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Comments of

TechFreedom

Bilal Sayyed

In the Matter of

Review of the Horizontal and Non-Horizontal Merger Guidelines,

European Commission

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INTRODUCTION

TechFreedom [1] welcomes the opportunity to comment on the European Commission's ("Commission") review of its Horizontal and Non-Horizontal Merger Guidelines ("Merger Guidelines"). We do not believe significant changes are needed to the Merger Guidelines, but some clarifying principles should be adopted in the revised merger guidelines ("Revised Guidelines").[2]

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[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.

Bilal Sayyed, the primary drafter of this comment, is Senior Competition Counsel of TechFreedom. He is also an adjunct professor at Antonin Scalia Law School, George Mason University and a counsel at a U.S. headquartered law firm. The comment expresses the views of the drafter, in his role at TechFreedom. None of the positions should be attributed to any clients of the law firm or of funders of TechFreedom. No person outside of TechFreedom staff has reviewed this comment prior to its submission, or directed or influenced any position expressed in the comment.

He was previously Director of the Office of Policy Planning at the United States Federal Trade Commission (April 2018–January 2021). He was also an Attorney Advisor to then FTC Chairman Timothy J. Muris (June 2001-August 2004). As Director, he participated in the drafting of the Department of Justice and Federal Trade Commission Vertical Merger Guidelines (2020) and the drafting of the Federal Trade Commission's Commentary on Vertical Merger Enforcement (2020). He also led the FTC's Competition and Consumer Protection Hearings for the 21st Century, including a three-day hearing on the competitive effects analysis of multi-sided platforms. He can be reached at bsayyed@techfreedom.org.

[2] Merger guidelines of the Commission's sister agencies have generally increased in length as part of their revision process. We encourage the Commission to avoid this tendency. Not every theory of harm, factor, or consideration potentially relevant to analyzing the competitive effect of a given merger should be encapsulated in the Merger Guidelines. Guidelines should state general policy. See U.S. DEPT. OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS at 2 (Apr. 20, 2000) (rescinded); U.S. DEPT. OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY at 1 (Jan. 12, 2017). "No set of guidelines could possibly indicate how the Agencies will assess the particular facts of every case." See U.S. DEPT. OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION at 3 (Jan. 13, 2017); U.S. DEPT. OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY at 1 n.2 (Jan. 12, 2017); see also U.S. DEPT. OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS at 1-2 (Apr. 20, 2000) (rescinded) ("No set of guidelines can provide specific answers to every antitrust question that might arise …").

I. Revised Merger Guidelines Should Maintain a Structured But Holistic Competitive Effects Analysis

The analytic framework for the review of the effects of a merger, including one involving a firm operating in the digital sector should consist of a series of integrated steps:

1. The Commission must identify a plausible basis for alleging a proposed merger will have an anticompetitive effect, including its significance, magnitude, and likelihood.
    - Mergers that may be benign or procompetitive when engaged in by a firm that does not possess market power, may have an anticompetitive effect when engaged in by a firm with (or that will obtain, through merger) durable market power.[3] The Commission must demonstrate that the merged firm has, will maintain, or will obtain durable market power (and, in some instances, monopoly power or dominance) in the relevant market through the proposed acquisition. Durable market power, monopoly power, and dominance may be demonstrated by either or both direct and indirect evidence. ("Dominance" falls between market power and monopoly power, and should, for purposes of evaluation of a merger, be aligned with the concept of market power.)
    - An asset or means of distribution, production, or marketing should not be deemed essential, pre- or post-merger, if the firm (or merged 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 the merged 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 either market power or dominance: 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.

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[3] Issues that can arise in cases featuring digital platforms that may inform an analysis of relevant markets and durable 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.

- Potential harm to rivals must be connected to harm to competition to support an enforcement action against combining parties.[4] Post-merger conduct by a firm 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 merger. 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 additional or improved products, and thus may harm the business prospects of rivals, is not harm to competition or the competitive process, and is likely to enhance consumer welfare.

2. If the Commission makes the requisite showing of harm, the merging parties 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 be sufficient to defeat a claim of future harm associated with a merger.
3. Alternatively, the merging parties may identify efficiencies or procompetitive benefits linked to the merger. The merging parties bear 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, are merger-specific, and are sufficiently significant to have a material effect on, for example, lowering the merged firms' cost structure, increasing the merged firms' output, or support future 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.

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[4] 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 a 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 durable market power—can harm rivals without harming the competitive process.

- 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 merging firms may create should not typically be relevant to the determination of whether a merger is anticompetitive. Rather, the merging parties should be required to establish, with evidence, how *the specific benefits from the merger* benefits competition and consumer welfare.

4. If market power or monopoly power is durable and there is a plausible basis (and credible evidence) for both the harm alleged and for non-pretextual procompetitive justifications for the merger, the merging parties 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 merging firms make such a showing, the Commission should determine, and be prepared to prove that, on balance—on "net"—the merger is either harmful, beneficial or neutral to competition.
    - The Commission should compare the likelihood and magnitude of anticompetitive effects of the proposed merger with the likelihood, magnitude and sufficiency of efficiencies to determine the likely or actual overall effect of the merger. As the expected harm of the merger increases, the required offsetting benefits should also increase.
    - The analysis of benefits or efficiencies of a merger should be evaluated symmetrically with the harms associated with a merger. Long-term bias against efficiencies (or setting too high a standard for their proof) may affect the competitiveness of any single firm (especially as evaluated against competitors) and may also limit the competitiveness of all or many firms within an industry. Alternatively, consistent overvaluation of the benefits from mergers may lead to a concentrated, static market that is less innovative and less productive. Either bias can thus harm consumers across the Union.
    - 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 Commission nor the merging parties should be required to 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: the Commission and the merging parties should bear the same 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 transaction or specific post-merger conduct that harms rivals; (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 should accept 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) 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; and, in consummated mergers, (vi) corrective actions; and (vii) monetary equitable remedies.

II. Revised Merger Guidelines Should Abandon the Horizontal / Non-Horizontal Characterization of Transactions for Purposes of Analyzing Competitive Effects of a Transaction or Merger

The Commission presently maintains both Horizontal and Non-Horizontal Merger Guidelines.[5] Revised Guidelines should abandon this distinction and issue a unified set of merger guidelines that characterizes potential theories of harm as either unilateral or based on coordinated effects.

