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The Big Ban(g) Theory

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I. INTRODUCTION

A. The Big Tech Merger Concern

The term "Big Tech" is referred to: Amazon, Apple, Facebook (Meta), Google and Microsoft. These companies are the five largest multinational online service or computer hardware and software companies and have the top position in the stock market by market share[1] Data indicated that these five firms have made over 700 acquisitions from 1987 to 2019[2] (Google 32%, Microsoft 31%, Apple 15%, Amazon 11%, and Facebook 11%). After 2001, The DOJ and FTC began to use NAICS codes to report HSR (Hart-Scott-Rodino) transactions. The code name is NAICS 518 for data processing, hosting, and related services (mainly including Google, Amazon, Facebook)[3] Over 200 transactions were reportable between 2001 and 2017 and only one of which was challenged by the DOJ in federal district court – the Google/ITA case[4] This rate, as a percentage of transactions cleared to the agencies over the period, is about 3%, which is significantly lower than that of 13% across all sectors[5]

All this data raises controversy in relation to the effects of the dominance and overpowering of the Big Tech to innovation and market entry; incentives to compete on price and nonprice dimensions; and the potential for AI-driven biased pricing and other theories of harms[6]. In realising this growing power of the Big Tech and underenforcement in regulations, US Senator Josh Hawley proposed the bill of "Bust Up Big Tech Act" on April 19th 2021[7], which will "crack down on mergers and acquisitions by mega-corporations and strengthen antitrust enforcement to pursue the breakup of dominant, anticompetitive firms", according to him[8]

B. Motif

In section 2, this article examines the US regulations on both horizontal and non-horizontal mergers and the evolution of the law in the past 60 years. In section 3, the article looks at how the law interacts with the Big Tech merger

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1 Andrea Murphy & Isabel Contreras, The Global 2000, FORBES (May 12, 2022 6:30 AM), https://www.forbes.com/lists/global2000/?sh=2a2f8a7c5ac0#HEADER:MARKETVALUE_SORTREVERSE:TRUE.

2 *Id.*

3 NAICS Code 518 Description, SICCODE, https://siccode.com/naics-code/518/data-processing-hosting-services (last visited October 14, 2022).

4 Lina M. Khan & Richard A. Powers, *Hartt-Scott-Rodino Annual Report Fiscal Year 2020*, tab. X, https://www.ftc.gov/system/files/documents/reports/hart-scott-rodino-annual-report-fiscal-year-2020/fy2020_-_hsr_annual_report_-_final.pdf.

5 *Id.*

6 Ariel Ezrachi & Maurice E. Stucke, *Artificial Intelligence & Collusion: When Computers Inhibit Competition*, 2017 U. ILL. L. REV. 1775, 1775 (2017).

7 S.1204 – BUST UP BIG TECH ACT, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/senate-bill/1204/cosponsors (LAST VISITED OCT. 12, 2022).

8 Senator Hawley Introduces the 'Trust-Busting for the Twenty-First Century Act': A plan to Bust Up Anti-Competitive Big Business, JOSH HAWLEY U.S. SENATOR FOR MISSOURI (Apr. 12, 2021), https://www.hawley.senate.gov/senator-hawley-introduces-trust-busting-twenty-first-century-act-plan-bust-anti-competitive-big.

and acquisition activities and introduce the shortcomings to the existing system. In section 4, the article in-depth analyses the theories of harm and what would happen if an authority banned all the mergers and acquisitions for the Big Tech. In section 5, the article briefly expresses the authors' view regarding to what extend the authors agree with "The Big Ban(g) Theory".

II. HOW DOES THE CURRENT LEGAL FRAMEWORK ADDRESS MERGERS?

A. General Note

Hart-Scott-Rodino Antitrust Improvement Act[9] placed responsibility to review mergers to the Department of Justice and the Federal Trade Commission. The two "big guns" in the legislation are the Sherman Antitrust Act and the Clayton Act[10] While s. 2 of the Sherman Act is concerned with unilateral exclusionary conduct, s. 7 of the Clayton Act prohibits mergers and acquisitions that may 'substantially lessen' competition[11]

For the procedures of a merger case: firstly, very large mergers will be notified to both the DOJ and the FTC before the merger's completion per HSR threshold requirement[12]; secondly, the agencies would negotiate with the merging entities; finally, the binding result of negotiations would be in either a Consent Order by the FTC or a Consent Decree by the federal court at the request of the DOJ[13] After the second stage, the negotiations could lead to a clearing of the transaction; or initiating proceedings to block it; or reaching a remedial agreement with the parties to alleviate possible competition concerns[14].

