The Record of Weak U.S. Merger Enforcement in Big Tech

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"As the pace of innovation accelerates, and top talent joins startups rather than large companies, startups might become threats faster than you can buy them." – John Chambers, Chairman Emeritus, Cisco, 2018[2]

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 five of the top six slots, by market value, for publicly traded firms.[3] The growth of Big Tech over the past three decades is a function of numerous forces. These range from economic phenomena such as network effects and winner-take-all markets, organic growth resulting from innovative business models and technologies, to expansion through a series of acquisitions of smaller, potential, or nascent rivals.

While Big Tech has undoubtedly produced benefits, significant concerns have coalesced around it. The growth of Big Tech has created controversy over the companies' role in our society and raised a suite of competition issues that are attracting attention from Congress and enforcers.[4] These include effects on innovation and market entry; incentives to compete

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[2] Cyril Ebersweiler and Benjamin Joffe, *10 key lessons about tech mergers and acquisitions from Cisco's John Chambers*, techcrunch.com, Dec. 2018, https://techcrunch.com/2018/12/23/twelve-key-lessons-about-tech-mergers-and-acquisitions-from-ciscos-john-chambers/.

[3] *The Worlds Largest Public Companies, 2019 Ranking*, Forbes.com, https://www.forbes.com/global2000/list/#header:marketValue_sortreverse:true.

[4] Federal Trade Commission, Hearings on Competition and Consumer Protection, Hearing #3: Multi-Sided Platforms, Labor Markets, and Potential Competition, October 15-17, 2018, https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century; *See* also U.S. House Committee on the Judiciary, Online Platforms and Market Power, Part 1: The Free and Diverse Press, June 11, 2019,

on price and non-price dimensions of competition such as privacy; and the potential for artificial intelligence-driven algorithmic pricing to facilitate coordinated conduct.[5]

The debate over the size and alleged dominance of Big Tech companies has promoted wide-ranging proposals to use the antitrust laws to break them up.[6] But few of these proposals are driven by a methodological, fact-based analysis. Such analysis would explore the strategic competitive abilities and incentives that are specific to different Big Tech business models, how the companies compete in a variety of individual markets and clusters of related markets, and how alleged conduct potentially runs afoul of the U.S. antitrust laws. Breakup proposals therefore "put the cart before the horse" and fail to provide needed support for more vigorous antitrust enforcement and beneficial reform proposals.

This American Antitrust Institute (AAI) White Paper offers a fact-based analysis of one important component of a broader assessment of the competitive issues surrounding Big Tech. It focuses on Big Tech's acquisition of over 720 smaller, potential, and nascent rivals over almost the last three decades.[7] As is typical of M&A activity, only a portion of these transactions were reportable to the U.S. antitrust agencies under the Hart Scott Rodino Act (HSR) federal premerger reporting requirements.[8] A closer look at enforcement data for one major Big Tech industry category reveals that while the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) appear to have subjected a higher than average number of transactions to more extensive agency investigation, only one deal has been challenged in federal court.

It does not come as a surprise therefore that the record of U.S. merger enforcement in an important Big Tech industry category is far lower than the record across all sectors, as defined by the rate of merger challenges in federal court. This statistic warrants further inquiry. This White Paper does not investigate whether serial acquisitions by Big Tech companies have created dominance in certain markets, or if they engage in conduct that violates the antitrust laws. Those questions should be the subject of appropriately framed merger retrospectives and antitrust agency inquiries, including the DOJ's reported investigation into Google.[9] Rather, the analysis herein explores the various reasons why enforcement might be weaker in Big Tech and the policy implications raised by those explanations.

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https://judiciary.house.gov/legislation/hearings/online-platforms-and-market-power-part-1-free-and-diverse-press.

[5] *See, e.g.*, Ariel Ezrachi and Maurice E. Stucke *Artificial Intelligence & Collusion: When Computers Inhibit Competition*. 2017 University of Illinois Law Review (2017), available at https://ssrn.com/abstract=2591874; *see also*, U.S. Department of Justice, *Assistant Attorney General Makan Delrahim Delivers Remarks at the Federal Telecommunications Institute's Conference in Mexico City*, Nov. 7, 2018, https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-federal-institute.