Unilateral effects or unilateral theories of harm are advanced in both horizontal and non-horizontal matters: (i) elimination of an actual, future or perceived close or significant competitor through acquisition; (ii) full or partial exclusion or foreclosure of an actual or future competitor to an upstream, downstream or complementary asset (broadly defined to include both tangible and intangible assets) of the combined firm;[6] (iii) elimination of an actual or future competitor through increased likelihood of, or ability to engage in, price or non-price predation[7]; (iv) the creation or strengthening of an impediment to entry or expansion; (v) the creation or strengthening of a disincentive for independent entry or expansion[8]; and (vi) entrenchment or monopoly maintenance of a current position in a market, generally through any of (i) through (v).[9] Some of these theories of harm are associated with horizontal mergers, some with non-horizontal mergers. However, what is common to all is that they allow for the creation, strengthening, entrenchment, or facilitation of unilateral market power without requiring an accommodating response by rivals or other market participants.

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[5] Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings (2004/C 31/03) (Feb. 2004) ("Horizontal Merger Guidelines"); Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulations on the Control of Concentrations Between Undertakings (2008/C 265/07) (Oct. 2008) ("Non-Horizontal Merger Guidelines"). The Non-Horizontal Merger Guidelines characterize such mergers as either vertical mergers or conglomerate mergers.

[6] Portfolio effects or anticompetitive bundling is consistent with a customer foreclosure theory of harm. As discussed later in this comment, revised guidelines should be clearer on how conglomerate mergers will be evaluated, and how possible efficiencies will be considered, including how such efficiencies will not be considered an "efficiency offense."

[7] Predation-based theories of merger harm are rare, perhaps because price predation theories are generally associated with price cuts and discounts, and because at least some non-price predation theories require a duty-to-deal with the affected party.

[8] This could include, for example, when a merger gives the merged entity access to information about a competitor's plans, which it may seek to exploit.

[9] Evasion of regulation, while not clearly a competition theory of harm, is also a form of unilateral effect. See U.S. DEPT. OF JUST. MERGER GUIDELINES (1984) §4.23, https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11249.pdf.

Coordinated effects or theories of harm are advanced in both horizontal and non-horizontal mergers. Mergers may create or strengthen the conditions necessary for coordination by: (vii) elimination of an actual, perceived, or future competitor through acquisition, including but not limited to a maverick firm,[10] which creates or strengthens the conditions for future coordination; and (viii) acquisition of an asset (tangible or intangible, including information, contracts, relationships) that provides the combined firm with information about the plans of one or more actual, perceived or future competitors, creating or strengthening the conditions for future coordination. Some of these theories of harm are associated with horizontal mergers, some with non-horizontal mergers. However, what is common to them is that they strengthen or create conditions for a coordinated outcome but require an accommodating response of other market participants (or make existing coordination efforts more likely to be successful or durable).

Characterization of a merger as horizontal or non-horizontal suggests that competitive effects may be limited by the pre-merger relationship of the firms. They do not.[11] The distinction should be abandoned in Revised Guidelines to avoid limiting the application of different models of competition to specific mergers based on the relationship of the combining firms. This may not be specifically relevant to the Commission's review of a merger, yet it may be relevant to review of the Commission's decision by the EU courts.

[10] A firm that does not have the incentive to lead, follow or otherwise participate in a coordinated reduction in output (broadly defined) or common practice is a maverick firm. A maverick may be an existing firm, a potential market entrant, or a firm that is perceived as a future competitor.

[11] Some observers may note that mergers of competitors can be analyzed based on structural factors, while mergers of firms that are not-competitors cannot be analyzed on structural factors. The existing Commission guidelines reject this position, creating soft-presumptions for both horizontal and non-horizontal transactions based on structural considerations. The Horizontal Guidelines contain a soft presumption with respect to concentration and post-transaction market share; the Non-Horizontal Guidelines contain a soft presumption with respect to the market share of the parties in their markets.

III. Structural Screens in Revised Guidelines Should Be Based on the Commission's Investigation and Enforcement Experience

The Commission asks whether structural factors—*e.g.*, concentration, market share (however measured[12])—should play a more significant role in competitive effects analysis. High market shares and/or high concentration levels may be an effective way to differentiate transactions that should and should not be subject to additional investigation. Very high shares and/or very high concentration levels may create a presumption, even a strong presumption, of anticompetitive effects. The Commission's experience, and the experience of other competition agencies, suggests that structural factors are not the only relevant factor in determining the likely competitive effects of a merger. This is reflected in the Commission's existing Merger Guidelines.

Maintaining the existing market share and concentration screens in Revised Guidelines, or the adoption of higher or lower market share and concentration screens may be a sensible way to screen transactions for a more comprehensive review by the Commission. But any structural screen should be based largely if not exclusively on the Commission's more than 20 years of investigation and enforcement under the existing Merger Guidelines. General, broad-based empirical studies of concentration (and changes in concentration) within an industry, region or national borders do not carry the same significance of the Commission "cases studies" of hundreds of merger transactions. In setting concentration screens for Revised Guidelines, the Commission should consider whether changes in concentration and market share screens (up or down) are consistent with its investigation and enforcement practices over the past two decades, and with the decisions of the Courts of Justice. There is substantial learning that can be derived from that experience, and it should be incorporated into Revised Guidelines.[13] We are more skeptical of the broad-based empirical literature,

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[12] The Commission's survey asks responders to identify, if valuable, metrics for measuring market share. We do not think the Commission should identify in the guidelines all, or a buffet of, ways to measure market share. In many industries actual or projected sales, output, capacity will be relevant ways to measure share. However, this may not always be true. Common but less straightforward measurements of share include share based on wins in bid markets (with or without regards to size of supply), share of users (which can be complex in situations where users multi-home). There may be other relevant metrics in the specific case. Limiting the variables by which the Commission measures market share may be constraining and may affect judicial review of Commission decisions which depart from the identified metrics. We believe the same with respect to the request for additional metrics to identify non-price effects, including the measurement of innovation effects.

[13] Former Chairman Joe Simons noted that the concentration thresholds in the U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010) were derived from significant experience with actual transactions, including transactions that were investigated, and suggested they may have been appropriately determined with reference to that experience. See Prepared Keynote Address by Chairman Joseph J. Simons, at American University Washington College of Law Conference on Themes of Professor Jonathan Baker's New Book, The Antitrust Paradigm: Restoring a Competitive Economy at 5-8 (March 8, 2019),

which often suffers from methodological flaws and often has little direct relevance to specific matters before the Commission and Courts.

IV. Revised Guidelines Should Recognize That a Merger That Does Not Create or Enhance Durable Market Power Will Not Significantly Impede Effective Competition

Revised Guidelines should recognize more clearly than the existing Merger Guidelines that for a merger to significantly impede effective competition, a merger *must* create, strengthen, enhance or entrench market power, or facilitate the exercise of market power. This principle has been adopted in every iteration of the US merger guidelines since 1982[14] and, under US

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https://www.ftc.gov/system/files/documents/public_statements/1515179/simons_-_jon_baker_speech_3-8-19.pdf. The United States revised its concentration and change in concentration thresholds downwards in the 2023 Merger Guidelines, based, in part, on a belief that the concentration screens in the 2010 Horizontal Merger Guidelines were too low and had allowed potentially anticompetitive transactions to close without substantive review. See Footnote 15 to the U.S. DEPT. OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES (2023) at 6, https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf (citing "experience and evidence developed since [the 2010 Horizontal Merger Guidelines])." This seems inconsistent with the FTC's actual merger investigation experience between 2010 and 2020, based on the drafter's experience as Director of the Office of Policy Planning and as a private practitioner.