B. Horizontal Merger Control

Professor Carl Shapiro[15] had observed a gradual weakening of the US antitrust law on horizontal mergers. Three stages can be roughly divided:

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9 HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976, PL 994-435 (CODIFIED AT 15 U.S.C.A. CH. 34).

10 SHERMAN ANTITRUST ACT OF 1890 (26 STAT 209, 15 USC 1-7); CLAYTON ANTITRUST ACT, AMENDMENT OF US CONGRESS TO THE SHERMAN ACT IN 1914 (15 USC 13).

11 ACQUISITION BY ONE CORPORATION OF STOCK OF ANOTHER, 15 U.S.C.A. §18 (1996)(WEST).

12 THOMAS E. Kauper, *Merger Control in the United States and the European Union: Some Observations*, 74 St. John's L.Rev. 305 , 309-10 (2000).

13 GEORGE METAXAS ET AL, *MERGER REVIEWS IN THE US AND THE EU: A COMPARATIVE OVERVIEW*, GLOBAL COMPETITION REVIEW 57, 57 (2006) https://www.hoganlovells.com/~/media/hogan-lovells/pdf/publication/2206globalisation_pdf.pdf.

14 15 U.S.C.A. §18.

15 CARL SHAPIRO, *PROTECTING COMPETITION IN THE AMERICAN ECONOMY: MERGER CONTROL, TECH TITANS, LABOR MARKETS*, 33 J. OF ECON. PERSPS. 69, 73 (2019).

The article calls the first stage the "golden era" of the "structural presumption". In Philadelphia National Bank[16], the Supreme Court held that any merger that would result in a "significant increase in the concentration of firms in that market is inherently likely to lessen competition substantially" by holding an undue percentage share. Mergers will only be allowed if this presumption can be rebutted by clear evidence. In a subsequent case[17], the court ruled out - efficiencies as a defence to illegality. The 1968 Merger Guideline reflected these rulings and focused largely on the market shares of the merging firms.

The second stage marked the fall of "structural presumption" (this can be partially accredited to Chicago School's pro-efficiency merger revolution). In the DOJ's 1982 Merger Guidelines, they gave less weight to market shares and raised the threshold levels of concentration that would trigger the structural presumption. To make things worse, the DC Circuit departed from the Supreme Court's 1960s precedents and stated that "evidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness"[18]

The third stage was the rise of the "effect-based approach". Three subsequent revisions were made on the Horizontal Merger Guidelines in 1992, 1997, and 2010, where less weight was given to market shares and greater weight to the effect of the merger on competition. The 1992 Guidelines introduced "unilateral effects" to focus on loss of direct competition; the 2010 Guidelines supplemented with concepts of upward pricing pressure, merger simulation, and bidding and auction model.

C. Non-Horizontal Merger Control

1. Pre 2020

Non-horizontal merger enforcement observed a similar trend as its horizontal counterpart, although with arguably less scrutiny[19]:

In 1950, the Clayton Act had no definition of what conduct substantially lessens competition or tends to create monopolies, so the court used to apply a higher level of scrutiny in non-horizontal merger cases.

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16 *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 363 (1963).

17 *F.T.C. v. Procter & Gamble Co.*, 386 U.S. 568, 589 (1967) ("Possible economies cannot be used as a defense to illegality.").

18 *United States v. Baker Hughes Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990).

19 Steven C. Sallop & Daniel P. Culley, *Revising the US Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners*, J. Antitrust Enforc., 2015, at 1.

The two leading cases from the 1960s highlighted the harm of foreclosure in Brown Shoe 1962[20] and entrenchment in Procter 1967. The 1968 Merger Guidelines included both theories.

But in the 1970s, the Chicago School criticises the approach by stating there is obvious advantages in improving economic efficiency[21] In response to this criticism, agencies and courts dramatically changed their attitude toward enforcement for non-horizontal mergers. And unsurprisingly in 1982's revision of DOJ's Guidelines, they omitted the foreclosure and entrenchment theories and replaced them with a presumptive standard of efficiency for non-horizontal merger enforcement and added some empirical analytical tools including Hypothetical Monopolist Test and Herfindahl-Hirschman Index.

