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LAW FOR A DYNAMIC FUTURE

Comments of

TechFreedom

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In the Matter of

Proposed Amendments to the Korea Fair Trade Commission Merger Review Guidelines and Comments on the Merger Review Guidelines (Republic of Korea)

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INTRODUCTION

TechFreedom welcomes the opportunity to participate in the public consultation process with respect to the Fair Trade Commission's Proposed Amendments to the Merger Review Guidelines.[1] Founded in 2010, TechFreedom is a nonprofit, nonpartisan think tank based in the United States dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

While this is the first time TechFreedom has submitted a comment to an agency in the Republic of Korea, TechFreedom has commented on significant competition issues in the United States over the past decade. For example, we recently provided comments on the U.S. Department of Justice ("DOJ") and U.S. Federal Trade Commission ("FTC") Draft Revised Merger Guidelines[2] and the DOJ and FTC Request for Information on Merger Enforcement.[3]

The Proposed Amendments are intended to provide guidance on how the Fair Trade Commission evaluates mergers in the digital sector. We support further guidance from the Fair Trade Commission on its merger review analysis, but do not believe the Merger Review Guidelines should adopt language that singles out firms operating in the digital sector for unique treatment.

Mergers may allow firms operating in the digital sector to obtain or expand competitive benefits and increase consumer welfare; thus, mergers in the digital sector should not be subject to a more stringent review than mergers in any other economic sector. In our comments, we also suggest that the Fair Trade Commission rely on the concept of "innovation markets" sparingly, and, in the digital sector, look to "innovation effects" in an existing or future product market, rather than defining innovation markets.

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[1] This comment was prepared in English and translated to Korean for purpose of submission. To the extent practicable, the English language version of this submission should be considered controlling.

2 Comments of TechFreedom, In the Matter of Draft Merger Guidelines (Sep. 18, 2023), https://techfreedom.org/wp-content/uploads/2023/09/Bilal-Sayyed-Merger-Guidelines-Comments-9-18-2023.pdf.

3 Comments of TechFreedom, In the Matter of Request for Information on Merger Enforcement (Apr. 21, 2022), https://techfreedom.org/wp-content/uploads/2022/04/TechFreedom-Comments-Merger-Guidelines-April-21-2022.docx.pdf.

I. Overview of Digital Platforms and Characteristics of Multi-Sided Markets

Many firms operate with a digital component. For example, many formerly brick-and-mortar retail firms now offer an online ordering and service component. Somewhat informally, firms characterized as digital platforms can be defined as software-based businesses that provide services to multiple participants (consumers or other businesses) and often operate in multiple markets, both digital and non-digital. The markets of significant interest to regulators and enforcers are thus multi-sided markets. Multi-sided markets are found in a variety of industries and are not a function of digitalization. For example, previous ad-supported businesses—such as commercial radio, over-the-air television services, and newspapers are multi-sided markets, with listeners, viewers, and readers on one side, and advertisers on another. Merger analysis of such markets has not generally focused on effects on the quality of the "free" or "zero-price" side of such markets but has focused on the price effects on the advertising side of the business. The following description of platform markets is consistent with and applicable to the operation of both digital-based and non-digital based platforms.

Firms operating platforms may do business in several related markets. Markets in which platform firms operate may have several adjacent and often complementary markets. Platforms serve one or more distinct customer or user groups and allow for interaction between customers or customer groups. An important function of platforms is to attract both groups of customers in sufficient numbers or in a suitable balance to capture the value of positive (direct or indirect) network effects and to minimize negative network effects. Some—but not all—platforms operate "multi-sided transaction platforms" that facilitate transactions or other types of interactions between distinct groups of users. Some multi-sided transaction platforms offer multi-sided marketplaces. In some or all of their offerings, platforms may compete with non-platform firms. In many cases, other firms build their business "on top" of a platform's software.

Owners of platforms may be vertically integrated in input (upstream) and/or output (downstream) markets and provide platform services to itself as well as to others. Thus, a platform may also compete directly with its own customers by offering the same or similar products or services on its platform as its customers. The owner or operator of a platform that also serves as a multi-sided marketplace may integrate and sometimes also be a "user"—typically a seller or content supplier—on one side of the platform, in addition to operating the platform itself.

Two common features of multi-sided platforms are relevant to inquiries into whether a firm operating a platform has market power or will obtain or strengthen its market power through merger. The first feature is "multi-homing," which occurs when a platform user

connects to multiple platforms simultaneously or in relatively quick succession. For example, a consumer is multi-homing if she uses multiple ride-sharing apps in deciding whether to book a ride. Firms operating platforms may have an incentive to limit multi-homing, either through conduct that limits the ability of rivals to compete, or through acquisition of competing platforms. Multi-homing can occur on only one side of a platform or can occur on multiple sides. In the ride-sharing example, if both riders and drivers use multiple platforms, then both sides are multi-homing, whereas if drivers tend to use a single platform, then only riders are multi-homing. The second is "switching costs," which refers to the cost platform users must bear in switching from one platform to another. Switching costs are lower when platforms are interoperable. All else equal, lower switching costs imply that a firm operating a platform has less ability to exercise market power or obtain and maintain monopoly power. Firms with market power may have an incentive to increase switching costs; however, firms with or without market power may benefit from lessening switching costs, as it may lead to greater acceptance or use of a service, either market-wide, or with respect to a specific firm. Thus, it should not be assumed that post-merger a firm has an incentive to increase the cost or decrease the ease of its customers to switch to or from another service.

Market power is necessary for a firm's individual conduct to limit competition, by, for example, unilaterally restricting output. A firm is generally considered to have market power when it can profitably raise price above what would occur in a competitive market by restricting output or innovation below competitive levels. The ability to diminish quality without an offsetting competitive response may also be a sign of market power; however, quality characteristics or preferences of consumers are idiosyncratic. For example, while one person might perceive an increase in advertisements on an otherwise free service to be a diminution in the quality experience of a service, because advertisements are a source of information, another person might consider an increase in advertisements as an increase in access to information. Similarly, while some view the collection of more personalized data as a diminution in quality, or a higher price for the provision of zero-price services, another person may appreciate the benefits of greater collection of personal data, as it may lead to an improved advertising experience—the receipt of more advertisements for products or services that person desires. Thus, a much more searching and complex inquiry is needed in assuming market power is associated with changes in non-price interactions between platform operators and users of the platform.

Neither market structure nor firm size is a strong proxy for market power or the intensity of competition. Thus, the Merger Review Guidelines should incorporate a market power principle to distinguish mergers that are likely to be harmful from those that are competitively benign or procompetitive. For example, amendments to the Merger Review Guidelines could incorporate the following principle:

> Mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise. For simplicity of exposition, these Merger Review Guidelines generally refer to all of these effects as enhancing market power. Conduct illegally or unjustifiably enhances market power if it is likely to encourage one or more firms to raise (or slow a decrease in) price (adjusted for quality), reduce output, diminish or slow innovation, or otherwise harm customers (at any level of distribution) *as a result of diminished competitive constraints or incentives without any offsetting efficiency benefit or rationale*. A merger may enhance market power if it allows or enhances the ability of a firm to exclude, in part or in full, actual or potential rivals or trading partners from one or more relevant markets; however, under certain conditions, acting on an incentive to exclude one or more rivals is consistent with pro-competitive effects, and the welfare effect may be positive.

