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Before the
Senate Committee on the Judiciary
Subcommittee on Competition Policy, Antitrust,
and Consumer Rights

"Trends in Vertical Merger Enforcement"

July 19, 2023

I. Our antitrust enforcers are fighting anti-competitive vertical mergers

It has been exciting to witness the revitalization of antitrust enforcement that is currently underway at the FTC and Department of Justice. In the past, courts narrowed antitrust law and Congress cut antitrust budgets. In response, antitrust enforcers narrowed their view of what was possible for them to achieve. Though Congress charged them to protect competition and consumers, there were a number of instances of caution and formalism holding our enforcers back from using the tools at their disposal to promote a competitive economy where corporations compete for customers and workers. Today, it is clear that both Congress and our federal and state antitrust enforcers recognize the importance of preserving competitive and open markets through aggressive antitrust enforcement.

In particular we've seen a marked increase in our federal enforcers suing to block vertical mergers. This is something that Public Knowledge has been calling for for a long time. The FTC and DOJ are to be commended for this impressive and important shift.

Unfortunately, it appears that the courts have not yet come around to this perspective. Antitrust law was written broadly, which has allowed courts the flexibility to incorporate new economic learning over time. This has given courts a lot more power in this area of the law than in many others. The consumer welfare standard wasn't built in a day, and similarly I anticipate that implementing the economic learning of the last ten years purely through litigation would take some time as well. New merger guidelines will help immensely. Courts should look to new guidelines for the most up-to-date understanding of competition law and economics. Congress can and must do its part as well. Americans cannot wait another 20 years for their antitrust laws to slowly catch up with the market needs of today.

Congress has already begun to support the increased enforcement effort by passing the Merger Filing Fee Modernization Act last year giving more funding to our federal enforcers. Thank you for passing that important legislation. However I fear our federal enforcers are still resource constrained, facing more anti-competitive mergers than they have the resources to stop. We call on Congress to authorize more funding for federal antitrust enforcement. At the same time, a deterrence strategy is needed. By showing that the agencies are not afraid to sue to block anti-competitive mergers, they can make other potential merging parties think twice before attempting an anti-competitive merger. This strategy is particularly important for vertical mergers right now, where courts have been even more reluctant to recognize the impacts on competition. Showing that the enforcers are paying attention to anti-competitive vertical mergers can be especially effective at deterring them from being agreed to in the first place.

The effectiveness of a deterrence strategy can be hard to measure. Former Assistant Attorney General for Antitrust, Bill Baer, spoke about mergers that should not have left the boardroom. Today, Assistant Attorney General Kanter says: it's already happening, many of those mergers are no longer leaving the boardroom.[1]

II. Vertical mergers can have a pernicious effect on competition

Mergers can be horizontal, vertical, or conglomerate. A horizontal merger is between direct competitors, such as when two organic grocery chains merge. A vertical merger is a merger in which a company buys their input supplier, distributor, or a company at another layer of the technology stack, such as an e-commerce marketplace purchasing an organic grocery chain, or an app store purchasing an app developer. A conglomerate merger is one where a company buys another and their relationship isn't clear or they may have no relationship. Of course there are also mergers that exhibit some characteristics of each of these three categories.

When a platform buys a company that competes on the platform, we worry that the platform will have an incentive to self-preference its own products on the platform. This means that other companies competing on that platform may not have fair access to consumers. By making things more difficult for a competitor, the vertically integrated platform can also deter competition. As we have seen, a reputation for self-preferencing can deter investment, pushing the "smart money" to invest elsewhere.

When a company purchases an important input supplier or important distribution channel, enforcers should be on guard. The merged entity may now have the incentive and ability to withhold or degrade access to that input or distribution channel from competitors. This creates a risk that competition may be substantially lessened. Withholding access could take the form of refusing to sell the product or service, offering it on less advantageous terms, or denying or degrading interoperability. This concern also applies to platforms.

Platform annexation, identified in the work of Fiona Scott Morton and Susan Athey, is a merger where a dominant platform acquires a company in an adjacent market that makes multi-homing, using multiple service providers at once, more difficult.[2] Platform annexation deals give rise to a conflict of interest whereby a dominant provider has the incentive to degrade or withdraw the

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[1] Assistant Attorney Gen. Jonathan Kanter, Opening Remarks at the Second Annual Spring Enforcers Summit (Mar. 27, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-second-annual-spring.
[2] Fiona M. Scott Morton & Susan Athey, *Platform Annexation*, SSRN (Feb. 16, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3786434.

multi-homing experience for its competitors. If market participants are forced to choose just a single provider, it will most likely be the dominant player.

Multi-homing can be the competitive Achilles heel for dominant platforms. Their gatekeeper power makes it incredibly difficult for individuals and business users to quickly and completely leave. A seller might stick with Amazon even when they face mistreatment if the alternative is to completely sever their relationship with Amazon and thus lose their main conduit to customers and profits. In a "take it or leave it" world, dominant platforms win at the expense of those relying on the gatekeeper. Multi-homing allows companies to move between platforms gradually. Incurring smaller switching costs spread out over time instead of all at once. Smaller competitors that might not have the capacity to provide service to a huge customer all at once can grow over time.

A market with a high-degree of multi-homing is much more likely to be a competitively vibrant one. Multi-homing creates competitive pressure on dominant platforms. If they mistreat their platform business users through high fees or onerous terms, those business users have options to gradually disassociate themselves from the dominant platform. We should thus encourage making multihoming as seamless as possible and enforcers should be especially wary of potential mergers to make multi-homing more difficult.

I'm particularly concerned about the risk of a platform annexation merger in cloud computing. Multihoming for Cloud Computing Services is particularly important, since migrating a customer's entire cloud at once may be prohibitively costly. In the cloud industry, well capitalized hyperscalers Google, Amazon and Microsoft currently interoperate and coexist with other platforms like Snowflake that run on top of their services and facilitate multi-homing. A competitive environment in cloud computing is critical since so many businesses rely on it to do their work. The ability to multi-home by using independent platforms not owned by a downstream competitor hyperscaler (like Snowflake) is key to that competitive environment.

III. Agency guidelines for vertical mergers should include anti-competitive presumptions

Our antitrust enforcement agencies have been working hard on new merger guidelines for the past year. Public Knowledge and others have advocated that the new guidelines should include anti-competitive presumptions for certain types of vertical mergers that pose a risk to competition.[3] Of course presumptions are rebuttable if the merging parties can show in fact there is not a threat to substantially lessen competition.

Presumptions are an important part of merger guidelines. Presumptions can help the agencies and merging parties save valuable resources at every stage of a transaction's review. When experience shows that certain market structure puts competition at risk, it isn't cost effective to make enforcers prove the obvious and waste resources on unnecessary litigation. Presumptions also provide a certain level of business certainty to merging parties so that they can make informed decisions about their legal risks, and can help them to conserve their litigation resources as well.

Perhaps most importantly, anti-competitive presumptions in the merger guidelines can support generalist judges in quickly getting up to speed on the latest in antitrust law and economics. In too many recent antitrust cases, court decisions seemed to rely heavily on crediting the testimony of the merging parties' executives that they would behave differently from how the structure of the market would indicate. Judges should not credit a CEO's self-serving storytelling when past experience with this market structure--which should be reflected in new merger guidelines--shows incentives to harm competition. When corporate executives make unenforceable promises to judges to sway them to approve their deals, clear and well-supported anti-competitive presumptions can support judges to not credit that testimony.

Of course, structural presumptions are more complicated for non-horizontal mergers, but there are some non-horizontal structures that still deserve a presumption. In our comments on the vertical merger guidelines from 2020 and merger guidelines in 2022, both appended at the end of this testimony, Public Knowledge has called for a dominant platform presumption, an input foreclosure & customer foreclosure presumption, as well as presumptions against mergers that would eliminate a potential entrant or a maverick firm.[4]

IV. Remedies

Since so many vertical mergers have been allowed to go through, we find ourselves in the unenviable position of trying to remedy anti-competitive mergers through legislation. The subcommittee has already identified some particularly anti-competitive vertical holdings to target with legislation, some achieved through merger and others through organic growth. The

[3] Comments on Draft Merger Guidelines, Public Knowledge, April 21, 2022, https://publicknowledge.org/policy/comments-on-doj-and-ftc-merger-guidelines; *Recommendation and Comments on the Draft Vertical Merger Guidelines*, Jonathan B. Baker, Nancy L. Rose, Steven C. Salop, and Fiona Scott Morton (filed Feb. 24, 2020), at 18-20.
[4] Comments on the Draft Vertical Merger Guidelines, Public Knowledge and Open Technology Institute, Feb. 26, 2020, https://publicknowledge.org/policy/comments-to-doj-and-ftc-on-vertical-merger-guidelines.