Two years later in 1984, the DOJ published a slightly revised version of the Guideline. It still left out the foreclosure theory, which is the theory of harm alleged in almost 70% of non-horizontal merger enforcement actions brought by the DOJ and FTC between 1995 to 2015[22]

2. Post 2020

On June 30th, 2020, the DOJ and FTC replaced the 1984 Non-Horizontal Merger Guidelines with the 2020 Vertical Merger Guidelines (VMG). As Michael Salinger[23] commented the guidelines are "muddying the waters instead of clarifying them", the guidelines were not making the agencies life easier. However, in September 2021, President Biden's FTC rescinded it, claiming they represented a "flawed economic theory regarding purported pro-competitive benefits of mergers".

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[20] *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

[21] Charles A. Miller, *Big Data and the Non-Horizontal Merger Guidelines*, 107 Cal. L. Rev. 318, 319 (2019).

[22] Sallop, *supra* note 19.

[23] Michael A. Salinger, *The New Vertical Merger Guidelines: Muddying the Water*, 59 Rev. Ind. Organ. 161, 162-171 (2021).

III. WHAT ARE THE LIMITATIONS TO THE CURRENT LEGAL/REGULATORY FRAMEWORK?

A. Weak Horizontal Merger Enforcements[24]

On April 9, 2012, Facebook announced its acquisition of Instagram at $1 billion, The FTC reviewed the acquisition and on August 22 the same year closed the investigation without taking an action[25] However, many scholars[26] including the FTC in 2020[27] regard Instagram would have been a direct competition to Facebook. The 2012 acquisition was never brought up in court, but Professor Click[28] named four hurdles the agencies would have had to overcome to succeed in court under his "potential competition doctrine".

First, the 1984 Guidelines purported that a challenge is unlikely if concentration in the acquired firm's market is below 1800HHI (the measure for social networking market would be satisfied but not for display advertising market)[29] Second, the DOJ will not challenge a potential competition merger if entry into the market is easy (but data barrier is hard to measure and in digital advertising market even adjacent firms can become competitors)[30] Third, if entry is not easy, then the DOJ must show that Instagram had an entry advantage not possessed by three or more firms (however, Facebook can argue Instagram was just one of many potential entrants into social networking)[31] Finally, the government must show that Instagram's entry into the social networking or advertising markets would deconcentrate the market or have a significant pro-competitive effect (but Instagram had not entered the digital advertising market yet, thus it was impossible to establish a procompetitive effect)[32]

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[24] Diana L. Moss, *The Record of Weak U.S. Merger Enforcement in Big Tech*, AMERICAN ANTITRUST INSTITUTE (Jul. 8, 2019), https://www.antitrustinstitute.org/wp-content/uploads/2019/07/Merger-Enforcement_Big-Tech_7.8.19.pdf.

[25] Claire Y. Cho, *Mergers and Acquisitions in Digital Markets*, CONGRESSIONAL RESEARCH SERVICE (Mar. 30, 2021), https://sgp.fas.org/crs/misc/R46739.pdf.

[26] *E.g.*, Miller, *supra* note 21; Mark Glick & Catherine Ruetschlin, *Big Tech Acquisitions and the Potential Competition Doctrine: The Case of Facebook*, INSTITUTE FOR NEW ECONOMIC THINKING (Oct. 2019), https://www.ineteconomics.org/uploads/papers/WP-104-Glick-and-Reut-Oct-10.pdf.

[27] *Fed. Trade Comm'n v. Facebook, Inc.*, 581 F. Supp. 3d 34, 52-61 (D.D.C. 2022) (stating FTC alleged Facebook has maintained its monopoly position by buying up companies that pose a threat).

[28] Glick & Ruetschlin, *supra* note 26.

[29] *Id.* at 33.

[30] *Id*. at 35.

[31] *Id*. at 37.

[32] *Id*. at 39.

Although it is unknown why he based his 'potential doctrine' on the 1984 Guidelines considering the 2010 version was long published, the hurdles should apply, and the three subsequent updates only added more challenges to the already daunting task for the FTC. One can see, it is virtually impossible for the authorities to succeed in even such a "classic horizontal merger" case like Facebook/Instagram. The author concluded the Chicago School influenced doctrine as "…essentially ties the hands of the antitrust agencies because it demands levels of proof that are intractable…".

B. Weak Non-Horizontal Merger Enforcement[33]

This is a typical example of how a vertical data-related merger in a non-price market received insufficient scrutiny. ITA Software is a firm who provides algorithms for travel sites to find and book flights. Google and ITA are not direct competitors, but ITA can help with one of the services Google provides – Google Flights, which puts them in a vertical relationship.