Evidence of market power may be direct or indirect and is often identified using the indirect method of calculating market shares. The proposed amendments to the Merger Review guidelines correctly recognize the difficulty of calculating revenue-based market shares for free or zero-price services. The alternative measures proposed however, may not, in any case or in all cases, serve as a reliable estimate, even indirect, or a firm's pre- or post-merger market power, especially in the case of multi-homing. We thus believe it would not be appropriate to include these alternative measures in the Merger Review Guidelines; the Fair Trade Commission may consider the evaluation of specific metrics of market power on a case-by-case approach to a particular merger; alternatives to an output, sales, or capacity measure of market power should not be included in the guidelines.

II. Potential Competitive Benefits Associated with Mergers of or Involving a Firm Operating in the Digital Sector

Platforms create economic benefits by reducing transaction costs, i.e., by facilitating transactions between actual and potential trading partners. In some cases, platforms, by creating a market, enable transactions to occur that otherwise would not have occurred. In other cases, platforms disrupt existing marketplaces by enabling the sale of goods, services, and content at lower prices and/or higher quality or in a more innovative way. They may also allow customers to find goods, services, and content they would not otherwise have been able to find. The popularity of many large so-called digital platforms is likely related to these benefits.

Conduct such as vertical integration—which can occur via entry, merger, or contract—may appear to be restrictive, but also can offer procompetitive benefits. Such practices can *improve* competition by, for example, reducing transaction costs, eliminating double

marginalization, and otherwise aligning companies' incentives in a way that benefits consumers.

Digital platform markets often involve economies of scale. Such markets may be most efficiently organized with just a few large operators. Acquisitions of competing platforms or assets used to create, operate, or expand platforms, exclusive contracts with users, or other actions that increase the volume of business flowing through a platform can allow the platform to benefit from scale economies and become a lower cost or otherwise more efficient competitor. This is competition on the merits; increasing scale or increasing scope of products or services provided via merger should not be evaluated as the creation of barriers to entry to other firms. Increased efficiency, increased output, and increases in the variety of output associated with a merger are consumer welfare enhancing. Where scale and increased scope of products and services are procompetitive or welfare enhancing, non-multi-product firms can enter into contractual arrangements to offer multi-product packages, or to better use joint production capacity (for example) to better compete with the merged firm's attainment of efficiencies via merger.

Firms that operate platforms may engage in mergers or acquisitions that generate efficiencies and benefit platform users or are otherwise justified. For instance, certain mergers may enable the platform to better satisfy user preferences, including conduct that benefits one set of users but potentially harms another, to reduce transaction costs between users, to reduce double marginalization, or otherwise to enable firms to offer goods or services that are cheaper, more valuable, or brought to market faster than would otherwise be possible. Accordingly, mergers that produce anticompetitive effects in one market (or one side of a multi-sided market) may nevertheless be justified on the ground that it is procompetitive in another market (or the other side of a multi-sided market) because it involves, for example, greater efficiency or enhanced consumer appeal. This is competition on the merits, rather than predatory or exclusionary behavior.

There are certain types of unilateral conduct in which a firm operating a platform might engage in that, without more, will tend not to harm competition and/or will tend to produce efficiencies. Mergers that allow (1) vertical integration by entry; (2) improved product designs; and (3) above-cost price reductions are typically pro-competitive and deliver value to consumers. Proposed amendments to the Merger Review Guidelines should recognize this.

Mergers may plausibly have mixed effects, such as mergers between a platform and another firm that provides a complementary product or service. Such mergers can yield an anticompetitive effect, but they also have the potential to create efficiencies, such as allowing

firms to streamline production, inventory management, or distribution, or create innovative products in ways that would have been difficult to achieve without a merger.

III. Potential Competitive Harms Associated with Mergers Involving Digital Markets

A firm operating a digital platform can harm competition in the platform market or the adjacent user markets. It can do so in the same ways that any business can harm competition: by entering into anticompetitive agreements; by monopolizing or attempting to monopolize, including by acquiring nascent or potential competitors; or by undertaking acquisitions that eliminate or substantially lessen competition.

A firm operating a platform that also serves as a multi-sided marketplace may integrate and sometimes be a "user"—typically a seller or content supplier—on one side of the platform, in addition to operating the platform itself. Such integration, on its own, typically does not necessarily harm competition and may be procompetitive because, through that integration (or entry), the platform provider offers a new competitive alternative to third-party sellers or content providers using the platform.

However, in some circumstances, a firm that both operates the platform and competes in an adjacent market may have the incentive and ability to exclude a competitor, in full or in part, sufficient to harm competition.[4] Thus a non-horizontal merger—one that combines a firm operating a platform with a firm operating on the platform—may change the incentives (and sometimes the ability) of the post-merger firm to engage in exclusionary conduct. Different theories of harm require analysis of the competitive conditions in the various relevant markets. A firm operating a platform may harm competition in the "core" platform market by engaging in anticompetitive conduct that may either (a) limit the ability of a rival platform to compete, or (b) prevent a firm in an adjacent market from growing or achieving scale, if the firm in the adjacent market is or may in the future become a competitive threat in the core platform market. An investigation of this theory of harm arising from a merger would typically require analyzing current and/or anticipated future competitive conditions in the core platform market.

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[4] See, e.g., Thomas G. Krattenmaker and Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale Law Journal 209 (1986); Steven C. Salop and David T. Scheffman, *Raising Rivals' Costs*, 73 Amer. Econ. Rev. 267 (1983); and Susan Athey and Fiona Scott Morton, *Platform Annexation*, 84 Antitrust Law Journal 677 (2022). See also the theories of harm regarding mergers of firms offering complementary products in the 2020 DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION VERTICAL MERGER GUIDELINES and the Federal Trade Commission's COMMENTARY ON VERTICAL MERGER ENFORCEMENT (DECEMBER 2020).

A firm operating a platform may also harm competition in an adjacent market directly: for example, by consummating a merger that allows it to acquire or maintain market power in that market, or by entering into post-merger agreements that restrain competition and harm consumers in the adjacent market. An investigation of this theory of harm would typically require analyzing current and/or future competitive conditions in the adjacent market, which may differ from competitive conditions in the core "platform" market.

If the firm operating the platform is vertically integrated—if the platform acts as a seller or content provider on the platform it operates—a rival may be a customer of the platform rather than the operator of a separate, competing platform. In this context, an evaluation of the proposed merger should assess whether harm to an unintegrated rival is connected to harm to competition, and therefore whether and how the digital platform's conduct affects consumer welfare. This may be shown by evidence that the firm operating the platform has raised its unintegrated rival's costs, with the effect that competition in the market in which the unintegrated rival competes is reduced, or through some other coherent economic theory of harm. Vertical or non-horizontal mergers can raise concerns about access to confidential data of horizontal competitors who are customers of the post-merger firm (e.g., previous and continuing customers of one of the merging parties), but these are not exclusive to firms operating in the digital sector.[5]

The Proposed Amendments identify tying and bundling arrangements as arrangements that pose unique concerns in non-horizontal or conglomerate mergers. This is incorrect. Neither should be specified as unique concerns in digital markets, and, consistent with the "market power" guideline, neither tying nor bundling should be considered likely to have anticompetitive effects unless the merged firm has market power in the tying product, or one or more of the bundled products. This is a necessary but not sufficient requirement to a finding of harm.

