

Update on Digital Technology: The Failure of Merger Enforcement and Need for Reform

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I. Introduction

In July 2019, the American Antitrust Institute (AAI) issued the White Paper THE RECORD OF WEAK U.S. MERGER ENFORCEMENT IN DIGITAL TECHNOLOGY ("2019 AAI WHITE PAPER").² The widely cited paper, which was the subject of AAI testimony before the Senate Judiciary Committee, drew attention to the acquisitive history of the five largest multinational online service or computer hardware or software companies: Amazon, Apple, Facebook, Google, and Microsoft ("Big Tech"). It also unpacked the history of merger enforcement under Section 7 of the Clayton Act in a major segment of the digital technology sector.³ The White Paper concluded that, as compared to enforcement across all sectors, the rate of merger challenges in digital technology is exceptionally low.⁴

Since then, much has happened in the digital technology sector. Big Tech has solidified its hold on the top-most slots, by market value, in the Fortune 500.⁵ Federal and state monopolization cases have been filed against Google and Facebook, alleging harmful exclusionary practices designed to achieve and maintain dominant market positions in search advertising and in personal social network services, respectively.⁶ Among other things, the Facebook complaints allege that acquisitions of small rivals, such as social media firms

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³ 15 U.S. Code § 18.

⁴ See Testimony of Dr. Diana Moss, Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital, Before the United States Senate, Committee on the Judiciary Subcommittee on Antitrust, Competition and Consumer Rights, American Antitrust Institute (Sept. 24, 2019), https://www.antitrustinstitute.org/wp-content/uploads/2019/09/Moss_SJC-Hearing_Digital-Mergers_9.24.19_F.pdf.

⁵ Fortune 500, FORTUNE.COM (2020), https://fortune.com/fortune500/2020/search?f500_mktval=desc. ⁶ See, e.g., U.S. et al., v. Google LLC, No. 1:20-cv-03010 (D.D.C. filed Oct. 10, 2020) and New York v. Facebook, No. 1:2020-CV-03589 (D.D.C filed Dec. 9, 2020).

Instagram (2012) and WhatsApp (2014), were a strategy to snuff out potential competition to maintain a monopoly in personal social networking services.

The public policy debate over the dominance of Big Tech has also generated numerous proposals to remedy competitive and consumer harm. These include breakups, imposed through antitrust remedies or legislation.⁷ Other policy solutions include digital market regulation, similar to what has been introduced in Europe, that addresses nondiscriminatory access, interoperability, data portability, and privacy protection.⁸ A 2020 House Judiciary Committee report examined competitive issues raised by the platforms that are at the core of many of the large digital ecosystems.⁹ Moreover, the digital ecosystems have been the subject of ongoing economic, business, and policy research, which has advanced the state of thinking over potential policy solutions to the problems they raise.¹⁰

In light of the many developments in the digital markets over the last two years, we have updated the 2019 AAI White Paper. Results indicate that expansion by acquisition continues to be a leading method by which the large digital ecosystems grow. Enforcers can expect to see further growth that, when juxtaposed with persistent, weak merger enforcement in the sector, will likely exacerbate competition problems. Indeed, stronger merger enforcement over the last two decades would have mitigated the monopolization concerns that we see now. As it stands, however, Section 2 of the Sherman Act is virtually the only antitrust tool left to combat dominance in the digital technology sector.¹¹

This White Paper turns first to updating data on acquisitions by Big Tech through 2020 and merger enforcement statistics through the latest available reporting year, 2019. It then examines the implications of Big Tech's likely trajectory of further expansion through acquisition and growth in critical cloud infrastructure capability. It closes with an analysis of reforms necessary to revitalize merger enforcement in digital technology.

⁷ 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. See also, Diana L. Moss, Breaking Up is Hard to Do: The Implications of Restructuring and Regulating Digital Technology Markets, THE ANTITRUST SOURCE (Oct. 2019).

⁸ See, e.g., The Digital Markets Act: ensuring fair and open digital markets, EUROPEAN COMMISSION, https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.

⁹ Investigation of Competition in Digital Markets, MAJORITY STAFF REPORT AND RECOMMENDATIONS, SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY (2020),

https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519. ¹⁰ See, e.g., *Competition Economics of Digital Ecosystems*, DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS, COMPETITION COMMITTEE, OECD (Feb. 24, 2021), https://www.oecd.org/daf/competition/competitioneconomics-of-digital-ecosystems.htm.

