Thou Art Weighed In The Balance–And Found Wanting? Evidence in Government Merger and Monopolization Litigation

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FOR THE BETTER PART OF A YEAR NOW, U.S. competition enforcers have been telling anyone who will listen that the old way of doing business is dead. Citing a "once-in-a-century inflection point in terms of [the] reach of corporate power," Assistant Attorney General for Antitrust Jonathan Kanter recently claimed a mandate to "update and adapt our antitrust enforcement to address new market realities."[1] FTC Chairwoman Lina Khan likewise told reporters that her agency would no longer invest in drawn-out settlement negotiations with parties seeking merger clearances, and instead would "focus[] [its] resources on litigating" those cases.[2] And former Deputy Assistant Attorney General Richard Powers made waves when he announced that the Antitrust Division would not "shy away from bringing criminal monopolization charges" in the right circumstances.[3]

These policymakers are not limiting their ambitions to just filing more cases. Instead, they aim to expand the ambit of antitrust concern beyond the criteria that dominated jurisprudence over the last half century: price, output, and quality. The new guard contends that a myopic focus on those criteria (and the consumer-welfare standard they embody) not only is inconsistent with statutory and case law origins, but that it also gave rise to decades of underenforcement, a legal and economic quagmire in the case law, and a systematic neglect of competitive dimensions that resist measurement or quantification.[4] Antitrust law and enforcement has to adapt, they say, to remedy the sins of the past and ward off the insidious competitive problems of the future.

Yet, absent new legislation, antitrust law will continue to develop as part of the common-law process—courts, rather than legislators or the agencies, control the agenda by applying and interpreting Section 7 of the Clayton Act and Section 2 of the Sherman Act in an ever-evolving set of circumstances.[5]

For courts, practitioners, academics, businesses, and anyone else keeping score, the agencies' policy goals and renewed appetite for litigation raise a series of burning questions. We examine two of them in this article: First, what type of evidence will the agencies muster as part of their antitrust-law reframing project? Second, are the agencies making progress towards those goals? We examine these questions in the context of merger and monopolization enforcement, two focal points of the agencies' aggressive new posture.[6] The early indications are that the agencies are positioning new categories of evidence as a supplement to, rather than a replacement for traditional evidence of price, output, and quality impacts. As to the second issue, we conclude that courts are weighing the agencies' new evidentiary approaches within the balances of traditional consumer-welfare criteria, implying that litigants fighting the agencies in court should continue to make price, output, quality, and innovation the focus of the narrative. In short, yesterday's debates will continue to resonate today.

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Will Evidentiary Challenges Sink the More Aggressive Merger Agenda?

Assistant Attorney General Kanter and Chair Khan quickly aligned on an overhaul of merger enforcement policy, both as a matter of process and underlying substantive philosophy. We review that ongoing project and focus in particular on the jurisprudential and evidentiary challenges that have arisen and are likely to recur as the DOJ's and FTC's enforcement agenda translates into litigation.

The Roots of the Newly Muscular Enforcement Approach in Section 7 Cases. Under current case-law interpretation, Clayton Act Section 7 analysis in federal court

typically reduces to a few key elements: a structural presumption of anticompetitive effects based on market structure and, where necessary, a detailed exploration of effects and efficiencies under a price-oriented consumer-welfare standard.[7] But in recent years, the agencies began to bring cases—and develop evidence—based on a broader set of competitive indicia, including innovation, vertical effects, potential competition, and dynamic markets.[8]

These attempts at a reinvigorated enforcement approach predate the current administration, and find their roots in the ongoing challenge of applying Section 7 (and Section 2) to platform markets and Big Tech.[9] In *United States v. Sabre,* for example, the DOJ under the Trump Administration sued to block a merger between an incumbent travel distribution platform and an upstart technology provider.[10] And the crux of the Division's case was evidence that the platform defendant viewed the upstart as a nascent rival and a competitive threat.[11] In a preview of the difficulty the agencies would encounter in relying on courts to advance their agenda, the district court in *Sabre* rejected the DOJ's theory as a matter of law.[12] Parsing the complex dynamics of multi-sided platforms, the court adopted the arguably myopic view that only *other* travel distribution platforms could compete with the defendant for purposes of Section 7 analysis.[13]