American Innovation and Choice Online Act focuses on self-preferencing and anti-competitive discrimination that gatekeeper platforms use to promote their own products on their own platforms at the expense of fair competition. The Open App Markets Act addresses the power that the operating system and app store companies have to control competition between apps and to put a thumb on the scale for their own apps. The AMERICA Act is also about vertical power: it takes on the conflict of interest that arises when the same company has a powerful market position in the ad exchange and both sides of the ad placement process, representing advertisers and publishers.

Once these huge vertical mergers are allowed to go through, it's much more difficult to restore competition. It would be much more efficient and effective to identify and stop anti-competitive vertical mergers, "in their incipiency" as the Clayton Act intended.

With the renewed interest in stopping vertical mergers, it will also be useful to review the types of remedies that can be effective for enforcers to impose at the time of a merger. While many vertical mergers will need to be outright blocked, there may also be situations where a consent decree can be an efficient resolution that protects competition and keeps the agency's powder dry for other priorities. Like any litigant, the FTC and DOJ are resource constrained and can do more with less if they can achieve beneficial settlements in some cases that would be expensive to litigate.

If the concern is withholding a critical input or distribution channel, imposing duties to deal can be really valuable for allowing fair competition to continue. This could include a compulsory license--as the EU has required of Microsoft as a condition of allowing its merger with Activision, interoperability requirements, or other obligations to deal fairly with competitors.

Non-discrimination requirements or prohibitions on self-preferencing can protect independent competitors' ability to compete fairly in the market. It may be difficult to identify *ex ante* all of the ways that a vertically integrated firm post-merger can preference their own products and discriminate against strategic competitors. It will be important to use broad definitions to capture new products and services and new mechanisms of self-preferencing or anti-competitive discrimination that arise.

The practicalities of enforcement are important to take into account when considering a consent decree. Consent decrees that are weak, difficult to enforce or not enforced well, or time limited for too short a time can do a real disservice to consumers and to competition. It can be difficult for our enforcement agencies as currently structured to police compliance on these internal decisions. Consent decrees should include details of how enforcement will be managed, and should err on the side of caution with those enforcement procedures by providing speedy resolution of alleged violations, auditing authority, and more. And Congress should authorize more funding so that the compliance division of each enforcement agency can operate effectively.

Another limitation of consent decrees has been keeping up with changing circumstances. Predicted pro-competitive outcomes may not materialize. To address this, agencies can leave open the possibility of modifying the consent decree if certain expected metrics are not met, as the DOJ did in the *Assa Abloy* settlement.[5]

V. Microsoft

A recent example can be found in the FTC's challenge of the Microsoft/Activision merger. Although Microsoft has some games, it is primarily a provider of consoles, gaming subscriptions, and cloud gaming. Activision is primarily a game studio. Enforcers at the FTC--and consumer groups like Public Knowledge-- were concerned about this primarily vertical merger. Microsoft competes primarily with Sony, another provider of consoles. Once they own a game studio would they have the incentive and ability to foreclose competition by withholding key games from Sony? The FTC determined that they would, and sued to block the merger. The UK competition and Markets Authority (CMA) also determined that the merger violated their competition laws.

At the preliminary injunction stage, the district court found last week for Microsoft, denying the preliminary injunction and clearing Microsoft to begin moving forward with their merger. Of particular note in Judge Corley's decision was her discussion of vertical mergers in general. She was able to justify her skepticism of an FTC challenge to a vertical merger by pointing out how rarely vertical mergers have been challenged in the past.[6] She particularly noted that there is no structural presumption against any category of vertical mergers.[7]

In an anti-competitive vertical merger it's common that the distributor would have an incentive to withhold a critical input from competing distributors. In this case before the merger Microsoft had an incentive to withhold Call of Duty from Sony and valve. Before the merger of course the distributor does not have the ability to withhold that input from competing distributors. The input supplier, on the other hand, has the ability but not the incentive to withhold that input. In this

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[5] "Justice Department Reaches Settlement in Suit to Block ASSA ABLOY's Proposed Acquisition of Spectrum Brands' Hardware and Home Improvement Division" May 5, 2023, https://www.justice.gov/opa/pr/justice-department-reaches-settlement-suit-block-assa-abloy-s-proposed-acquisition-spectrum.

[6] *FTC v. Microsoft Corp.*, No. 23-cv-02880-JSC, 2023 U.S. Dist. LEXIS 119001, at *21 (N.D. Cal. July 10, 2023).

[7] *Id*. at *31.

case, Activision could have made Call of Duty exclusive to one platform, but that didn't benefit Activision when it was an independent company. When the distributor buys the supplier, the distributor's incentive is now matched up with the supplier's ability, and the merged firm may have the incentive and ability to foreclose competition by withholding--or degrading--access to a critical input from competitors. What's important for the merger analysis is that the merged firm has the incentive and ability to foreclose and that some component of that is increased or created by the merger. One need not increase both components. In fact it's very common that the incentive would already be in place and therefore not be increased by the merger. Or, in the case of a supplier buying a distributor, that the ability would already be in place but not the incentive. I believe the court's analysis would have been aided by merger guidelines that clearly stated a structural presumption for vertical mergers.

It's worth noting that Microsoft offered to make Call of Duty and other existing games available to competing consoles and game stores. In the EU, they agreed to make all Activision games available for cloud streaming on any cloud service for the next 10 years. I think these commitments are good for consumers and for competition. From a consumer perspective, it is very important to me that any remedy focused exclusively on Call of Duty and existing games will be insufficient to protect consumers from anti-competitive harm. In a competitive marketplace I would expect consumers would care about more than just the most popular game, and that the most popular game will not always be Call of Duty. The market structure will remain after any commitments run out, and I fear that market structure will still push the merged firm to raise rivals' costs and degrade their quality, at the expense of consumers.

V. Conclusion

Today, the world of tech startups is built around the monumental gravitational pull of the largest tech platforms. Knowing that these firms provide a more reliable "exit" where founders and venture capital investors can obtain the exponential gains they need to fund their business model, has a huge impact on the types of businesses that get funded. Too many of our innovation resources--not just funding, but also brain power--now are focused on creating features that a big tech firm will want to buy. With greater scrutiny on these mergers, I'm hopeful that we can change this system. We want tomorrow's innovators to challenge the status quo. To build a competitor to the dominant platform, not a feature for it. Or to focus on a different interesting challenge.

Competitive markets function better. They function better for consumers, workers, competitors, and adjacent markets. They are easier to regulate because each individual business has less power. Businesses that face competition work hard to identify what their customers want and invest in innovation to provide that.

Our antitrust enforcement agencies are doing their part to promote competition throughout the economy. They are bringing the cases we need to stop anti-competitive mergers. Consumer advocates have been sounding the alarm for years saying that existing antitrust law is not where it needs to be to address the harms of consolidation. We need Congress to do its part in this fight.

The Competition and Antitrust Law Enforcement Reform Act (CALERA) from Senator Klobuchar and others would update the standard for merger review to help our antitrust enforcers to stop more mergers. Other efforts at antitrust reform also deserve attention. Sector specific tools like AICOA, OAMA, and the AMERICA Act are critical to opening up digital platform markets for fair competition.

Of course, it's important to keep in mind that antitrust cannot solve every problem. In digital markets, Public Knowledge is very aware of problems that are unlikely to be solved by competition alone. Consumer protections, particularly privacy protections, will still be needed in the law, and researcher access will be an important tool for understanding the problems of disinformation online.

April 21, 2022

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Washington, DC 20580

Submitted via Regulations.gov

Re: Request for Information on Merger Enforcement, FTC-2022-0003-0001

Public Knowledge appreciates the opportunity to comment on the Department of Justice (DOJ) and Federal Trade Commission's (FTC) merger guidelines. This is a great opportunity for our antitrust enforcement agencies to clarify this important area of the law where so much excellent research is available to improve our courts' understanding and decision-making. As experienced experts in this field, the views of the FTC and DOJ should be invaluable to courts in interpreting the law, just as past merger guidelines have been. Great progress has been made in our collective understanding of antitrust economics and the impacts of consolidation since the publication of the 2010 Horizontal Merger Guidelines, so it's important that the new guidelines make substantive changes in order to reflect new understanding.