[6] *See, e.g.*, Elizabeth Warren, *It's Time to Break Up Google, Amazon, and Facebook*, https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c.

[7] Cecilia Kang et al., *Justice Dept. Explores Google Antitrust Case*, N.Y. TIMES (May 31, 2019), https://www.nytimes.com/2019/05/31/business/google-antitrust-justice-department.html.

[8] For an explanation of the HSR premerger program, *see* Federal Trade Commission, *Premerger Notification Program*, https://www.ftc.gov/enforcement/premerger-notification-program.

[9] The Wall Street Journal, *The FTC Report on Google's Business Practices*, Mar. 24, 2015, http://graphics.wsj.com/google-ftc-report/.

The AAI has provided independent, in-depth legal, economic, and policy analysis of antitrust and competition issues for over 20 years. The organization has been outspoken on the issue of competition in the tech sector through its research, education, and advocacy agenda and initiatives.[10] This White Paper begins with an empirical review of the acquisition history of Big Tech and the U.S. antitrust agencies' limited record of merger enforcement in a major industry area in which many Big Tech firms operate. It then unpacks the limited merger enforcement record and examines why it can and should be invigorated.

II. Big Tech Has an Acquisitive History

A. A Note on the Confusion Surrounding Classifications of "Big Tech"

It is often assumed that Big Tech companies all share the same business model and form of economic organization. This is inaccurate. Generally, the Big Tech firms encompass online "ecosystems of exchange and collaboration," through which myriad services are available to intermediate and end users.[11] These include, among others, business-to-consumer (B2C) markets such as search, news and content, video, advertising, social networking, locational services, online retail, and productivity tools. Some Big Tech companies feature a "platform," or set of technologies with which other technologies, applications, or processes interoperate. Several Big Tech firms also feature multi-sided exchanges or markets that bring together providers and/or users of services, in which the platform owners often compete against independent rivals.

Antitrust should be sensitive to the foregoing types of distinctions, since they bear directly on the companies' strategic competitive incentives and abilities. One feature that most of the

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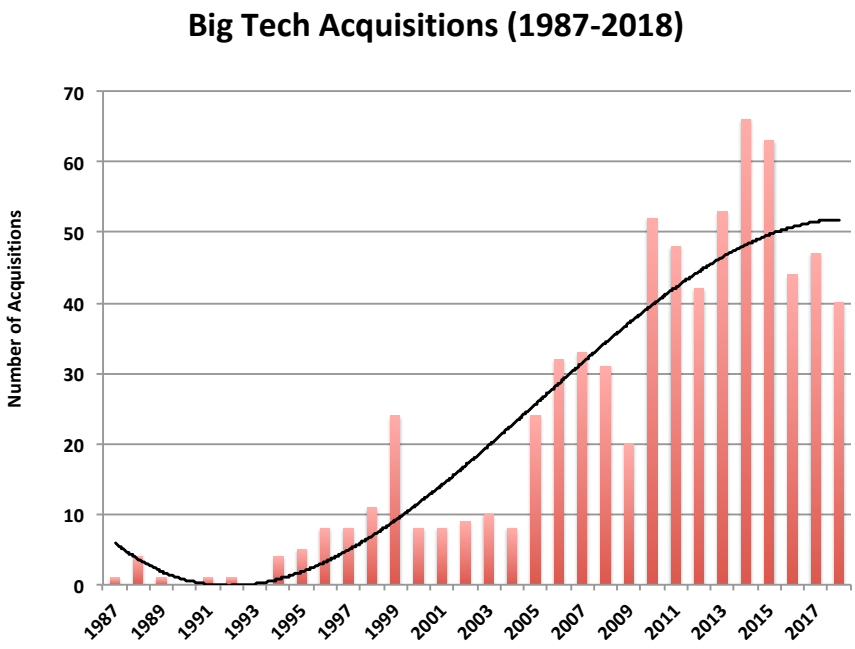
[10] *See, e.g.*, *AAI Digital Platforms Roundtable*, event materials available at https://www.antitrustinstitute.org/event/aai-digital-platforms-roundtable/; *Moss Tells Washington Post That the Antitrust Laws Can and Should Be Applied to the Tech Platforms*, July 25, 2018, https://www.antitrustinstitute.org/moss-tells-washington-post-that-the-antitrust-laws-can-and-should-be-applied-to-the-tech-platforms/; AAI President, Diana Moss, participated in the Federal Trade Commission's Hearings on Competition and Consumer Protection: Hearing #3: Multi-Sided Platforms, Labor Markets, and Potential Competition, Nascent Competition: Are Current Levels of Enforcement Appropriate?, Oct. 17, 2018, https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century; American Antitrust Institute, *Google Acquisition of DoubleClick: Antitru*st Implications (urging the FTC to block the merger of Google and DoubleClick), Nov. 6, 2007, https://www.antitrustinstitute.org/wp-content/uploads/2018/08/Google_DoubleClick_memo_110620071437.pdf; American Antitrust Institute, *Analysis of the FTC's Decision Not to Block Google's Acquisition of AdMob* (raising the question of whether a mobile advertising market that is dominated by Google and Apple ad networks will provide insufficient competition to protect advertisers, mobile web publishers and developers), June 7, 2010, https://www.antitrustinstitute.org/wp-content/uploads/2010/06/google-admob-white-paper_060720101348.pdf; American Antitrust Institute, *An Examination of the Antitrust Issues Posed By Google's Acquisition of ITA* (concluding the merger warrants serious consideration of a challenge), Feb. 18, 2011, https://www.antitrustinstitute.org/wp-content/uploads/2018/08/Google-ITA-AAI-White-Paper2.18.11.pdf; American Antitrust Institute, *NPR's Morning Edition Talks Big Tech with Diana Moss* (stressing that public and private enforcers should bring more cases involving Big Tech), June 11, 2019, https://www.antitrustinstitute.org/nprs-morning-edition-talks-big-tech-with-diana-moss/.