¹¹ 15 U.S. Code § 2.

II. Updated Big Tech Acquisition Data Reveal the Contours of a Recent, Massive Cycle of Expansion

AAI's 2019 White Paper highlighted Big Tech's acquisition of just over 700 firms from 1987-2018.¹² The blue bars in Figure 1 below show those acquisitions over this period. AAI's analysis drew attention to a first cycle of acquisitions beginning in about 2005, peaking in 2007, and ending in 2009. But a much bigger cycle is obvious beginning in 2010 and peaking in 2014. Over the entire period, Big Tech made just over 20 acquisitions per year, with an average annual rate of increase in acquisitions of almost 20% per year. Google accounted for the largest percentage of total acquisitions (32%), followed by Microsoft (30%), Apple (15%), Amazon (12%), and Facebook (10%). Google was, by far, the most acquisitive of the five companies, with about 13 acquisitions per year.



We updated data on acquisitions by Big Tech through the end of 2020, or for the period 1987-2020. Collectively, the companies made just over 70 acquisitions in 2019 and 2020. These are shown in Figure 1 by the green bars. The additional data show a slight increase in the average annual number of acquisitions from 1987-2020, relative to the shorter time period covered in the 2019 AAI White Paper (1987-2018). And the percentage allocation of acquisitions across the five companies remained about the same.

However, the average annual rate of acquisitions over the updated, longer time period fell slightly. This was driven by a decline in the average annual rate of acquisitions by Microsoft, Google, and Facebook, as compared to the 1987-2018 time period. The rate of acquisitions by Apple remained about the same and increased significantly for Amazon. The updated data reveal a 10% per year decline in the rate of acquisitions from the peak of the second cycle in 2014 through 2020. Acquisitions in digital technology thus appear to be on the downhill side of the current cycle, as is clear in comparing the dashed fitted trend line in

¹² Data on acquisitions and investments by Big Tech for the 2019 AAI White Paper and this updated White Paper were sourced from the CrunchBase Pro search engine, https://about.crunchbase.com/market-research/. Figure 1 includes cloud infrastructure acquisitions by Google (Google Cloud Platform) and Amazon (Amazon Web Services) that were not included in the 2019 AAI Report data. This increases the total number of acquisitions from 1987-2018 to about 710.

Figure 1 (data through 2018) with the solid trend line (data through 2020). Even two additional years of data therefore bring the contours of the second large cycle of Big Tech acquisitions into clearer focus.

III. Merger Enforcement in Digital Technology Has Weakened Even Further

As discussed in the 2019 AAI White Paper, only a fraction of the total acquisitions made by Big Tech are reportable to the U.S. antitrust agencies under the Hart Scott Rodino Act (HSR) federal premerger reporting requirements.¹³ The White Paper presented data over the period 2001-2017, when the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) first presented HSR statistics for a major segment of the digital technology sector.¹⁴ We updated enforcement data to include statistics through the most recently available, 2019 HSR report.¹⁵ As in the 2019 AAI White Paper, we compared DOJ and FTC enforcement statistics for merger transactions across all sectors with those that fall in the category for internet service providers, web search portals, and data processing services.

A number of observations stand out from the updated enforcement data. First, just over 80% of transactions, as a percentage of those that were cleared to the DOJ and FTC for a closer look, received early termination (*i.e.*, were closed after initial or early-stage review). This is about the average observed across all sectors.¹⁶ The 2019 AAI White Paper revealed that the agencies subjected a much higher percentage of digital technology transactions, as a percentage of total clearances, to review through the second request process (and beyond) relative to all transactions.¹⁷ But the 2019 analysis also found that the rate at which the agencies challenged mergers, as a percentage of total clearances, in a major segment of the digital technology sector was far lower than the average across all sectors.¹⁸

The table below summarizes enforcement statistics for the 2001-2017 period covered in the 2019 AAI White Paper and the longer, 2001-2019 period in this update. It shows the percentage difference between the rates of second requests and challenges in digital technology versus all sectors between the two time periods. For example, the FTC's rate of

termination-notices. The rates of clearance to an agency for initial review were obtained from annual HSR reports. *See supra* note 13.

¹³ For an explanation of the HSR premerger program, *see* Federal Trade Commission, *Premerger Notification Program*, https://www.ftc.gov/enforcement/premerger-notification-program.