Similarly, the Fair Trade Commission should be careful to avoid presuming that technologically tying is anticompetitive, as this is a product design decision that likely takes account of consumer preferences for ease of use and adaptability. For many users of a platform with multiple functions and multiple software to access those functions and application, standard default choices or incorporation of functions into the core product is beneficial and consumer welfare enhancing; in short, such "tying" limits or eliminates the need for a consumer to himself or herself incorporate what are otherwise disparate product features into an overall product, such as a mobile phone with applications. Tying and

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[5] See, e.g., Federal Trade Commission, Commentary on Vertical Merger Enforcement (2020), https://www.ftc.gov/system/files/documents/reports/federal-trade-commissions-commentary-vertical-merger-enforcement/p180101verticalmergercommentary_1.pdf.

bundling theories of harm can be evaluated under the existing framework for evaluating foreclosure or exclusionary conduct set forth in the Merger Review Guidelines and are not specific to digital or online platform markets. They are also potentially efficiency enhancing and should not be presumed to harm competition or to decrease consumer welfare.

IV. Special Factors in Competitive Effects Analysis of Mergers Involving Digital Platform Markets

Each platform business is different, as are the markets in which such businesses compete. Nevertheless, some factors are present in many platform markets, whether digital or not, and these factors may be relevant to the competitive impact of a merger involving a digital platform. The Proposed Amendments attempt to incorporate these factors into the Merger Guidelines Review, but without sufficient recognition that such factors are not uniquely relevant to digital businesses, and without sufficient recognition that these factors may be associated with increased competition and consumer welfare, and not merely impediments to future entry or negative effects on consumer welfare.

A. Considerations in Markets Involving Data

Although the use of data to make competitive decisions is not unique to firms operating platforms, firms that operate platforms often have access to very large data sets. The competitive significance of data may vary significantly from one case to another in light of the nature of the relevant market or markets; the nature of relevant business models in those markets; and the source, content, nature, breadth, utility, and availability of competitively significant data.

Consistent with the foregoing, the utility and competitive significance of data may vary by market, by time, and by characteristics specific to the data. Different data or data sets may have different and varied characteristics. Some data may be ubiquitous, easily replicable, readily substitutable, or of limited or transitory value. Other data may provide significant and hard-to-replicate competitive advantages for the firms that own or control it. A need for data may impede expansion or entry of an actual or potential competitor, particularly when there are few or no commercially available alternatives to the data, and when access to such data is competitively important in some way. Alternatively, access to data may allow a platform operator to enter new markets, and entry should be viewed as pro-competitive.

Data may be competitively significant for one or more reasons, including its nature (e.g., historical, real-time, etc.), breadth and depth (e.g., varied, voluminous, etc.), utility (e.g., basis for better analytics or new products and services, etc.), and availability (e.g., costly, time-intensive, and hard-to-replicate alternatives, etc.). The process by which a firm operating a platform collects, uses, and shares data may also inform the analysis of mergers. However,

the analysis of competitive effects of a merger must consider whether the relevant data is easily replicable and/or whether rivals or entrants can compete effectively without the data, or with smaller sets of data.

In markets where data or data-derived products and services is a key differentiator, a firm's access to a distinctive or competitively significant data set (or to large amounts of competitively significant data) may allow it to protect its position in a market. Evidence that a firm operating a platform selectively denies (or would deny, post-merger) rivals' access to data to deny those rivals efficient distribution channels or sufficient sales to operate at sufficient scale is relevant to competitive effects analysis. Similarly, agreements that prohibit customers or trading partners from sharing data are relevant to a competitive effects analysis. They are not determinative of the competitive effects of the merger, however, and may be justified for reasons related to information security, device security, and privacy considerations.

In some mergers there may be a relevant market for certain types of data or for access to certain types of data. Transactions that allow a merged firm to limit access to such data can be anticompetitive. But the analysis of the competitive effects of a merger must consider how important such data is as an input and whether it can be replicated or purchased from a third party, and, of course, whether limiting access to such data is sufficiently costly to the merged firm (such as in lost revenue associated with the refusal to share such data) that it is not profitable.

A platform owner that also operates business units that compete with other users of the platform may, by virtue of owning the platform, obtain competitively sensitive information from these users. The access and use of such information by a platform owner's business units that compete with other users, including any related agreements providing for the transmission of such data by platform users, may result in reduced competition that harms consumers.

In any particular merger there may also be scale and scope efficiencies associated with the use, collection, and maintenance of data. The combination of data sets, through merger, can be complementary, leading to, for example, better responses to search queries, better personalization of experiences, including but not limited to advertising, and to the identification of patterns or common characteristics of certain outcomes (such as disease treatment, disease identification).

B. Network Effects & Multi-Sidedness

The presence of direct[6] and indirect[7] network effects may make it difficult for a new entrant offering a competitively superior product to enter, expand, and successfully provide a competitive alternative to an incumbent platform. However, network effects are not merely an impediment to future entry. Network effects may expand the adoption, utility, or use of a platform; thus, mergers should not be challenged merely because of the presence of or potentially strengthening of network effects.

The existence, scope, and strength of direct and indirect network effects are factual questions relevant to the competitive effects analysis. Network effects exist on a continuum, where at one endpoint on the continuum any indirect network and feedback effects are strong and at the other endpoint the effects are weak. The strength and degree of direct or indirect network effects may be different on different sides of a firm's platform, and the network effects may be positive or negative.

An evaluation of the competitive effects of enhanced scale and scope should be mindful that the degree and nature of network effects can change, sometimes rapidly, in response to a new technology or business model. An evaluation of the effects of mergers should take account of the presence and strength of network effects.

Strong indirect network effects may make it more likely that an incumbent platform operator can, post-merger, unilaterally engage in anticompetitive or exclusionary conduct. In these circumstances, a new entrant platform must attract sufficient customers on both sides of the platform to create value, and indirect network effects operating across customer groups can make entry more challenging. But users of multi-sided platforms can benefit from feedback effects. Indirect network effects can sometimes be self-reinforcing. If indirect network effects are positive in multiple directions, then these effects can build upon one another. Using the example of a computer operating system, more consumers lead to more software applications, and more software applications lead to more consumers, yielding a "virtuous cycle" of growth for the platform. Feedback effects can also be negative, in that losing users on either side can lead to a "vicious cycle," whereby the platform's scale decreases quickly.

The nature of competition may be different on each side of a multi-sided platform. A competition agency should consider whether competition on one side of the platform makes

[6] Direct network effects exist when a single user's desire to use a network is a function of the number or identity of users *from the same set of users* who also use the network.

[7] Indirect network effects are a feature of multi-sided platforms. Such effects exist when the demand for the network for a user from one set of users is a function of the number and identity of users *from a different set of users* who also use the network.

it less likely that a platform can engage in anticompetitive or exclusionary conduct on other sides of the platform. In assessing conduct directed only or primarily at one side of the platform, a competition agency should consider the degree of competition on other sides of the platform, and any other competitive constraints on the platform.

C. Non-Price Competition

Anticompetitive effects may be associated with price or non-price effects, or both. Non-price effects include, among other things, effects on output, quality, variety, and innovation. A violation of law may be based on actual or anticipated price effects only, actual or anticipated non-price effects only, or both.

In some mergers involving platforms, effects on non-price competition may be especially important because price effects may be difficult to detect or measure. Firms operating a platform may provide a product or service to one set of users at a nominal price of zero, which does not change over time. In this context, in detecting whether such users have been harmed, it may be appropriate to focus the competitive effects analysis on non-price effects. Even when a product or service is provided for a nominal price of zero, effects on competition and welfare may manifest, in whole or in part, in changes in output, variety, the rate of innovation, and/or quality (including terms of service to users and businesses, or privacy and data security practices). It may be appropriate to challenge practices or transactions that harm consumers solely through such non-price effects. However, the measurement of non-price effects can be difficult and lead to ambiguous or unclear results—thus, a focus on challenging mergers solely on the basis of projected non-price effects should be minimized.[8]

With regard to effects on output, a merger may harm or be reasonably likely to harm competition even when market-wide output is increasing over time (or when nominal price is declining or unchanging). The relevant comparison is between the actual or anticipated effects of the challenged conduct and actual or anticipated scenarios where the conduct has not occurred or does not occur. Such actual or anticipated scenarios where the challenged conduct does not occur may also involve market-wide output increasing.