[11] Garces, Eliana, The Dynamics of Platform Business Value Creation (August 2017). CPI Antitrust Chronicle, August 2017, https://ssrn.com/abstract=3138924.

Big Tech firms share is that they draw from a common set of inputs. These range from various types of software, business intelligence, artificial intelligence, cyber-security systems, developer tools, communications, payment systems, and the like. Many of these products and services are exchanged in business-to-business (B2B) markets.

B. Big Tech Acquisitions Have Increased Rapidly Since 2005

Data on Big Tech acquisitions reveal that the five firms made over 700 acquisitions in the last 32 years, or over 20 acquisitions per year.[12] Total acquisitions from 1987-2018 are shown in the graph below. The graph shows one cycle of acquisitions beginning in about 2005, peaking in 2007, and ending in 2009. But a much bigger cycle is obvious beginning in 2010, peaking in 2014, declining somewhat since then, but without enough data to determine an endpoint. The average annual rate of increase in acquisitions over the entire period 1987-2018 is almost 20% per year. During the first, shorter cycle, the average annual rate of acquisitions rose to almost 30%.



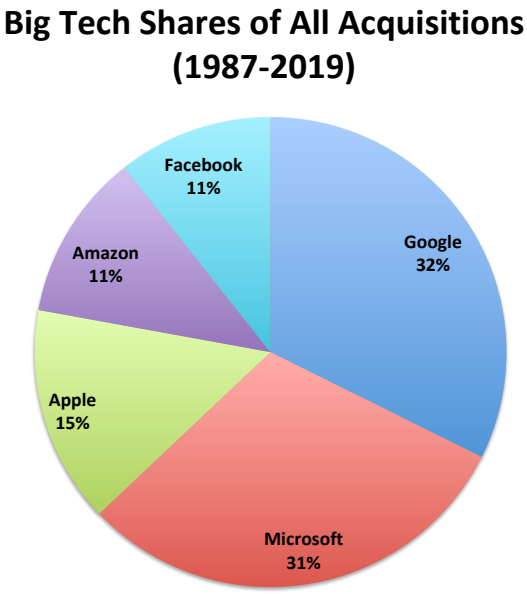
As shown in the table and chart below, between 1987 and 2019 to date, Google accounts for the largest percentage of total acquisitions (32%) and has averaged about 13 acquisitions per year. This is followed by Microsoft, with 31% of total transactions and an average of seven acquisitions per year; Apple with 15% of the total and an average of about three per year;