We encourage the Commission to follow the past practice of the Federal Trade Commission and release summary statistics on the concentration (and change in concentration) levels of mergers challenged and not challenged (by market), and other factors—such as number of competitors and findings with respect to ease of entry—so that commentators have a better sense of the Commission's historical reliance on market share and concentration statistics. See FED. TRADE COMM'N, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996-2011(JAN. 2013), https://www.ftc.gov/sites/default/files/documents/reports/horizontal-merger-investigation-data-fiscal-years-1996-2011/130104horizontalmergerreport.pdf; FED. TRADE COMM'N, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996-2007 (DEC. 2008), https://www.ftc.gov/sites/default/files/documents/reports_annual/horizontal-merger-investigation-data-fiscal-years-1996-2007/081201hsrmergerdata_0.pdf; FED. TRADE COMM'N, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996-2005 (JAN. 2007), https://www.ftc.gov/sites/default/files/documents/reports_annual/horizontal-merger-investigation-data-fiscal-years-1996-%E2%80%93-2005/p035603horizmergerinvestigationdata1996-2005_0.pdf; FED. TRADE COMM'N, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996-2003 (FEB., 2004, revised, AUG. 2004), https://www.ftc.gov/sites/default/files/documents/reports/horizontal-merger-investigation-data-fiscal-years-1996-2003/040831horizmergersdata96-03.pdf; U.S. DEPT. OF JUST. & FED. TRADE COMM'N, MERGER CHALLENGES DATA, FISCAL YEARS 1999-2003 (DEC. 2003), https://www.ftc.gov/sites/default/files/documents/reports_annual/merger-challenges-data-1999-%E2%80%93-2003/mdp_0.pdf. The regular and consistent publication of key statistics (on an aggregate basis) of agency merger investigations helps the public identify evidence or facts that may be relevant to merger investigation outcomes. I recognize that the Commission publishes much more detailed analyses of its merger decisions than the Federal Trade Commission and Department of Justice.

[14] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES (2023) at 1 ("Mergers that substantially lessen competition ... increase, extend, or entrench market power."), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf; U.S. DEPT. OF

law is a necessary condition for a merger to substantially lessen competition.[15] The Commission's Horizontal Merger Guidelines are ambiguous on this point (in referencing dominance):

> The creation or strengthening of a dominant position ... has been the most common basis for finding that a concentration would result in a significant impediment to effective competition. ... As a consequence, it is expected that *most cases* of incompatibility of a concentration with the common market will be based on a finding of dominance.[16]

Revised Guidelines should clarify the Commission's position on dominance and market power. The Commission should consider adopting the position that: (i) a finding of dominance requires a finding of market power, and (ii) a finding of market power is necessary to find that a merger will (or has a reasonable prospect to) significantly impede effective competition.

More specifically, Revised Guidelines should recognize that only a merger that creates, enhances, entrenches, or strengthens **durable** market power (including through improved conditions for coordination) or facilitates its exercise, may raise competitive concerns sufficient to find it will significantly impede effective competition.

The requirement that market power be durable is implicit in the Horizontal Merger Guidelines recognition that post-merger entry (or expansion) can remedy short-term anti-competitive effects of a merger.[17] Revised Guidelines should recognize this explicitly by

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JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010) at 2 ("The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise."), https://www.justice.gov/atr/file/810276/dl?inline; U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1992) at 2 ("The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise."), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11250.pdf; U.S. DEPT. OF JUST. MERGER GUIDELINES (1982) at 1 ("The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance "market power" or to facilitate its exercise."), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11248.pdf.

[15] It is not a sufficient condition, because a merger may also create efficiencies that create or strengthen the ability or incentive of the merged entity to increase output, improve service, or advance innovation.

[16] Horizontal Merger Guidelines ¶ 4 (emphasis added).

[17] Horizontal Merger Guidelines ¶¶ 68-75.

articulating durable market power as a core requirement to finding a significant impediment to effective competition from a proposed or consummated merger.[18]

A firm is generally considered to have durable market power when it can profitably raise price above what would occur in a competitive market by restricting output[19] below competitive levels, *without triggering timely expansion (or a timely and effective competitive response) by existing competitors or timely entry by new competitors sufficient to counteract the exercise of market power*.[20] (The ability to diminish quality without an offsetting competitive response may also be a sign of durable market power; however, quality characteristics or preferences of consumers are idiosyncratic.[21] Thus, a more searching inquiry may be needed to identify whether durable market power is associated with changes in (predicted) non-price competition than for (predicted) price changes.

Revised Guidelines should adopt a durable market power requirement; this would better incorporate, and be more consistent with, the Commission's existing Merger Guidelines' discussion of countervailing factors of both entry and efficiencies. The following language (or similar) should be considered for inclusion into revised guidelines:

> A merger illegally or unjustifiably significantly impedes effective competition if it creates, enhances, entrenches, or maintains **durable market power** (or facilitates its exercise), and thereby is likely to have the effect of allowing the merged firm or a set of rivals to raise price (or slow a decrease in price) as adjusted for quality, or reduce output, diminish or slow innovation, or otherwise harm customers (or suppliers to the merged firm or its rivals) at

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[18] We use the term "merger" to include all forms of combination of the assets of two or more firms by contract, including but not limited to acquisitions, consolidations, joint-ventures that require an integration of some or all assets of two or more firms and mergers.

[19] Output includes capacity, sales, and quality factors, including innovation.

[20] In the language of the U.S. merger guidelines, entry (or expansion) may be "uncommitted" or "rapid" and not incur significant sunk costs, or it may be "committed" and require a firm to incur significant sunk costs. See U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010) § 5.1 (discussing rapid and committed entrants) and § 9 (discussing committed entrants), https://www.justice.gov/atr/file/810276/dl?inline; See also U.S. DEPT. OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES (2023) at §4.4.A, https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

[21] 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-(monetary) 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.

any level of production or distribution as a result of diminished competitive constraints, without any offsetting efficiency benefits.