An evaluation of a merger should consider how a challenged practice or transaction affects or may affect innovation, compared to an alternative in which the practice or transaction did not occur. Markets in which platform businesses compete—when competitively healthy—may be characterized by intense innovation. Accordingly, effects on innovation may be, and in some instances must be, a significant focus in matters involving technology platforms. We

[8] See discussion *supra* Section II.

discuss this in more detail, with references to the experience of the U.S. Federal Trade Commission, later in this comment.

Anticompetitive effects on innovation could take the form of a reduced incentive to continue existing product development efforts or reduced incentives to develop new products. A competitive effects analysis should also consider whether the practice or transaction enables or may enable innovation to occur that would otherwise not take place. Both incumbents and entrants, and likewise both large firms and small firms, engage in innovation that increases welfare. As in the analysis of effects on other factors relevant to competition, the focus should be on both firm-specific and market-wide effects on innovation. Effects on individual firms' incentives and abilities to innovate are a part of market-wide effects.

The analysis of effects on innovation may include both quantitative and qualitative evidence. Reliable quantitative evidence regarding how a business practice affects innovation may not be available or of limited utility. Quantitative evidence should not be necessary to determine that a merger may affect innovation. A merger may combine complementary assets and increase spending on research, or, more importantly, improve innovative efforts and outcomes.

D. Monetizing Platforms and Business Models

Firms operating platforms may use different business models and may monetize their products and services in various ways. This may include earning revenue through the sale of advertising, or by charging fees to users on one or more side of the platform for access to the platform. Some platforms may use a mix of strategies to earn revenue, including charging fees to users and selling advertising opportunities.

Firms operating platforms can experiment with different approaches to earn revenue. They may change their approaches over time for various reasons, such as responding to new competitive conditions and expanding their product or service offerings. Innovation in business models may be as valuable as innovation in technology, but just as it may benefit consumers, it may also harm them. It may be appropriate to investigate such changes to determine whether they reflect or are part of a firm's effort to impair the competitive process. For example, it may be appropriate to investigate whether a firm's change to its approach to earning revenue is a mechanism through which the platform can raise the cost of using a competitor's platform.

V. The Fair Trade Commission's Merger Review Guidelines Should Strengthen the Burden-Shifting Approach to the Analysis of Conduct in or for Platform Markets

Because mergers may have both procompetitive and anticompetitive effects, TechFreedom recommends that the Fair Trade Commission adhere to a burden-shifting approach to the analysis of the competitive effects of mergers involving firms operating in platform markets.

Mergers may reduce market-wide output, quality, or innovation, and/or increase firm or market-wide prices, each as compared to an alternative in which a merger did not occur. The Merger Review Guidelines should not condemn mergers that are procompetitive or that are competitively neutral. The Proposed Amendments to the Merger Review Guidelines, as incorporated in the guidelines, must balance concerns about overenforcement and underenforcement, and *should strive to minimize the sum of Type 1 errors (overenforcement)* and *Type 2 errors (underenforcement).*

Merger analysis should follow a structured but flexible framework to identify the competitive effects of acquisitions of or by digital platforms; the framework should not be different for mergers involving digital platforms, but should be able to take account of firm- or market-specific factors. The analytic framework should result in challenging or finding illegal only those mergers that have demonstrable anticompetitive harms not outweighed by specific, cognizable, and verifiable procompetitive benefits.

When required to balance harms and benefits, the Fair Trade Commission, as the relevant enforcement agency, should consider whether the firm operating the platform could achieve similar benefits through reasonable less restrictive or exclusionary alternatives to the proposed merger. In evaluating whether any anticompetitive harms outweigh any anticompetitive benefits, the focus must be on the state of competition with, as compared to without, the practice under review.

The framework for the review of the effects of a merger, including one involving a firm operating in the digital sector should consist of 3–6 steps, set forth below.

1. The Fair Trade Commission must identify a plausible basis for alleging the proposed merger will have an anticompetitive effect. It should identify the significance, magnitude, and likelihood of that effect.

    - Mergers that may be benign or procompetitive when engaged in by a firm—even a firm operating a platform—that does not possess significant market power, may have an anticompetitive effect when engaged in by a platform with significant

market or monopoly power.[9] The Fair Trade Commission must demonstrate that the firm operating the platform has, will maintain, or will obtain market power or monopoly power in the relevant market through the proposed acquisition. Market power and monopoly power may be demonstrated by either or both of direct and indirect evidence.

- An asset or means of distribution cannot be deemed essential, pre- or post-merger, if the firm alleged to control that asset or facility does not have *monopoly power* in the relevant market. The analysis of monopoly power must consider the durability of that monopoly power, including the ability of a firm to exclude others, and the ability of another firm to replicate, "leap-frog" or otherwise find an alternative to the allegedly essential facility. Monopoly power is different than market power, and it requires an ability to exclude competition over the long-term.
- Anticompetitive effects through merger may be identified as price effects, non-price effects, or both. Non-price effects include, among other things, effects on output, quality, variety, and innovation. An enforcement action may be based on actual or anticipated price effects only, actual or anticipated non-price effects only, or both. Because the measurement of non-price effects and their welfare effect may be ambiguous, caution in relying on non-price effects to show harm is appropriate.
- Potential harm to rivals must be connected to harm to competition to support an enforcement action against a merger.[10] Post-merger conduct by a platform that may harm a rival or a third party (or a group of similarly situated rivals or third parties) is typically insufficient *by itself* to support a challenge to the practice. Such harms may be part of a body of evidence that supports a challenge to a merger, however, as harm to a rival can be consistent with a viable theory of harm to competition. A merger that makes the merged firm more efficient or able to offer

[9] Issues that can arise in cases featuring digital platforms that may inform an analysis of relevant markets and market power include (i) whether, and to what extent, firms that offer goods and/or services for sale through brick-and-mortar outlets compete with firms that offer goods and/or services for sale online; (ii) whether a single platform's marketplace can constitute a relevant market; and; (iii) whether platform users face unreasonably high costs to switch to a competing platform, effectively locking them in to use the dominant platform.

[10] Harm to a competitor can be associated with harm to competition, particularly in concentrated markets with few rivals. For example, if the conduct at issue effectively raises the rival's costs, thereby enabling the platform profitably to raise price and/or reduce quality compared to an alternative in which the conduct did not occur, it may be anticompetitive. Harm to rivals also can be the product of competition on the merits. For example, a linear, non-predatory price reduction that has the effect of transferring sales from a rival to the price cutter may harm the rival but is consistent with competition on the merits. Competition on the merits—even when practiced by a firm with market power—can harm rivals without harming the competitive process.

additional or improved products, and thus may harm rivals, is not harm to competition or the competitive process, and is likely to enhance consumer welfare.

