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Feasibility of the potential competition doctrine to Big Tech acquisitions

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## ABSTRACT

Healthy, vigorous competition in a free market guarantees better service for customers. Startups, small and medium-sized technology companies with innovative ideas Big Tech is acquiring at an astonishing rate. To be acquired by a tech giant has become an ultimate goal for many nascent firms. Big Tech absorbs every threat, actual or potential competitors, and the competition law is currently toothless. During the last two decades, the demand for digital products and services has significantly increased. Since the coronavirus pandemic outbreak, the digital world has become a necessity for humanity. Lately, the European Union and the United States' lawmakers and academics have actively discussed Big Tech and the possibility of regulating it. The first steps are to be taken. Therefore, the issue is extremely relevant. It is on the agenda to rethink and modernize the competition law for digital platforms to prevent future anticompetitive conduct.

The purpose of this thesis is to scrutinize the potential competition doctrines feasibility for Big Tech acquisitions. Based on the analysis, the perceived potential competition doctrine is feasible for challenging such acquisitions. Following the review of Facebook`s most notable acquisitions, it became clear that Big Tech perceives the firm as a potential competitor and acquires it to avoid future competition. Through these acquisitions, Big Tech not only prevents competitive pressure but also enters into new markets. The competition authorities should observe how the company perceives the potential rival to challenge Big Tech acquisitions, and as a plaintiff, they should carry less burden of proof. The shift from ex-post to ex-ante is required because of the specific characteristics of the digital economy. The competitive relevance of data must be taken into account. Therefore, a case-by-case approach is required.

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## LIST OF ABBREVIATIONS

OECD – Organisation for Economic Co-operation and Development

DDI – Data-Driven Innovation

FTC – The United States Federal Trade Commission

DOJ – The United States Department of Justice

DMA – Digital Markets Act

DCA – Digital Services Act

CEO – Chief Executive Officer

AI – Artificial Intelligence

ICT- Information and Communication Technological firm.

TTC – The European Union`s and the United States Trade and Technology Council

EEA – The European economic area

TFEU – Treaty of Functioning of the European Union

GDPR – General Data Protection Regulation

SSNIP - Small but Significant Non-transitory Increase in Price

SSNDQ – Small but Significant Non-transitory Decrease in Quality

## INTRODUCTION

9 out of 10 venture-backed exits in 2004–2019 in the United States occurred in the form of mergers and acquisitions.<sup>1</sup> The number of start-up acquisitions in the technology industry increases every year. The increased number of acquisitions already has visible consequences – the dominant technology firms are acting as regulators in the digital products market, and instead of competing, they are simply acquiring existing and potential rivals. The total deal value of technology industry acquisitions and mergers conducted in 2020 was 603 billion USD.<sup>2</sup> The majority of start-ups have only one end goal – to be acquired by a leading technology company for a higher price. Some even suggest that, in the early stages of start-up, nascent firms should find the potential acquirers, understand their needs, and launch start-ups considering this information. In short, the potential acquirers should be treated as clients.<sup>3</sup> Big Tech, on the other hand, thrives on acquiring start-ups with innovative products, growing network effects, or talent. As Facebook's CEO Mark Zuckerberg mentioned in his email after acquiring Instagram: "One thing about startups, though, is you can often acquire them."<sup>4</sup> Big Tech acquired hundreds of firms during the last decade, and in this way, they strengthened their dominant market position. The increased number of acquisitions already has visible consequences – dominant technology firms are acting as regulators in the digital markets, and instead of competing, they are simply buying potential or existing rivals. The problem is that anticompetitive conduct is increasing in the digital markets, and meanwhile, the agencies struggle to provide objective pieces of evidence and relevant economic analysis. Therefore, the majority of tech acquisitions are not being challenged.

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<sup>1</sup> National Venture Capital Association (NVCA), 2020, page 34-37 available at: <https://nvca.org/wp-content/uploads/2020/03/NVCA-2020-Yearbook.pdf>

<sup>2</sup> See. *Technology industry M&A total deal value worldwide 2004-2020*, Kimberly Mlitz, June 21 2021, Statista.com, available at: <https://www.statista.com/statistics/511155/worldwide-technology-industry-mergers-acquisitions-total-deal-value/>

<sup>3</sup> See. *How to make your early-age startup valuable for acquisitions*, Abdo Riani, Forbes, March 6, 2020; Available at: <https://www.forbes.com/sites/abdoriani/2020/03/06/how-to-make-your-early-stage-startup-valuable-to-acquirers/?sh=400548f840cc>

<sup>4</sup> See. Case No.: 1:20-cv-03590, paragraph 15.

