral services 'provid[ing] leads of qualified consumers to . . . senior living facilities'). That same year, the FTC also had sued to block the merger of DraftKings and FanDuel, the two dominant online platforms for daily fantasy sports; a merger that it claimed would have resulted in a 'near monopoly'.[87] The parties competed vigorously on a number of elements, including: commission rates; discounts; contest prizes; and non-price factors, such as contest size, product features and contest offerings.[88] Despite the unique and relatively nascent nature of this industry, the FTC pursued a fairly traditional unilateral effects case of closeness of competition.[89] The parties ultimately abandoned the deal approximately a month after the FTC's complaint.[90]

In the area of horizontal deals, the current Chairman of the FTC and the Bureau of Competition director have indicated that they are both focused on stricter requirements for divestiture remedies.[91] This is an area where the Trump administration could prove 'tougher' than its predecessor. A retrospective study of merger remedies done under the Obama administration found that while 80 per cent of all divestiture remedies were effective, only 70 per cent of those divestiture remedies that involved asset divestitures (as opposed to standalone business divestitures) were successful.[92] As part of his Senate confirmation statement, Chairman Simons indicated that he plans to reduce that failure rate, which could suggest that the FTC will become even less receptive to asset divestitures (and more insistent on full business divestitures) than before.[93] Of course, in practice, the scope of the business that needs to be divested will depend significantly on the identity and capabilities of the divestiture buyer. But the apparently tougher stance of this administration on divestiture remedies is something to keep in mind when consolidating major online competitors.

87 Complaint, *In the Matter of DraftKings, Inc and FanDuel Limited,* File No. 161-0174 (19 Jun. 2017), at ¶ 1.

88 id. at ¶¶ 17, 60-75.

89 id. at ¶¶ 49-57.

90 Chris Kirkham & Ezequiel Minaya, 'DraftKings, FanDuel Call Off Merger', *Wall Street Journal* (13 Jul. 2017), https://www.wsj.com/articles/draftkings-fanduel-call-off-merger-1499976072.

91 D. Bruce Hoffman, It Only Takes Two to Tango: Reflections on Six Months at the FTC, Remarks at GCR Live 7th Annual Antitrust Law Leaders Forum, at 6 (2 Feb. 2018) ('[T]he FTC has been increasingly inquisitive and tough on remedies. We intend to continue strictly enforcing the requirements for remedies.'), https://www.ftc.gov/system/files/documents/public_statements/1318363/hoffman_gcr_live_feb_2018_final.pdf.

92 Federal Trade Commission, The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics, at 1 (January 2017) ('Divestitures of limited packages of assets in horizontal, non-consummated mergers fared less well [than divestitures involving an ongoing business], but still achieved a success rate of approximately 70%.'), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition- economics/p143100_ftc_merger_remedies_2006-2012.pdf.

93 See Joseph Simons, Responses to Initial Questionnaire from US Senate Committee on Commerce, Science & Transportation, at 16 (criticising 30 per cent failure rate of enforcement actions requiring divestitures of assets other than stand-alone businesses), https://www.commerce.senate.gov/public/_cache/files/6c4149af-3023-4825-90f1- 3c38e279fd0d/6A0CCF409AF89DC8D5C0A84CE8730012.confidential---simons---committee-questionnaire-redacted.pdf.

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Non-horizontal theories

There have been a number of major non-horizontal merger reviews involving digital market companies in recent years, such as Apple's acquisition of Shazam, Amazon's acquisition of Whole Foods, Microsoft's acquisitions of Skype and LinkedIn, Google's acquisitions of ITA Software and Fitbit. Except for the latter two, the US agencies did not conduct in-depth investigations of these transactions, much less seek remedies. In contrast, the European Commission subjected most of the same transactions to extensive investigation based on non-horizontal theories of harm, and even imposed behavioural remedies in one that the US agencies cleared without a second request.

For example, Apple's acquisition of Shazam triggered an in-depth investigation from the European Commission (though it was cleared unconditionally)[94] based on concerns that Apple would use Shazam data to target customers of rival music streaming apps (e.g., Spotify), as discussed above, and foreclose such rival apps from important referral traffic from Shazam.[95] In contrast, the US agencies do not appear to have conducted such an in- depth investigation of the deal.