In addition to stronger guidelines that more accurately interpret existing law, Public Knowledge believes that it's imperative for Congress to step in with statutory changes. To truly achieve competitive markets in key industries and across the economy, we need more than what existing law can accomplish. Public Knowledge supports legislation like Senator Klobuchar's *Competition and Antitrust Law Enforcement Reform Act of 2021* (CALERA) for its commonsense proposals to reform and strengthen the antitrust laws.[1] Congress can further empower antitrust enforcement through infusions of funding to ensure that agencies have the proper resources to combat the growing threat of consolidation and anticompetitive behavior throughout the economy. Sector-specific competition laws are also appropriate in key sectors such as dominant digital platforms. And other antitrust law reforms may be needed as well.

Digital Platforms

Public Knowledge believes that digital platform markets present unique risks to competition and are deserving of special analysis. Three major facets of these markets merit discussion: network effects, economies of scope and scale, and the limits of user choice. These markets tend towards tipping to one or a few powerful firms.[2] In such situations, competition occurs largely "for" the market rather than ongoing dynamic competition. Both enforcers and courts must take account of these unique features to make accurate enforcement decisions and achieve optimal market and consumer outcomes. Market participants, including the dominant platforms themselves,

[1] S. 225, 117th Cong. (2021).

[2] Nicolas Petit & Natalia Moreno Belloso, *A Simple Way to Measure Tipping in Digital Markets*, PROMARKET (Apr. 6, 2021), https://www.promarket.org/2021/04/06/measure-test-tipping-point-digital-markets/#:~:text=The%20conventional%20definition%20of%20tipping,not%20all%E2%80%94of%20the%20market.

understand these market realities and thus focus on aggressive growth to survive.[3] Digital platform markets, such as online search, e-commerce, and social networking, have grown to incredible economic importance since the last update to the merger guidelines. Public Knowledge believes this increasing importance, coupled with the unique market characteristics explained below, merits special attention in the merger guidelines.

Network Effects

A market exhibits network effects where the utility of a good goes up the more people that use said good.[4] As a network gains users, the number of potential connections goes up exponentially. This makes a larger network increasingly more attractive for both its current and potential future users. On the one hand, this is a major incumbency advantage that makes it very difficult for a second mover to have success. On the other hand, the potential for the market to tip and shift quickly to another network means that potential and nascent competitors may pose a more serious competitive threat than in other markets. Although uncertainty is high, incumbents in these markets face so little competition that enforcers and courts must err on the side of protecting the independence of these competitors. These dynamics deserve a special place in discussions about digital platform mergers. In markets characterized by network effects, companies that are small in size may still be important to protect from acquisition.[5] Agencies should look long and hard before allowing these firms to be acquired by the dominant platform purveyors (discussed in detail more below).

Economies of Scope and Scale

Today's platform markets run on data. Platforms collect data on our transactions, online searches, browser history, social media use, and so much more. This data is then aggregated and used to power targeted advertisements that make digital platforms some of the most profitable companies the world has ever seen. Data as a good has several unique properties. In many situations, data is non-rivalrous (one platform's exploitation of your data doesn't really affect the ability of another to do the same), and non-fungible (data is specific to an individual user so data from other users isn't helpful in filling in the blanks). Most importantly, however, data exhibits massive increasing returns both in scope and scale. More data, from more sources, is exponentially as valuable as less data. That means there will be a market gravitational pull keeping the companies with the most data on top.

Digital platforms also have a strong incentive to expand into as many verticals as possible, as each vertical can result in a new data stream about the user. This has a synergistic effect with network effects—bigger firms benefit both from stronger network effects and data scale

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[3] *See* Tim Sullivan, *Blitzscaling*, HARVARD BUS. REV. (Apr. 2016), https://hbr.org/2016/04/blitzscaling.
[4] *See, e.g.*, Feng Zhu & Marco Iansiti, Why Some Platforms Thrive and Others Don't, HARVARD BUS. REV. (Jan. 2019), https://hbr.org/2019/01/why-some-platforms-thrive-and-others-dont.
[5] *See* Michael Kades & Fiona Scott Morton, *Interoperability as a competition remedy for digital networks*, Wash. Ctr. for Equitable Growth (Sept. 23, 2020), https://equitablegrowth.org/working-papers/interoperability-as-a-competition-remedy-for-digital-networks/.

advantages. This has advantages beyond just lowering the cost of production, but other advantages (such as attracting capital at favorable rates). This also must be taken into account as a potential motivator for and an impact of mergers. A merger that may appear not to have a horizontal impact can confer important data advantages.[6]

Natural and Unnatural Limits of User Choice

Digital platforms have unprecedented control over what their users experience on their platforms. The user interface for a website or app can be designed in ways to nudge or even aggressively push the user towards certain choices, including particular products and services.[7] Disfavored and competitor services may be more difficult for a user to access, especially when they don't know that they need to be looking extra hard to find alternatives.

This phenomenon is exacerbated by basic tenets of consumer behavior. Consumers may exhibit an "if it ain't broke, don't fix it" mentality when it comes to digital platform services. If a product has worked well enough, a user can be "sticky" and unlikely to switch and experiment with other products that may be superior.[8] Nobel Prize-winning economists Daniel Kahneman and Richard Thaler discuss how people exhibit "bounded rationality" in which they use shorthand rules of thumb to make decisions in a complex world.[9] Platforms can take advantage of this to manipulate consumer choices and stay on top. In digital platform markets dominated by online gatekeepers, just being the "best" sometimes isn't enough if consumers aren't willing to at least try your offerings.

The Importance of Protecting Potential and Nascent Competition

As a result of these market characteristics, enforcers and courts need to pay particular attention to potential and nascent competition in digital platform markets. They create markets prone to tipping, where a small, new, or potential competitor may play an outsized role. To protect competition in these markets, it's especially important to recognize the harms of acquisitions of potential or nascent competitors and block mergers that might be allowed in other types of markets.

Digital markets today are led by gatekeepers that can effectively control their competitors'

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[6] *See, e.g.*, Public Knowledge & Consumer Federation of America, *DOJ Letter on Google - Fitbit* (Apr. 29, 2020), https://publicknowledge.org/policy/public-knowledge-and-consumer-federation-of-america-doj-letter-on-google-fitbit-merger/.

[7] *See, e.g.*, The Consumer Council of Norway, *You Can Log Out, But You Can Never Leave* (Jan. 14, 2021), https://fil.forbrukerradet.no/wp-content/uploads/2021/01/2021-01-14-you-can-log-out-but-you-can-never-leave-final.pdf.

[8] Public Knowledge, *Letter to Antitrust Subcommittee for Innovation Hearing*, (July 19, 2019), https://docs.house.gov/meetings/JU/JU05/20190716/109793/HHRG-116-JU05-20190716-SD010.pdf.

[9] Richard H. Thaler, From Cashews to Nudges: The Evolution of Behavioral Economics, 108 AMER. ECON. REV. 1265 (2018)

access to the market.[10] While these markets today are characterized by a distinct lack of direct, ongoing, head-to-head competition, fear of being unseated as the market champion may have some competitive impact on dominant firms.[11] Even nascent or potential competitors can have positive effects for consumers in the market and influence the dominant players to innovate and respond. This competition might not look like much, but any sort of competitive pressure is vastly preferable to none at all.

This leads to a discussion of what is known as Type I and Type II errors. Since predicting the future is difficult, it's likely that "errors" may sometimes occur in antitrust enforcement. Type I errors are where the agencies block a benign merger ("false positive") while Type II errors represent the inverse, the agencies failing to block an anticompetitive merger ("false negative"). The concept was originally introduced by Frank Easterbrook in a seminal article in which he argued antitrust should be far more concerned with Type I, which might be termed "over-enforcement" than Type II, "under-enforcement" errors.[12]

The result of Easterbrook and his intellectual progeny has been systematic underenforcement of our antitrust laws and rising concentration throughout the entire economy. Today's experts have convincingly argued that antitrust has become unbalanced with deleterious effects on the economy as a whole.[13] However, the Easterbrook Type I error bias deserves special condemnation in markets prone to tipping such as digital markets.