Potential entrants into the digital markets are vulnerable to the existing tendency for acquisitions. Potential entrants have an immense role in competition law, as they create pressure on already-existing companies in the market, and, as a result, customers receive a better, more innovative product. If Big Tech continues to acquire every innovative start-up, this pressure will entirely vanish. Regrettably, the competition authorities are failing to secure and maintain vigorous competition.

The thesis aims to carefully examine the feasibility of the existing potential competition doctrine concerning Big Tech acquisitions. For this purpose, the first chapter of the thesis covers the definition of Big Tech and the tendency of acquisitions. The second chapter of the thesis contains analysis of the perceived and actual potential competition doctrine, as a part of the legal framework of the United States legislation in relation to Big Tech acquisitions. The third chapter covers the issues regarding the barriers to entry and characteristics of the digital economy, as well as the role of data in the technology markets, and how these peculiarities affect challenging Big Tech acquisitions under the potential competition doctrine. The fourth chapter concerns the European Union's legislation and the proposed Digital Markets Act, as a possible way to regulate Big Tech, and the well-known tests and standards in relation to Big Tech acquisitions. The fifth chapter examines Facebook's most notable acquisitions and demonstrates the competition agencies' erroneous analysis and lack of sufficient experience, which unintentionally resulted in the strengthening of Facebook's market dominance.

Based on the analysis, it is concluded that certain elements of the potential competition doctrine are feasible for challenging Big Tech acquisitions, particularly the perceived potential competition doctrine. Another finding during research is that if the authorities rethink the barriers to entry in the digital markets, as well as market definition, other parts of the doctrine will be feasible. The competitive relevance of data must be taken into account. Therefore, a case-by-case approach is required.

# CHAPTER I

## BIG TECH COMPANIES AND THE TENDENCY OF ACQUISITIONS

The most powerful technology companies are referred to as Big Tech. Big Tech's journey from nascent digital companies to tech giants is full of acquisitions of nascent and potential competitors. Big Tech is currently one of the biggest challenges for the competition law. As U.S. House Antitrust, Commercial, and Administrative Law Subcommittee Chairman David N. Cicilline stressed in the opening statement for the hearing “Online Platforms and Market Power,” “Big Tech's “ability to dictate terms, call the shots, upend entire sectors, and inspire fear to represent the powers of a private government. “ (Cicilline Opening Statement At Big Tech Antitrust Hearing, 2020)

Big Tech operates in different markets, from online shopping stores, to search engines, software operation systems, cloud systems, social networking, mapping. The list is impressive. The reason for such diversity is partly the hundreds of acquisitions that allowed Big Tech to enter into new markets.

Amazon was founded in 1994 by Jeff Bezos as an online bookstore, and it currently operates in different markets, entered through acquisitions. In an emailed statement to Forbes, an Amazon spokesperson stated, “Amazon operates in a diverse range of businesses, from retail and entertainment to consumer electronics and technology services, and we must thrive in well-established competition in each of these areas.”<sup>5</sup> (Durkee, 2021) Considering that Amazon entered the organic food market through an acquisition and currently sells organic foods online, Until this moment, it was the most expensive acquisition in the history of Amazon. Acquiring the 40-year-old grocery store chain, Whole Foods, known for its organic products, cost 13 billion USD.

Google, another member of the Big Four, acquired companies at an astonishing rate in the 2010s, adding one every 10 days. Some of the most notable acquisitions included DoubleClick, Youtube – a direct competitor to Google Video – and Waze – a major competitor to Google Maps.<sup>6</sup>

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<sup>5</sup> See. Amazon's Biggest Acquisitions Have Allowed It To Become A Marketplace For Nearly Everything, Alison Durkee, Forbes, 2021, available at: <https://www.forbes.com/sites/alisondurkee/2021/05/24/amazon-biggest-acquisitions-have-allowed-it-to-become-a-marketplace-for-nearly-everything-mgm-deal/?sh=3c9bd25c6354>

<sup>6</sup> See. Tim Wu & Stuart Thompson, *The Roots of Big Tech Run Disturbingly Deep*, New York Times, June 7, 2019