V. Adoption and Clarification of the Ability, Incentive and Effect Analysis to Horizontal and Non-Horizontal Mergers

Revised Guidelines should more clearly articulate the holistic nature of the analysis of competitive effects. The evaluation of mergers under the Commission's existing Merger Guidelines may be mistaken for a stepwise or checklist analysis (notwithstanding the Commission's efforts to disabuse interested parties of this interpretation). Changes to the market share and concentration thresholds, even if warranted, may suggest the same.

The Commission should clarify that an "overall assessment of the foreseeable impact of [a] merger in the light of relevant factors and conditions"[22] requires an inquiry into the combined firms' change in either or both of its (i) ability and (ii) incentive to (iii) have more than a non-material effect on competition. It may be useful for the Commission to note that under certain conditions, a change in only one of the ability and incentive factors is sufficient to raise the prospect of a merger impeding competition. But, where a firm has neither ability nor incentive to impede effective competition pre-merger, and the merger does not change that, under what conditions, if any, will a merger that improves a non-zero ability or incentive to impede competition be viewed as having a current or prospective effect on competition? That is, if the ability (or incentive) to impede competition is zero pre-merger, and the merger does not change that, under what conditions, if any, does an increase in the incentive (or ability) to impede competition effectuate a significant impediment on effective competition, either in the present or future? This inquiry may be especially relevant for consideration of competition from a future competitor but may not be limited to that situation.

VI. Revised Guidelines Should Clarify the Framework for Identifying a Future Entrant into a Relevant or Related Market (An Actual Potential Entrant)

The Commission's Horizonal Merger Guidelines adopt a narrow definition of a potential competitor. The definition aligns generally with the identification of actual market participants in the 1992 and 2010 US Horizontal Merger Guidelines. Therein, the US antitrust agencies characterized firms as market participants (not potential competitors) if they didn't presently supply into the relevant market but would supply into the relevant market without the expenditure of significant sunk costs of entry and exit (uncommitted or rapid entrants)

[22] Horizontal Merger Guidelines ¶ 13.

or if they if they had committed to entering the relevant market.[23] The Commission's Horizontal Merger Guidelines define such firms not as current market participants but as potential competitors.

This is too narrow, as the Commission itself seems to recognize. The Commission should identify more specifically how it will identify and evaluate the competitive significant of a future entrant into a relevant or related market and avoid the highly speculative inquiry found in the early US potential competition cases.[24] A future entrant is a firm that does not presently operate in a relevant or related market and that expects to incur significant sunk costs in entering a market.[25]

The combination of an incumbent firm with a future competitor (or the combination of two future competitors) can lessen or eliminate competition that would (or is reasonably likely to) have occurred in the future, but for the transaction. Revised Guidelines should provide more clarity on how the Commission will identify a future competitor, and how to evaluate the competitive impact of a future competitor.

Revised guidelines should adopt the following definition of a future competitor:

> A future competitor is a non-incumbent firm[26] that has both the ability and incentive to enter a relevant market but expects to incur significant sunk costs in entering the market.[27] A non-incumbent firm that does not have both the ability and incentive to enter a relevant market is not a future competitor. The relevant market need not be the same market that an incumbent firm

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[23] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010) § 5.1 (discussing rapid and committed entrants) and § 9 (discussing de-novo entrants), See U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1992) § 1.3.

[24] For a summary of the early U.S. potential competition cases, see Bilal Sayyed, *Actual Potential Entrants, Emerging Competitors, and the Merger Guidelines: Examples from FTC Enforcement 1993-2022* at 9-20, https://techfreedom.org/wp-content/uploads/2022/12/Actual-Potential-Entrants-Nascent-Competitors-and-the-Merger-Guidelines-Examples-from-FTC-Enforcemen.pdf.

[25] We use the term "related market" consistent with its meaning in the U.S. DEPT. OF JUST. & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES (2020) (withdrawn and superseded), https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

[26] A non-incumbent firm is a firm that is not presently operating in the relevant market, and whose presence outside the relevant market (or in other markets) *does not* affect present competition in the relevant market.

[27] Ability, as used here, means objective capabilities consistent with successful entry, but does not presume successful entry. Incentive, as used here, means successful entry is expected to be profitable, considering other reasonable alternatives.

presently operates in but is a market in which the incumbent and non-incumbent will (or are reasonably likely to) both compete in, in the future.[28]

Alternatively, because a non-horizontal transaction can also impede future competition from a current or future horizontal competitor through partial or full foreclosure to an asset of a firm presently operating in a related market, or that would in the future operate in a related market, Revised Guidelines should adopt a definition of a future related market entrant:

> A future related market entrant is a non-incumbent firm that has both the ability and incentive to enter a related market but expects to incur significant sunk costs in entering the market.[29] A non-incumbent firm that does not have both the ability and incentive to enter a related market is not a future entrant into a related market.

Assuming a non-incumbent firm has both[30] the ability and incentive to enter a relevant or related market, Revised Guidelines should identify a framework for evaluating the competitive effect of the elimination of this future entry. The Horizontal Merger Guidelines' existing analysis of entry as a countervailing factor does not limit the analysis to likelihood of entry but considers the materiality (or sufficiency) of entry, and the timing (or timeliness) of entry when analyzing the competitive effect of a transaction.

Revised Guidelines should adopt the "timely, likely, and sufficient" framework for evaluating the competitive significance of future entry by a non-incumbent:

- The acquisition of a future competitor (or future related entrant) will substantially lessen competition when, absent the merger, entry into the relevant (or related) market was reasonably likely to occur within a reasonable period and that entry was reasonably expected to have a material effect on competition in the relevant (or related[31]) market.

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[28] This is intended to capture situations where future competition between the merging firms will take place in an existing or future market or in an alternative to the market the incumbent operates in (*e.g.*, competition from an "adjacent" market).

[29] Ability, as used here, means objective capabilities consistent with successful entry, but does not presume successful entry. Incentive, as used here, means successful entry is expected to be profitable, considering other reasonable alternatives.

[30] We noted earlier that the Commission should identify under what circumstances it would significantly impede effective competition if a firm that does not, pre-merger, have an ability (incentive) to take an action increases its incentive (ability) to undertake an action by reason of a merger.

[31] Increased competition in the related market may improve current or future competition in the relevant market.

- Certain principles should be adopted to guide the competitive analysis of an acquisition of a future competitor (or future related entrant into a related market), and whether future entry by the non-incumbent party to a merger will constrain the incumbent, post-merger, consistent with the entry analysis in the Horizontal Merger Guidelines.
    - The degree of likelihood of entry is relevant to the competitive assessment of a combination with, or of, a future competitor (or future related entrant).
    - While the evaluation of timeliness may vary with each merger, the relevant industry and market dynamics, generally the further in the future that entry is likely to occur, the less certainty the Commission can place on such entry or expansion occurring.
    - The likely entry must be of sufficient scale, with a sufficient range of the relevant goods or services, to provide an effective competitive constraint on the incumbent firm (either by the future competitor in the horizontal case, or by a trading partner of a future related entrant in the non-horizontal case).
- Where the material effect from future entry is expected to be substantial, it may be appropriate to accept greater uncertainty in the likelihood of entry or accept greater delay in the timing of entry (and vice versa).