Easterbrook dramatically overestimates market contestability and focuses too much on unquantified potential benefits, especially in the digital market context. The maxim that a firm cannot enjoy monopoly profits for long before competitors will swoop in for their own slice of the pie doesn't hold true in markets with massive entry barriers like digital platform markets. Meanwhile, increasing consolidation stifles innovation (especially the market-changing type that could threaten the dominant status quo) making the potential benefits even more illusory in platform markets.[14]

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[10] *See* Jonathan B. Baker, Joseph Farrell, Andrew I. Gavil, Martin S. Gaynor, Michael Kades, Michael L. Katz, Gene Kimmelman, A. Douglas Melamed, Nancy L. Rose, Steven C. Salop, Fiona M. Scott Morton & Carl Shapiro, *Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets*, WASH CTR. FOR EQUITABLE GROWTH (2020), https://equitablegrowth.org/wp-content/uploads/2020/04/Joint-Response-to-the-House-Judiciary-Committee-on-the-State-of-Antitrust-Law-and-Implications-for-Protecting-Competition-in-Digital-Markets.pdf.

[11] George J. Stigler Ctr. for the Study of the Econ. and the State, Comm. for the Study of Dig. Platforms Mkt. Structure and Antitrust Subcomm. Report ["Stigler Report"] 50 (Jul. 1, 2019), https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C.

[12] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

[13] *See e.g.*, Steven C. Salop, *Dominant Digital Platforms: Is Antitrust Up to The Task?*, 130 YALE L.J.F. 563 (2021); Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. OF EUROPEAN COMP. L & PRACTICE 131 (2018); and TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018).

[14] *See, e.g.*, Asher Schechter, *Mergers Are Bad for Innovation*, PROMARKET (Sept. 29, 2017), https://www.promarket.org/2017/09/29/mergers-bad-innovation/.

Fundamentally, competition in these markets is *hard*. The theory that an agency mistakenly approving an ultimately anticompetitive merger would lead to new entry that would quickly alleviate any competitive concerns has not proven true in platform markets. For example, Facebook's acquisitions of Instagram and WhatsApp simply extended its dominance of social networking and no direct competitors have yet meaningfully entered. Given the high costs of Type I errors in these markets, it makes far more sense to worry more about Type II errors.

As an example, when Facebook sought to purchase Instagram, it faced a rare inflection point in its growth where it may have been at risk of being unseated.[15] A new technology, mobile phones, was taking off, and Facebook was slow to adapt. They might or might not have weathered that transition as the largest network. Facebook recognized the importance of retaining their position as the dominant incumbent, a "bet the firm" imperative in a market prone to tipping like social networking. Instagram was thriving with its focus on mobile, and despite its small size it had a dedicated and growing user base. Of course, the FTC's internal deliberations on that merger are non-public. But neither the agency nor the courts seemed to recognize at the time the general principle that a small competitor in what might at the time have been considered an adjacent industry could have a significant competitive impact on an incumbent in a market prone to tipping. It's crucially important that they incorporate this economic learning to be able to block a similar merger in the future.

Making Merger Enforcement More Efficient

The Federal Trade Commission and the Department of Justice are overworked and understaffed. The FTC has fewer staff than it did during the Jimmy Carter administration.[16] Meanwhile, mergers are at an all-time high. What was once a yearly estimate for the number of mergers that the agencies would need to evaluate (~200) is now happening about every two weeks.[17]

Strict statutory merger review timelines remain static despite the smaller staff and higher caseload. The current system is not working well for anyone. Agency staff is swamped with a backlog of requests and are thus unable to give every deal the scrutiny it deserves. This could lead to a situation where a deal that harms consumers and should be blocked might be able to sneak through. Honest businesses are also negatively affected by the inefficiencies of the current system. They face uncertainty for deals that should be quickly approved and have to face the specter of litigation to unwind their mergers for years. More funding and extending the statutory timelines for review would both be important statutory changes. Merger guidelines also have an important role to play in creating a more efficient system. Efficient merger enforcement would give businesses the clarity they need to properly pursue their economic goals.

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[15] Amended Complaint, FTC v. Facebook, Inc., No. 1:20-cv-03590-JEB (D.D.C. Aug. 19, 2021).

[16] Federal Trade Commission, *FTC Appropriation and Full-Time Equivalent (FTE) History*, https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation (showing 1,746 employees in 1979 compared to just 1,123 in 2021).

[17] Federal Trade Commission, *Premerger Notification Program*, https://www.ftc.gov/enforcement/premerger-notification-program (showing ~400 HSR filings per month).

More Clarity Through Clear Presumptions

Properly constructed, the merger guidelines should provide clarity to both enforcers and businesses. Antitrust enforcement agencies are incredibly resource-constrained and need to operate efficiently. The merger guidelines should be structured in such a way that obviously anticompetitive mergers never make it out of the boardroom.[18] Presumptions can provide needed clarity and predictability. If incorporated into the guidelines, they can put the evidentiary burden on the merging parties rather than overworked and underfunded enforcers. This saves businesses from wasting time and effort on long-shot legal challenges, and enforcers can focus their efforts on mergers that are a closer call.

Presumptions make sense for several reasons. First, it is the merging parties themselves who have the most relevant information in their possession and are thus best equipped to prove their merger would be competitively benign.

Second, presumptions can halt competitively dangerous mergers in their infancy, saving agencies precious time and resources. When companies know that they'll have to offer proof alongside their merger applications, they should be far more wary of meritless mergers. This in turn allows the agencies to focus on the edge cases, creating further clarity in merger law which benefits all players.

Third, basic tenets of justice and fairness lean towards putting initial evidentiary burdens on the merging parties themselves in a wider range of circumstances. Antitrust enforcement agencies work for the public, not the merging parties. The pre-merger notification process confers a benefit on would-be merging parties seeking an advance indication from the agencies if their proposed deal would result in litigation.

One possible presumption that we think is appropriate would be a "dominant platform" presumption. This would state a dominant platform's attempts to acquire either: 1) a firm with a substantial probability of entering into competition with it absent the merger, or 2) a firm competing in an adjacent market would be presumptively anticompetitive. A dominant platform would be defined as one with gatekeeper or "bottleneck" power.[19] This could function as a proper way to recognize and account for the power that dominant platforms can exert in an already competitively precarious market. For more on this presumption as well as other potential presumptions, please see the joint comments of Public Knowledge and the Open Technology Institute on the Vertical Merger Guidelines.[20]

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[18] *Oversight of the Enf't of the Antitrust Laws Before the Subcomm. on Antitrust, Competition Pol'y and Consumer Rights of the S. Comm of the Judiciary* 114th Cong. (2016) (statement of Bill Baer, Asst. Att'y Gen., Antitrust Division), https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-antitrust-division-testifies-senate-judiciary.

[19] Stigler Report, *supra* note 11, at 32; Digital Competition Expert Panel, *Unlocking digital competition* 59 (Mar. 13, 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking _digital_competition_furman_review_web.pdf.

Clear presumptions can also cut down on the resources devoted to expensive competing economic analyses. Those same competing economic experts also spend time quantifying proposed efficiencies that may never materialize. Limiting these burdensome and sometimes unnecessary costs can allow the agencies to take on more mergers, as well as needed conduct enforcement.

Giving Less Credence to Merger Efficiency Claims

A recurring problem in merger enforcement is that merging companies are able to claim broad, consumer-centric efficiencies that will come about as a result of their merger. These claims receive little pushback from the agencies when they are made, despite sometimes questionable evidence in their favor. This problem is compounded by little to no follow-up from the agencies asking if the promised efficiencies ever materialized. If merging parties want to claim that their merger will be good for consumers, not just their shareholders, they should be forced to actually follow through on their claims.[21]

Absent competition, there is no reason to expect businesses to pass on earned efficiencies to consumers. Businesses are profit-maximizing enterprises and if consumers have nowhere else to go, businesses can comfortably raise and maintain prices at monopoly levels, no matter how "efficient" their operation becomes. Therefore, even if the agency analyzes efficiencies, they should be discounted or dismissed if insufficient competition exists post-merger. Consumers lose if they are made to give up competition in exchange for efficiencies. Heavy skepticism is also warranted for claims that concentration in an existing market will allow entry into a new one.

An excellent example of this phenomena is the AT&T/Time Warner merger. AT&T was able to complete the transaction in large part due to big claims about consumer-centric, merger-specific efficiencies. We now know those claims never materialized.[22] There was no continuing oversight of the AT&T/Time Warner combination and thus no real need for the company to follow through on its lofty promises. So, they didn't.

True efficiencies can result from a merger and in some cases consumers might be better off. Companies are free to claim this, but the merger guidelines should specify some level of proof needed. Just as wild claims devoid of factual basis are thrown out early in the litigation process, so should claims of merger efficiencies without a factual proof background.