The 1984 NHMG did not provide guidance on non-price harms, foreclosure, entrenchment, and price discrimination, thus, at the time of the case, the Guidelines might be insufficient for the agencies to succeed at court. The DOJ nonetheless challenged the deal by filing a complaint on April 8, 2011, but mainly based its case on foreclosure theory (which is not even in the 1984 NHMG) that Google might foreclose competitor travel sites from using ITA's algorithm after the merger[34] Unsurprisingly, in the end, DOJ did not block the merger and settled for a consent decree to have Google's promise to allow other competitor sites to use the algorithm for five years.

The decision's inadequacy is two-fold: one, the Consent Decree might not be sufficient to maintain the competition and two, five years merely slowed down the foreclosure but did not end it. For the former, Google could simply make their Google Flights widget more favourable upon users' searches – they did not even need to stop other competitors from using the algorithms to beat them because the competitors' results simply would not show up at the top. For the latter, it did not take Google long to exclude the competitor's access to ITA's

[33] COMPLAINT, UNITED STATES V. GOOGLE INC., NO. 1:11-CV-00688, 2011 WL 1338047 (D.D.C. APR. 8, 2011).

[34] *Id.*

algorithm after 2016[35] and as a result, Google's advertising revenue from Google Flights has been estimated to be larger than all its competitors combined[36]

Before moving on to discuss the pros and cons of imposing an absolute ban on the Big Tech, it is useful to summarise the current limitations within the US antitrust regulatory framework. The AAI White Paper[37] has neatly done so:

First, the Big Tech may purposely and strategically pursue deals that are unlikely to trigger antitrust concerns[38] Second, the agencies are reluctant to challenge acquisitions of nascent rivals[39] Third, enforcers have an inadequate set of tools to deal with the complexity raised by Big Tech business models[40] And lastly, as the article demonstrated in detail earlier on, because of current unworkable merger presumptions and Big Tech firms' unique characteristics, the agencies can hardly succeed in court[41]

IV. ABSOLUTE BAN

The analysis of the effect of absolutely banning any merger activities by the Big Tech is highly economic. Therefore, it is important to keep in mind that every step the legislator takes is about consumer welfare, an economic factor.

A. Mergers in General

In the modern era, data is the "digital gold". Some mergers and acquisitions have the simple goal of acquiring the firm's data. However, network effects and increased switching costs can sometimes make this type of mergers undesirable. Data is especially likely to create barriers to entry from the former effects when paired with AI, which helps the Big Tech make better decisions. For example, Facebook uses the data from its users' newsfeeds to design products and services for subsidiary companies like Instagram[42] The latter effect is more viscous in

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[35] Tim Seppala, *Google is Changing How Other Sites Use its Flight Data,* ENGAGET (Nov. 1, 2017), https://www.engadget.com/2017-11-01-google-flight-data-api-shutdown.html.

[36] Dennis Schaal, *Google's Travel Business Is Already Twice the Size of Expedia's,* SKIFT (Nov. 1, 2016, 7:30 AM), https://skift.com/2016/11/01/googles-travel-business-is-already-twice-the-size-of-expedias/.

[37] *SEE GENERALLY* DIANA L, MOSS, *THE RECORD OF WEAK U.S. MERGER ENFORCEMENT IN BIG TECH*, AMERICAN ANTITRUST INST. (JULY 8, 2019), https://www.antitrustinstitute.org/wp-content/uploads/2019/07/Merger-Enforcement_Big-Tech_7.8.19.pdf.

[38] *ID.* AT 7.

[39] *ID.*

[40] *ID.*

[41] *ID.*

[42] MIKE ISAAC, *INSTAGRAM MAY CHANGE YOUR FEED, PERSONALIZING IT WITH AN ALGORITHM*, NEW YORK TIMES: TECHNOLOGY (MAR. 15, 2016), https://www.nytimes.com/2016/03/16/technology/instagram-feed.html

nature that: when a consumer becomes dependent with a platform, his data is harvested by the platform; and this data is the platform's leverage to stop competitors from attracting the consumer because data is not easily transferrable nor are the firms willing to; now because there are less attractions in the market and the consumer already invested time and energy to the platform that he must put up with some notorious digital platform strategies including changing privacy policies, price discrimination against existing customers, and discriminating against users who highly value a service[43]

If all mergers are banned for the Big Tech, barrier to entry in the market will significantly reduce and the Big Tech's leverage over the market is confined to its current power. Consumers will in turn enjoy a more diverse market with much healthier competitions. However, data was to provide better services from the first place, and it is likely without the additional acquired data, the Big Tech's service quality will diminish.