The identification and evaluation of a non-incumbent firm as a future competitor (or future related entrant) should be symmetrical with the evaluation of the competitive effect of entry as a countervailing factor as a defense to an otherwise anticompetitive merger. The Commission should not distinguish between objective and subjective factors, except as consistent with an evaluation of the ability to enter (capabilities) and the incentive to enter (profitable, as compared to other reasonable alternatives of the firm).

VII. The Commission Should Not Adopt the US Definition of a Perceived Potential Competitor

A perceived potential competitor is a firm that does not operate in the relevant market (taking account of both the product and geographic dimensions of a relevant market) but exerts, through a threat of entry, a current influence on the market. Thus, it is plausible that the acquisition of such a firm can significantly impede effective competition, in the present.

The concept of an uncommitted or rapid entrant, as discussed in the 1992 and 2010 US Horizontal Merger Guidelines, has some commonality with a perceived potential entrant: a firm that under certain conditions not yet present has the ability and incentive to supply into

the relevant market, and, in doing so, would not incur significant sunk costs of entry and exit. Through this threat of "hit and run" or rapid entry, the firm exerts a present constraining influence on the market and is considered an actual market participant in the US Merger Guidelines.

However, as developed in the US case law, the perceived potential competition doctrine does not necessarily look to the ability and incentive of the non-incumbent firm to enter but can look solely to the government's or incumbent firms' objective and subjective perception of the non-incumbent firm's entry decisions. This was a substantial weakness in the U.S. case law's development of the potential competition doctrine, which the 1992 and 2010 U.S. Horizontal Merger Guidelines addressed through a more comprehensive analysis of uncommitted/rapid and committed entrants as market participants.[32]

Unfortunately, the US Merger Guidelines (2023) have re-incorporated concepts of perceived and actual potential competition divorced from the analysis and identification of market participants. Above we addressed how the Commission may identify future entrants outside the scope of its existing framework in the Horizontal Merger Guidelines' discussion of potential competition. Here, we attempt to identify limitations in the perceived potential competition doctrine, without suggesting it be fully abandoned (beyond application of the uncommitted or rapid entrant concept).

The 2023 US Merger Guidelines theorize that a perceived potential entrant can be identified from the perspective of market participants alone: "The acquisition of a firm that is *perceived by market participants as a potential entrant* can substantially lessen competition by eliminating or relieving competitive pressure."[33] (There are two requirements to support identifying a perceived potential competitor: (i) whether a market participant could reasonably consider a firm not presently operating in the market to be a potential entrant or capable of applying competitive pressure and (ii) whether that presence or behavior has a "likely influence" on the market participants' decisions.

A perceived potential entrant can be established by objective evidence. A "market participant could reasonably consider a firm to be a potential entrant" based solely on objective evidence. "Objective evidence can be sufficient to find that a firm is a potential entrant." Objective evidence of potential entry includes "evidence of a feasible means of entry" *or* "communications by the company indicating plans to expand or reallocate resources." Evidence of market participants' perceptions of the potential entrant, or direct evidence of

[32] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010) §5.1; U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1992) §1.32.

[33] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES (2023) §2.4.B.

reaction to the potential entrant, may be sufficient to consider a firm a potential entrant. (In practice, however, the U.S. agencies often reject one form of evidence: testimony by the potential entrant that it has, in fact, no or insufficient interest in entering.)

Influence, or likely influence, on the competitive decisions of the market participant can be established by direct evidence of effect but can also be established by objective or subjective evidence. The same objective evidence appears sufficient to establish both potential to enter and influence on existing market participants: "objective evidence [of potential entry] includes evidence of feasible means of entry" and "objective evidence establishing that a current market participant could reasonably consider one of the merging firms to be a potential entrant can also establish that the firm has a likely influence on existing market participants." Subjective evidence that current market participants—including customers, suppliers, distributors— "internally perceive the merging firm to be a potential entrant can also establish a likely influence."[34]

The US Merger Guidelines' framework for identifying a perceived potential competitor or perceived potential entrant is not consistent with the "timely, likely, and sufficient" framework that both the US and EU use to identify a de-novo entrant (and that we argue should be applied to identify a future entrant). Nor does it meet the "ability, incentive, and effect" framework we believe should be applied to evaluate whether horizontal and non-horizontal mergers significantly impede effective competition.

The doctrine of perceived potential competition, as advanced in US law and the US Merger Guidelines, allows for a highly speculative and unfocused inquiry. It may, in practice, apply the mistaken perception of market participants (including but not limited to a participant to a merger, but to include customers, suppliers, and other firms operating in competition to one of the parties to a merger) to support a challenge to an otherwise procompetitive or competitively neutral merger. The US doctrine of perceived potential competition should not be adopted by the Commission. If the Commission wishes to minimize the aggregate harm associated with an over- or under-enforcement of the EU Merger Regulation, it should limit the application of the doctrine to the identification of an uncommitted or rapid entrant. If the Commission believes there is or may be value in maintaining an independent but incorrectly perceived competitive threat, the Commission should require significant evidence on the influence, and the materiality of the influence, of a non-incumbent firm on current market dynamics.

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[34] Id.

VIII. Innovation Markets, Technology Markets & Innovation Effects

The Commission's merger enforcement matters should use the concept of innovation markets sparingly and, in the alternative, identify a framework for analyzing effects on innovation in a current or future product market rather than alleging harm in a pure innovation or research and development market.

The US Antitrust Guidelines for the Licensing of Intellectual Property define the characteristics of innovation 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, 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.[35]

Recognizing innovation markets divorced from any commercializable product implies that innovation itself is welfare-enhancing. This is a highly speculative proposition, and the Commission (like the US agencies) are not in a good position to determine the welfare effects of innovation divorced from any existing or future product. Former FTC Chairman Tim 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, innovation market analysis in the US

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[35] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 8 (at note 27) (2017) (emphasis added), 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).

is intensely factual and not subject to any presumptions about potential harm from a merger.[36]

The Federal Trade Commission's and Department of Justice's use of innovation markets was strongly criticized during the period of their greatest use. Both the U.S. Department of Justice and the Federal Trade Commission have moved away from alleging harm in an innovation market and instead focus on 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 Commission should prefer this focus in the evaluation of the competitive effects of a merger. Rather than reliance on an innovation market approach, Revised Guidelines should largely rely, in its review of mergers, on either of two theories of harm to innovation found in the 2010 US Horizontal Merger Guidelines (superseded). Revised Guidelines 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: (i) reduced incentive to continue with an existing product-development effort or (ii) reduced incentive to initiate development of new products."[37]

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[36] 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-investigationgenzyme-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.