Google has acquired more than 270 companies. Currently, Google is the most popular search engine with over 3.5 billion daily searches and 1.2 trillion searches per year, worldwide.<sup>7</sup> Google was the largest media company in the world in 2020, with a 21 percent market share and ad revenues of approximately 132 billion USD.<sup>8</sup>

Facebook is a leading social network, which has acquired at least 92 companies. The most notable acquisitions were Instagram and WhatsApp. Facebook has acquired companies just for the employees, known as talent acquisition.<sup>9</sup> For example, in 2010 Facebook acquired a photo-sharing start-up -Divvyshot and after 6 weeks, Facebook shut down Divvyshot and their employees went to work for Facebook.<sup>10</sup> Facebook's major revenue comes from advertising. In 2020, its advertising revenue was 84.2 billion USD.<sup>11</sup> (Facebook's advertising revenue worldwide , 2021)

Apple focuses both on hardware and software and produces the most popular computers and mobile phone devices. Also, Apple is a direct competitor of Google with its software iOS system. It has acquired more than 100 companies during the last six years. They were mostly talent acquisitions, or technology and data-driven acquisitions simply for easy access to better technology. Apple`s third-quarter revenue for the fiscal year 2021 was 81.4 Billion USD. (Apple Inc., 2021)

Big Tech operates as a digital, multi-sided platform. Therefore, many tools of competition law are toothless when they are acquiring potential competitors. Before the competition authorities

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<sup>7</sup> Google Search Statistics, Internet live stats , available at: <https://www.internetlivestats.com/google-search-statistics> (Last accessed July 7, 2021)

<sup>8</sup> See. William Turvill, *Quintopoly? Five tech companies now earn 46% of global ad revenues as news media left behind*, Pressgazette, June 30, 2021 available at: <https://www.pressgazette.co.uk/global-advertising-spend-2020-quintopoly/>

<sup>9</sup>Glick, Mark A. and Ruetschlin, Catherine and Bush, Darren, Big Tech`s Buying Spree and the Failed Ideology of Competition Law: The Example of Facebook (December 11, 2020). Hastings Law Journal, Forthcoming, available at SSRN: <https://ssrn.com/abstract=3746728> or <http://dx.doi.org/10.2139/ssrn.3746728>

<sup>10</sup> See. Nicholas Carlson ‘*This Sandwich Is Good, But Getting Bought By Facebook Is Better!*’, *Businessinsider*, 2010 ‘Facebook just acquired photo-sharing startup called Divvyshot for an undisclosed sum. Divvyshot was a Y-combinator-backed startup. Founder Sam Odio, developer Paul Carduner, and designer Michael Yuan will join Facebook's engineering team and focus on Facebook Photos. Divvyshot.com will shutter in 6 weeks.’

<sup>11</sup> See. Facebook's advertising revenue worldwide, 2020, available at: <https://www.statista.com/statistics/271258/facebooks-advertising-revenue-worldwide/>

around the world realized the issue of Big Tech, they extremely strengthened their dominant position. The complexity to determine relevant market and market shares, insufficient experience due to the novelty of the digital economy, the lack of precise regulation and enforcement, and the inability to ascertain and secure the potential competition are an incomplete list of problems with competition law. The peculiarity of digital markets limits the use of well-known standards and tests. A case-by-case analysis of Big Tech`s acquisition and an individual approach are required.

## CHAPTER II

### THE POTENTIAL COMPETITION DOCTRINE

#### 1. THE HISTORY, DEVELOPMENT, AND PLACE IN THE UNITED STATES LEGISLATION

The United States antitrust legislation consists of three core antitrust acts: The Sherman Antitrust Act, which was passed by Congress in 1890, the Clayton Act, passed in 1914, and the Federal Trade Act, under which the Federal Trade Commission was created. The Clayton Act was amended in 1950 by the Celler-Kefauver Act,<sup>12</sup> particularly section 7 to “make clear the section`s applicability to business combinations of all types, those between firms competing in the same market at the time of the combination and those between firms not competing in the same market.”<sup>13</sup> The statute is preventative and strives to stop future anticompetitive conduct.<sup>14</sup> (Darren Bush, 2004) As the FTC suggests, “these are the three core federal antitrust laws still in effect today.”<sup>15</sup> (Federal Trade Commission, 2021)

The potential competition doctrine is an antitrust tool to prevent future anti-competitive conduct. During the 1960-1970 years, there was incremental merger activity in the United States, and the antitrust enforcement agencies challenged multiple acquisitions under Section 7 of the Clayton Act. The potential competition doctrine first appeared in 1964 and was considered a

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<sup>12</sup> Celler-Kefauver Antimerger Act of 1950, 64 Stat. 1225.