Similarly, the European Commission investigated foreclosure theories in Microsoft's acquisitions of Skype and, especially, LinkedIn. In the Skype acquisition, the European Commission evaluated whether, after the acquisition, Microsoft would degrade Skype's performance with other operating systems and platforms (or alternatively degrade how other communications services work on Microsoft's Windows OS); integrate Skype with Windows or its Office productivity software, thereby reinforcing its dominant position as a 'must-have'; or bundle the products to have the same effect.[96] The European Commission cleared the transaction without remedies, concluding that while Microsoft could do those things, it was unlikely to do so since it would harm the Skype brand and drive users to rival communication services.[97] In the LinkedIn acquisition, the European Commission tested a similar foreclosure theory (in addition to the foreclosure theories based on the LinkedIn data discussed above). Yet it came to the opposite conclusion and imposed remedies. The European Commission was concerned that Microsoft would pre-install LinkedIn on all Windows PCs and integrate it into Microsoft Office (among other applications), thereby significantly enhancing LinkedIn on dominant platforms such as MS Windows and Office, at the expense of rival professional social networks. As remedies, it required Microsoft to permit PC manufacturers and distributors not to install LinkedIn on Windows; to let users remove LinkedIn from Windows; and to allow rival professional social networks to maintain interoperability with MS Office and access to Microsoft Graph (to enable access to data stored on the Microsoft cloud).[98] The US agencies, on the other hand, cleared the Skype and LinkedIn acquisitions without a second request or remedies.

94 Press Release, Mergers: Commission clears Apple's acquisition of Shazam (6 Sept. 2018), http://europa.eu/rapid/press-release_IP-18- 5662_en.htm.

95 Press Release, Mergers: Commission opens in-depth investigation into Apple's proposed acquisition of Shazam, European Commission (23 Apr. 2018), http://europa.eu/rapid/press-release_IP-18-3505_en.htm.

96 Regulation (EC) No. 139/2004, Case No COMP/M.6281 – Microsoft/Skype, § 3, http://ec.europa.eu/competition/mergers/cases/decisions/m6281_924_2.pdf.

97 id., ¶ 144–158.

98 Press Release, 'Mergers: Commission approves acquisition of LinkedIn by Microsoft, subject to conditions', European Commission (6 Dec. 2016), http://europa.eu/rapid/press-release_IP-16-4284_en.htm.

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The FTC likewise passed on a host of non-horizontal theories of harm put forth by opponents in its review of Amazon's acquisition of Whole Foods. In addition to big data theories (discussed above), critics expressed concern, for example, that Amazon's acquisition of Whole Foods would allow it to leverage its scale, logistics, and buyer power in other retail areas to quickly dominate the grocery business (just like it did with book retailing).[99] They also raised the concern that Amazon would be able to squeeze certain food suppliers with that dominance.[100] The FTC cleared the acquisition promptly, without a second request,[101] rejecting these types of conglomerate monopoly leveraging theories apparently for lack of cognisable antitrust harms.[102] It did so presumably in part since both Amazon and Whole Foods had modest footprints in the online and offline grocery retail business.[103]

Of course, this is not to say that the US agencies will give any non-horizontal merger in the online space a pass. While the US agencies seem more sceptical of non-horizontal theories of harm in mergers involving online markets than their European counterparts, they have intervened in such matters in the past. For example, under Obama, the DOJ sought behavioural commitments to clear Google's acquisition of airfare pricing and shopping software developer ITA Software. The remedies were designed to ensure that Google would continue to provide rival online travel websites such as Bing and Kayak access to ITA Software's airfare pricing and shopping engine to power their flight search.[104] Under Trump, the DOJ challenged – to the point of full litigation through trial and appeal – AT&T's acquisition of Time Warner, which also was a purely vertical merger. While that acquisition was not entirely in the online markets sphere, the rationale for the transaction as well as its likely effects are very much so. AT&T, after all, claimed it pursued the transaction to compete directly in advertising with online advertising companies such as Google and Facebook. The DOJ sought to block the *AT&T/Time Warner* deal, out of concern that once part of AT&T, Time Warner would extract higher rents for its marquee programming (e.g., CNN, HBO) from traditional and online video distribution rivals of AT&T,

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99 Diane Bartz, 'Critics say Whole Foods deal would give Amazon an unfair advantage', Reuters (22 Jun. 2017), https://www.reuters.com/article/us-whole-foods-m-a-amazon-com-antitrust/critics-say-whole-foods-deal-would-give-amazon-an-unfair- advantage-idUSKBN19D2Q8.

100 id.

101 Press Release, 'Statement of Federal Trade Commission's Acting Director of the Bureau of Competition on the Agency's Review of Amazon.com, Inc.'s Acquisition of Whole Foods Market Inc.', (23 Aug. 2017), https://www.ftc.gov/news-events/press- releases/2017/08/statement-federal-trade-commissions-acting-director-bureau.