¹⁴ *Id. See* HSR Reports, Table X: Industry Group of Acquiring Person. Reports Were Queried for NAICS Code 518, years 2001 through 2019. NAIC code 518 is defined in the HSR report as: internet service providers, web search portals, and data processing services. Big Tech companies operate in a number of 3-digit NAICS code areas. NAICS code 518 is a primary identifier for Google, Amazon, and Facebook. *See* North American Industry Classification System, https://www.census.gov/cgi-

bin/sssd/naics/naicsrch?code=518&search=2017%20NAICS%20Search. The 2019 HSR report included a new reporting category for NAIC code 516 (internet publishing and broadcasting).

¹⁵ Merger enforcement data sources 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 2001-2019, https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports.

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-

¹⁷ *Supra* note 13.

second requests in digital technology between 2001-2017 was almost 80% higher than all sectors. But for the 2001-2019 period it was only about 60% higher. The longer time period shows that the gap between the FTC's rate of second requests in digital technology versus all sectors has decreased. Combined agency statistics for the longer, 2001-2019, time period show that the gap between the agencies' higher rate of second requests in digital technology relative to all sectors has decreased.

DOJ's rate of challenges between 2001-2017 in digital technology was 65% lower than all sectors. But for the 2001-2019 period, it was 75% lower. The longer time period therefore reveals that the gap between the DOJ's rate of challenges in digital technology versus all sectors has increased with the updated data. Combined agency statistics show that the rate of merger challenges was 3% in digital technology versus 15% across all sectors based on 2001-2017 data.¹⁹ Updated statistics for 2001-2019 show that this rate fell to about 2.5%, while remaining at about 15% across all sectors. Combined agency statistics for the longer, 2001-2019, time period show that the gap between the agencies' relatively lower rate of challenges in digital technology has increased.

Enforcement Statistic	Difference in Merger Enforcement in Digital Technology v. All Sectors					
	Federal Trade Commission		Department of Justice		Both Agencies	
	2001-2017	2001-2019	2001-2017	2001-2019	2001-2017	2001-2019
Second Requests	79% higher	61% higher	6% lower	no difference	36% higher	34% higher
Challenges	no challenges	no challenges	65% lower	75% lower	80% lower	84% lower

These statistics are trending in decidedly the wrong directions. The agencies' higher rate of second requests in digital technology signal that enforcers have scrutinized digital technology acquisitions more closely. But merger enforcement has lost ground over the last two years. Likewise, the agencies' rate of challenges in digital technology signaled that enforcers were not moving to force the abandonment or restructuring of, or seeking to block, potentially harmful acquisitions in digital technology.²⁰ Here again, merger enforcement has lost ground over the last two years.

The updated enforcement statistics reinforce the 2019 AAI White Paper's observation that merger enforcement is essentially nonexistent in the digital technology sector, and has weakened even further since. With the exception of DOJ's challenge to Google's acquisition of ITA Software in 2009, the antitrust agencies still have not challenged more than one acquisition by the largest digital technology companies.²¹ There are two possible explanations for the persistently low merger challenge rate in digital technology over the last two years.

https://www.justice.gov/atr/case-document/file/497686/download.

¹⁹ Supra note 13. Mergers challenged in federal court by the agencies are reported in the HSR report section "Developments in the Premerger Program."

²⁰ For a more detailed discussion of merger challenges, *see, e.g.,* Diana L. Moss, *What Does Expanding Horizontal Control Mean for Antitrust Enforcement? A Look at Mergers, Partial Ownership, and Joint Ventures, AMERICAN ANTITRUST INSTITUTE (Nov. 4, 2020), pp. 9-10, https://www.antitrustinstitute.org/wp-content/uploads/2020/11/Moss_Horizontal-Control_11.4.20.pdf.*

²¹ U.S. v. Google, Inc. and ITA Software, Inc., Complaint, Case 1:11-cv-00688, April 8, 2011,

One is that the FTC and DOJ have been busy with Section 2 investigations in digital technology. The agencies may, therefore, have learned everything they needed to know about acquisitions via those investigations. This could obviate the need for second requests. Another is that the Section 2 investigations could have had the effect of restraining moves by the largest firms to attempt anticompetitive acquisitions while in the enforcement spotlight, thus explaining the decline in challenges. While these are plausible explanations, they do not address the larger picture of relatively weak merger enforcement in the digital technology sector over a longer period of time. The effect of weak enforcement in contributing to past and potential future growth of Big Tech therefore remains troublesome.