2. If the Fair Trade Commission makes the requisite showing of harm, the firm operating the platform may rebut this showing by establishing that its existing or threatened future market power or monopoly power will not be durable.
    - Ease of entry, a showing that entry is likely, and of sufficient scale and to occur in a timely manner, or ease of significant or material expansion by a firm acting unilaterally, or jointly in a bona-fide joint venture, will often defeat a claim of future harm associated with a merger.
3. Alternatively, the platform operator may identify efficiencies or procompetitive benefits linked to the merger. The platform operator should have the burden of showing the significance, magnitude, and likelihood of the procompetitive effect.
    - Whether such a justification for the merger is convincing will depend upon facts specific to the transaction under review or consideration.
    - Efficiency claims should be evaluated to confirm they are not speculative, merger-specific, and sufficiently significant to, for example, lower the merged firms' cost structure, increase output, or support innovation in products, delivery of products, or manufacturing or distribution. A lower cost structure, increased output, increased quality, increased innovation (including speed of achievement), are all enhancements to competition on the merits.
    - The evaluation of the essential nature of an asset or facility should consider whether forced sharing of the asset, post-merger, may diminish the incentive to innovate or invest in assets or facilities otherwise deemed to be essential.
    - The identification of efficiencies or other procompetitive benefits may not be sufficient to rebut a claim (and proof) of an illegal merger, but in the presence of durable monopoly power, significant cognizable efficiencies may rebut a presumption of anticompetitive effect of a merger; however, other factors, such as ease of entry, can be sufficient to rebut any presumption of illegality of a merger.
    - If the merging parties offer procompetitive justifications for the merger, the claimed benefits must be related to the merger under review, i.e., "merger-specific," in addition to being verifiable and cognizable. The general economic benefits the platform has created should not typically be relevant to the determination of whether the merger is anticompetitive. Rather, the platform must explain and show, with evidence, how *the specific benefits from the merger* benefit competition.

4. If market power or monopoly power is durable and that there is a plausible basis (and credible evidence) for both the harm alleged and for non-pretextual procompetitive justifications for the merger, the platform operator must show that there is no reasonable alternative to the merger that would allow the relevant efficiencies to be obtained. Such alternatives to a merger must be practical, not merely theoretical.
5. If the platform operator makes such a showing, the Fair Trade Commission should determine, and be prepared to prove that, on balance—on "net"—the merger is either harmful or beneficial to competition.
    - The Fair Trade Commission should compare the likelihood and magnitude of anticompetitive effects with the likelihood, magnitude, and sufficiency of efficiencies to determine the likely or actual overall effect. As the expected harm of the merger increases, the required offsetting benefits should also increase.
    - In analyzing harms and benefits, it is necessary to consider the scope and strength of the evidence of actual or likely effects. Mere assertions of potential effects or a business justification are insufficient. However, neither the Fair Trade Commission nor the platform operator must identify and weigh each anticompetitive and procompetitive effect with specificity and precision. Such analysis may not be possible or efficient in an individual investigation. But the burden should be symmetrical; neither party should have a lower or higher burden of persuasion. The burden of production of relevant evidence should fall on the party most likely to have information relevant to the inquiry.
6. Where remedies are required, they should be designed to: (i) address the competitive harm from the conduct or transaction; (ii) fit the facts of the case and characteristics of the relevant market, which requires a close and logical nexus between the theory of harm and the remedy; (iii) focus on preferred and time-tested approaches, though novel remedies may be appropriate in some contexts; and (iv) preserve efficiencies to the extent such efficiencies are consistent with effective relief. The party proposing the remedy has the burden of showing the remedy meets these criteria.
    - Remedies should preserve or restore competition and prevent or correct the exercise of market power that has resulted in harm to competition. To the extent possible, remedies should preserve efficiencies associated with the merger, where such remedies are consistent with effective relief. Remedies that may be appropriate include:(i) divestiture or separation; (ii) a prohibition on, or pre-consummation notice of, mergers or acquisitions; (iii) compulsory licensing, including the licensing of data sets or intellectual property; (iv) interoperability requirements; (v) non-discrimination requirements; (vi) corrective actions; and (vii) monetary equitable remedies.

VI. Key Principles of a Competitive Effects Analysis in Platform Markets

Analyzing the competitive effects of mergers affecting platform markets is a fact-specific process through which the Fair Trade Commission, guided by its experience, can apply a range of existing tools—analytical tools—to the available evidence. The competitive effects analysis should be focused on and limited directly on how the merger may affect price, output, quality, and innovation.[11] The analytic focus of this inquiry must be on the actual or reasonably likely effects of the conduct, not its label. Although characterizing a platform as an "essential facility" or potential post-merger conduct as "an exclusive deal," a "refusal to deal," a "product design decision," or "self-preferencing" may be helpful in identifying relevant prior agency law or whether the conduct is commonly engaged in by market participants without market power, such labeling should not be the focus of the inquiry.

The Merger Review Guidelines' analytic framework should consider effects on each class of platform participants that are proximately affected by the post-merger conduct under consideration, including in markets upstream or downstream, or operating in a complementary relationship to the relevant market, and with respect to both inputs and intermediate and final products or services. As part of this analysis, the Fair Trade Commission should consider the nature of the relationship and interaction among the different sides (or different sets of users) of the platform, if a firm is operating a multi-sided platform business.

The analysis of the potential anti- and procompetitive effects of the proposed merger should include, where possible, both short-term and long-term effects. A firm's effort to prevent a nascent technology or nascent competitor from maturing into a viable competitive alternative to an existing platform or platform market constitutes a valid theory of harm even if the process of maturation may take some time or is uncertain. Similarly, the fact that any benefits associated with the merger may not accrue in the near term should not preclude a determination that such benefits are procompetitive or welfare enhancing. Competitive conditions in a market or industry may change over time. Meaningful competitive constraints may emerge in a platform market that currently lacks such constraints; and conversely, the existence of meaningful competition today does not necessarily mean that such competition will, or is likely to, persist in the future. Such facts, if available, are germane

[11] When the Fair Trade Commission can identify and analyze conduct based on factors other than price, output, and innovation that, based on factual analysis, are important competitive variables, the effect of firm conduct on such factors can be incorporated into the competitive effects analysis. However, the agency should proceed cautiously in expanding the relevant factors for competitive effects analysis and should do so on a case-by-case basis.

to the evaluation of the proposed merger. The evidentiary standard required to show anti- or procompetitive effects should be symmetrical.

Neither the Fair Trade Commission nor platform operators or participants in platform markets should be required to construct a hypothetical alternative marketplace or otherwise show with specificity how competition would have occurred but for the proposed merger. The focus of the inquiry should be only on the connection between the proposed merger under review and any harms and benefits it may produce, in comparison to competition absent the conduct.

Nascent or potential competition may be important in platform markets, or, more generally, in dynamic markets—markets characterized by rapid change or its potential. Accordingly, the Merger Review Guidelines may attend to mergers that it is feared would exclude or harm nascent or potential competitors, including acquisitions that remove a nascent competitive threat. However, they must also recognize that competition law should not condemn competition on the merits even when that competition harms a nascent or potential competitor.

The Merger Review Guidelines should not require a showing that a new entrant is offering a competitively superior alternative to an incumbent provider in order to show harm in conjunction with a merger. The focus of the analysis should be on whether the firm operating a platform may be likely to, and has the incentive and ability to, engage in conduct that harms competition, post-merger, such as by foreclosing a probable new entrant from key distribution channels or key customers such that the probable entrant's costs are raised and the incumbent faces less disciplining competition to the detriment of consumers.

A firm operating a platform may take actions, including through merger, to prevent or limit its rivals' ability to capture the benefits of direct or indirect network effects. If this is a harm to competition and not just a competitor, the Merger Review Guidelines framework should allow the evaluation and weighing of that harm against any direct or indirect network efficiencies gained from the conduct. Efficiencies or other economic benefits that are inextricably linked to the merger or post-merger conduct should be evaluated together in analyzing the competitive effects of the merger or conduct. Similarly, mergers or post-merger conduct that deprives rivals of platform participants on one side of the market but increases the merging parties' number (or quality) of platform participants on the other side of the market, must be evaluated together with respect to benefits and harms.