[12] CrunchBase Pro search engine, https://about.crunchbase.com/market-research/. Data were cross-checked against other sources, when available, including: Ramzeen A V, *72 Facebook Acquisitions – the Complete List (2019)!* June 17, 2019, Techwyse.com, https://www.techwyse.com/blog/infographics/facebook-acquisitions-the-complete-list-infographic/; *Google Acquisition Tracker*, CBInsights.com, https://www.cbinsights.com/research-google-acquisitions -; and *Microsoft Acquisition Tracker*, CBInsights.com, https://www.cbinsights.com/research-microsoft-acquisitions.

and Amazon and Facebook, each with about 11% of total transactions and an average of 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



III. The Rate of Merger Challenges in a Major Big Tech Industry Category is Much Lower Than the Average Across All Sectors

In 2001 the DOJ and FTC began to report more specifically on HSR transactions using NAICS codes. This makes it easier to identify industry categories in which some Big Tech firms do business. The HSR reports have consistently defined and reported on NAICS code 518 – data processing, hosting, and related services – which is a primary identifier for Google, Amazon, and Facebook.[13] They are, however, not the only companies that operate in this industry code and where just over 200 transactions were reportable to the antitrust agencies between 2001 and 2017.[14] Nine of these transactions received a second request for

[13] NAICS codes have been subject to revision over time. Big Tech companies operate in a number of 3-digit NAICS code areas. *See* North American Industry Classification System, queried for NAICS code 518 on June 23, 2019, https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=518&search=2017%20NAICS%20Search. The HSR reports define this code as: Internet service providers, web search portals, and data processing services.

[14] Data obtained from *Hart-Scott-Rodino Annual Report (HSR Report)*, filed under Section 7A of the Clayton Act, Hart-Scott-Rodino Antitrust Improvements Act of 1976, years 2001-2017, https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports; *see* Table X: Industry Group of Acquiring Person. Reports Were Queried for NAICS Code 518, years 2001 through 2017.

more information by either the DOJ or FTC. Only one deal was challenged in federal district court, by the DOJ, in the Google-ITA Software, Inc. matter.[15]

We can make several observations about the foregoing merger enforcement statistics for data processing, hosting, and related services. First, more than 80% of transactions, as a percentage of clearances to either agency, were closed after early stage or initial review over the period 2001-2017. This is about the average across all sectors.[16] Second, the agencies subjected transactions to more extensive investigation (i.e., a second request and beyond) in more than 25% of cases. This rate is above the average for second requests across all sectors, which is just under 20%. The FTC's rate of second requests is almost double that of the agency's rate of second requests across all sectors, while the DOJ's is about the same.

Third, the rate of agency challenges involving transactions in the area of data processing, hosting, and related services was far lower than the average for all transactions. As noted, only one Big Tech acquisition was challenged in federal court between 2001 and 2017. This rate, as a percentage of transactions cleared to the agencies over the period, is about 3%, as compared to the 13% average challenge rate across all sectors.[17] The FTC's challenge rate is 0%, as compared to a 12% challenge rate across sectors. The DOJ's challenge rate is about 7%, as a result of the one case they brought and settled in Google-ITA Software Inc., as compared to a 17% challenge rate across all sectors.

The relationship between early stage reviews, more extensive investigations, and challenges for transactions involving data processing, hosting, and related services – a key area of commerce for many of the Big Tech companies – 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 also 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.

IV. Making Sense of the Limited Record of Merger Enforcement in Big Tech

Big Tech firms have been effective in expanding their positions in B2C markets such as advertising, locational services, online shopping, and social networking. But they have also been active in expanding in B2B markets such as business intelligence, data analytics, and cloud computing. 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

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[15] *U.S. v. Google, Inc. and ITA Software, Inc.*, Complaint, Case 1:11-cv-00688, April 8, 2011, https://www.justice.gov/atr/case-document/file/497686/download. The DOJ's classification of the transaction includes the term "web search portals." See, Antitrust Case Filing's search page, https://www.justice.gov/atr/antitrust-case-filings.

[16] *See* Federal Trade Commission, Early Termination Notices, queried for each of the Big Tech companies and their holding companies, https://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notices. The rates of clearance to an agency for initial review were obtained from annual HSR reports. See *supra* note 14.