IV. The Implications of Further "Expansion Through Acquisition" and Growth of Big Tech's Cloud Infrastructure Capability

The 2019 AAI White Paper highlighted the "acquisitive" nature of Big Tech. This trend persists, even as the updated acquisition data more clearly reveal the contours of the most recent, massive acquisition cycle. Further cycles are likely as the digital ecosystems continue to mature. Moreover, past cycles of acquisition activity by Big Tech may tell us something about the direction of further expansion.²² For example, Figure 2 shows Amazon acquisitions during the first cycle of expansion (2004-2009). The word cloud is based on industry descriptors for Amazon acquirees.²³ The focus is on E-Commerce, with secondary emphasis on acquisitions around shopping, publishing, and entertainment. The ecosystem is relatively small and tightly oriented around the core functionality of Amazon's online marketplace.



Figure 2 Industry Descriptors for Amazon Acquisitions (2004-2009)

Amazon's acquisitions during the second, larger cycle of Big Tech activity from 2010-2020 look very different. As shown in Figure 3, industry descriptors for more recent acquisitions focus on functionality in cloud infrastructure, including cloud computing, storage, and

²² Acquisition data indicate that Microsoft has cycled through three distinct phases of acquisitions: 1994 to the early 2000s, the mid-2000s to 2010, and the early 2010s to 2020. *See, supra* note 12.

²³ Supra note 12. The prevalent term "software" was eliminated from industry descriptors in both Figures 2 and 3 in order to highlight more descriptive ecosystem attributes.

management; data analytics; artificial intelligence; and machine learning. These competencies, amassed through buying companies, parallel Amazon's focus in E-Commerce. Similar examples can be constructed for the other Big Tech companies, which also show distinctly different emphases in acquisitions across cycles of activity.



Figure 3 Industry Descriptors for Amazon Acquisitions (2010-2020)

A major part of the last cycle of acquisitions by Big Tech includes cloud infrastructure assets. In July of 2019, for example, AAI sent a letter to the DOJ encouraging the Antitrust Division to scrutinize Google's acquisition of the data analytics and business intelligence startup, Looker.²⁴ The AAI letter on the Google-Looker acquisition, cited in the 2020 House Judiciary Committee report, explained that cloud infrastructure is a major engine of growth for Big Tech.²⁵ Cloud infrastructure is at the center of Big Tech's ability to drive commerce through their ecosystems by deploying vast caches of data and the capability to process and enrich it. Targeted methods, such as "algorithmic recommendations," are one way that digital ecosystems expand user engagement through data analytics and related technologies.²⁶

Big Tech's acquisitions in cloud infrastructure accelerated dramatically between 2013 and 2018 and have continued apace since. Updated data indicate a banner year in 2019, with an all-time high of 24 cloud-related acquisitions, or an almost 20% increase over the peak in 2014. This acquisition streak has fortified Big Tech's capability in cloud infrastructure. The roughly 150 cloud acquisitions made by the five companies since 1998 have proceeded without enforcement action, including the 34 acquisitions made between 2019-2020. Indeed,

²⁴ Letter to the Honorable Makan Delrahim, Assistant Attorney General, Antitrust Division, U.S. Department of Justice re: Antitrust Review of Google's Acquisition of Data Analytics and Business Intelligence Startup Looker, AMERICAN ANTITRUST INSTITUTE (Jul. 8, 2019), https://www.antitrustinstitute.org/wpcontent/uploads/2019/07/AAI-Ltr-to-DOJ_Google-Looker_7.8.19.pdf.

²⁵ Supra note 9, at p. 387.

²⁶ See, e.g., Sachin Banker and Salil Khetani, Algorithm Overdependence: How the Use of Algorithmic Recommendation Systems Can Increase Risks to Consumer Well-Being, 38 J. OF PUB. POL. & MKTING. 500 (2019).

after reports that the DOJ was looking more closely at the Google-Looker deal in October 2019, the transaction received early termination in early November 2019.²⁷

The wave of acquisitions at the center of Big Tech's build-out of cloud infrastructure has important implications for merger enforcement. First, four players make up almost 65% of the cloud market: Amazon Web Services (31% in 2021), Microsoft Azure (20%), Google Cloud Platform (7%), and Alibaba Cloud (6%).²⁸ Two of those companies, Amazon and Microsoft, account for over 50% of the market. The centrality of data and data analytics to the digital ecosystems' value proposition, and the economies of scale and scope associated with them, create a formidable barrier to entry to entities that might grow to challenge the market positions of the large incumbent firms.²⁹