The agencies picked up the banner again just before the outset of the next administration. By way of example, the FTC brought an aggressive challenge to Facebook's acquisitions of Instagram and WhatsApp, in which it pressed new theories of anticompetitive "nascent" acquisitions under Section 2.[14] Similarly, the Commission recently sued to enjoin DNA sequencing platform Illumina's acquisition of Grail—a manufacturer of medical tests—on the basis that the deal would stifle innovation in the development of cancer-detection tests.[15] The agencies grounded each of these actions on established case law (or asserted extensions of it), flexed to adapt to new market realities and dynamic competition. What was missing was any explicit or implicit break from the consumer-welfare standard.

The Mismatch Between Theory and Practice. Notwithstanding their desire to push courts to accommodate a broader definition of harm to competition—for example, one that focuses on injuries to privacy and small businesses and takes aim at concentration itself[16]—the agencies' most recent enforcement actions rest on traditional grounds. The DOJ's challenge to Penguin Random House's acquisition of Simon & Schuster focused primarily on alleged horizontal price effects on superstar authors.[17] Likewise, the FTC's challenge to Meta's acquisition of Within Unlimited is fundamentally a case about price and quality injuries to competition: the price and quality of virtual reality fitness apps, and the price of top developers' labor.[18]

It is true that these and other recently filed cases assert relatively narrow product markets.[19] But that practice is hardly new, as the agencies seek to define markets that enable them to benefit from strong structural presumptions whenever they go to court. Likewise, the FTC's particular focus on developing vertical theories of competitive harm—including its unilateral withdrawal of the Vertical Merger Guidelines—remains grounded in traditional foreclosure theories.[20] The new and truly progressive cases have yet to come (but we believe they will).

The Prospect of New Evidentiary Standards and Metrics to be Placed in the Balances. Based on the agencies' recent public commentary, it is clear that they would like—and may press for—a return to a pre-Chicago School view of Section 7 standards, whereby the incipiency principle and structuralism drive the courts' merger analysis.[21] Yet proposing new case law direction in speeches is one thing; persuading courts to change Section 7 evidentiary standards is quite another. Perhaps recognizing the scope and difficulty of the task they have set for themselves, the agencies appear to be training their focus on a handful of key areas.

Market definition is one of those areas. Earlier this year, in a notice seeking input on a variety of merger-enforcement issues, the agencies posed a series of questions calling into doubt the utility of traditional market definition in Section 7 cases.[22] For example, the agencies asked whether market definition is even necessary in every merger case; whether the "formalistic market definition exercise" overlooks actual and potential injuries to dynamic competition; and whether the merger guidelines make it sufficiently clear that direct evidence of probable harm can substitute for traditional market definition evidence.[23] And while it is unlikely that the agencies will file a complaint omitting "formalistic" market-definition allegations any time soon, they are looking for opportunities to persuade courts that other evidence—namely, "evidence of substantial competition between the merging parties" or "evidence that one of the merging parties possesses market power"—is just as good.[24] Indeed, this type of broad linkage and flexibility on market definition—including the notion of "future potential competition"—appears to underpin the FTC's recent complaint seeking to enjoin Meta from acquiring Within Unlimited, a developer of virtual reality fitness applications.[25]

Nor is market definition the only proof point that the agencies seem eager to reconsider. Based on the questions in their Request for Information, they also appear ready to revisit the merger guidelines' concentration thresholds for presumptive harm and to advance other measures of market structure as alternatives to, or replacements for, the venerable Herfindahl-Hirschman Index.[26] If they succeed in implementing these new governing principles, the agencies are not likely to limit their reach to so-called "blockbuster" transactions. Rather, they appear just as determined to revive the incipiency principle as courts understood it in the middle of the twentieth century: that Section 7 applies with equal force to one-off blockbuster mergers and "a large number of mergers [that] would slowly but inevitably gravitate . . . a market of many small competitors to one dominated by one or a few giants[.]"[27]

Perhaps more difficult than convincing courts to adopt (or readopt) these principles is the task of persuading them that harm to competition can manifest itself in the new ways the agencies have in mind—injuries to small businesses, marginalized communities, entrepreneurs, privacy, and sustainability (among others). The agencies have gestured towards those types of effects in several recent cases, but thus far have not made them the centerpiece of merger-litigation efforts.