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[20] Public Knowledge & Open Technology Institute, *Comments on the Draft Vertical Merger Guidelines* (Feb. 26, 2020), https://publicknowledge.org/policy/comments-to-doj-and-ftc-on-vertical-merger-guidelines/.

[21] *See* American Antitrust Institute & Public Knowledge, *DOJ Letter on Discovery/WarnerMedia Merger* (Sept. 2, 2021), https://publicknowledge.org/policy/public-knowledge-and-american-antitrust-institute-doj-letter-on-discovery-warnermedia-merger/.

[22] *See* John Bergmayer, *AT&T is Reminding Us Why the Video Marketplace Was Traditionally Highly Regulated*, PUBLIC KNOWLEDGE (June 3, 2020), https://publicknowledge.org/att-is-reminding-us-why-the-video-marketplace-was-traditionally-highly-regulated/.

Enforcement agencies should also have some sort of enforcement mechanism to ensure claimed efficiencies actually come to pass. This could be through unwinding mergers or by putting efficiency claims into consent decrees so the agency can enforce them. Notably, previous iterations of the guidelines expressed deep skepticism of merger efficiency claims, and we would advocate a return to this kind of thinking.[23]

Platform Annexation Deserves Special Scrutiny

Public Knowledge would like to highlight academic work by Susan Athey and Professor Fiona Scott Morton on "platform annexation."[24] This is a phenomenon where a dominant platform acquires a company in an adjacent market that makes multi-homing more difficult for the user. Although not strictly vertical or horizontal, platform annexation deals give rise to a conflict of interest whereby a dominant provider has the incentive to degrade or withdraw the multi-homing experience for its competitors. If market participants are forced to choose just a single provider, it will most likely be the dominant player.

Multi-homing can be the competitive Achilles heel for dominant platforms. Their gatekeeper power makes it incredibly difficult for individuals and business users to quickly and completely leave. A seller might stick with Amazon even when they face mistreatment if the alternative is to completely sever their relationship with Amazon and thus lose their main conduit to customers and profits. In a "take it or leave it" world, dominant platforms win at the expense of those relying on the gatekeeper. Multi-homing allows companies to wean themselves off the dominant platform gradually. The company can experiment with other platforms, while maintaining a relationship with the dominant platform, and then completely migrate over time.

A market with a high-degree of multi-homing is much more likely to be a competitively vibrant one. Multi-homing creates competitive pressure on dominant platforms. If they mistreat their platform business users through high fees or onerous terms, those business users have options to gradually disassociate themselves from the dominant platform. We should thus encourage making multihoming as seamless as possible and the merger guidelines should be especially wary of potential mergers to make multi-homing more difficult.

An example of this phenomenon can be found in the recent Amazon purchase of start-up Veeqo.[25] At first blush, there might appear to be little competitive concern in the acquisition. Veeqo is a small start-up with around 60 employees that didn't even directly compete with Amazon. Veeqo's core product was a tool that allowed online sellers to manage their sales and inventory across multiple e-commerce platforms, from Amazon to eBay to Shopify. In other words, Veeqo was a tool that made multihoming in e-commerce easier. Now that it is under

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[23] U.S. Dep't of Justice, Merger Guidelines ¶ 10 (1968), https://www.justice.gov/archives/atr/1968-merger-guidelines.

[24] Fiona M. Scott Morton & Susan Athey, *Platform Annexation*, SSRN (Feb. 16, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3786434.

[25] Annie Palmer, *Amazon acquires Veeqo, a start-up that helps sellers manage their online businesses*, CNBC (Mar. 7, 2022), https://www.cnbc.com/2022/03/07/amazon-acquires-e-commerce-software-start-up-veeqo.html.

Amazon's control, there are clear incentives to degrade interoperability with other platforms which in turn will force sellers to pick the one dominant player in the space—Amazon.

American Express and Two-Sided Markets

In *Ohio v. American Express Co.* (*AmEx*), the Supreme Court in effect created special rules for two-sided markets.[26] Special rules for two-sided markets don't make sense: separating a two-sided market from other types of markets is inexact, and harms to one "side" of the market should not be justified by benefits to another "side" of the market. While a statutory fix would be most effective at addressing this bad decision, it is appropriate and necessary for enforcers and courts to take a narrow interpretation of the *AmEx* case.

Of particular relevance for merger enforcement would be the proposition that companies competing on only one side of a market are not in the same market as companies competing on both sides of the market.[27] If not explicitly rejected by the guidelines, it could lead to a disastrous loophole allowing dominant digital platforms free reign to acquire and kill their one-sided competitors. Digital platform markets are notoriously two-sided. The Amazon Marketplace connects buyers and sellers and Google Search connects advertisers on one side with users and their search results on the other. These companies are so large and powerful, it can be too much to ask for a competitor to simultaneously enter every vertical a digital platform has a presence in. A strong competitor active on only one side of the market can exert meaningful competitive pressure on the dominant platform provider and thus an acquisition of such a company by the two-sided incumbent may cause harm to competition.[28]

Conclusion

With bold leadership in place, Public Knowledge is pleased to see the FTC and DOJ move forward on a rethinking and a revitalization of the merger guidelines. We hope these ideas will aid the enforcement agencies during their process. We welcome the opportunity to expound further on these ideas.

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[26] 138 S. Ct. 2274 (2018).
[27] Charlotte Slaiman, *U.S. v. Sabre Decision Is Wrong About Platform Markets*, PUBLIC KNOWLEDGE (Apr. 9, 2020), https://publicknowledge.org/u-s-v-sabre-decision-is-wrong-about-platform-markets/.
[28] *See* Aaron M. Panner, *Market Definition and Anticompetitive Effects in* Ohio v. American Express, 130 YALE L.J.F. 608 (2020).

Comments on the Draft Vertical Merger Guidelines

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Public Knowledge and New America's Open Technology Institute submit these comments in response to the request for public comment regarding the Federal Trade Commission's and Department of Justice's Draft Vertical Merger Guidelines.[1] We support the decision to revisit the non-horizontal merger guidelines that were last published in 1984. Since then, there has been much more antitrust scholarship on mergers generally and vertical mergers specifically, as well as real-world examples that should inform the new guidelines.

While the FTC and DOJ have made the right decision to revise the guidelines, the current draft has important shortcomings that should be addressed. In particular, we recommend revising the guidelines to include: (1) rebuttable anticompetitive presumptions; (2) application to all non-horizontal mergers; (3) an evaluation of previous vertical mergers and their enforcement impact; and (4) an extended deadline for first-round public comments and a second round of reply comments.

In addition to these written comments, Charlotte Slaiman of Public Knowledge and Joshua Stager of the Open Technology Institute would welcome the opportunity to participate as speakers at the workshops scheduled for March 11 and March 18, 2020.

I. The Guidelines Should Include Anticompetitive Presumptions

Vertical mergers in concentrated markets are often anticompetitive. As a result, certain anticompetitive presumptions are warranted in some types of cases. Presumptions can help the agencies and merging parties save valuable resources at every stage of a transaction's review. Presumptions also provide a certain level of business certainty to merging parties so that they can make informed decisions about their legal risks.

The agencies should adopt *rebuttable* presumptions that can be invoked when at least one of the markets is concentrated and therefore competitive harm is more likely, and when certain other key criteria are met.[2] None of the presumptions are based solely on market shares and concentration.[3] All of the presumptions would be rebuttable by evidence showing that anticompetitive effects are unlikely.[4]

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[1] *Draft Vertical Merger Guidelines*, DOJ and FTC (rel. Jan. 10, 2020).
[2] Jonathan B. Baker, Nancy L. Rose, Steven C. Salop, and Fiona Scott Morton, *Five Principles for Vertical Merger Enforcement Policy*, Georgetown Law Faculty Publications and Other Works (hereafter "*Five Principles*") (Summer 2019), at 16, available at: https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3166&context=facpub; see also *Recommendation and Comments on the Draft Vertical Merger Guidelines*, Jonathan B. Baker, Nancy L. Rose, Steven C. Salop, and Fiona Scott Morton (hereafter "*Comments of Baker, Rose, Salop, Morton*") (filed Feb. 24, 2020), at 18-20.
[3] *Five Principles*, at 17.
[4] *Id.*

The Commission should adopt a **dominant platform presumption**. This would be a presumption that a merger is anticompetitive if a dominant platform acquires a firm with a substantial probability of entering into competition with it absent the merger, or if that dominant platform company acquires a competitor in an adjacent market.[5] Competition against platforms occurs differently than in other types of markets and is often harder. Entering from an adjacent market is one of the few viable ways to compete against a dominant platform.[6] As a result, it is important that mergers between dominant platforms and adjacent markets receive extra scrutiny.