[37] 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 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.

The first effect 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,* [38] *Boston Scientific/Guidant*,[39] *Amgen/Immunex*,[40] *Pfizer/Pharmacia*,[41] and *Pfizer/Warner-Lambert*[42] are examples of challenges to mergers involving potential competitors that would, according to the FTC, reduce innovation competition. In each, the FTC 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

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[38] 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 erase 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.").

[39] 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).

[40] 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").

[41] 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).

[42] 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[43], *Bayer/Aventis*[44], and *Ciba-Geigy/Sandoz*[45] 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.

In considering effects on innovation, the Commission may wish to make greater use of technology markets, rather than product markets. Technology markets consist of the intellectual property that is licensed (the "licensed technology") and its close substitutes—that is, the technologies or goods that are close enough substitutes to significantly constrain the exercise of market power with respect to the intellectual property that is licensed. When rights to intellectual property are marketed separately from the products in which they are used, the Agencies may analyze the competitive effects of a licensing arrangement in a technology market. [46]

A merger may eliminate competition in the innovation and development of technology; in such instances, the US antitrust agencies have alleged harm to non-price competition—the effect on innovation and development of a technology—in specific technology markets.[47] Competitive harm in a technology market can also affect future competition in a market for an existing or future product, because firms may use developments in technology markets to introduce new commercial products or differentiate existing commercial products to compete with current market participants.

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[43] 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.").

[44] 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).

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

[46] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property 9 (2017), https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf [hereinafter IP Guidelines].

[47] See Bilal Sayyed, Non-Price Effects in Mergers: Examples from Federal Trade Commission Enforcement, 1992-2023, Antitrust Chronicle, Winter 2024, https://www.pymnts.com/wp-content/uploads/2024/01/2-NON-PRICE-EFFECTS-IN-MERGERS-EXAMPLES-FROM-FEDERAL-TRADE-COMMISSION-ENFORCEMENT-1992-2023-Bilal-Sayyed.pdf.

IX. Efficiencies

A. Symmetrical Treatment in Analyzing Efficiencies and Harm

The evaluation of competitive harm from a merger, and the evaluation of efficiencies associated with a merger are both probabilistic and subject to uncertainty. While it may be appropriate for a lawmaker to prefer either smaller or larger firms as a matter of policy, absent such a specific determination, competition agencies should analyze the probability and magnitude of potential harms and benefits symmetrically. Revised Guidelines should adopt this principle of symmetrical analysis.

A bias against the likelihood of efficiencies being obtained through merger (as compared to the likelihood of harm from a merger) may, over time, lead to less efficient firms, and a less efficient industry. The Commission should consider whether its policies towards evaluating efficiencies in the past have had the effect of limiting the efficiency of individual firms and specific industries.

B. Elimination of Double Marginalization

The Commission should not apply the same burden of proof to the consideration of the likelihood of merger specific benefits of the elimination of double marginalization in non-horizontal transactions, as compared to a more general efficiencies analysis applied in horizontal mergers. The framework articulated in the US Dept. of Justice and Federal Trade Commission Vertical Merger Guidelines (2020) sets forth the proper standard for consideration of EDM:

> Due to the elimination of double marginalization, mergers of vertically related firms will often result in the merged firm's incurring lower costs for the upstream input than the downstream firm would have paid absent the merger. This is because the merged firm will have access to the upstream input at cost, whereas often the downstream firm would have paid a price that included a markup. The elimination of double marginalization is not a production, research and development, or procurement efficiency; it arises directly from the alignment of economic incentives between the merging firms. Since the same source drives any incentive to foreclose or raise rivals' costs, the evidence needed to assess those competitive harms overlaps substantially with that needed to evaluate the procompetitive benefits likely to result from the elimination of double marginalization. …
>
> Mergers of firms that make complementary products can lead to a pricing efficiency analogous to the elimination of double marginalization. Absent the merger, the merging parties would set the price for each complement without

> regard to the impact of lower prices for one on demand for the other. If the two merge, the merged firm has an incentive to set prices that maximize the profits of the firm as a whole, which may result in lower prices for each component. Any incentive to offer lower prices may be more pronounced if the merged firm can target lower prices at customers that buy both components from it.[48]

C. Innovation Efficiencies

A discussion of innovation effects in Revised Guidelines should recognize that mergers may lead to increased incentives or capabilities to innovate. Mergers may lead to increased incentives to innovate if, post-merger, the combined firm will keep more of the benefits of the innovation or can commercialize a new (innovative) product more quickly. A merger may increase the capability to innovate, if the merger combines complementary assets (including intellectual property).[49]

D. Revised Guidelines Should Recognize "Cumulative Efficiencies" when Evaluating the "Cumulative Effect" of Serial Acquisitions

It has become accepted by major competition agencies that a series of mergers may harm competition through a cumulative effect even if no specific merger is anticompetitive. Yet we doubt that a series of mergers, none of which may significantly impede effective competition, can significantly impede effective competition when considered cumulatively: zero times one, or zero times 100, is still zero.

Yet we also recognize that interpreting the EU Merger Regulation (or case law) to require the Commission to show more than a de minimis lessening of competition from a merger, or other factors—such as notification thresholds or limited agency resources—might create practical hurdles to identifying and challenging a merger with small but reasonably probable

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[48] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES (2020) at §6, 11-12, https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

[49] "A merger of two innovative firms may lead to an increase in innovative activity relative to the status quo, and these merger-specific efficiencies may outweigh the potential for harm due to an elimination of competition between them. . . . Sometimes, reduced incentives to innovate may not be a cause for competitive concern if the merger increases the merged firm's ability to conduct R&D more successfully. OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, Non-Price Effects of Mergers – Note by the United States (June 6, 2018) at 12, https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/non-price_effects_united_states.pdf. See also, Statement of 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.

anticompetitive effects. In other words, the harm to competition in each case might not be zero but might be too low to be practically measurable. Where the acquiring firm has engaged in a series of such acquisitions, a cumulative approach may be defensible.

Efficiency improvements can also be cumulative. For example, a series of small horizontal acquisitions that combine otherwise substitutable capacity may cumulatively (but not individually) increase production sufficient to obtain economies of scale; non-horizontal acquisitions can create economies of scope and can combine complementary assets to allow for an increase in innovation, the speed of innovation, and the distribution of new products.

Currently, to be credited as a countervailing factor in support of a merger, the Horizontal Merger Guidelines requires efficiencies to (i) benefit consumers, (ii) be merger specific and (iii) be verifiable.[50] But the merger-specificity requirement may not be symmetrical with a general position that harm from so-called serial acquisitions does not require a showing of harm from any specific merger.