102 Interview of Bruce Hoffman – Director, Bureau of Competition, Federal Trade Commission – 25 July 2018, *The Threshold*, Vol. XVIII, No. 3, at 15-16 (Summer 2018), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/the_threshold_summer_2018_issue.authcheckdam.pdf.

103 Diane Bartz, 'Critics say Whole Foods deal would give Amazon an unfair advantage', Reuters (22 Jun. 2017), https://www.reuters.com/article/us-whole-foods-m-a-amazon-com-antitrust/critics-say-whole-foods-deal-would-give-amazon-an-unfair-advantage-idUSKBN19D2Q8; see also Investor's Business Daily, 'Ignore the Critics, the Amazon/Whole Foods Deal Is Good For Consumers' (17 Jun. 2017), https://www.investors.com/politics/editorials/amazon-steps-into-the-physical-world-and-thats-a-good-thing/.

104 Complaint, *United States v. Google, Inc*., 1:11-cv-688 (D.D.C. 8 Apr. 2011).

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such as Cox, Dish or Dish Sling, and thereby weaken their ability to put competitive pressure on AT&T. The DOJ lost its challenge both at the district court and appellate court levels, and the merger will stand.[105]

However, the outcome of the *AT&T/Time Warner* case could cause the US agencies to become yet more selective in enforcing against vertical mergers than they have been from a policy perspective, especially in dynamic online environments. While the DOJ issued a second request in the *Google/Fitbit* deal, it remains to be seen whether the DOJ will intervene. Under Trump, the agencies have expressed strong reservations about behavioural remedies and indicated that they will typically insist on divestiture remedies if they have serious concerns, even in the rare vertical merger challenge (as DOJ did in *AT&T/Time Warner*).[106] The outcome in that case shows, however, that there is a greater risk associated with taking that position in vertical deals (as opposed to accepting behavioural remedies, as done in the past), if it leads to litigation. Accordingly, the US agencies may be inclined to challenge fewer vertical deals, unless they are willing to revisit to some degree their policy position on use of behavioural remedies.

Multisided market definition

While an in-depth discussion of the Supreme Court's decision in *Ohio v. American Express* is beyond the scope of this contribution, a few quick observations about that decision are worth making, given how frequently online markets and big data issues involve multisided platforms. The Supreme Court concluded that in proving the relevant market and market harm in cases involving multisided transactional platforms, such as American Express's credit card network, plaintiffs must account for the effects of the conduct at issue on all customers of the platform (not just the effects on customers on one side of the platform). The court made clear, however, that this requirement did not uniformly apply to all multisided platforms, but rather only to 'transaction' platforms that 'cannot make a sale to one side of the platform without simultaneously making a sale to the other',[107] explaining that in such a case a platform is 'better understood as "supplying only one product" – transactions'.[108] The court identified newspapers as an example of two-sided platforms in which this does not apply: 'But in the newspaper-advertisement market, the indirect networks effects operate in only one direction; newspaper readers are largely indifferent to the amount of advertising that a newspaper contains.'[109]

105 See Memorandum Opinion, *United States v. AT&T Inc*., 1:17-cv-2511, Doc. No. 18-5214 (D.C. Cir. 26 Feb. 2019), https://www.lit-antitrust.shearman.com/siteFiles/27063/USCA%20DCA%2018-5214%20-%20USA%20v%20AT&T%20-%20Opinion.pdf.

106 See 'Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Fall Forum' (16 Nov. 2017) (taking the position that behavioural remedies 'often fail' to 'let the competitive process play out' and criticising prior administrations' use of consent decrees in vertical mergers), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar; see also Remarks of Bruce Hoffman, 'Vertical Merger Enforcement at the FTC', Credit Suisse 2018 Washington Perspectives Conference (10 Jan. 2018) at 7 ('First and foremost, it's important to remember that the FTC prefers structural remedies to structural problems, even with vertical mergers'), https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf.

107 *Ohio v. American Express*, 585 U.S., slip op. at 2 (2018).

108 id., slip op. at 14, n. 8.

109 id., slip op. at 12.

