



**Competition in Digital Technology Markets:
Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms**

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Subcommittee on Antitrust, Competition and Consumer Rights**

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Thank you Chairman Lee, Ranking Member Klobuchar, and Members of the Subcommittee. It is an honor to be here today to lend the [American Antitrust Institute's](#) (AAI's) perspective to the issue of competition in digital technology markets. AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. We serve the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. As the leading progressive organization dedicated to promoting competition, AAI is pleased that lawmakers in the U.S. Senate have turned their attention to the questions surrounding antitrust enforcement and competition policy in the digital technology sector.

I. Introduction

The term “Big Tech” is often used to describe the five largest multinational online service or computer hardware and software companies: Amazon, Apple, Facebook, Google, and Microsoft. These companies hold the top slots, by market value, for all publicly traded firms. The growth of Big Tech over the past three decades is a function of forces ranging from network effects and winner-take-all markets, to organic growth resulting from innovative business models and technologies, and expansion through serial acquisitions of nascent or potential rivals.

AAI recently analyzed several decades of enforcement data for a major category of commerce involving the digital technology industry. Detailed analysis and references are contained in the White Paper [THE WEAK RECORD OF MERGER ENFORCEMENT IN BIG TECH](#). We compared sector-specific enforcement statistics with those across all sectors, as reported in the Department of Justice (DOJ) and Federal Trade Commission (FTC) Hart Scott Rodino (HSR) Annual Reports to Congress. AAI's analysis reveals that the DOJ and FTC have more intensely scrutinized transactions in the digital technology sectors than the average across all sectors. However, the agencies' rate of merger challenges in federal court is far lower than the all-sector average.

The “weak” record of U.S. merger enforcement prompts a number of questions and potential concerns. My testimony today will (1) briefly describe the record of merger enforcement in digital technology markets; (2) explore the likely reasons why enforcement might be weak; and (3) suggest potential ways to invigorate antitrust enforcement, for the benefit of competition, consumers, and innovation.

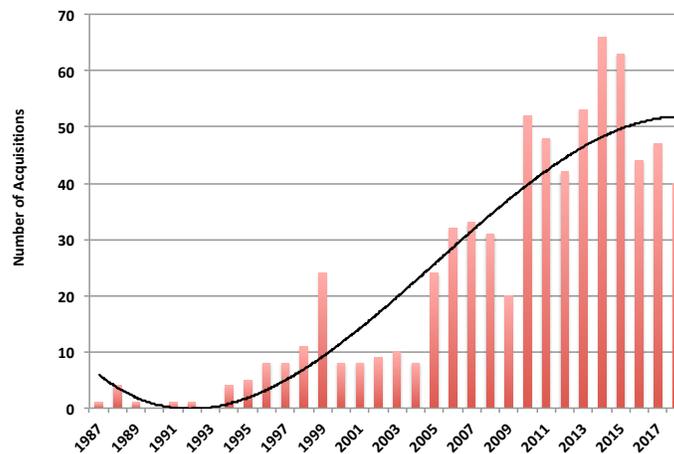
II. Big Tech Ecosystems

Digital technology firms have been described as encompassing online ecosystems of exchange and collaboration, through which myriad services are available to intermediate and end users. These include business-to-consumer (B2C) markets such as search, news and content, video, advertising, social networking, locational services, and online retail. Digital technology firms also draw from a common set of inputs, ranging from software, business intelligence, and artificial intelligence. Many of these products and services are exchanged in business-to-business (B2B) markets. Some digital technology companies feature a “platform,” or set of technologies with which other technologies, applications, or processes interoperate. Several digital technology firms also feature multi-sided exchanges or markets that bring together providers and/or users of services, in which the platform owners themselves compete against independent rivals.

III. Acquisitions Have Increased Rapidly Since 2005

As shown in the figure below, the Big Tech firms made over 700 acquisitions of nascent or potential rivals in the last 32 years or, on average, over 20 acquisitions per year. One cycle of acquisitions began in 2005, peaked in 2007, and ended in 2009. A much bigger cycle began in 2010, peaked in 2014-15, and appears to be in decline. The average annual rate of increase in acquisitions over the entire period 1987-2018 is almost 20% per year.

Big Tech Acquisitions (1987-2018)



As shown in the table below, between 1987 and mid-2019, Google accounts for the largest percentage of total acquisitions (32%), averaging about 13 acquisitions per year. This is followed by Microsoft, with 31% of total transactions and seven acquisitions per year; Apple with 15% of the total and about three acquisitions per year; and Amazon and Facebook,

each with about 11% of total transactions and about four and seven acquisitions per year, respectively.