Will Positive Price Effects Remain Part of the Balance? Even if courts entertain and adopt these new standards and metrics, the consumer-welfare standard and its signal focus on prices is unlikely to fade away. And there may be circumstances in which a traditional consumer-welfare analysis does not align with the outcome under some of the agencies' new lenses. For example, one can foresee a case in which there is reliable proof that a merger will *lower* prices (at least in the short run) or boost innovation prospects, yet the transaction impacts another area of agency concern—*e.g.*, a harmful score on wages or potential negative effects on employment, privacy, or sustainability. When confronted with that fact pattern, courts that have applied the consumer-welfare analysis for decades will have to determine if and when the agencies' new values and standards have any purchase.

Irrespective of where Section 7 jurisprudence lands over the new few years, the agencies appear poised to press forward: either they will gain traction in the courts or they will press Congress for a new mandate that expands the definition of "harm to competition."

Section 2 Enforcement and the Continuing Relevance of *Microsoft*

Anti-monopolization enforcement, just like merger policy, features prominently in the government's agenda and litigation docket. And the agencies are litigating two significant cases—*United States v. Google, Inc.* and *FTC v. Facebook* (*n/k/a Meta*)—in the very same district court in which they famously prevailed in monopolization cases against AT&T and Microsoft. The agencies are attempting to refocus Section 2 jurisprudence on the notion that a violation may be established where a lawfully dominant firm is creating some form of protection from future potential competition; *e.g.*, asserting that Big Tech firms are building protective "moat[s]" around their platform "castle[s]" and ecosystems.[28] Will courts be accommodating of these new metaphors, and what kind of rigor will they demand from the litigants who advance them? It isn't clear. Again, in translating their evidentiary goals into litigation wins, the agencies are likely to face many of the same challenges in the Section 2 context that they will encounter in policing mergers.

An Early Test: FTC v. Facebook Inc. The FTC's monopolization complaint against Facebook (n/k/a Meta) presented an early test for the agencies' new evidentiary approaches, and in particular the FTC's apparent decision to use its complaint to migrate away from the "formalistic market definition exercise."[29] The district court partially declined the invitation to migrate.

In its initial complaint against Facebook, the FTC alleged facts undergirding two alternatives to traditional market definition that it would later propose in the merger context—evidence of direct competition between the parties to a merger and evidence that one party to the transaction possessed market power.[30] First, the FTC presented what it characterized as evidence of direct competition between Facebook and Instagram.[31] Second, the FTC alleged (without much supporting detail) that Facebook "maintained a dominant share of the U.S. personal social networking market (in excess of 60%)[.]"[32] The district court did not reject that proposed personal social networking market outright; it held that the FTC plausibly alleged it, even if it was "somewhat idiosyncratically drawn."[33]

But the court explained that it could not "compartmentalize the two issues" of market definition and market power, given that "the two inquiries ultimately come together to produce the conclusion that matters: the defendant's market power."[34] And on the market-power question, the court characterized the FTC's allegations as woefully insufficient. "To merely allege that a defendant firm has somewhere over 60% share of an unusual, nonintuitive product market—the confines of which are only somewhat fleshed out and the players within which remain almost entirely unspecified—is not enough[,]" the court concluded.[35]

It may be the case that the initial Facebook complaint did not present a genuine test of the agencies' new approaches to market definition and power. After all (and as the district court noted), the FTC spent nearly all of its brief arguing that its market-share allegations—the conventional means of proving power in relevant antitrust product and geographic markets—sufficed as a matter of law.[36] But the FTC's decision to make traditional market-share analysis the focal point of its brief reflected a value judgment: that the need to defeat Facebook's motion to dismiss outweighed the drive to advance new means of proving market power in relevant markets.