Again, the Commission should treat harms and efficiencies symmetrically. Where the showing of harm is not transaction-specific but cumulative, Revised Guidelines should make clear that, as with harms to competition, efficiency claims will be evaluated on a cumulative basis and that cumulative efficiencies associated with a series of mergers may be sufficient to counter the cumulative anticompetitive effects associated with a series of acquisitions.[51]

E. Revised Guidelines Should Clarify the Analysis of Conglomerate Effects & Reject the Idea of "Anti-Competitive Efficiencies"

The current Non-Horizontal Merger Guidelines include theories of harm arising from a conglomerate merger. Certain theories of harm in conglomerate mergers are based on foreclosure models. Others derive from so-called portfolio effects, monopoly extension, or monopoly leveraging theories of harm: (i) offering products at a lower price if purchased together; (ii) restricting sales of multiple products to the purchase of a bundle; (iii) integrating products within a digital ecosystem; and (iv) "tying" products.

If Revised Guidelines maintain a separate class of conglomerate effects theories, they should also recognize that the conduct such theories of harm are based on may also create significant efficiencies that benefit consumers, even if they act as an impediment to a rival's entry into or expansion in a relevant market. (Cross-selling and bundling may support

[50] Horizontal Merger Guidelines ¶78.

[51] The Commission may wish to take the same position with respect to balancing cumulative efficiencies in one market with cumulative harm in another market, where the acquisitions under review have effects in multiple markets.

entry.) Outdated US case law with respect to conglomerate mergers identifies (potential) efficiencies as a (potential) source of anticompetitive harm.[52] Revised Guidelines should not adopt this position. Rather, they should provide a framework for evaluating possible harms (to competitors) from potential benefits or efficiencies (to consumers) where the products (or services) of the merging parties may be sold solely as a package post-merger and disadvantage rivals but not harm competition.

The "merger-specificity" requirement for evaluating efficiencies associated with a merger is especially inapt for this analysis, unless the Commission would not, symmetrically, allege harm from the linking of sales if such linkage could have occurred through some other reasonable means short of merger. (Revised Guidelines should recognize that non-merging parties may be able to counter any alleged illegal or anticompetitive linking, bundling, or tying of products by entering into agreements with other parties to offer linked, bundled or tied sales.)

Revised Guidelines should address this limitation by recognizing that the merged firm must have monopoly power or a reasonable probability of obtaining monopoly power (and not merely dominance) in at least one of the linked products for a merger of firms offering products sold as a package to have the potential to significantly impede effective competition (taking into account the pro-competitive effects of combining complementary products). The monopoly power requirement, which should be a high hurdle to meet, reflects an interest in not chilling pro-competitive efficiencies associated with bundled, tied, or otherwise linked product sales. The efficiencies associated with the combination of bundled products (or services) especially where offered at a lower price may still indicate that a merger is welfare-enhancing, notwithstanding some exclusionary effect.

If the Commission adopts portfolio or bundling theories of harm in Revised Guidelines, the Commission should consider adopting the test developed by US courts for illegal predatory pricing in *Brooke Group,* the safe harbor in *Peace Health*, and the cautious analysis of technological tying in *Microsoft* so as to set forth a consumer welfare-sensitive framework for evaluating conglomerate effects.[53] Revised Guidelines should also address how the Commission will weigh short-term benefits to consumers (from discounting and bundling practices, and integration of complementary technology into a digital platform or device)

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[52] See OECD Directorate for Financial and Enterprise Affairs Competition Committee, Conglomerate Effects of Mergers – Note by the United States (June 2020) at 4-5, https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-conglomerate_mergers_us_submission.pdf.

[53] Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); Cascade Health Solutions v. PeaceHealth, 515 F.3d 883 (9th Cir. 2008); United States v. Microsoft, 253 F.3d 34 (2001).

with the potential for longer-term harm from exclusionary or predatory conduct (*e.g.*, exclusion of a competitor, or alleged extension of a monopoly to a second market).

X. Revised Guidelines Should Prioritize Areas of Competitive Rivalry in Evaluating Competitive Effects

Both price and non-price aspects of competition are integral to the competitive process. However, there is potentially a long list of potential differentiators among competitors. If Revised Guidelines recognize harm across many forms of competitive rivalry, the Commission should adopt and provide a framework for articulating a tradeoff between what have long been considered primary areas of competition (*e.g.*, price, innovation) and what are likely, for most consumers, to be secondary areas of competition or rivalry (*e.g.*, environmental sustainability, employment terms and conditions). Revised Guidelines should explain if, and how, the Commission will weigh alleged harm in one area of competitive differentiation with benefits to another area of competitive differentiation.

Such weighing is necessary when there are efficiencies, or when customers have different preferences. When preferences are idiosyncratic, harm to one group (*i.e.*, those who value environmental sustainability and would be worse off if a merger made the combined firm less environmentally conscious) may be counterbalanced by benefits to another group (perhaps the environmental degradation lowers costs and thus prices, and a larger group of customers values low prices). Similarly, some customers may prefer less interoperability if it enhances security or usability. Revised Guidelines must better articulate if and how the Commission will make such tradeoffs.

XI. Resiliency

Revised Guidelines should not adopt considerations of resiliency into a competitive effects analysis. Such considerations may easily devolve into the requirement that firms (or industries) maintain excess capacity[54] for periods of future supply shocks. Not all industries must be resilient to supply or demand shocks. Such requirements, to the extent that they are necessary, are the provenance of sector regulators.

Previous FTC reports on prices spikes and market responses may be instructive. The FTC's report on the effects of and oil industry's response to Hurricane Katrina evaluated whether and how general business practices contributed to shortages of petroleum products

[54] Capacity can be measured in different ways, including number of firms (which may lead to too many inefficient firms) or size of firms (which may lead to inefficient capacity holdings).

(predominately gasoline) after two major hurricanes hit the US Gulf Coast in 2005/2006.[55] The FTC has studied the causes and impact of other supply shocks in gasoline markets.[56] It is common for supply shortages to result in price spikes, and it is understandable that one response might be for producers or suppliers to maintain higher stocks for emergencies. However, there is a cost, and it can be a significant cost, in the aggregate, to maintaining excess (unused) capacity, or higher levels of inventory. In some instances, only larger firms may be able to absorb the higher costs associated with some forms of resiliency. This may bias merger review to accepting anticompetitive harms as a possible trade-off to resiliency. The Commission's competition and merger enforcement arm should not set itself out as the implementer of the Union's resilience goals. Sector-by-sector regulation seems likely to be more effective in identifying the proper scope of resiliency requirements and how they are to be achieved.