Second, expansive capability in cloud infrastructure could facilitate diversification into new markets as part of a next cycle of expansion. As the history of Big Tech's acquisitions shows, the companies have grown by grafting on external assets over time. But investment activity is also important.³⁰ For example, data indicate that between 1999-2020, Big Tech's portfolios included almost 450 discrete investments, including venture, seed, and corporate capital; as well as non-equity assistance, grants, and debt financing.³¹ Some of these investments are potential acquisition targets and have, in fact, been acquired by Big Tech.³² Figure 4 shows Big Tech's investments, superimposed on past acquisitions. Investment activity has accelerated dramatically since the peak of the second cycle of acquisitions in 2014, possibly signaling exploratory efforts that could provide insight into the next wave of expansion.

²⁷ See, e.g., Mark Bergen, Sarah McBride, and David McLaughlin, Google's \$2.6 Billion Looker Deal Said to Get Closer DOJ Review, Bloomberg.com (Oct. 11, 2019),

https://www.bloomberg.com/news/articles/2019-10-11/google-s-2-6-billion-looker-deal-said-to-getcloser-doj-review. *See also*, 20191627: Alphabet Inc.; Looker Data Sciences, Inc., Federal Trade Commission, Pre-Merger Notification Program: Early Termination Notices (Nov. 6, 2019), https://www.ftc.gov/enforcement/premerger-notification-program/early-terminationnotices/20191627.

²⁸ Katy Stalcup, AWS vs Azure vs Google Cloud Market Share 2021: What the Latest Data Shows,

PARKMYCLOUD.COM (Feb. 10, 2021), https://www.parkmycloud.com/blog/aws-vs-azure-vs-googlecloud-market-share/. Based on cloud infrastructure spending in 2020.

²⁹ See, e.g., Marc Bourreau, Some Economics of Digital Ecosystems, Hearing on Competition Economics of Digital Ecosystems, Directorate for Financial and Enterprise Affairs Competition Committee, OECD (Nov. 13, 2020), https://www.oecd.org/daf/competition/competition-economics-of-digital-ecosystems.htm.

³⁰ Gautam Ahuja and Riitta Katila, *Technological Acquisitions and the Innovation performance of Acquiring Firms: A Longitudinal Study*, 22 STRAT. MGMT. J. 197 (2001).

³¹ *Supra* note 12.

³² Jason Rowley, A peek inside Alphabet's investing universe, TECHCRUNCH.COM (Feb. 17, 2018),

https://techcrunch.com/2018/02/17/a-peek-inside-alphabets-investing-universe/. (Noting that "All in, Alphabet has acquired seven companies in which it had previously invested.")





Further cycles of expansion through acquisition are likely to create larger and more powerful digital ecosystems. The next cycle could, for example, highlight expansion into services in healthcare, energy, education technology, and other areas. This dynamic could perpetuate the same types of monopolization concerns that we see, for example, in the Facebook case. As such, enforcers should be looking closely at how the large digital ecosystems are evolving, the likely competition concerns their continued expansion raises, and how to revitalize merger enforcement in the sector.

V. Implications of Persistent Weak Merger Enforcement in Digital Technology

AAI's 2019 White Paper suggested a number of reasons for why merger enforcement in digital technology is so low. These included: (1) the pervasiveness of "error cost" analysis, or that too-aggressive enforcement will stifle pro-competitive mergers and acquisitions; (2) the concern that antitrust does not have the tools to address the complexities of digital markets; (3) thresholds for required reporting of proposed mergers and acquisitions that are too low; and (4) evidentiary standards for showing that transactions are likely to harm competition that are too high.

Developments over the last two years prompt a fresh look at these issues. For example, the role of error cost analysis in generally stifling merger enforcement in the U.S. over the past four decades cannot be understated. And the digital technology sector has been particularly hard hit.³³ Error cost analysis gives more weight to the costs of mistakenly challenging benign or pro-competitive deals, relative to those of mistakenly not challenging anticompetitive deals.