The FTC's amendments to its complaint confirmed that value judgment. The agency doubled down on its market-share strategy, supplementing its allegations with detailed evidence of Facebook's share of daily average users, monthly average users, and users' average time spent on personal social networks.[37] And it used those "reinforcing, specific allegations" to persuade the court that Facebook "maintained a dominant market share during the relevant time period."[38] At least on this point then, it appears that the FTC will resolve any tension between its policy goals and the exigencies of litigation in favor of the latter. In light of the public scrutiny of the government's cases and courts' power to control the goal posts, it would not be surprising to see that trend continue.

The Microsoft Roadmap for Government Monopolization Litigation. Notwithstanding the hiccup in the

Facebook case, the agencies may be on better footing to push their policy goals in the monopolization context because of the U.S. Court of Appeals for the D.C. Circuit's *Microsoft* precedent.[39] Two observations about *Microsoft* are in order. *First*, in terms of reducing complex monopolization cases to workable litigation rules, *Microsoft* provides the government with clear evidentiary targets. For example, to show that a defendant's anticompetitive conduct enabled it to maintain its monopoly power—the "causation requirement" for a monopolization claim—the government need only meet a "rather edentulous test": does the conduct "reasonably appear[] capable of making a significant contribution to [creating or] maintaining monopoly power[?]"[40]

The D.C. Circuit made clear that circumstantial evidence would suffice to make that showing.[41] And for the agencies, perhaps the most important corollary of that holding was the court's comment that it could "infer causation when exclusionary conduct is aimed at producers of nascent competitive technologies as well as when it is aimed at producers of established substitutes."[42] For enforcers deciding whether to bring a case in the first instance—especially a case premised on a novel theory of anticompetitive effects—the court's willingness to draw inferences in their favor on the causation element is more conducive to bringing hard cases.

Second, the *Microsoft* court provided the government a clear roadmap for the analysis that governs the question whether a given type of conduct should be classified as exclusionary:

> First, to be condemned as exclusionary, a monopolist's act must have an anticompetitive effect. That is, it must harm the competitive *process* and thereby harm consumers. . . . Second, the plaintiff, on whom the burden of proof of course rests, . . . must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect. . . . Third, if a plaintiff successfully establishes a *prima facie* case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a procompetitive justification for its conduct. . . . Fourth, if the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit. . . . Finally, in considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of § 2, our focus is upon the effect of that conduct, not upon the intent behind it.[43]

The emphasis on actual, concrete anticompetitive effects is a hallmark of the *Microsoft* test. That emphasis on tangible harm may offer some solace to monopolization defendants. But the *Microsoft* court's definition of "anticompetitive"—conduct that "has a substantial effect in protecting [the monopolist's] market power, and does so through a means other than competition on the merits"[44]—should not.

As to *Microsoft's* emphasis on competitive effects, this will require the crystallization and quantification of harms other than price, output, and quality—perhaps giving defendants clear targets for attack. Think for example of a monopolization case involving a merger that allegedly degraded nascent competition on a dimension of privacy. The emphasis on concrete anticompetitive effects for a nascent and qualitative dimension of competition may put defendants in a better starting position than the government, because future and qualitative dimensions of competition may be difficult to quantity or distill into a showing of "effects."

While the emphasis on effects may offer some solace to defendants (as it implies a call for hard-core empirics), as noted, we can expect the government to invoke the "reasonably capable" standard to relieve pressure on the showing and place it into context. Moreover, we should expect the government to underscore *Microsoft's* observation that any uncertainty as to how a "but-for world" would have evolved in the absence of the challenged conduct cuts against the monopolization defendant, not the government:

> We may infer causation when exclusionary conduct is aimed at producers of nascent competitive technologies as well as when it is aimed at producers of established substitutes. Admittedly, in the former case there is added uncertainty, inasmuch as nascent threats are merely *potential* substitutes. But the underlying proof problem is the same—neither plaintiff nor the court can confidently reconstruct a product's hypothetical technological development in a world absent the defendant's exclusionary conduct. To some degree, the defendant is made to suffer the uncertain consequences of its own undesirable conduct.[45]

At least on its face, that classification appears to be broad enough to accommodate the new categories of effects evidence that the agencies intend to present in these cases.

"Anticompetitive effect" by definition means actual-world outcomes in which consumers are worse off than they would have been in a world without the conduct (the "but-for world"). If one side of the ledger cannot be distilled with exactitude, will that relieve the pressure on the government to tender a showing of anticompetitive effects in the first instance?