B. Small Firms Operating in Related Markets

Mergers by the Big Tech have a kill-zone effect on small firms operated in related markets. On the one hand, if the Big Tech enters the market by buying a firm, it creates challenges for the rest to survive due to their network effects, economies of scale and data driven economies of scope. This can scare off investors as it is harder to survive – making it harder to pay back. On the other hand, because of the former effect that the Big Tech usually only must buy one firm to kill off the rest, some firms crave to be the "chosen one" in their racket. That is these companies strived to be innovative with the purpose of going public or getting acquired by bigger firms. Or in case of Facebook/Instagram, Facebook CEO Zuckerberg threatens to create a similar product to compete if Instagram did not agree to sell.

If an authority bans all the mergers from the Big Tech, more capitals will flow into the market to cradle more innovation. And foreseeably the "first mover" will start acquiring its smaller neighbours to grow. However, there are studies to suggest that the Big Tech may have stronger incentives to develop the innovation than the acquired firm when there are important supply-side and

("INSTAGRAM PLANS TO RELY ON ITS MACHINE-LEARNING TECHNOLOGY AND A MIX OF SIGNALS TO DETERMINE THE ORDER OF PHOTOS AND VIDEOS IN USERS' FEEDS, INCLUDING THE LIKELIHOOD A PERSON WILL BE INTERESTED IN THE CONTENT, THE TIMELINESS OF THE POSTS AND THE RELATIONSHIP BETWEEN THE TWO USERS.").

[43] ALLEN P. GRUNES, *ANOTHER LOOK AT PRIVACY*, 20 GEO. MASON. L. REV. 1107, 1132 (2013).

demand-side synergies between both firms' products[44] Thus, the analysis of the absolute ban is hinged on the balance between the acceleration of the development of innovation and the elimination of competition.

C. Horizontal Mergers

Horizontal mergers by two major players are usually synonyms to a higher-level a of market entry barrier. A case to illustrate, although not by the Big Tech, is Bazzarvoice/PowerReviews.45 The merger was challenged by the DOJ because the merger would have rendered an almost oligopoly market and as a result would substantially lessen the effective competition in the market by raising the entry barrier. Besides creating difficulties to entry, in a zero-price market (where most of the Big Tech operated in), the platforms extract surplus from the other side of the markets, including advertisers, developers, and 3rd party producers etc, instead of directly from the consumers. And these parties on the other end will make profits by selling their services to the consumers. The net result of two major platforms merging is they can use their increased market power to ask for higher advertising fees (possibly the case of Facebook/Instagram), which will be retrieved by the vendors by increasing their price. Ultimately it is the consumers who pay the bills.

However, Zhou[46] argued that not all horizontal mergers by the Big Tech raise competition concerns. For example, Microsoft/Yahoo!, both were unimportant undertakings in the online advertising market and way behind the market leader Google. Their merger enabled the entity to compete with Google, instead of raising entry barriers to deter other competitors' innovation efforts. He argued the merged entity also promoted both disruptive and incremental innovation in the online search engine field.

In considering banning all horizontal mergers, three categories can be identified: Microsoft/Yahoo! and Bazzarvoice/PowerReviews are as demonstrated to be sitting at two extreme ends; and Facebook/WhatsApp can probably be a third category because they, as EC identified, "can be easily

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[44] MARC BOURREAU & ALEXANDRE DE STREEL, *BIG TECH ACQUISITIONS: COMPETITION AND INNOVATION EFFECTS AND EU MERGER CONTROL*, CENTRE ON REGULATION IN EUROPE, AT 11 (FEB. 2020), https://cerre.eu/wp-content/uploads/2020/03/cerre_big_tech_acquisitions_merger_control_EU_2020.pdf.

[45] UNITED STATES V. BAZAARVOICE, INC., 2014 WL 203966 (N.D. CAL. JAN. 8, 2014).

[46] SIYOU ZHOU, *MERGER CONTROL IN DIGITAL ERA*, INTERNATIONAL FEDERATION OF EUROPEAN LAW, AT 33 (2021) https://fide2020.eu/fide-2020/young-fide-seminar/.

threatened by nascent competitors"[47] It is not a clear-cut answer to whether a complete ban on horizontal mergers can benefit the consumers, especially, considering most mergers and acquisitions are of non-horizontal nature between 2008 to 2018[48]

D. Killer Acquisitions

This term was introduced by Cunningham in 2020. It means to buy only to discontinue. This happens in 6% of the pharmaceutical merger cases the author investigated comparing to 60%[49] in the Big Tech mergers. There are three types of killer acquisitions: first, killing one that has overlap between the core product of the incumbent and the target innovation; second, killing the target innovation which overlaps with the non-flagship offering on either side of the incumbent; third, the target innovation complements a neighbouring product[50] The third one is unique to digital platforms and is argued to be the most difficult to the agencies as it involves speculation. Because such mergers appear to be non-horizontal at first glance, but due to digital market's unique nature, the entering into the acquirer's market by the target from its neighbour market is not impossible (e.g., Facebook/Instagram, PayPal/ Honey). Such tactics by the Big Tech might explain the earlier comment on most of the mergers being non-horizontal for the past decade.