Claims that too-aggressive merger enforcement will stymie the venture capital start-up financing model, thus imperiling an important innovation pipeline for Big Tech, is a central

³³ 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. See also, Diana L. Moss, Merger Policy and Rising Concentration: An Active Agenda for Antitrust Enforcement, 33 ANTITRUST (Fall 2018).

part of error-cost doctrine in the digital technology sector. This argument persists, despite the fact that antitrust enforcement has historically not deferred to the uniqueness of any specific sector or innovation model. But the costs of error-cost analysis to competition and consumers are now apparent. For example, there is mounting economic evidence from merger retrospectives that reveals the harmful effects of concentrative mergers.³⁴ This exposes the fallacy that such mergers can still, on balance, generate countervailing cost savings and consumer benefits.

Another reason proffered for weak Section 7 enforcement in digital technology is that enforcers have an inadequate toolkit for dealing with "complexity." Recent federal and state monopolization cases, however, debunk this argument. The Google and Facebook cases clearly articulate the features of digital ecosystem markets. These include zero-price markets, pervasive network effects and winner-take-all markets, and scale and scope economies in data and data analytics. In doing so, the cases demonstrate that the consumer welfare standard reaches to both the price and non-price (e.g., quality) dimensions of competition.³⁵

In sum, error-cost analysis very likely continues to influence merger enforcement in digital technology. However, it is clear that enforcers have the tools to evaluate competition concerns in the sector, so "complexity" is not a good reason for persistent, weak merger enforcement. We therefore turn to other reasons and the need for reform.

A. Revisions to HSR Reporting Thresholds

The history of Big Tech's acquisitions reveals that they include not only horizontal acquisitions of potential rivals, but also vertical and "ecosystem" acquisitions. The latter types of acquisitions do not eliminate a rival. Rather, a vertical acquisition can enhance the ability and/or incentive of a dominant platform to potentially foreclose rivals by controlling a critical digital input or distribution channel. An ecosystem acquisition—or asset not directly in a vertical or horizontal relationship to the acquirer—could facilitate the leveraging of market power from a dominant position to other parts of the digital ecosystem. These are particularly important in light of the centrality of user data to fueling connectivity across multiple markets in an ecosystem.

Enforcers recognize the competitive issues raised by ecosystem acquisitions. For example, a DOJ statement in the Google-Admeld (2011) case noted that the agency had investigated concerns over the possibility that the acquisition would enable Google to extend its market power in Internet search to the display advertising market.³⁶ This level of agency

³⁴ John Kwoka, The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns, 81 ANTITRUST L.J. 837 (2017)

³⁵ See, e.g., John M. Newman, Antitrust in Zero-Price Markets: Foundations, University of Pennsylvania Law Review, 164 (2015), https://ssrn.com/abstract=2474874. See also, 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. See also letter From Jessica L. Rich, Director of the FTC Bureau of Consumer Protection, to Erin Egan, Chief Privacy Officer, Facebook, and to Anne Hoge, General Counsel, WhatsApp Inc., (Apr. 10, 2014),

https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatappltr.pdf. ³⁶ 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,

transparency, nearly a decade ago, is notable in that it presaged the very concerns that are at the center of current monopolization cases. The European Commission's (EC's) recent decision to condition approval of Google's recent acquisition of the fitness wearables, Fitbit, on certain remedies is another example. There, one concern was the leveraging enhanced market power in the market for health and fitness data to the broader ad-tech ecosystem market, potentially raising barriers to entry by rivals.³⁷

HSR reporting thresholds that are too high will limit the ability of enforcers to evaluate the competitive consequences of acquisitions of smaller firms. These many, smaller acquisitions are a strategic method for reinforcing the market position of the platform that is the central hub of a digital ecosystem, and in expanding and diversifying the ecosystem. Indeed, the capacity of a digital ecosystem to host a diverse set of products and services is vast. Figure 5 shows a word cloud based on the industry descriptors for the almost 250 acquisitions made by Google since 2001.³⁸ Such an ecosystem is comprised of a far greater number of smaller acquisitions than a similarly sized ecosystem in a non-digital sector. For example, the average value of Google's acquisitions made, for example, by Johnson & Johnson (\$3.5 billion) and Visa (\$6 billion), both of which are large Fortune 500 companies.³⁹





Lower HSR reporting thresholds would capture the smaller transactions that typify the "expansion by acquisition" strategies of digital technology firms. To the FTC's credit, the agency opened an inquiry in early 2020 under Section 6(b) of the Federal Trade Commission

³⁸ *Supra*, note 12.

https://www.justice.gov/opa/pr/statement-department-justices-antitrust-division-its-decision-closeits-investigation-google.