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Earlier this year, the US District Court for the District of Delaware was the first to apply the Supreme Court's decision in *Ohio v. American Express* in the merger context. In rejecting the DOJ's challenge to Sabre Corp's US$360 million acquisition of Farelogix Inc, the court found that Farelogix and Sabre were not competitors because Sabre is a two-sided platform that acts as a conduit between the airlines and travel agents, whereas Farelogix only offers services to the airlines. The Court interpreted *Ohio v. American Express* as requiring the government to show that the merger would harm both sides of the two-sided market to enjoin the merger. Since Farelogix is only present on one of the markets, the government failed to meet its burden. The DOJ appealed the decision. Despite the victory at the district court, the parties ultimately abandoned their deal because the United Kingdom's Competition and Markets Authority (CMA) prohibited the transaction.[110] Afterwards, the DOJ asked the Third Circuit Court of Appeals to vacate the lower court's decision. The court granted the motion, though it noted that its decision was not to be construed as commentary on the merits:

> *We also express no opinion on the merits of the parties' dispute before the District Court. . . . As such, this Order should not be construed as detracting from the persuasive force of the District Court's decision, should courts and litigants find its reasoning persuasive.*[111]

It is yet unclear exactly where any particular online, advertising-based business operating a multisided platform will fall on the Supreme Court's spectrum – closer to Amex's payment network or to a newspaper. That will be highly fact-specific. But it is worth evaluating that, in each particular case, including in the merger context, to ensure that the full impact of a merger and a complete set of competitors of the merging parties are taken into account when in an agency review. Continued case development will show how significant a factor (or not) *Ohio v. American Express* will play in merger reviews involving digital markets.

Conclusion

While unlikely to become law, the Better Deal bill and its proponents may have been a contributing factor in agency officials committing resources to issues raised by the bill. The FTC's launch of its Technology Task Force, Chairman Simon's focus on acquisitions of nascent competitors by digital platforms, the topics of the FTC's Hearings, and the FTC's request for information on the last 10 years of mergers from the five largest tech companies (totalling nearly 400 deals) certainly suggest so. The FTC Hearings involved more than 350 panellists and over 850 public comments, and covered topics such as 'competition . . . issues in communication, information, and media technology networks, . . . markets featuring "platform businesses," . . . intersection between privacy, big data, and competition . . . [e]valuating the competitive effects of corporate acquisitions and mergers', and 'monopsony power, including but not limited to, in labor markets'.

110 Press Release, 'Sabre Corporation Issues Statement on its Merger Agreement with Farelogix', Sabre Corp. (1 May 2020), https://www.sabre.com/insights/releases/sabre-corporation-issues-statement-on-its-merger-agreement-with-farelogix/.

111 *United States v. Sabre Corp.*, No. 1:19-cv-01548-LPS, Doc. No. 282 (3d Cir. Jul. 20, 2020).

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That said, the agencies have already thoroughly investigated mergers involving digital markets and big data issues many times before. And merger enforcement has picked up quite a bit since the Obama administration, with several successfully litigated mergers, including in tech markets (e.g., *Bazaarvoice/PowerReviews*). Thus, unless merger retrospectives uncover compelling evidence of significant consumer harms from past under-enforcement, the question is how much more aggressive or experimental the administration will want to or realistically can be in its merger enforcement (other than perhaps being stricter on remedies). Doing so could risk more harm than good and run into boundaries set by judicial precedent (especially with the significant number of conservative judges that have recently joined the bench, including at the appellate court levels). The outcome in DOJ's recent challenge of the *AT&T/Time Warner* merger is illustrative in that respect. The European Commission has greater discretion in that sense, since it does not have to prevail in court to stop a merger, and typically is given more deference by the courts than are the US agencies. Yet, despite its historically greater policy focus on big data and tech issues, even the European Commission has not to our knowledge blocked mergers based on concerns about such issues.

The current administration, at least at the FTC, has devoted more investigative resources to mergers in these areas of the new economy, especially acquisitions of start-up companies in the technology sector, but it remains to be seen whether that will lead to much more enforcement.

The one area in which there has been significant change in merger enforcement policies compared to the last administration, is in remedies, especially in vertical mergers. That difference could surface in merger investigations involving digital markets and big data, since non-horizontal theories of harm are quite common there. As discussed, the DOJ's loss in *AT&T/Time Warner* could mean it ends up intervening less in vertical mergers. On the other hand, the agencies clearly have been serious about not favouring behavioural remedies and typically insisting on divestiture remedies even in vertical mergers. That is something to take into account when planning vertical mergers that could raise significant opposition, including when negotiating the antitrust risk allocation in merger agreements. The agency's policy position on behavioural remedies, combined with the outcome in the *AT&T/Time Warner* case, could in some circumstances cause parties to negotiate longer drop-dead dates, more litigation commitments and greater reverse break fees in merger agreements for such deals.