For purposes of this presumption, a dominant platform could be defined as a firm with bottleneck power, as discussed in the Stigler Digital Platforms and Market Power Report and the UK Digital Markets Competition Report (also known as "The Furman Report"). According to the Stigler Report, "'bottleneck power' describes a situation where consumers primarily single-home and rely upon a single service provider (a 'bottleneck'), which makes obtaining access to those consumers for the relevant activity by other service providers prohibitively costly."[7] The Furman Report describes gatekeepers as companies that "have a high degree of control and influence over the relationship between buyers and sellers, or over access by advertisers to potential buyers."[8] These platforms are often important routes to market for other firms. Bottlenecks also benefit from market characteristics that tend to impede entry and lead to foreclosure, such as high switching costs for users, bundled services (either by contract or technology), and the inertia of defaults. Digital businesses that have this incentive and ability to develop and preserve a single-homing environment should be considered dominant platforms and therefore subject to the presumption.

Platforms often face "competition for the market" rather than dynamic and ongoing competition.[9] This type of competition is especially hard for new entrants and can be easily thwarted. Dominant platforms will often be in a better position to identify potential competitors that have a chance of unseating the incumbent than regulators. The threat to the dominant incumbent is existential, but the chances of success for the new entrant may be low. This makes proving the likely anticompetitive effect of the merger especially difficult at the same time that protecting the potential competition is especially important. This is a situation where a presumption can provide a real competitive benefit to the market, as it incentivizes the dominant platform to compete rather than purchase the potential competitor. This presumption is similar to the elimination of potential entry presumption, but due to the network effects and economies of

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[5] *Id.;* see also *Comments of Baker, Rose, Salop, Morton*, at 18-19.
[6] Stiger Committee on Digital Platforms, Final Report, Stigler Center for the Study of the Economy and the State (Sept. 2019) (hereafter "Stigler Report"), available at: https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf.
[7] *Stigler Report*, at 84.
[8] *Unlocking digital competition: Report of the Digital Competition Expert Panel* (Mar. 2019) (hereafter "Furman Report"), at 41, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.
[9] *Stigler Report*, at 88.

scale that protect dominant platforms from competition,[10] the need to prove that an adjacent market is a potential competitor is lifted.

Dominant platforms also have particular foreclosure capabilities for adjacent markets, which create incentives similar to vertical mergers in non-platform markets. A platform with market power could substantially disadvantage firms in an adjacent market by refusing to interoperate with them. If a platform purchased one adjacent market firm, it would then benefit from preferencing the owned firm over competing adjacent market firms, either by denying interoperability or making interoperability difficult, thereby diverting substantial business to the owned firm.

We can use the acquisition of Instagram by Facebook as an example. Though Instagram and Facebook may already have been horizontal competitors at the time of the merger, some have indicated that the two companies, one focused on mobile devices and photo sharing, the other focused on desktop devices and general social networking, may in fact have been in different markets.[11] If the FTC determined that in fact the two were not horizontal competitors, it could have been a useful time for a dominant platform presumption.

An **input foreclosure** presumption is another important anti-competitive presumption to include in the guidelines. When a company buys its input supplier, the merger may or may not be substantially likely to reduce competition.[12] But if the supplier produces a *critical* input, and if the market they're selling in (the input market) is *concentrated*, and if the merged company could divert substantial business to itself through a refusal to deal with competing customers, then a presumption that the merger would be substantially likely to reduce competition is warranted.[13]

This is because this situation allows the new merged firm to exercise market power. The new merged firm likely has the incentive and ability to fully withhold, or offer to sell only on unfavorable terms, the critical input from buyers that have now become competitors in the post-merger world.

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[10] *Five Principles*, at 17.

[11] There is no discussion of this question in the public closing documents, so we have no reliable indications of how the agency analyzed this merger. See *FTC Closes Its Investigation Into Facebook's Proposed Acquisition of Instagram Photo Sharing Program*, Press Release, Federal Trade Commission (Aug. 22, 2012), available at: https://www.ftc.gov/news-events/press-releases/2012/08/ftc-closes-its-investigation-facebooks-proposed-acquisition.

[12] *Five Principles*, at 16.

[13] This should also apply facing the other direction, as distribution can be considered a critical input for a manufacturer, such that what we typically think of as a downstream firm could also be considered an upstream firm, and vice versa. *Id.*

An illustrative example is the purchase of NBCUniversal, primarily a television content company, by Comcast, primarily a multi-channel video programming distributor (MVPD), in 2011. In that case, the FCC, applying its public interest standard, analyzed the merger much as an antitrust enforcer would, looking at possible input foreclosure.[14] The FCC found that a post-merger Comcast/NBCU would have the power to disadvantage downstream rivals—competing MVPDs—by permanently cutting off a rival from access to NBCU video programming, or even temporarily withholding that access.[15] It also found that the merged company could raise its rivals' costs by increasing the price of video programming to MVPD competitors.[16] The FCC then asked whether the exclusion of rivals would result in harm to competition and concluded that successful exclusion using one of these strategies would likely permit a merged Comcast/NBCU to obtain or maintain market power in the downstream MVPD market.[17] The FCC found that the merged firm would have the ability to "exclude all Comcast's rivals" from its programming.[18] In the end, the FCC approved a consent decree that it argued would remedy these problems, but as advocates argued at the time, it did not prove sufficient to remedy the complete competitive harm created by the merger.[19]

A presumption of anticompetitiveness in cases of input foreclosure would work in a similar way. Enforcers would have to show that the video programming market was concentrated, and that video programming was a critical input for MVPDs. They would have to show that a merged NBC/Comcast could divert substantial business—in this case subscribers to cable television—from competitors to itself by refusing to offer its programming to rival MVPDs. If enforcers could prove those three things, the burden would shift to Comcast to rebut the presumption that the merger is anti-competitive. Having such a presumption in place would not necessarily mean that a merger like Comcast/NBCU would not be settled with a consent decree. However, shifting the burden would make it possible to more easily block some anti-competitive mergers and to achieve stronger and more effective remedies if a consent decree was ordered. For example, the DOJ may have been able to require Comcast to commit to better arbitration requirements and/or stronger limits on most favored nation clauses (MFNs).

[14] Jonathan Baker, *Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis* (2011), at 37, available at: https://transition.fcc.gov/osp/projects/baker_vertical_mergers.pdf.
[15] *Id.* at 37.
[16] *Id.*
[17] *Id.*
[18] *Id.* at 38.
[19] Commissioner Michael Copps correctly identified the problem with the consent decree, "I believe loopholes remain that will allow Comcast-NBCU to unduly pressure both distributors, especially small cable companies, and content producers who sit across the table from the newly-consolidated company during high-stakes business negotiations for programming and carriage." (Dissenting Statement of Commissioner Michael J. Copps, *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket 10-56, FCC 11-4 (rel. Jan. 18, 2011) (hereafter "*Comcast/NBCU Order*", available at: https://www.fcc.gov/proceedings-actions/mergers-transactions/comcast-corporation-and-nbc-universal-mb-docket-10-56).

A similar anti-competitive presumption should apply in the case of **customer foreclosure**. Like input foreclosure, this deals with customers and suppliers, but in this case, rather than selling a critical input, the merging firm need only be a *substantial* purchaser of an input produced in a *concentrated* market.[20] Similar to input foreclosure, the merged firm must also be able to divert a substantial amount of business through refusing to deal.[21] Again, in this type of case we expect the new merged firm can exercise market power. The new merged firm likely has the incentive and ability to refuse to buy, or offer to buy only on unfavorable terms, from input suppliers that have now become competitors in the post-merger world, and the merged firm represents a substantial part of their business.

This also came up in the context of the Comcast/NBCU merger. Though the FCC has a different legal standard, their economic analysis appears similar to the concept of customer foreclosure in antitrust law. The FCC considered a range of exclusionary strategies that Comcast might employ, including refusing to carry a rival programming network on Comcast's distribution system; placing a rival network in a less advantageous service tier where fewer users would pay for access to it, or making it difficult for subscribers to find the rival network by giving it a less advantageous channel number.[22] These exclusionary strategies could harm the rival programming networks by reducing their viewership thereby making them less attractive to advertisers. The FCC concluded, "As a result, these unaffiliated networks may compete less aggressively with NBCU networks, allowing the latter to obtain . . . or maintain market power with respect to advertisers seeking access to their viewers."[23] In a similar analysis at the DOJ or FTC, we might expect similar results under the antitrust laws.