Acquisitions by Big Tech (1987-2019)

Company	Amazon	Apple	Facebook	Google	Microsoft
Years Active	1998-2019	1988-2019	2007-2019	2001-2019	1987-2019
# of Acquisitions	83	108	77	234	221
Avg. Annual # of Acq.	4	3	7	13	7
Percent of total	11%	15%	11%	32%	31%

IV. The Rate of Merger Challenges in a Digital Technology is Much Lower Than the Average Across All Sectors

The HSR Annual Reports issued by the DOJ and FTC report statistics on numerous industry areas, including Internet Service Providers, Web Search Portals, and Data Processing Services (NAICS code 518). This code, first reported in 2001, is a primary identifier for the businesses in which many of the digital market players participate. Just under 240 transactions were reportable to the antitrust agencies between 2001 and 2018, over 80% of which were closed after early stage review. The agencies more extensively investigated (i.e., through a second request and beyond) nine of those cases. This is just under 25%, as a percentage of deals cleared to the agencies. Only one deal was challenged in federal district court (the DOJ’s case against Google-ITA Software, Inc.), or about 2.5%, as a percentage of deals cleared to the agencies.

Comparing enforcement statistics for the digital technology sector to those across all sectors leads us to the following observations. First, the percentage of digital technology cases that were closed after early stage review is about the average across all sectors. Second, the agencies’ combined rate of second requests in digital technology cases is almost 20% higher than across all sectors. While FTC’s rate of second requests is over 60% higher than the agency’s rate of second requests across all sectors, the DOJ’s is 25% lower. Finally, the rate of agency challenges in digital technology is over 80% lower than the average for transactions across all sectors.

The foregoing relationships between early stage reviews, more extensive investigations, and challenges for transactions involving digital technology mergers is important. It indicates that while transactions received average scrutiny in early stage review, they received more than average scrutiny in later stage review, perhaps because of the unique issues they raise. But the enforcement data indicate that the agencies ultimately are not finding that transactions raise competitive concerns, or are finding that they raise the kind of competitive concerns that the agencies are not comfortable challenging.

V. Making Sense of the Weak Record of Merger Enforcement in Digital Technology Markets

Digital Technology firms have been effective in expanding their positions in B2C and B2B markets. This expansion has occurred at a very rapid pace, which in itself warrants close monitoring by the antitrust agencies. More important, the weak record of merger enforcement in digital technology should prompt further inquiry. The following factors potentially explain this limited record of merger enforcement.

- 1. Digital market firms may purposely and strategically pursue deals that are unlikely to trigger antitrust concerns.** These include acquisitions that are not reportable under the HSR requirements and smaller, reportable transactions that are likely to fly below the antitrust radar. In pursuing such a strategy, digital technology firms may have succeeded in embarking on mergers that are pro-competitive or benign. But given the significant record of serial acquisitions by Big Tech over the last three decades, it is imperative that enforcers broaden their lens to consider the longer-term implications of such a strategy on market concentration and barriers to entry.
- 2. The agencies are reluctant to make competitive concerns surrounding acquisitions of nascent or potential rivals the basis of a complaint in federal court.** This is based on the assumption that the agencies apply error cost analysis under conditions of uncertainty, which may lead them to unfavorably compare the costs of mistakenly challenging benign or pro-competitive deals to the cost of mistakenly not challenging anticompetitive deals. This factor is at the center of larger debates over the last many years and, in AAI's view, continues to stymie more vigorous antitrust enforcement.
- 3. Enforcers perceive that they have an inadequate set of tools to deal with the complexity raised by digital technology mergers.** Digital platforms exhibit, among other features, returns to scale and network effects, both of which contribute to winner-take-all scenarios. These issues could challenge enforcers in assessing whether mergers in some digital technology markets are likely to substantially lessen competition. Enforcers' perceptions that they lack the tools or expertise to fully or effectively litigate a digital technology merger case, in turn, increase the perceived risk of losing in court, with negative implications for future enforcement.
- 4. Because of unique characteristics of digital technology markets, acquisitions may raise concerns that are not reachable under current merger presumptions.** This reason recognizes that some digital technology acquisitions that eliminate nascent or potential rivals raise concerns are cognizable under antitrust law. However, such concerns may not be reachable in practice because evidentiary standards are currently too high.

For the purposes of this hearing, I would like to focus on the third and fourth potential explanations for weak merger enforcement in digital technology markets. They raise important issues support initiatives to invigorate enforcement.

VI. Enforcers Have Adequate Tools to Review Acquisitions in Digital Technology Markets

There are a number of features of digital technology markets that enforcers may perceive pose challenges for antitrust review. First, the metric of exchange in many digital technology markets (e.g., social media) is consumer data, not price. Potential adverse effects in these “zero-price” markets may include requiring users to provide more consumer data or linking the quality of service to the provision of data. Some digital technology spaces also feature multi-sided markets, which bring together providers and users of a service or product on either side of an exchange. Second, many digital market mergers can have effects on non-price dimensions of competition such as quality. One aspect of quality is whether a merger will change the firm’s incentives around the protection of user privacy.

Third, digital technology mergers raise issues in narrowly defined markets such as advertising or locational services. But they may also strengthen incentives to leverage market power across related markets in which a firm possesses significant market power (e.g., search or online retailing). Finally, many digital technology mergers, particularly involving B2B markets such as cloud infrastructure or software, present vertical issues relating to the competitive effects of combining assets in adjacent markets.

Evidence from previous enforcement investigations, coupled with legal-economic research, support the notion that antitrust has most if not all of the tools it needs to address competitive issues raised in digital markets. For example, zero-price and multi-sided markets are well within the reach of the consumer welfare standard, which accommodates different market definitions and both price and non-price effects. Agency statements indicate that enforcers are comfortable addressing these issues.