³⁷ Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions, European Commission (Dec. 17, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484.

³⁹ Id.

Act into Big Tech's past, non-reported acquisitions.⁴⁰ The antitrust community awaits the outcome of the agency's investigation, which will provide important perspective and information about the role of HSR thresholds in the growth of Big Tech.

B. Different Evidentiary Standards for Acquisitions of Smaller Rivals

Throwing the HSR reporting "net" over a larger number of smaller acquisitions will put them on the radar of antitrust enforcers. But without the ability to reasonably demonstrate that an acquisition will harm competition and consumers, changes to filing requirements will fall short. This is because weak merger enforcement in digital technology may also be due to the fact that acquisitions of potential rivals are cognizable under antitrust law but unreachable due to overly burdensome evidentiary standards.⁴¹ Changes in business models more generally, and the realities of digital ecosystem business models specifically, make a strong case for revisiting potential competition doctrine.

For example, some have suggested importing the Section 2 causation standard into the Section 7 context for acquisitions of potential competitors.⁴² That is, prohibiting acquisitions under Section 7 that are reasonably capable of contributing significantly to the maintenance of market power, regardless of finding of monopoly power.⁴³ Such as standard would accommodate phenomena such as winner-take-all markets, where once a dominant position is speedily achieved, maintaining market power becomes the order of the day. In other words, antitrust may not be fast or nimble enough to prove monopoly power before a dominant firm embarks upon conduct that solidifies its market power, to the detriment of competition and consumers.

An antitrust inquiry should focus instead on the factors that are important in establishing whether a digital ecosystem engaged in conduct to maintain dominance. These include the type of digital platform (e.g., aggregator or marketplace); the role of acquisitions in constraining competition; and the enhanced incentive and/or ability to leverage market power across the ecosystem. These changes likely do not require statutory reform. Rather, they could be made by updating agency guidance and internal standards for merger review. This approach, however, would be tested in the courts relatively quickly.

⁴⁰ FTC to Examine Past Acquisitions by Large Technology Companies: Agency Issues 6(b) Orders to Alphabet Inc., Amazon.com, Inc., Apple Inc., Facebook, Inc., Google Inc., and Microsoft Corp. (Feb. 11, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technologycompanies.

⁴¹ See, e.g., Carl Shapiro, Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets, (Jun. 12, 2019), at 30. http://faculty.haas.berkeley.edu/shapiro/protectingcompetition.pdf. (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.:)

⁴² See, e.g., Tim Wu and C. Scott Hemphill, *Nascent Competitors*, NYU LAW AND ECONOMICS RESEARCH PAPER NO. 20-50 (Jun. 19, 2020) and UNIV. PENN. L. R. (forthcoming),

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3624058. The authors argue that if "an acquirer's management team holds the considered view that, but for its purchase, the target would pose a future competitive threat, why should the government be required to prove that the threat was even clearer and stronger than management believed?"

This approach highlights entirely different types of evidence that enforcers might look to in assessing the likelihood that an acquisition of a potential rival is harmful. These go to the impendency and "potency"⁴⁴ of entry by a potential rival and include evidence of: (1) a historical pattern of acquiring potential rivals, (2) acquirees being dismantled shortly after acquisition, (3) failure to integrate the acquiree into the ecosystem post-merger, (4) a too-high acquisition price, (5) anecdotal evidence of management's intent to eliminate potential rivals through serial acquisitions, (6) eliminating the acquiree's top managers or founding innovators shortly after acquisition, and (7) an acquiree's history of funding rounds, relative to a benchmark successful startup.

VI. Conclusions

A number of takeaways follow from the foregoing, updated analysis of Big Tech acquisitions and merger enforcement statistics in digital technology.

- Big Tech appears to be on the downhill side of a massive cycle of expansion that began in 2010 and has reinforced the cloud infrastructure that will facilitate further growth and diversification. More cycles of acquisitions are likely, which could create larger and even more powerful digital ecosystems.
- Updated statistics show persistent under-enforcement of merger law in digital technology. A lack of merger enforcement debilitates Section 7 as a viable tool for protecting competition and consumers, leaving monopolization enforcement to control the increasing dominance of the largest digital ecosystems.
- The failure of merger enforcement in digital technology calls for urgent reforms, including lower HSR filing thresholds to capture the smaller acquisitions that are the signature of the digital ecosystems; and different evidentiary standards for showing that acquisitions of small rivals violate Section 7.