Finally, a word on evidence of intent to monopolize. While the *Microsoft* court placed emphasis on evidence of monopolistic *conduct* instead of monopolistic intent, it left open an avenue for plaintiffs to introduce the latter "to the extent it helps [the court] understand the likely effect of the monopolist's conduct."[46] Given that intent evidence often serves as the grist for compelling storytelling, it would not be surprising to see competition enforcers use it more regularly in monopolization cases.

What's Next for the Agencies' Evidentiary Project?

Almost two years into the Biden Administration, the agencies' prospects for remaking antitrust evidentiary standards appear to be uncertain. Driven by the hydraulics of the litigation process and federal courts' gatekeeping power, the agencies find themselves reverting to conventional strategies for presenting evidence of market power and harm to competition. But notwithstanding their middling record

of success up until this point, there is no indication that the agencies intend to abandon their campaign to convince courts to bless new categories of evidence. Rather, they are likely to continue packaging the new with the old—pairing evidence of idiosyncratic impacts to privacy and sustainability alongside evidence of conventional impacts to price, output, or quality.

The agencies also appear to be more sensitive to litigation losses than some of their rhetoric might suggest. In the *Facebook* case, for example, the FTC amended its complaint to accommodate the district court's conventional critique rather than double down on what it characterized as direct evidence of monopoly power.[47] Some might hypothesize that the government, if it comes up short in litigation, will use those outcomes to bolster its case for new legislation. Will the government win by losing? Perhaps. But the agencies appear to be unwilling to put at risk years of investigation and the attendant investment of resources for the uncertain benefit of building a legislative rationale. There is little indication that the agencies' appetite for that type of gamble will grow over time, which makes it increasingly likely that they will fight battles on their new categories of evidence at the margins. Those losses are easier to swallow, and can easily be fashioned into a platform for arguing for legislation. ■

[1] Stefania Palma, *A 'Once-in-a-Century Inflection Point': DOJ's Antitrust Chief on Curbing Corporate Power*, Financial Times (June 2, 2022), https://www.ft.com/content/313550db-3006-401e-9908-981577663c51.

[2] Margaret Harding McGill, *FTC's New Stance: Litigate, Don't Negotiate*, Axios (June 8, 2022), https://www.axios.com/2022/06/09/ftcs-new-stance-litigate-dont-negotiate-lina-khan.

[3] Deputy Assistant Attorney General Richard A. Powers, Effective Antitrust Enforcement: The Future Is Now, Keynote Before the University of Southern California Global Competition Thought Leadership Conference (June 3, 2022), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-keynote-university-southern; Justin P. Murphy, Paul M. Thompson, Han Cui, Alexandra Lewis, Marisa E. Poncia, *Cartel Corner*, McDermott Will & Emery (Aug. 2022), https://www.mwe.com/pdf/cartel-corner-august-2022/ (noting that Powers declined "to provide guidance regarding what criminal enforcement of a Section 2 claim may look like but stated that 'there's ample case law out there to help inform those who have concerns or questions.'").

[4] *See, e.g.*, Assistant Attorney General Jonathan Kanter, Remarks Before the New York City Bar Association's Milton Handler Lecture (May 18, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association ("[A]ntitrust is more about protecting what we cannot predict or measure rather than what we can."); *id.* ("The irony of the consumer welfare standard is that consumers have been harmed in its name by underenforcement of the antitrust laws."); Chair Lina M. Khan, *Memorandum to Commission Staff and Commissioners: Vision and Priorities for the FTC* at 1-2, Fed. Trade Comm'n (Sept. 22, 2021) [hereinafter "Khan Memo"], https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf ("[W]e need to take a holistic approach to identifying harms, recognizing that antitrust and consumer protection violations harm workers and independent businesses as well as consumers. . . . Broadening our frame can also help surface the macro effects of our policy decisions, such as the relationship between market structure and supply chain fragility, or data consolidation and security vulnerabilities.").

[5] *See* Lina M. Khan, *The End of Antitrust History Revisited*, 133 Harv. L. Rev. 1655, 1678-79 (2020) (recognizing that antitrust law "now rests 'firmly in the grip of [an] unelected judiciary'").