Non-horizontal mergers should also be presumed anti-competitive if the merger **eliminates a potential entrant** to a concentrated market. This can be defined as one merging firm having a substantial probability of entering into the other firm's market in the absence of merger, when the market losing the potential entrant due to the merger is concentrated.[24] This would be a two component test, the first component is substantial probability of entry in the absence of the merger, and the second component is concentration in the potential entry market. Even the threat of entry can put competitive pressure on a concentrated market.

The **elimination of a maverick** firm should also lead to a presumption that a merger is anti-competitive. A maverick is defined as a firm that has prevented or substantially constrained coordination by its competitors in a concentrated market.[25] If a firm with a vertical relationship to the maverick, either a customer of the maverick's products or an input supplier to the

[20] *Five Principles*, at 16.
[21] *Id.*
[22] Baker, *Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis*, at 39.
[23] *Comcast/NBCU Order*, at ¶ 116.
[24] *Five Principles*, at 16.
[25] *Id.*

maverick, purchases the maverick, the constraining influence of the maverick could be eliminated, which would lead to higher prices.[26] This is because it would likely be in the interest of the new merged firm to cease the maverick firm's maverick behavior since it would now benefit from coordination in that market. The mechanism by which this change takes place may not be obvious, so an example is helpful. Perhaps the maverick firm is an input supplier being purchased by a customer. Ordinarily the customer would benefit from having a maverick in the upstream market. However, once the customer owns the maverick, it now benefits from a lack of competition in the upstream market, as it can absorb the increased revenues in the upstream market.

II. The Guidelines Should Apply to All Non-Horizontal Mergers

The previous guidelines were named Non-Horizontal Merger Guidelines rather than Vertical Merger Guidelines. This is an important and valuable distinction. Not all non-horizontal mergers are vertical, yet other types of non-horizontal mergers may also have anti-competitive effects. The Commission should explicitly clarify that the guidelines apply broadly to non-horizontal mergers and not only to vertical mergers.

Mergers of complementary products in particular share economic similarities to vertical mergers. It will not be a good use of resources for agencies to have to prove that the merger they are concerned about is actually vertical rather than complementary in order to benefit from these new guidelines. One key component of a vertical merger is that a company engaged in a vertical line of business often has an easier time entering a market than other companies. This is similar for complementary products, as products that are complementary today can quickly become competitors.

Limiting the application of these guidelines to cases where the agency can prove a vertical relationship would leave out many merging firms in non-horizontal markets, where a similar analysis should nonetheless apply. Especially in communications and internet-related markets, where products and services change often, it can be difficult to identify whether the two merging parties are "at different stages of the same supply chain," as the draft guidelines require in footnote 2. However, the merger still shares important characteristics with vertical mergers and should be subject to the same guidelines.

In today's economy, it is common to have mergers that would not necessarily be characterized as vertical yet where a vertical merger analysis should still apply.[27] For example, we can imagine a situation where an Internet service provider ("ISP") buys a programming company that offers a video streaming channel directly to consumers. If the consumer then buys Internet service from

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[26] *Id.*
[27] *Comments of Baker, Rose, Salop, Morton*, at 5.

the ISP and contracts directly with the programming company for the video channel, is this a vertical relationship? It may not be so clear. Yet the economic analysis should apply in the same way. As such, the guidelines should include vertical as well as non-horizontal mergers to address mergers, such as the aforementioned example, that involve complementary products.

III. The Guidelines Should Include An Evaluation Of Past Enforcement Impact

The guidelines would benefit from an evaluation of how markets have fared after the approval of vertical mergers. At a minimum, past enforcement impact should inform the future direction of the Commission's work. Commenters have participated in several vertical transaction reviews, each of which can contribute to the Commission's record and understanding of the impacts of vertical mergers.

AT&T's 2015 acquisition of DirecTV demonstrates how promised efficiencies can fail to materialize in vertical mergers. AT&T claimed that the merger would produce efficiencies that would incentivize the deployment of new broadband service to millions of new customers. Specifically, AT&T committed to deploy fiber-to-the-home broadband to 12.5 million new locations and Fixed Wireless Local Loop services to 13 million rural households, all by the end of 2019.[28] This efficiency claim played a significant role in the transaction's approval, as it was viewed as a public interest benefit that could help close America's digital divide.[29]

However, AT&T appears to have wildly overestimated the merger's efficiencies. According to latest estimates, AT&T has only deployed Fixed Wireless Local Loop to 2.7 million households—a far cry from the 13 million household commitment.[30] When asked in 2017 if AT&T would honor this commitment, a spokesman merely replied that the commitment was not binding.[31] AT&T is even more opaque in its fulfillment of the fiber-to-the-home pledge. The company recently claimed it now "markets" fiber to 14 million locations.[32] However, *marketing* and *deployment to the home* are not synonymous, and AT&T is reportedly deeming any location within 1,000 feet of its fiber network as being served.[33] The Federal Communications Commission does not recognize this 1,000-foot threshold, and it is unclear how many locations

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[28] *FCC releases order approving AT&T-DIRECTV Transaction*, Federal Communications Commission, (July 28, 2015), https://www.fcc.gov/document/fcc-releases-order-approving-att-directv-transaction.
[29] *Id.*
[30] *Fixed Wireless Internet Providers*, BroadbandNow, https://broadbandnow.com/Fixed-Wireless-Providers.
[31] Jon Brodkin, *AT&T's wireless home Internet, with 160GB cap, is now in 18 states*, Ars Technica, (Sept. 28, 2017), https://arstechnica.com/information-technology/2017/09/atts-10mbps-wireless-replacement-for-slow-dsl-comes-to-nine-more-states/.
[32] AT&T, *Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, (Nov. 5, 2019), https://otp.tools.investis.com/clients/us/atnt2/sec/sec-show.aspx?Type=html&FilingId=13718698&CIK=0000732717&Index=10000.
[33] Bruce Kushnik, *AT&T's 1000 Foot Violation of AT&T-DirecTV Merger Conditions?*, HuffPost, (June 14, 2016), https://www.huffpost.com/entry/atts-1000-foot-violation_b_10449612.

are merely close to AT&T's fiber network rather than directly connected as the commitment entailed.

It is clear that, since the transaction closed, AT&T has given DirecTV preferential treatment over third-party content providers. At the time, experts voiced concerns that if the merger was allowed, AT&T would give anticompetitive preference to DirecTV content on its network.[34] In 2017, the FCC concluded that AT&T's free data or "zero rating" plan for DirecTV content likely violated the agency's net neutrality rules.[35] Pointedly, this plan runs afoul of the pledge that AT&T made, just two years prior, to adhere to net neutrality rules as a condition of the DirecTV merger.[36]

Throughout the past four years of broken promises and unrealized efficiencies, the video service that AT&T acquired through the merger has suffered greatly. By the end of 2019, AT&T had 20.4 million video subscribers—down from 25.4 million when the merger closed in 2015.[37] According to industry press, DirecTV "keeps tanking" as it hemorrhages subscribers and faces investor calls to divest from AT&T.[38] Much of this was foreseeable from the get-go due to the inherent incentives of the market. Clearer, more specific guidelines could have helped the Department of Justice to either block this merger or obtain more effective conditions.