In considering the horizontal mergers as a whole, despite certain advantages associated with Microsoft/Yahoo! type of case, there are many uncertainties in terms of the consequences of the mergers, especially when no Big Tech companies would reveal ex-ante what their intentions might be.

E. Non-Horizontal Mergers

In the market of a particular service, let's say purchasing music, clothes, or even plane tickets, there are consumers, the platform (Big Tech), and the upstream service providers. If the platform merges with the service provider. Two things are likely to happen to the disadvantage to the consumers: one, there is going to be preferential access which restricts the consumers' options; two,

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[47] *SUMMARY OF THE STAKEHOLDER CONSULTATION TO THE EVALUATION OF THE MARKET DEFINITION NOTICE*, EUROPEAN COMMISSION, 9 (2020), HTTPS://EUR-LEX.EUROPA.EU/LEGAL-CONTENT/EN/TXT/PDF/?URI=PI_COM:ARES(2020)7730543&FROM=EN.

[48] ELENA ARGENTESI ET AL, *EX-POST ASSESSMENT OF MERGER CONTROL DECISIONS IN DIGITAL MARKETS*, LEAR, 20 (2019) (DOCUMENT PREPARED BY LEAR FOR THE COMPETITION AND MARKETS AUTHORITY).

[49] ALEX GAUTIER & JOE LAMESCH, *MERGERS IN THE DIGITAL ECONOMY*, AT 8 (2020) https://ideas.repec.org/p/ces/ceswps/_8056.html.

[50] ZHOU, *SUPRA* NOTE 46, AT 35.

the platform company can use the data gained from external suppliers and design their upstream selling strategies to benefit their own. This foreclosure will manifest in several ways including self-preferencing, tying, bundling practices and disproportionate access rules and platform participation fees.

If an authority bans all mergers, the supply of services will arguably become less rigged and upstream service providers will be fighting harder to provide better and cheaper goods and services through the platform to please their consumers. The overall consumer welfare will increase.

However, there are certain advantages associated with vertical integration. Lina Khan[51], the present FTC director, analysed the pros and cons of a "vertical separation regime" – to separate the role of sellers and the platforms (Big Tech) – which is the opposite of being integrated. There are a few points to take away: First, integration can eliminate double markups. If an authority bans all the vertical mergers, it faces losing certain cost savings, resulting in higher prices. And this is a competing interest with innovation in the market (lower the interference from the platforms, higher the innovation by other players). Second, integration motivates platform innovation. This is because by allowing the platform to compete more aggressively, they collect one, additional profits; two, uniquely valuable business intelligence; and three, greater leverage over complementors[52] Banning all vertical mergers will stifle all mentioned activities and thus diminishing the platform's incentive to invest, hence less innovation.

V. CONCLUSION

The US Antitrust on Big Tech has been clearly lacking partially because of the record of weak enforcement of both horizontal and vertical mergers in general; and partially accredited to the complex nature of the digital platform that the Big Tech are operated in. Although the legal analysis was based on the US, the economic impact of the Big Ban(g) Theory applies to economies around the globe. As demonstrated, there are pros and cons to the absolute ban, but horizontal mergers pose more concerns than the vertical ones. It might not be a great idea to impose an absolute ban as it is likely to create a pre-mature per se illegal rule. There are other options available: i.e., a Congressional Research Service report[53] called for a complete shifting of burden of proof, shifting from

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[51] LINA M. KHAN, NOTE, *THE SEPARATION OF PLATFORMS AND COMMERCE*, 119 COLUM. L. REV. 973, 1098 (2019).

[52] *Id.*

[53] CONGRESSIONAL RESEARCH SERVICE, REP. NO. 46739, https://crsreports.congress.gov/product/pdf/R/R46739 (2021).

defining the relevant market, and shifting focus from consumer welfare. In making the legislative decisions, it is ultimately the economy as a whole that must be considered.