DATA, INNOVATION, AND POTENTIAL COMPETITION IN DIGITAL MARKETS – LOOKING BEYOND SHORT-TERM PRICE EFFECTS IN MERGER ANALYSIS

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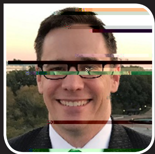

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I. INTRODUCTION

Often, it is possible to analyze the competitive effects of a merger by focusing on price and quantity. If a particular merger
or reduce quantity, we can generally be reasonably con dent that the merger is anticompetitive. The virtues of price and
tend to be readily observable and to lend themselves to empirical analysis. Antitrust practitioners have a variety of too
quantity effects based on sales and diversion data.

For many digital markets, however, relying solely on traditional price-based modeling in merger analysis is likely t
is particularly true in two-sided markets, which involve two distinct sets of customers. Two-sided markets are nothing ne
sought to attract both readers and advertisers for centuries. Banks have sought to attract both creditors and borrowers fo

It is common in two-sided markets for users on one side to subsidize those on the other side. Digital markets are n
digital products and services are often offered to customers for “free.” Examples include Internet search engines, social n
and Twitter, booking engines such as OpenTable and Expedia, and even software such as Adobe PDF.

increase innovative activity."[12]

Antitrust enforcers should and do incorporate innovation effects into our analysis, and the U.S. antitrust agencies' re Horizontal Merger Guidelines include a section that specifically addresses innovation effects.[13] Innovation in the merger context may be a non-p dimension of current competition. It may also be an important factor in assessing the prospects for future competition, pa is planning to enter a market with a new technology.

One argument made against aggressive antitrust enforcement in digital merger cases is that competition enforce able to assess the competitive effects of a particular transaction with sufficient accuracy and across a sufficiently long ti antitrust intervention. While digital markets are often dynamic and fast-moving, the underlying market structure in these m remarkably durable – particularly once a firm achieves a dominant position. The dynamic nature of a market is not, by its refraining from aggressive antitrust enforcement in these markets.

Issues of both innovation and market dynamism were front and center in the U.S. DOJ's challenge to Bazaarv acquisition of PowerReviews, a case that involved online product review and ratings platforms. The DOJ alleged that t previously engaged in "feature driven one-upmanship," and that the transaction "significantly reduced incentives to . . . in[14] An exhibit featured company executives commenting on how Bazaarvoice and PowerReviews had "pushed each other t help[ed] consumers and retailers."[15]

The court in *Bazaarvoice* acknowledged that the social commerce industry was "at an early stage of development fragmented, and subject to potential disruption by technological innovations" and that "the future composition of the in unpredictable."[16] Judge Orrick held, however, that "while Bazaarvoice indisputably operates in a dynamic and evolving field evidence that the evolving nature of the market itself precludes the merger's likely anticompetitive effects."[17]

The FTC confronted the issue of innovation in the context of two-sided markets in its review of *Zillow-Trulia*. Zillow and Trulia both opera websites and mobile apps that provided consumers with free access to residential real estate listings and information. T offerings made up one side of the two-sided platforms managed by Zillow and Trulia; the companies supported these fr advertising products to real estate agents looking to reach those consumers. FTC staff conducted a thorough investiga important conclusions. On the paying side of the platform, staff investigated whether a merged Zillow-Trulia could profita prices to real estate agents. The evidence, however, suggested that real estate agents use numerous methods in add operated by Zillow and Trulia to attract customers.[18] Staff also examined whether the merger would reduce the combined entity's i innovate by developing new features attractive to consumers, ultimately concluding that it would not.[19] While the Commission voted unanimou

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IV. SAFEGUARDING POTENTIAL COMPETITION

Enforcers should look closely for evidence that mergers in digital markets may eliminate potential or future competition. numerous divestitures over the years in pharmaceutical markets based on potential competition concerns. Notably, the cor is not that any current measurable competition between the parties will be lost – but rather, that the loss of a potential ent competitive outcomes in the future. As noted above, this is the approach the FTC took in Nielsen/Arbitron, a case in wh divestiture of competitive assets to protect future competition in the market for cross-platform audience measurement ev itself was still in development.

In 2015, the FTC challenged the merger between Steris and Synergy, the second and third-largest sterilization cor At the time of the merger, Steris was a leading provider of sterilization services in the United States. The Commission planned to enter the United States with a promising new x-ray sterilization technology. According to the Commission, th future competition by terminating Synergy's entry plans, thereby depriving customers of additional competition and a pror technology.[20] The district court judge denied the FTC's request for injunctive relief. There was no dispute that Synergy had eng planning to enter the U.S. market, nor that Synergy's decision to abandon those efforts came only after the company agree The district court disagreed with the FTC, however, that the merger played a role in Synergy's change of heart. It thus failed to show that Synergy "probably would have entered the U.S. contract sterilization market . . . within a reasonable the merger.[21]

Several commentators have suggested that the U.S. antitrust agencies haven't been aggressive enough in bloc dominant firms in the digital space. Some have gone so far as to call on the FTC to "put a hold on all future mergers and ac – and potentially Google and Amazon."[22]

The FTC lacks the authority to categorically ban or "put a hold on" acquisitions by individual companies. Moreo *Steris* case illustrates the practical limitations of potential competition doctrine under the Clayton Act from a litigation perspective. T even though the potential competitor was a large, established company with over half a billion in annual revenues that ha planning to enter the market at issue. Quite often, acquisitions in digital markets involve start-ups that have no or neglig concrete plans to challenge the incumbent directly.

One concern in digital markets is that a powerful incumbent will identify firms that may pose only a small risk of poter dominant position and acquire them. Let's say a dominant digital incumbent acquires 20 firms, each with just a five percen competing directly against it. Much of the debate in this area has to do with disagreement over how much of a threat the upstart must presen to the current incumbent to justify blocking a merger. If the question is whether it is probable that any individual firm would have directly challenged the incumbent, the answer is clearly no.

At the same time, if we look at the twenty acquisitions collectively, there's a roughly 64 percent chance that at leas would have grown to challenge the incumbent but for its acquisition. Looking at each acquisition individually under Sectio is likely to miss the forest for the trees.

To the extent that the acquiring firm possesses monopoly power in a relevant market, that firm's acquisitions sh as potential Sherman Act Section 2 violations. In 2017, the FTC challenged Mallinckrodt ADR's acquisition of synthetic assets from Novartis under Section 2. The FTC's complaint referred to the acquisition as a "defensive move" by Mallinck

20 Complaint, *In the Matter of Steris Corp. and Synergy Health PLC*, Dkt. No. 9365 ¶¶ 68-70 (May 29, 2015), https://www.ftc.gov/system/files/documents cases/150529sterissynergypart3cmpt.pdf.

21 FTC v. Steris Corp., 133 F. Supp. 3d 962, 978 (N. D. Ohio 2015).

22 Lynn & Stoller, *How to Stop Google and Facebook from Becoming Even More Powerful*, The Guardian, Nov. 2, 2017, https://www.theguardian.com/ commentisfree/2017/nov/02/facebook-google-monopoly-companies.

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