For example, in Google-DoubleClick, the FTC issued a press release and closing statement noting that it investigated the effect of the acquisition on the online advertising market, as well as the possibility that the transaction could adversely affect consumer privacy. Likewise, DOJ issued a press release in the Google-Admeld stating it had investigated concerns over adverse effects in the online display advertising market but *also* the possibility that the transaction would enable Google to extend its market power in Internet search to the display advertising market.

Finally, vertical mergers are standard fare for enforcers. The DOJ challenged Google’s acquisition of ITA Software, Inc. because the merger enhanced Google’s incentives to foreclose rival online comparative flight search services from access to ITA’s airfare pricing and shopping system. European enforcers also explored how Apple’s newly acquired access to data about its rivals’ customers through its acquisition of music recognition application Shazam could hamper competition.

In sum, what we know about enforcement agencies’ approach to digital technology mergers supports the notion that they do not pose insurmountable complexity. Enforcers have the tools, they just need to use them.

VII. Current Merger Presumptions May be Inadequate for Digital Technology Acquisitions

The record supports the idea that antitrust enforcers have adequate tools to evaluate competitive effects in digital technology markets. We therefore may need to look elsewhere for the reason for weak enforcement. Namely, some competitive concerns that are cognizable under antitrust law may not be reachable in practice because evidentiary standards are currently too high. This explanation for weak enforcement is compelling. It is likely to be compounded by the Horizontal Merger Guidelines' focus on narrowly defined markets and "one acquisition at a time." The rapid series of digital technology acquisitions over the past few decades supports the idea that enforcers should attempt to expand the lens through which they evaluate serial transactions, with emphasis on the longer-term effects of such consolidation.

Leading economists have identified the challenges that digital technology acquisitions pose. For example, economist Carl Shapiro explains that superstar firms possess durable competitive advantages over rivals, the conditions under which mergers are most likely to lessen competition and harm consumers. Economist John Kwoka notes that adding functions to a basic platform makes competition and entry more difficult, reduces choice, and may eliminate incentives to innovate. Both economists have put forward proposals for stronger presumptions for digital technology acquisitions. This includes an affirmative burden on the company proposing the acquisition to justify the acquisition and lowering the evidentiary requirements necessary for the government to prevail in a potential competition case by showing that the target firm is reasonably likely to become a rival.

VIII. Conclusions and Recommendations

The foregoing analysis of merger enforcement in the digital technology sector provides strong support for why lawmakers and enforcers should consider a variety of ways to invigorate merger enforcement. I want to make it clear that antitrust is a leading policy instrument for addressing some, but not all of the myriad concerns raised by the digital technology markets. As a mechanism of law enforcement that relies on an investigatory and evidence-based process and is subject to judicial review, antitrust is ill suited to address broader social policy concerns raised by some of the large digital technology players.

Moreover, antitrust is not designed to be used as a tool to implement industrial policy, including through comprehensive breakups that are not tailored to identifiable competitive harms. Doing so could stymie enforcement at a time when we need to strengthen, clarify, and invigorate antitrust. Antitrust should address competition concerns as a leading policy tool in a portfolio approach that potentially includes social regulation, economic regulation, access and interoperability standards, and other policies.

I respectfully suggest a number of policy proposals to address weak merger enforcement in the digital technology sector.

- 1. Stronger merger presumptions are needed for acquisitions in the digital technology sector and should be a leading tool for invigorating effective merger enforcement.** These include the presumptions for acquisitions of nascent and potential

rivals, as described above. But given that many of digital technology acquisitions are vertical mergers, stronger vertical presumptions should also be considered. This includes rebuttable presumptions surrounding the effect of high market share in upstream or downstream markets on enhancing incentives to foreclose rivals. And the structural presumption in highly concentrative horizontal mergers involving digital technology markets should be rigorously applied.

2. **Retrospective analysis of consummated mergers involving digital technology acquisitions is essential for determining which consummated deals should be challenged.** Retrospective analysis of mergers is vital for determining if certain digital technology mergers resulted in higher prices, lower quality, less choice, or slower innovation. If concerns are identified, the agencies should use the full scope of their authority to bring challenges to consummated mergers under Section 7 of the Clayton Act and use fully effective remedies to restore competition lost by the acquisitions.
3. **Improved agency transparency on digital technology merger actions would provide valuable information to the business community, consumers, and entrepreneurs.** This includes more expansive press releases and/or closing statements for important acquisitions where the agencies investigated but took no enforcement action. Appropriately framed explanations as to why the agencies reached the decisions they did would provide important information without hampering the agencies' flexibility in future transactions.
4. **A “blue ribbon” committee should be formed and tasked with evaluating the need for a new Digital Markets Act.** The committee would evaluate the goals and parameters of potential legislation for a sectoral oversight authority. This includes an independent regulatory body with authority to implement and enforcement any new regulation surrounding digital market privacy, access, and interoperability. The committee would also frame out how such a regulator would work with antitrust enforcers to advise on technical matters that affect competition.