The ability to self-preference is a function of being vertically integrated. Vertical integration, through merger, can be, and is often, efficient. Merger Review Guidelines should be clear that self-preferencing in the absence of market power is not likely to harm competition, and that

self-preferencing, even when accompanied by market power is not necessarily anticompetitive. Self-preferencing may support entry into new markets; the proposed Merger Review Guidelines should not discourage entry by penalizing self-preferencing.

VII. Innovation Markets Should Be Used Sparingly, and Then Only Where the Fair Trade Commission Has a Basis for Identifying Firms Operating in an Innovation Market

The current Merger Review Guidelines provide that a separate innovation market can be defined in a merger involving companies that are active in innovative research and development markets. The proposed amendments add examples of past Fair Trade Commission precedents where innovation markets were defined.

The Fair Trade Commission should be cautious in its use of innovation markets and should use the concept of innovation markets sparingly. The experience of the U.S. Federal Trade Commission is instructive. While the Federal Trade Commission recognizes that research and development efforts support the improvement and differentiation of existing products and the introduction of future products,[12] it has moved away from alleging harm from a merger in innovation markets, and now alleges harm to innovation in an existing or future product market. Because the products offered by firms operating in the digital sector are not commonly submitted for government review and efficacy testing prior to introduction, the identification of firms operating in innovation markets in the digital sector is likely to be extremely difficult. Thus, the use of innovation markets in the digital sector should be avoided.

The United States Antitrust Guidelines for the Licensing of Intellectual Property define the characteristics of innovation markets—now referred to as "research and development markets":

> A research and development market consists of the assets comprising research and development *related to the identification of a commercializable product, or directed to particular new or improved goods or processes*, and the close substitutes for that research and development. When research and development is directed to particular new or improved goods or processes,

[12] *See, e.g.*, Bayer AG, 134 F.T.C. 184, 188 (2002) ("Competition in research and development of New Generation Chemical Insecticide Active Ingredients has led to innovations including reductions in the cost of insecticides, reduced amounts of chemical insecticides used, development of chemicals with reduced risk of harmful environmental and health impacts due to insecticide exposure, and improved product properties and performance."); Dow Chemical Co., 131 F.T.C. 600, 606 (2001) ("Innovation through competition in research and development in LLDPE reactor process technology leads to reductions in cost, improved product properties, performance, and expansion of uses for polyethylene resin.").

> the close substitutes may include research and development efforts, technologies, and goods that significantly constrain the exercise of market power with respect to the relevant research and development, for example by limiting the ability and incentive of a hypothetical monopolist to reduce the pace of research and development. The Agencies will delineate a research and development market only when the capabilities to engage in the relevant research and development can be associated with specialized assets or characteristics of specific firms.[13]

For about a decade, starting in the mid-1990s, the U.S. Federal Trade Commission identified stand-alone "research and development" for an existing or future commercial product as a relevant antitrust market, but the Commission have stopped alleging innovation markets/research and development markets as stand-alone markets in 2007.[14] *Notably, all of the Federal Trade Commission's use of an innovation market was in the area of pharmaceutical and medical device markets, where a regulatory process allowed for an understanding of other competitors engaged in late-stage research and development or innovation.*

In *Ciba-Geigy/Sandoz*, the Federal Trade Commission alleged that the merger would combine two firms in the "highly concentrated" markets for "research and development" in four gene therapy markets: (i) HSV-tk gene therapy for the treatment of cancer; (ii) HSV-tk gene therapy for the treatment of graft versus host disease; (iii) gene therapy for the treatment of hemophilia; and (iv) chemoresistance gene therapy.[15] In *American Home Products/American Cyanamid*, the Commission identified competitive concerns in the market for "the research and development of a vaccine against Rotavirus infection in humans."[16] In *Sensormatic Electronics/Knogo*, the Federal Trade Commission alleged that the transaction would harm competition in the "highly concentrated" markets for research and development of disposable labels developed or used for source labeling, and for processes to manufacture disposable labels.[17] In *Wright Medical*, the Federal Trade Commission alleged that Wright's

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[13] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 8 (at note 27) (2017), https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf [hereinafter IP GUIDELINES]. The 1995 IP Guidelines use the term "innovation markets" to describe such markets. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 10 (Apr. 6, 1995).

[14] To the best of our knowledge, the U.S. Department of Justice has not alleged an innovation market in at least twenty years.

[15] Federal Trade Commission, Ciba-Geigy Limited, 123 F.T.C. 842, 844-45 (1997).

[16] Federal Trade Commission, Am. Home Products Corp., 119 F.T.C. 217, 219 (1995).

[17] Federal Trade Commission, Sensormatic Elecs. Corp., 119 F.T.C 520, 522 (1995).

proposed acquisition of Orthonet would eliminate actual competition between Wright and Orthonet in the market for the research and development of orthopedic implants used or intended for use in the human hand. The Federal Trade Commission also alleged that the proposed acquisition would eliminate Orthonet as a potential competitor of Wright in the market for FDA-approved orthopedic implants used or intended for use in the human hand.[18] In *Glaxo/Wellcome*, the Federal Trade Commission alleged that the merger would eliminate competition in the market for the research and development of non-injectable 5HT1D agonists, a specific class of drugs known to act on the receptors in the human body that cause migraine attacks; the merger would decrease the number of R&D tracks, and post-merger, Glaxo would have the ability to unilaterally reduce research and development of non-injectable 5HT1D agonists.[19] In *Upjohn/Pharmacia*, both Upjohn and Pharmacia were in advanced stages of developing topoisomerase I inhibitors for the treatment of colorectal cancer. The Federal Trade Commission alleged that their merger would eliminate actual competition in research and development in the market for such topoisomerase I inhibitors as well as the "potential for actual, direct, and substantial price competition" for topoisomerase I inhibitors for the treatment of colorectal cancer.[20] In *Baxter/Immuno*, the Federal Trade Commission identified a relevant market for "research, development, manufacture and sale of Fibrin Sealant to be approved by the FDA for sale in the United States" and explained that the merger would eliminate "the significant on-going competition between Baxter and Immuno in the research and development . . . of fibrin sealant in the United States" and "future competition in the manufacture and sale of fibrin sealant in the United States."[21]

However, the Federal Trade Commission has stopped alleging innovation markets/research and development markets as stand-alone markets in merger matters. *Boston Scientific/Guidant,* from 2007, is the last instance where the Federal Trade Commission did so.[22] There, the Federal Trade Commission identified harm in the market for research and development of Implantable Cardioverter Defibrillators (ICDs). Guidant, Medtronic, and St.

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[18] Federal Trade Commission, Wright Medical Technology, Inc., 119 F.T.C. 344, 346 (1995).

[19] Federal Trade Commission, Glaxo PLC, 119 FTC 815 (1995).

[20] Federal Trade Commission, The Upjohn Co., 121 F.T.C. 44, 45 (1996).

[21] Federal Trade Commission, Complaint, Baxter International, No. C-3726 (Mar. 24, 1997, FTC), https://www.ftc.gov/sites/default/files/documents/cases/1997/03/c3726cmp.pdf; Analysis of Proposed Consent Order to Aid Public Comment at 2 (Dec. 1996), .

[22] In one other matter that we are aware of, the Federal Trade Commission investigated the impact on the "market for basic research and innovation in any human health market[]" in its analysis of the Pfizer/Wyeth merger. See Statement of the Federal Trade Commission Concerning Pfizer/Wyeth, FTC File No. 091-0053 (Oct. 14, 2009) at 3-4 ("staff evaluated whether the transaction would decrease basic research … in pharmaceutical markets by eliminating a leader in pharmaceutical research and development . . ."), https://www.ftc.gov/sites/default/files/documents/cases/2009/10/091014pwyethstmt.pdf.