XII. Special Factors in Competitive Effects Analysis of Digital Platform Markets

Each platform business is unique, 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 unilateral or joint conduct by a firm designated as having strategic market status. Such factors are not uniquely relevant to firms operating platforms, and these factors may be associated with increased competition and consumer welfare, and not merely impediments to future entry or negative effects on consumer welfare.

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[55] Federal Trade Commission, Investigation of Gasoline Price Manipulation and Post- Katrina Gasoline Price Increases (2006), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-investigation-gasoline-price-manipulation-and-post-katrina-gasoline-price/060518publicgasolinepricesinvestigationreportfinal.pdf.

[56] See, e.g., Federal Trade Commission, Bureau of Economics, Gasoline Price Changes and the Petroleum Industry: An Update (2011), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-economics-gasoline-price-changes-and-petroleum-industry-update/federal-trade-commission-bureau-economics-gasoline-price-changes-and-petroleum-industry.pdf; Federal Trade Commission, Report on Spring/Summer 2006 Nationwide Gasoline Price Increases, https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-spring/summer-2006-nationwide-gasoline-price-increases/p040101gas06increase.pdf; Federal Trade Commission, Gasoline Price Changes: The Dynamic of Supply, Demand, and Competition (2005), https://www.ftc.gov/sites/default/files/documents/reports/gasoline-price-changes-dynamic-supply-demand-and-competition-federal-trade-commission-report-2005/050705gaspricesrpt.pdf; Prepared Statement of the Federal Trade Commission, Market Forces, Anticompetitive Activity, and Gasoline Prices: FTC Initiatives to Protect Competitive Markets (July 15, 2004), https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-market-forces-anticompetitive-activity-and-gasoline/040715gaspricetestimony.pdf.

A. Multi-Homing & Switching Costs

Two common features of multi-sided digital market platforms are relevant to inquiries into whether a firm operating a digital market platform has market power or will obtain, strengthen, or entrench its market power through its unilateral conduct or through agreements with other firms (or through merger).

The first feature is "multi-homing," which occurs when a platform user connects to multiple digital market 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. Multi-homing can occur on only one side of a platform or can occur on more than one side of the platform. 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. Firms operating digital market 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.

The second feature is "switching costs": the cost digital market 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 to obtain, strengthen, or entrench market 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 a digital market platform provider has an incentive to increase the cost or decrease the ease of its customers' ability to switch to or from another service.

B. Network Effects & Multi-Sidedness

The presence of direct[57] and indirect[58] 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 digital market platform; thus, firms designated as having strategic market status should not

[57] 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.

[58] 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.

be placed under conduct requirements or subjected to allegedly pro-competitive interventions merely because of the presence of or strengthening of network effects.

The existence, scope, and strength of direct and indirect network effects are factual questions relevant to a competitive effects analysis. Network effects exist on a continuum: 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.

Strong indirect network effects may make it more likely that an incumbent digital market platform operator can 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 the positive feedback effects of larger digital market platforms. 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. In evaluating whether a merger raises competitive concerns, the Commission should consider whether competition on one side of the platform makes it less likely that a platform can engage in anticompetitive or exclusionary conduct on other sides of the platform. In assessing the effects of post-merger conduct directed only or primarily on one side of the platform, the Commission should consider the degree of competition on other sides of the platform, and any other competitive constraints on the platform.

C. Considerations in Markets Involving Data

Although the use of data to make competitive decisions is not unique to firms operating digital market platforms, firms that operate such 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, time, and characteristics specific to the data. Different data 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, even where it displaces rivals.

Data may be competitively significant for one or more reasons, including its nature (*e.g.*, historical, real-time), breadth and depth (*e.g.*, varied, voluminous), utility (*e.g.*, basis for better analytics or new products and services), and availability (*e.g.*, costly, time-intensive, and hard-to-replicate alternatives). The process by which a firm operating a platform collects, uses, and shares data may also inform the analysis of its conduct. However, the analysis of competitive effects of its conduct 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 are 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 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. Agreements that prohibit customers or trading partners from sharing data are similarly relevant. They are not determinative of competitive effects, however, and may be justified for reasons related to information security, device security, and privacy.

There may be a relevant market for certain types of data or for access to certain types of data. Agreements or policies that allow a firm to limit access to such data can be anticompetitive. But the analysis of the competitive effects of an agreement or policy 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 firm (*e.g.*, 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. However, access to non-competitively sensitive information, and the use of that information, may be procompetitive; for example, it may support entry into the relevant market by the platform operator. This can be welfare-enhancing, even if it allows the platform operator to take sales from the user of the platform.

There may also be scale and scope efficiencies associated with the use, collection, and maintenance of data. The combination of data sets, through agreement or merger, can be complementary and, for example, may lead to 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 (*e.g.*, disease treatment or disease identification).

D. Non-Price Competition, Including Innovation 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.

Effects on non-price competition may be especially in platform markets because price effects may be difficult to detect or measure. Firms operating a digital market 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, as 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. 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.

With respect to effects on output, harm to competition may occur 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.

A competitive effects analysis 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.

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. Agreements with other firms that exclude or prioritize certain relationships may combine complementary assets and increase spending on research, or, more importantly, improve innovative efforts and outcomes.

Both incumbents and entrants, and likewise both large firms and small firms, may engage in innovation that increases consumer 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 be of limited utility. Quantitative evidence should not be necessary to determine that conduct or market conditions may affect innovation.

E. 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 sides 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 merger may create incentives or ability for a firm to change to its approach to earning revenue is a mechanism through which the platform can raise the cost of using a competitor's platform.

XIII. Conclusion

We appreciate the opportunity to comment on the EU Merger Guidelines review. We do not believe significant changes are needed to either the Horizontal or Non-Horizontal Merger Guidelines, but some clarifying principles should be adopted in Revised Guidelines. A guiding principle for the Commission is that the analytic framework adopted in Revised Guidelines, should, for purpose of implementing the EU Merger Regulation, strive to minimize the aggregate sum of the error from both under- and over-enforcement. To best effectuate this, we recommend that: (i) potential anticompetitive harms and potential procompetitive benefits be evaluated using symmetrical standards of proof; (ii) the Commission abandon the distinction between horizontal and non-horizontal mergers, and clarify that all mergers are reviewed under the "ability, incentive, and effect" framework; (iii) any structural screens maintained in the guidelines align with the Commission's experience; (iv) that a focus on innovation be limited to innovation effects in existing and future markets, and the concept of innovation markets be used with substantial care; and (v) guidelines not adopt considerations within the competitive effects analysis that are better left to specific and specialized sector regulators.

Respectfully submitted,

_____/s/_____

Bilal Sayyed
Senior Competition Counsel
TechFreedom
bsayyed@techfreedom.org
1500 K Street NW
Floor 2
Washington, DC 20005

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