[17] *Supra* note 14. Mergers challenged in federal court by the agencies are not reported in tabular form in the HSR reports. Rather, the reports provide summaries of each transaction in the section titled "Developments in the Premerger Program."

enforcement in Big Tech should prompt further inquiry. Multiple factors are likely to explain the limited record of merger enforcement in Big Tech.

1. **Big Tech 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 theory it is possible that in pursuing such a strategy, Big Tech has succeeded in only embarking on mergers that are pro-competitive or benign. Economic retrospectives of consummated Big Tech acquisitions are likely to provide the type of information and analysis that would aid in this determination.

2. **The agencies are reluctant to make competitive concerns surrounding acquisitions of smaller, potential, or nascent rivals the basis of a complaint in federal court.** [18] This is, of course, an age-old story. It involves the agencies' implicit application of 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.[19] Because error cost analysis has driven outcomes in past merger enforcement, it should be considered as a likely candidate for why enforcers may not be bringing cases involving Big Tech acquisitions.[20]

3. **Enforcers have an inadequate set of tools to deal with the complexity raised by Big Tech business models, economics, and strategic incentives.** Economist Jean Tirole recently noted: *"[A]t the platform level, competition confronts the existence of large returns to scale and/or network externalities, leading to natural monopoly situations and a winner-take-all scenario."*[21] This description sums up many of the issues that could challenge enforcers in assessing whether mergers in some Big Tech markets are likely to substantially lessen competition. Without the tools to fully or effectively litigate a Big Tech merger case, for example, enforcers may perceive a higher risk of losing in court, with negative implications for future enforcement.

4. **Because of some of the unique characteristics of Big Tech firms, their acquisitions raise concerns that are not reachable under current merger presumptions.** This is a troubling potential reason for why the enforcement record in Big Tech could be so low. It focuses on the notion that acquisitions of smaller, potential, and nascent competitors are cognizable under antitrust law but not reachable in practice because evidentiary standards are currently too high.

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[18] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010), available at http://www.justice.gov/atr/public/guide lines/hmg-2010.pdf.
[19] *See, e.g.,* Diana L. Moss, *Merger Policy and Rising Concentration: An Active Agenda for Antitrust Enforcement*, 33 ANTITRUST (Fall 2018).
[20] *See, e.g.,* Jonathan B. Baker *Taking the Error Out of 'Error Cost' Analysis: What's Wrong with Antitrust's Right*, 80 Antitrust Law Journal (2015), https://ssrn.com/abstract=2333736 or http://dx.doi.org/10.2139/ssrn.2333736.
[21] Allison Schrager, *A Nobel-winning economist's guide to taming tech monopolies*, June 27, 2018, qz.com, https://qz.com/1310266/nobel-winning-economist-jean-tirole-on-how-to-regulate-tech-monopolies/.

The first and second potential explanations above for why merger enforcement in Big Tech is low are difficult to expand on because they require more sophisticated empirical analysis garnered through merger retrospectives that are beyond the scope of this White Paper. However, the third and fourth potential explanations raise important issues of enforcement and policy that are worth exploring here.

V. The Complexity of Big Tech Mergers Does Not Explain Weak Enforcement

There are a number of features of Big Tech markets that might pose challenges for antitrust enforcers under the current interpretation of the law and the consumer welfare standard. However, anecdotal evidence based on previous enforcement investigations and actions, coupled with legal-economic research, both point strongly in the direction that antitrust has the tools it needs to address competitive issues raised by Big Tech.

1. **Zero-Price and Multi-Sided Markets –** Many B2C markets in which some of the Big Tech companies participate do not involve a price-based metric of exchange. Rather, the metric centers on the provision of consumer information or attention, such as in social networking, or locational services. The nature of these "zero-price" markets means that antitrust analysis must focus on a non-price metric of exchange.[22] Rather than paying a price for a service, users can be required to provide more (or different) consumer data, receive quality of service that is positively related to their provision of data, or be forced to interact with a platform in ways that impose additional costs on the user. Likewise, some Big Tech companies feature multi-sided markets, which bring together providers and users of a service or product on either side of an exchange. These concepts are not beyond the reach of the consumer welfare standard, which can accommodate a variety of market definitions and the effects of consolidation or conduct on price and non-price dimensions of competition.