Jude Medical were the only companies with significant sales of Implantable Cardioverter Defibrillators (ICDs) in the United States. The Federal Trade Commission alleged that the proposed acquisition would eliminate "actual, direct, and substantial competition between Cameron and Guidant in the market for research and development of Implantable Cardioverter Defibrillators through BSC's exercise of its contractual control and receipt of information rights over Cameron, thereby reducing innovation in this market." The Federal Trade Commission also alleged that the effect of the proposed acquisition would "eliminat[e] potential competition between BSC/Cameron and Guidant in the market for the manufacture and sale of ICDs."[23]

The Federal Trade Commission also alleges relevant markets that include research and development as a component of a market that also includes the manufacture and/or distribution of an existing or future commercialized product. An early enforcement matter is *Roche/Genentech*. In *Roche/Genentech*, the Federal Trade Commission alleged that Roche's proposed acquisition of Genentech eliminated actual and potential competition in, among others, the U.S. markets for research, development, production, and marketing of (i) vitamin C and (ii) therapeutics for treatment of human growth hormone (HGH) and HGH releasing factor. Roche was the market leader in the market for vitamin C. Genentech did not participate in that market but had developed a patented process for producing vitamin C using recombinant technology. Genentech had a near-monopoly share of the market for therapeutics for treatment of HGH deficiency and HGH releasing factor. Genentech's product was designated an orphan drug and, for a period, was protected from competition from any product, unless a new entrant could establish its product was superior to Genentech's. Roche had conducted advanced clinical trials for a product that would compete with HGH (HGH releasing factor) and had developed and patented human growth hormone releasing factor analogs. [24]

A study of the matters in which the Federal Trade Commission alleged innovation markets found that it was often the case that the research and development failed, in fact, to develop a marketable product. [25] Whether this was because the Federal Trade Commission

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[23] Federal Trade Commission, Boston Sci. Corp., No. C-4164, 2006 WL 2330115, *3 (F.T.C. July 21, 2006).

[24] Federal Trade Commission, Roche Holding Ltd., 113 F.T.C. 1086, 1087-88 (1990).

[25] Ilene Gotts and Richard Rapp, *Antitrust Treatment of Mergers Involving Future Goods*, ANTITRUST MAGAZINE (Fall 2004),
https://www.nera.com/content/dam/nera/publications/2004/Antitrust_Magazine_Fall_2004.pdf.

The authors' state:

> The results do not foster enthusiasm for antitrust intervention as a means of making future goods markets more competitive. Of the ten pharmaceutical merger enforcement episodes we examined, only four cases resulted in two or more products arising from transactions that had

incorrectly concluded that the innovation was likely to lead to a product, absent the merger, or, the relief required to address concerns in the innovation market had the effect of causing the loss of efficiencies or complementarities in the research and development otherwise potentially obtained through the merger is unknown. However, it is notable that in many matters in which the Federal Trade Commission alleged an innovation market, no product was produced was developed and marketed in the 5-10 years after the merger was challenged. This should suggest caution in relying on innovation markets as a tool of competitive effects analysis. [26]

Bristol-Myers Squibb/Celgene and *Illumina/Grail* are recent examples of the current practice to allege research and development only when alleging harm in the sale (and sometimes manufacture) of an existing or future product. In *Bristol-Myers Squibb/Celgene,* the Commission alleged that BMS's proposed acquisition of Celgene raised concerns in the relevant product market for "research, development, manufacture and sale of oral products to treat moderate-to-severe psoriasis." Celgene's product, Otezla, was the most significant oral product approved in the United States to treat moderate to severe psoriasis. BMS was developing a competing treatment; its potential (future) commercial product was the most advanced oral treatment in development. The Commission's complaint alleged that the effect of the transaction would eliminate future competition between BMS and Celgene in the development (and sale) of oral products to treat moderate to severe psoriasis. [27] In *Illumina/Grail*, a vertical transaction, the Commission alleged that the acquisition "would substantially lessen competition in the market for the research, development, and commercialization of [multi-cancer early detection ("MCED")] tests in the United States. According to the Commission's complaint, Illumina, the dominant provider of DNA sequencing platforms, would have the incentive, post-acquisition, to foreclose or

> either been stopped or permitted only on condition of divestiture or compulsory licensing. Moreover, in three of these cases, non-merger parties have been more successful than the merger parties; and in three others, several firms besides the merger parties have entered or are today just as likely to enter as the merged entity. It is thus questionable whether the successful divestiture remedies were necessary to ensure that competition exists. Id. at 102.

[26] Then FTC Chairman Muris identified significant hurdles to use of innovation markets, and rejected that a merger of the only two, or two of only a few, firms that are engaged in research and development towards a specific product should be presumed illegal. Rather, he says, innovation market analysis is intensely factual and not subject to any presumptions about potential harm from a merger. See Statement of Federal Trade Commission Chairman Timothy J. Muris, in the matter of Genzyme Corporation / Novazyme Pharmaceuticals, Inc. (Jan. 2004), https://www.ftc.gov/system/files/attachments/press-releases/ftc-closes-its-investigation-genzyme-corporations-2001-acquisition-novazyme-pharmaceuticals-inc./murisgenzymestmt.pdf. He cited the Commission's Global Marketplace Report (1996), stating "assuming that an innovation market analysis is appropriate … a careful, intense, factual investigation is necessary to distinguish between procompetitive and anticompetitive combinations of innovation efforts." Statement of Chairman Muris, at 3-4.

[27] Federal Trade Commission, Bristol-Myers Squibb Co., No. C-4690, 2019 WL 6168274 (F.T.C. Nov. 15, 2019).

disadvantage Grail's rivals. Illumina's next-generation sequencing platform is an essential input for the development and commercialization of MCED tests; Grail was "racing against several other firms to develop and commercialize" an MCED test. Post-merger, Illumina would have the incentive, and ability, to discriminate against its post-merger rivals, and would "control the fate of every potential rival to Grail." According to the Commission's complaint, Illumina could "impede the rival's research and development efforts by denying important technical assistance and other proprietary information." [28]

VIII. The Fair Trade Commission Should Analyze Mergers for Effects on Innovation in a Current or Future Product Market, Rather Than Allege Harm in an Innovation Market

The use of innovation markets was strongly criticized during the period of their greatest use.[29] Both the U.S. Department of Justice and the Federal Trade Commission have moved away from alleging harm in an innovation market to alleging a slowing or elimination of innovation competition in the market for an existing or future product as a possible anticompetitive effect arising from a transaction. The Fair Trade Commission should prefer this focus in the evaluation of the competitive effects of a merger and should not be limited to the evaluation of mergers in the digital or online sector. Rather than reliance on an innovation market approach, the Fair Trade Commission should largely rely on either of two theories of harm to innovation in its review of mergers.

The 2010 Horizontal Merger Guidelines of the United States provide the two relevant theories. The Fair Trade Commission should consider "whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger. That curtailment of innovation could take the form of reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products."[30]

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[28] Federal Trade Commission, Complaint, Illumina, Inc., No. C-9401 (F.T.C. Mar. 30, 2021), https://www.ftc.gov/system/files/documents/cases/redacted_administrative_part_3_complaint_redacted.pdf. The complaint in this matter is discussed in Submission of the United States to the OECD, The Concept of Potential Competition (Jun. 10, 2021), https://one.oecd.org/document/DAF/COMP/WD(2021)20/en/pdf.