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Appendix 1

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Daniel Bitton heads Axinn's West Coast antitrust practice. Trained in the EU and the US, Mr Bitton navigates clients through antitrust litigation, government investigations and merger clearance processes across the globe. He is regular antitrust counsel to major Fortune 500 companies including Google, McKesson and Stanley Black & Decker.

His recent matters include representing Google in investigations by the US Department of Justice and state attorneys-general, as well as sector inquiries in other countries including Australia; defending McKesson subsidiary RelayHealth in antitrust class actions and representing it in a related FTC litigation against Surescripts; defending three Danfoss Group companies in cartel litigation; securing global clearance for Johnson Controls' US$2 billion sale of Scott Safety to 3M; securing clearance for several significant deals by McKesson, including its US$3.4 billion healthcare technology joint venture with Change Healthcare and its US$1.4 billion acquisition of CoverMyMeds; securing global clearance for Dell's US$67 billion acquisition of EMC; securing global clearance for Thermo Fisher Scientific's US$13.6 billion acquisition of Life Technologies; and securing clearance for Google's US$2.35 billion sale of Motorola Home to ARRIS, and its US$700 million acquisition of ITA Software.

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Leslie C Overton is a partner in Axinn's Washington, DC office. Having previously served in senior positions at the US Department of Justice (DOJ) Antitrust Division, Leslie Overton offers her clients a valuable combination of experience and insight. Leslie guides companies through merger reviews, civil non-merger investigations, cartel investigations and litigation involving federal, state and foreign antitrust authorities. Her recent matters include representing Google in investigations by the US Department of Justice and state attorneys-general, as well as sector inquiries in other countries including Australia. She also represents clients in matters

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concerning anticompetitive conduct and consolidation by competitors, suppliers or customers. In her counselling practice, Leslie provides strategic advice and practical solutions on activities such as pricing, distribution and licensing. She also customises antitrust compliance programmes to match her clients' exposure and business realities.

While serving as deputy assistant attorney general for civil enforcement at DOJ during the Obama administration, Leslie managed merger challenges and supervised litigation and civil non-merger investigations, as well as several criminal antitrust matters. Additionally, Leslie oversaw the Antitrust Division's international engagement and healthcare policy work. During the Bush administration, she served as counsel to the assistant attorney general, where she contributed to investigations, litigation and the seminal healthcare hearings and report with the FTC.

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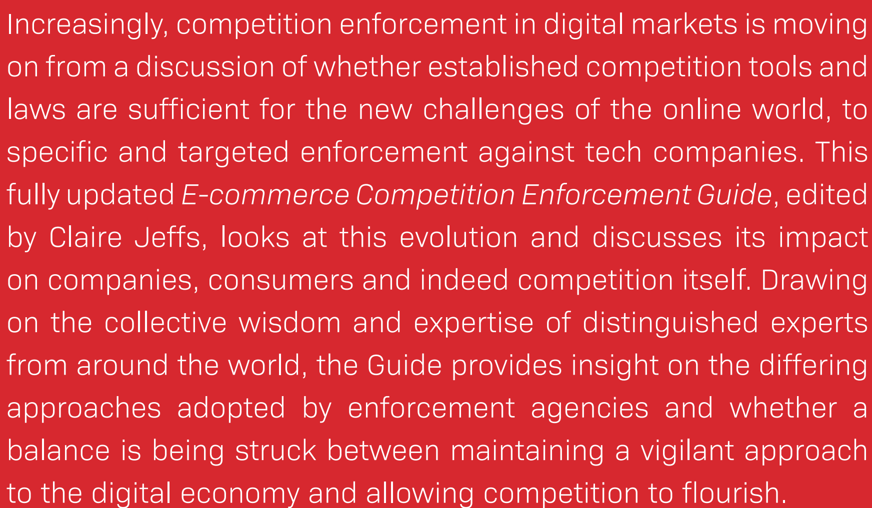

Increasingly, competition enforcement in digital markets is moving on from a discussion of whether established competition tools and laws are sufficient for the new challenges of the online world, to specific and targeted enforcement against tech companies. This fully updated *E-commerce Competition Enforcement Guide*, edited by Claire Jeffs, looks at this evolution and discusses its impact on companies, consumers and indeed competition itself. Drawing on the collective wisdom and expertise of distinguished experts from around the world, the Guide provides insight on the differing approaches adopted by enforcement agencies and whether a balance is being struck between maintaining a vigilant approach to the digital economy and allowing competition to flourish.

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