2. **Evaluating the Non-Price Dimensions of Competition –** Information gleaned from DOJ and FTC press releases and closing statements in past Big Tech acquisitions indicates that enforcers have already addressed a range of price and non-price dimensions of competition. For example, in Google-DoubleClick, the FTC furnished a press release noting that it investigated the effect of the acquisition on the online advertising market,[23] but *also* issued a closing statement stating that it investigated the possibility that the transaction could adversely affect non-price attributes of competition, such as consumer privacy.[24]

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[22] *See, e.g.*, John M. Newman, Antitrust in Zero-Price Markets: Foundations, University of Pennsylvania Law Review, 164 (2015), https://ssrn.com/abstract=2474874.

[23] Federal Trade Commission, *Federal Trade Commission Closes Google/DoubleClick Investigation Proposed Acquisition Unlikely to Substantially Lessen Competition,* Dec. 20, 2007, Https://Www.Ftc.Gov/News-Events/Press-Releases/2007/12/Federal-Trade-Commission-Closes-Googledoubleclick-Investigation

[24] Federal Trade Commission, *Statement of Federal Trade Commission Concerning Google/Doubleclick*, FTC File No. 071-0170, Dec. 20, 2017, at 2-3, https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf. In the Facebook-WhatsApp acquisition, the FTC staff issued a letter stating that the Commission would hold WhatsApp to their privacy commitments in connection with the acquisition, namely, honoring its privacy policies, which were stricter than Facebook's. The letter was issued by the Bureau of Consumer Protection, not the Bureau of Competition. Failure to do so would

3. **Leveraging Market Power Across Multiple Markets –** Enforcers have investigated the effects of Big Tech mergers on more narrowly defined markets. But they have also explored the notion that an acquisition might strengthen incentives to leverage market power across related markets in which they possess market power. For example, DOJ stated in its press release in the Google-Admeld case that it had investigated concerns over adverse effects on competition 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.[25]

4. **Vertical Issues Involving Big Tech Acquisitions –** Many of the competitive issues presented by some Big Tech mergers that involve B2B markets are standard fare for enforcers. For example, DOJ's challenge to Google's acquisition of ITA Software, Inc. was based on the theory that the merger enhanced incentives for Google to foreclose rival online comparative flight search services from access to ITA's airfare pricing and shopping system to Internet travel sites.[26] 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 enhance its ability to target such customers and encourage them to switch to Apple Music.[27]

In sum, what we know about the U.S. enforcement agencies' approach to Big Tech mergers supports the notion that they do not pose insurmountable complexity. The agencies appear to have tackled numerous issues that, had they failed to recognize or address them in their investigations, could otherwise explain weaker enforcement. In reflecting on the Microsoft cases in AAI's 2006 documentary film, Fair Fight in the Marketplace, Judge Thomas Penfield Jackson of the U.S. District Court for the District of Colombia aptly noted, *'I didn't see any reason why conventional antitrust analysis couldn't be used to approach the problems represented here. We're talking about markets, we're talking about consumers, we're talking about consumer choice, we're talking about the pricing of commodities.'*[28] Just as Judge Jackson's sentiment applied to Microsoft two decades ago, it also applies to Big Tech today.[29]

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constitute a violation of Section 5 of the Federal Trade Commission Act. *See* Letter From Jessica L. Rich, Director of the Federal Trade Commission Bureau of Consumer Protection, to Erin Egan, Chief Privacy Officer, Facebook, and to Anne Hoge, General Counsel, WhatsApp Inc., Reminding Both Firms That WhatsApp Must Continue To Honor Its Promises To Consumers With Respect to the Limited Nature of the Data It Collects, Maintains, and Shares With Third Parties, Apr. 10, 2014, https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatapplt r.pdf.

[25] U.S. Department of Justice, *Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of Google Inc.'s Acquisition of Admeld Inc.*, Dec. 2, 2011, https://www.justice.gov/opa/pr/statement-department-justices-antitrust-division-its-decision-close-its-investigation-google.

[26] *Supra* note 14, *See also U.S. v. Google, Inc. and ITA Software, Inc.*, Proposed Final Judgment, Case 1:11-cv-00688, April 8, 2011, https://www.justice.gov/atr/case-document/file/497661/download.

[27] *See* European Commission, *Mergers: Commission clears Apple's acquisition of Shazam,* Sept. 6, 2018, http://europa.eu/rapid/press-release_IP-18-5662_en.htm.