AT&T offers yet another instructive example with its **2018 acquisition of Time Warner**. This transaction closed less than two years ago, yet it has already provided ample evidence that relying on AT&T's price reduction claims in lieu of clear market structure-based guidelines was a failed approach. In 2018, AT&T told a federal judge that "the evidence overwhelmingly showed that this merger is likely to enhance competition substantially, because it will enable the merged company to reduce prices … There is no sound evidence from which the Court could fairly conclude that retail pay-TV prices are likely to increase."[39] Moreover, AT&T specifically argued that "certain merger efficiencies will begin exerting downward pressure on consumer prices almost immediately." Instead, AT&T raised the price of its video streaming service within

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[34] Tom Wheeler to Sens. Edward J. Markey, Al Franken, Ron Wyden, Bernard Sanders, Elizabeth Warren, Tammy Baldwin, Richard Blumenthal, (Jan. 11, 2017), https://ecfsapi.fcc.gov/file/60001076101.pdf.
[35] FCC, Letter to Senator Markey (Jan. 11, 2017), https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0111/DOC-342982A1.pdf.
[36] *FCC releases order approving AT&T-DIRECTV Transaction*, Federal Communications Commission, (July 28, 2015), https://www.fcc.gov/document/fcc-releases-order-approving-att-directv-transaction.
[37] Jon Brodkin, *AT&T loses another 1.2 million TV subscribers as DirecTV keeps tanking*, Ars Technica, (Jan. 29, 2020), https://arstechnica.com/information-technology/2020/01/att-loses-another-1-2-million-tv-subscribers-as-directv-keeps-tanking/.
[38] *Id*.
[39] *United States of America v. AT&T et al.*, Case 1:17-cv-02511-RJL, (D.C. 2018), https://www.courtlistener.com/recap/gov.uscourts.dcd.191339/gov.uscourts.dcd.191339.121.0_1.pdf.

weeks of the transaction closing.[40] Eight months later, AT&T imposed a second price increase.[41] Six months after that, the company increased prices yet again.[42] Also within months of the transaction closing, AT&T engaged in a dispute with Dish Network that ultimately led to AT&T withholding HBO content from Dish for the first time in 40 years.[43] The loss of HBO could drive consumers to leave Dish's rival streaming service in favor of AT&T's—precisely what AT&T told the federal judge it would not do. Clearer vertical merger guidelines should specify the economic expectations in a situation like this so that agencies and courts are not relying on promises of companies to defy economic expectations. These price hikes and distribution disputes have created, in short order, a compelling record of the dangers of vertical mergers, particularly in oligopoly markets such as broadband service.

Comcast's purchase of NBCUniversal in 2011 is another transaction that the FTC and DOJ should take into account while developing new guidelines. This merger offers clear lessons in why new, specific and clear non-horizontal merger guidelines would be useful and effective. The Justice Department and the FCC approved Comcast/NBCU in 2011 with a relatively complex set of conditions, obtained under both the antitrust laws and the FCC's public interest authority, addressing the company's video and broadband services. For years, Comcast evaded and outright violated the conditions as enforcers struggled to monitor the company's conduct. For example, Comcast failed to "visibly offer and adequately market" a standalone broadband plan, as the 2011 consent decree required, resulting in an unprecedented $800,000 fine and FCC investigation.[44] Comcast also violated a condition to carry all unaffiliated news networks in the same "neighborhood" of channels by discriminating against Bloomberg, a news network that competed with Comcast-owned CNBC.[45] Both violations were uncovered by complaints from consumer groups and a well-resourced company; they do not necessarily constitute the full extent of Comcast's violations. They do, however, offer instructive examples of why enforcers should be skeptical of promises that companies will behave differently than the market structure suggests they will.

[40] Jon Brodkin, *AT&T promised lower prices after Time Warner merger—it's raising them instead*, Ars Technica, (July 2, 2018), https://arstechnica.com/information-technology/2018/07/att-promised-lower-prices-after-time-warner-merger-its-raising-them-instead/.
[41] Todd Spangler, *DirecTV Now Prices Going Up by $10 per Month for All Customers, AT&T Rolling Out Two New Reformatted Packages*, Variety, (Mar. 11, 2019), https://variety.com/2019/digital/news/directv-Now-price-Increases-
10-dollars-new-packages-1203160152/.
[42] Jon Brodkin, *AT&T hits online TV customers with second big price increase this year*, Ars Technica, (Oct. 18, 2019), https://arstechnica.com/information-technology/2019/10/att-hits-online-tv-customers-with-second-big-price -increase-this-year/.
[43] Chaim Gartenberg, *AT&T and Dish's HBO battle is the bleak future of cable and streaming*, The Verge, (Nov. 2, 2018), https://www.theverge.com/2018/11/2/18055780/att-dish-hbo-battle-warnermedia-cable-streaming-battle-future.
[44] *FCC Resolves Comcast NBCU Investigation*, Federal Communications Commission, (June 27, 2012), https://www.fcc.gov/document/fcc-resolves-comcast-nbcu-investigation.
[45] *FCC Affirms Bloomberg v. Comcast News Neighborhooding Decisions*, Federal Communications Commission, Sept. 26, 2013, https://www.fcc.gov/document/fcc-affirms-bloomberg-v-comcast-news-neighborhooding-decisions.

The Comcast/NBCU conditions have since expired, but Comcast's potential for market abuse has not. Within months of the conditions' expiration, Comcast faced complaints that it was using its content ownership to harm competitors. The American Cable Association, a lobbying group for smaller video and broadband providers, argued that Comcast now poses "an even bigger threat to competition than in 2011" and a bigger threat than the AT&T/Time Warner merger.[46] "When it was subject to the 2011 conditions, Comcast/NBCU at least thought twice about engaging in anticompetitive acts," the group wrote.[47] "Without a leash, it can engage in a much wider range of bad behavior and, if it gets caught, merely use its deep pockets to play out the clock or, at worst, ask for forgiveness."[48] The letter echoed concerns raised by Senator Richard Blumenthal, D-Conn., who in 2017 urged the Justice Department to investigate the expiring Comcast/NBC conditions and to consider unwinding the merger.[49] The agencies should consider whether stronger guidelines would have helped DOJ to devise a more effective way to prevent the harms identified in the DOJ Complaint.

Just as these examples are useful in these comments for explaining the presumptions, it will be useful for the final guidelines to have an accompanying commentary document explaining how the guidelines relate to recent precedents. The FTC endeavored to do this in 2006 with the Commentary on the Horizontal Merger Guidelines.[50] The FTC and DOJ should consider providing a similar commentary to accompany the new Non-Horizontal Merger Guidelines.

IV. The FTC and DOJ Should Extend The Comment Deadline And Solicit Reply Comments

The FTC and DOJ should extend the deadline for public comments and create a second round of reply comments. The FTC and DOJ publicly announced the draft guidelines on Jan. 10 along with a 30-day comment period. Reflecting the concerns of many, including Commissioner Chopra[51], the FTC and DOJ extended this deadline by two weeks. While we welcome this extension, we must acknowledge that six weeks is simply not sufficient time for individuals,

[46] Matthew W. Polka to Assistant Attorney General Makan Delrahim, (Nov. 6, 2018), https://www.americancable.org/wp-content/uploads/2018/11/181106-DOJ-Letter-re-Comcast-NBCU-w-Appendix-FINAL.pdf.
[47] *Id.*
[48] *Id.*
[49] Sen. Richard Blumenthal to Assistant Attorney General Makan Delrahim, (Dec. 13, 2017), https://www.blumenthal.senate.gov/imo/media/doc/12.13.17%20Letter%20to%20DOJ%20Antitrust%20re%20Comcast-NBCU.pdf.
[50] *Commentary on the Horizontal Merger Guidelines*, Department of Justice and Federal Trade Commission (March 2006), available at https://www.ftc.gov/sites/default/files/attachments/merger-review/commentaryonthehorizontalmergerguidelinesmarch2006.pdf.
[51] Statement of FTC Commissioner Rohit Chopra (Jan. 10, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561727/p810034chopravmgabstain.pdf.

organizations, and scholars to adequately rethink 36 years of new antitrust scholarship, court decisions, case studies, and the future of vertical merger enforcement.

The FTC and DOJ announced they will be holding two joint public workshops on the Draft Vertical Merger Guidelines in March. While we support these workshops, we believe it would have been more productive and valuable for the agencies and commenters alike if the comment deadline occurs *after* these workshops. If the goal is to have guidelines that are rigorously developed and robustly vetted, it would make sense to allow potential commenters to attend the workshops, participate in an exchange of ideas, and then file their comments. Accordingly, the FTC and DOJ should extend the current deadline beyond these two workshops.

In addition, the FTC and DOJ should create a second round of comments to allow commenters to reply to issues raised in the first round. Revising the guidelines is a significant endeavor that will significantly impact the public interest. The public should be given ample opportunity to weigh in on such an important matter, to read arguments presented in the record, and to express support or offer criticism. This additional level of engagement promotes transparency and gives the agencies important additional context. A reply-comment round is also consistent with decades of public comment precedent, such as the process established by the Administrative Procedure Act. The FTC and DOJ do not need to speed through this process.

V. Conclusion

For the reasons described above, the FTC and DOJ should move forward with new guidelines in a manner that best reflects the reality of vertical and non-horizontal mergers today. This includes acknowledging the failed enforcement of previous vertical mergers; incorporating anticompetitive presumptions in addition to the competitive presumptions; ensuring the revised guidelines apply to all non-horizontal mergers; and allowing for an adequate public comment period. If adopted, these recommendations will create stronger guidelines that benefit the agencies and the public interest alike.