[6] Khan Memo at 2 ("[W]e need to address rampant consolidation and the dominance that it has enabled across markets. This will require both finding ways to strengthen our merger enforcement work as well as generally focusing our resources on scrutinizing dominant firms, where lack of competition makes unlawful conduct more likely.").

[7] *See, e.g.*, United States v. Baker Hughes Inc., 908 F.2d 981 (D.C. Cir. 1990); *see generally* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (describing the Sherman Act as a "consumer welfare prescription").

[8] *See, e.g.*, United States v. AT&T Inc., 310 F. Supp. 3d 161 (D.D.C. 2018), *aff'd sub nom.*, 916 F.3d 1029 (D.C. Cir. 2019).

[9] *See generally* Ian Simmons, Asheesh Agarwal, Diana L. Moss, Hon. Noah J. Phillips, Timothy Wu, *High Technology Deals: Are New Standards Warranted?*, American Bar Association Antitrust Law Section 69th Antitrust Law Spring Meeting (Mar. 25, 2021).

[10] United States v. Sabre Corp., 452 F. Supp. 3d 97 (D. Del. 2020), *vacated*, 2020 WL 4915824 (3d Cir. July 20, 2020).

[11] Government's Pretrial Brief at 4, United States v. Sabre Corp., No. 1:19-cv-01548 (D. Del. Jan. 15, 2020), ECF No. 191 ("Defendants' business documents confirm that Sabre views the growth of Farelogix and the technology it has developed as a threat to the traditional GDS business model, and reinforce that the acquisition would eliminate this important competition.").

[12] *Sabre*, 452 F. Supp. 3d at 138.

[13] *Id.* ("DOJ cannot prevail on its claim as a matter of law. Only other two-sided platforms can compete with a two-sided platform for transactions, … and Farelogix is not a two-sided platform, as even DOJ concedes[.]") (cleaned up).

[14] First Amended Complaint, FTC v. Facebook, Inc., No. 1:20-cv-03590-JEB (D.D.C. Aug. 19, 2021), ECF No. 75-1.

[15] Complaint ¶¶ 1, 14, Illumina, Inc. and Grail, Inc., FTC Docket No. 9401 (Mar. 30, 2021), https://www.ftc.gov/system/files/documents/cases/redacted_administrative_part_3_complaint_redacted.pdf.

[16] *See* Assistant Attorney General Jonathan Kanter, Antitrust Enforcement: The Road to Recovery, Keynote Before the University of Chicago Stigler Center (Apr. 21, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler; Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Powers*, 9 Duke J. Const. L. & Pub. Pol'y 37 (2014); Lina M. Khan, *The End of History Revisited*, 133 Harv. L. Rev. 1655 (2020) (reviewing Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age (2018)); Assistant Attorney General Jonathan Kanter, Keynote Before the CRA Conference (Mar. 31, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-cra-conference; Chair Lina M. Khan, Remarks before the Int'l Competition Network, Berlin, Germany (May 6, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks%20of%20Chair%20Lina%20M.%20Khan%20at%20the%20ICN%20Conference%20on%20May%206%2C%202022_final.pdf.

[17] Complaint ¶¶ 37-39, 60, United States v. Bertelsmann SE & Co. KGAA et al., No. 1:21-cv-02886 (D.D.C. Nov. 2, 2021), ECF No. 1.

[18] Complaint ¶ 13, FTC v. Meta Platforms, Inc. et al., No. 5:22-cv-04325 (N.D. Cal. July 27, 2022), ECF No. 1 ("[T]his Acquisition poses a reasonable probability of eliminating both present and future competition. That lessening of competition may result in reduced innovation, quality, and choice, less pressure to compete for the most talented app developers, and potentially higher prices for VR fitness apps.").

[19] *E.g.*, Complaint ¶ 31, United States v. Booz Allen Hamilton Holding Corp. et al., No. 1:22-cv-01603 (D. Md. June 29, 2022), ECF No. 1 (alleging a relevant product market comprising the "sale of signals intelligence modeling and simulation services to NSA through [one NSA] contract").