[28] American Antitrust Institute, Fair Fight Film, transcript, https://www.antitrustinstitute.org/education-and-film/.

[29] *See* more generally, Andrew I. Gavil and Harry First, THE MICROSOFT ANTITRUST CASES: COMPETITION POLICY FOR THE TWENTY-FIRST CENTURY, MIT Press, 2014.

VI. Current Merger Presumptions May be Inadequate for Big Tech Acquisitions

Some competitive concerns arising in Big Tech acquisitions that eliminate smaller, potential, or nascent rivals may raise concerns that are cognizable under antitrust law but not reachable in practice because evidentiary standards are currently too high. This explanation for weak enforcement is compelling and is likely to be compounded by the Horizontal Merger Guidelines' focus on "one acquisition at a time" and a tendency to narrowly define markets. The rapid series of Big Tech acquisitions highlights the notion 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 Big Tech acquisitions pose for current enforcement approaches. Economist Carl Shapiro notes,

> *"…[S]uperstar firms are highly profitable based on durable competitive advantages they enjoy over their smaller rivals and over entrants, which cannot easily or quickly replicate their assets and capabilities. These are precisely the conditions under which mergers involving successful established firms are most likely to lessen competition and harm customers."*[30]

Economist John Kwoka further explains:

> *"[B]y incorporating added functions into a basic platform, such acquisitions make competition or entry by any other platform doubly difficult, reduce current choice of customers, and eliminate independent sectors of technological initiative that might otherwise result in alternative paths for the sector."*[31]

These same experts have put forward proposals for a stronger presumption for Big Tech acquisitions. For example, Kwoka calls for:

"[an] affirmative burden on any dominant tech company proposing mergers and acquisitions. That is, for such companies, any merger would require justification to the agencies, rather than the current system in which the agencies must demonstrate a likelihood that a target company might ever become a viable alternative technology in order to sustain a challenge."[32]

Likewise, Shapiro suggests:

> *"[L]owering the evidentiary requirements necessary for the government to prevail in a merger case based on a loss of 'potential competition.' For example, the government could meet its initial burden by showing that the target firm is reasonably likely to become a rival to the acquiring firm in the foreseeable future, even if the target firm has not yet made specific plans to do so. This change would reduce the ability of powerful firms to acquire potential rivals before they mature into actual rivals, without stopping them*

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[30] Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets,* June 12, 2019, at 6. http://faculty.haas.berkeley.edu/shapiro/protectingcompetition.pdf.
[31] John E. Kwoka, *Reviving Merger Control: A Comprehensive Plan For Reforming Policy and Practice*, Oct. 9, 2018, at 57-8, https://www.antitrustinstitute.org/wp-content/uploads/2018/10/Kwoka-Reviving-Merger-Control-October-2018.pdf.
[32] Kwoka, *supra* note 31, at 58.

from making acquisitions to improve their offerings or to challenge other firms with entrenched positions."[33]

In addition to stronger presumptions, reforms designed to strengthen antitrust enforcement in regard to Big Tech acquisitions would ideally include two additional components. One is retrospective analysis of consummated mergers involving Big Tech acquisitions to determine if they resulted in higher prices, lower quality (e.g., diminished privacy or security), less choice, or slower innovation. Given the implications of the analysis developed in this White Paper, performing merger retrospectives should be a priority for enforcers. 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.

A second component of stronger merger enforcement in the Big Tech sector is improved agency transparency. 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 to consumers, the business community, and legislators, without hampering the agencies' flexibility in future transactions.

VII. Conclusions

The foregoing analysis of Big Tech acquisitions over time, and its consequences for competition, consumers, and innovation, highlights the need for more vigorous merger enforcement. It provides empirical support for the notion that merger enforcement, as defined by agency challenges, has been limited in a major area of commerce in which Big Tech companies participate. It explores a variety of reasons for weak enforcement and focuses on one particularly important explanation. Namely, competitive concerns arising in some Big Tech acquisitions that eliminate smaller, potential, or nascent rivals raise concerns are cognizable under antitrust law but not reachable in practice because evidentiary standards are currently too high. Stronger presumptions are therefore needed.

[33] Shapiro, *supra* note 30, at 8.