[29] *See, e.g.* Richard T. Rapp, The Misapplication of the Innovation Market Approach to Merger Analysis, 64 Antitrust Law Journal 19 (1995).

[30] U.S. Dept. of Just. & Fed. Trade Comm'n, Horizontal Merger Guidelines at 23 (Aug. 19, 2010). A vertical merger may also diminish the incentive for the combined firm to engage in innovation or to support innovation efforts by competitors. See, e.g., Federal Trade Commission, Administrative Complaint, Lockheed Martin, No. 9405 (F.T.C., Jan. 25, 2022) (merger of Lockheed Martin, prime contractor for missile development, and Aerojet Rocketdyne Holdings, supplier of critical propulsion technologies, may result in diminished innovation, as post-merger the combined firm would have the incentive and ability to disadvantage rival missile developers by, among other things, failing to provide pre-acquisition levels of research investment, in order to shift future

The first of these effects is most likely to occur if at least one of the merging firms is *engaging in efforts* to introduce new products that would capture substantial revenues from the other merging firm. The Federal Trade Commission cases of *Thoratec/Heartware*,[31] *Boston Scientific/Guidant*,[32] *Amgen/Immunex*,[33] *Pfizer/Pharmacia*,[34] and *Pfizer/Warner-Lambert*[35] are examples of challenges to mergers involving potential competitors that would, according to the Federal Trade Commission, reduce innovation competition. In each, the Federal Trade Commission raised concerns about the continued incentive of the combined firm to continue to develop, or develop as quickly, differentiated products of the potential entrant that might cannibalize sales of the acquiring firm's existing products.

The second, longer-run effect is most likely to occur if at least one of the merging firms *has capabilities* that are likely to lead it to develop new products in the future that would capture substantial revenues from the other merging firm. The Federal Trade Commission cases of

prime missile contracts to Lockheed), https://www.ftc.gov/system/files/documents/cases/d09405lockheedaerojetp3complaintpublic.pdf; Federal Trade Commission, Administrative Complaint, Nvidia Corp., No. 9404 (F.T.C., Dec. 2, 2021) (rivals to combined firm would be less likely to share information necessary to innovate because combined firm could misuse this information and combined firm would have less incentive to pursue innovation that would benefit competitors), https://www.ftc.gov/system/files/documents/cases/d09404_part_3_complaint_public_version.pdf.

[31] Federal Trade Commission, Thoratec Corp., No. 091-0064, 2009 WL 2402681 (F.T.C. 2009) ("of Thoratec's competitors, only Heartware poses a potential significant threat . . . [to] rapidly erose Thoratec's monopoly … [and] will quickly take market share from Thoratec. Competition from Heartware has already forced Thoratec to innovate even though [Heartware's product] is still in clinical trials. . . . Proposed acquisition will . . . eliminat[e] innovation competition.").

[32] Federal Trade Commission, Boston Sci. Corp., No. C-4164, 2006 WL 2330115 (F.T.C. July 21, 2006) (transaction will reduce potential competition and research and development in the market for Coronary Drug Eluting Stents).

[33] Federal Trade Commission, Amgen Inc., 134 F.T.C. 333, 340 (2002) ("effects of the merger, if consummated" include "reducing innovation competition in the research, development and commercialization of (a) neutrophil regeneration, (b) TNF Inhibitor, and (c) IL-1 Inhibitor products").

[34] Federal Trade Commission, Pfizer Inc., 135 F.T.C. 608 (2003) (merger would eliminate potential competition in the market for prescription drugs to treat erectile dysfunction and actual competition in the market for the research and development of prescription drugs for the treatment of erectile dysfunction).

[35] Federal Trade Commission, Pfizer Inc., No. C-3957, 2000 WL 1088335 (F.T.C. July 27, 2000), https://www.ftc.gov/sites/default/files/documents/cases/2000/07/pfizercmp.htm.

The Commission alleged that Pfizer's acquisition of Warner Lambert increased the likelihood that the combined firm would unilaterally delay, deter, or eliminate competing programs to research and develop Epidermal Growth Factor receptor tyrosine kinase (EGFr-tk) inhibitors for the treatment of cancer, potentially reducing the number of drugs reaching the market and thus resulting in higher prices for consumers. The FDA had not approved any EGFr-tk inhibitors for the treatment of cancer. The market for the research, development, manufacture and sale of EGFr-tk inhibitors for the treatment of cancer was highly concentrated; only four companies, including Pfizer (with its development partner OSI Pharmaceuticals) and Warner Lambert, were in human clinical testing.

Nielsen/Arbitron,[36] *Bayer/Aventis*,[37] and *Ciba-Geigy/Sandoz*[38] are examples of transactions where the merging parties were believed to be the two, or two of only a few, firms that had the capabilities to develop specific new or future products that if brought to market in the absence of the merger would likely have captured substantial revenues from each other.

IX. The Fair Trade Commission Should Strengthen the Acceptance of Efficiencies in the Proposed Amendments to the Merger Review Guidelines

The Horizontal Merger Guidelines and the Vertical Merger Guidelines of the United States recognize that a merger may generate efficiencies, and that "merger-generated efficiencies may enhance competition"[39] and "have the capacity to create a range of potentially cognizable efficiencies that benefit competition and consumers."[40] Efficiencies available through merger may increase the certainty of bringing new products to market or increase the speed with which new products are brought to market.[41]

We applaud the Fair Trade Commission's interest in including a list of factors that will be taken into account in assessing the pro-competitive benefits and efficiencies associated with online platforms, including through merger, but caution that the Merger Review Guidelines should make clear that the list is not exhaustive. In addition, the Merger Review Guidelines should adopt the position that efficiencies obtained through merger that benefit one side of a multi-sided market are relevant to and part of the determination of the competitive effects of a merger, including where the merger is believed likely to cause harm on another side of a multi-sided market.

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[36] Federal Trade Commission, Nielsen Holdings N.V., No. C-4439, 2014 WL 869523 (F.T.C. Feb. 24, 2014) (merging parties "are the best-positioned firms to develop (or partner with others to develop) a national syndicated cross-platform audience measurement service because only [the merging parties] maintain large, representative panels capable of measuring television with the required individual-level demographics, the date source preferred by advertisers and media companies.").

[37] Federal Trade Commission, Bayer AG, 134 F.T.C. 184 (2002) (merger would eliminate potential competition in the market for New Generation Chemical Insecticide Active Ingredients and the technology used in their manufacture; Bayer, Aventis, and Syngenta were the only firms with significant development and production of New Generation Chemical Insecticide Active Ingredients, and Bayer and Aventis were distinguished by their ability to take new molecules from the discovery phase to the development and then marketing of such products).

[38] Federal Trade Commission, Ciba-Geigy Ltd., 123 F.T.C. 842 (1997).

[39] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES at 29 (Aug. 19, 2010).

[40] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES at 11 (June 30, 2020).

[41] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES at 40-41.

CONCLUSION

The Fair Trade Commission's Proposed Amendments to the Merger Review Guidelines should not single out mergers involving digital firms or apply different standards to the evaluation of mergers involving digital firms. The current Merger Review Guidelines provide a sufficiently flexible framework to address any likelihood of harm in digital markets from a proposed or consummated merger.

The Fair Trade Commission should rely on innovation markets sparingly, if at all, in its evaluation of mergers in the digital sector. The analysis of innovation effects in existing or future goods markets is preferred and would be consistent with the experience and practice of the U.S. antitrust agencies.

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Respectfully submitted,

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