[20] *See* Press Release, Fed. Trade Comm'n, Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary (Sept. 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary; *see also* Complaint, Illumina, Inc. and Grail, Inc., FTC Docket No. 9401 (Mar. 30,

2021), https://www.ftc.gov/system/files/documents/cases/redacted_administrative_part_3_complaint_redacted.pdf; Complaint, Nvidia Corp., Softbank Group Corp., and Arm, Ltd., FTC Docket No. 9404 (Dec. 6, 2021), https://www.ftc.gov/system/files/documents/cases/d09404_part_3_complaint_public_version.pdf; Complaint, Lockheed Martin Corp. and Aerojet Rocketdyne Holdings, Inc., FTC Docket No. 9405 (Jan. 26, 2022), https://www.ftc.gov/system/files/documents/cases/d09405lockheed-aerojetp3complaintpublic.pdf.

[21] *See* Chair Lina M. Khan, Remarks before the Fordham 49th Annual Conference on International Antitrust Law and Policy (Sept. 16, 2022), https://www.ftc.gov/news-events/news/speeches/remarks-chair-lina-m-khan-prepared-delivery-fordham-annual-conference-international-antitrust-law.

[22] Press Release, U.S. Dept. of Just. & Fed. Trade Comm'n, Request for Information on Merger Enforcement at 5-6, (Jan. 18, 2022) [hereinafter, "FTC-DOJ RFI"], https://www.justice.gov/opa/press-release/file/1463566/download.

[23] *Id.* at 5.

[24] *See id.*

[25] Complaint, FTC v. Meta Platforms, Inc. et al., No. 5:22-cv-04325 (N.D. Cal. July 27, 2022), ECF No. 1.

[26] FTC-DOJ RFI at 4 (questioning whether the guidelines' thresholds should be revised, and whether market-structure overlays like the "significant competitors" test should replace HHI-based metrics).

[27] United States v. Von's Grocery Co., 384 U.S. 270, 278 (1966); FTC-DOJ RFI at 2 ("Is [Section 7's] statutory language directed at preventing monopolies in their incipiency such as through serial acquisitions, including rollups?").

[28] *See* Assistant Attorney General Jonathan Kanter, Solving the G[l]obal Problem of Platform Monopolization, Keynote Before the Fordham Competition Law Institute's 49th Annual Conference On International Antitrust Law and Policy (Sept. 16, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-keynote-fordham.

[29] FTC-DOJ RFI at 5.

[30] *Id.* (identifying "evidence of substantial competition between the merging parties" or "evidence that one of the merging parties possesses market power" as possible direct-evidence substitutes for traditional market definition).

[31] FTC v. Facebook, Inc., 560 F. Supp. 3d 1, 7 (D.D.C. 2021).

[32] *Id.* at 18.

[33] *Id.* at 17.

[34] *Id.* (internal quotation marks omitted).

[35] *Id.* at 20.

[36] *Id.* at 13 ("Although the FTC briefly suggests in its Opposition that it can offer direct proof of market power,. . . it spends nearly its entire brief arguing why it has sufficiently pleaded indirect proof—*viz.*, that Facebook has a dominant share of a relevant product and geographic market (the United States market for Personal Social Networking Services) protected by entry barriers.").

[37] FTC v. Facebook, Inc., 581 F. Supp. 3d 34, 46-48 (D.D.C. 2022).

[38] *Id.* at 47.

[39] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

[40] *Id.* at 79 (internal quotation marks omitted).

[41] *Id.* ("We may infer causation when exclusionary conduct is aimed at producers of nascent competitive technologies as well as when it is aimed at producers of established substitutes.").

[42] *Id.*

[43] *Id.* at 58-59 (internal quotation marks and citation omitted).

[44] *Id.* at 62.

[45] *Id.* at 79 (internal quotation marks omitted).

[46] *Id.* at 59.

[47] *Facebook*, 581 F. Supp. 3d at 44 ("[T]he FTC contends that it has alleged both indirect and direct evidence of Facebook's monopoly power, although it devotes far more attention to the indirect-proof argument. . . . [T]he Court concludes that the FTC has adequately alleged indirect evidence of such monopoly power, it need not separately address whether this is the rare case in which the agency has also pleaded direct evidence.").