<sup>13</sup> Hood, R. K. (1976). Potential competition. *Antitrust Bulletin*, 21(3), 485-[ii]

<sup>14</sup> Bush, Darren, and Massa, Salvatore, Rethinking the Potential Competition Doctrine. *Wisconsin Law Review*, 2004, page 10

Available at SSRN: <https://ssrn.com/abstract=956494>

<sup>15</sup> Federal Trade Commission, The Antitrust Laws

available on: <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws>

helpful legal tool to analyze possible violations of future competition. The potential competition doctrine derives from section 7 of the Clayton Act.

Under Section 7 of the Clayton Act, the anti-competitive acquisitions are prohibited: “no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.”<sup>16</sup> The combination of words “may be to substantially lessen competition“ means the reasonable probability, as it was defined later.<sup>17</sup>

The potential competition doctrine was applicable for non-horizontal mergers. In 1968, the Department of justice issued the first Merger Guidelines. According to the guidelines, the potential competition “may often be the most significant competitive limitation on the exercise of market power by leading firms ... Department will ordinarily challenge any merger between one of the most likely entrants into the market.”<sup>18</sup> Acquiring a firm, to determine as "one of the most likely potential entrants into the market" should have both technological and financial resources, and an economic incentive to enter. <sup>19</sup> In the 1984 Merger Guidelines was the distinction between horizontal and non-horizontal mergers. The non-horizontal mergers involved a merger between the firms that did not operate in the same market.<sup>20</sup> The 2010 Merger Guidelines apply to mergers and acquisitions involving actual or potential competitors (horizontal mergers). <sup>21</sup> Therefore, the potential competition doctrine applies to Big Tech acquisitions, as a type of horizontal merger.

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<sup>16</sup> 15 U.S.C. §18

<sup>17</sup> Various Editors, *The ABC's of Clayton 7: Amendment of 1950, Brown Shoe, The Court, and Current Complexities*, 10 *Vill. L. Rev.* 734, page 740 (1965).

<sup>18</sup> 1968 Merger Guidelines at § 18.

<sup>19</sup> *Ibid.*

<sup>20</sup> *See* The U.S. Department of Justice & Federal Trade commission Horizontal Merger Guidelines 1984, section 4, Horizontal effect from non-horizontal mergers (by definition, non-horizontal mergers involve firms that do not operate in the same market.)

<sup>21</sup> *see* The U.S. Department of Justice & Federal Trade commission, 2010 merger guidelines

The term “potential competitor“ is defined as a firm that is “predicted to have a product that will compete at some point in the future, not currently.”<sup>22</sup> (Yun, 2019) The term and the doctrine first appeared in *The United States v. El Paso Natural Gas Co.*<sup>23</sup> The parties of the transaction were El Paso Natural Gas Co., the acquiring company, which was the only out-of-state natural gas provider to the California market at the time of the proposed acquisition. It provided 50% of California's gas. And the company to be acquired, the Pacific Northwest Pipeline Corp., owned one of two major interstate pipelines serving the trans-Rocky Mountain states, as well as substantial reserves of natural gas. Pacific Northwest was a vigorous competitor who was interested in breaking into the rapidly increasing California market on a large scale. Indeed, before the start of the merger talks with El Paso, Pacific Northwest had reached an agreement to supply natural gas to Southern California Edison, the state's largest industrial user.<sup>24</sup> This case was the inception of the potential competition doctrine, despite the fact that Pacific Northwest and El Paso Natural Co, were the actual competitors in the same market.

At the end of 1964, in *The United States v. Penn-Olin Chemical Co.*<sup>25</sup>, the Supreme court suggested certain criteria for applying the doctrine. (Hood, 1976) Penn-Olin was a newly

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<sup>22</sup> Yun, J. M. (2019). Potential Competition and Nascent Competitors. *Criterion Journal on Innovation*, 4, 625-638. Page 625

<sup>23</sup> *The United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964)

The Federal Government filed suit under § 7 of the Clayton Act charging that the acquisition by a natural gas company, then the sole out of state supplier to California, of the stock and assets of another gas company, one of the two major interstate pipelines serving the trans-Rocky Mountain States, which had made some efforts to enter the California market, "may be substantially to lessen competition." The District Court, without a written opinion, dismissed the complaint after trial, adopting verbatim the findings of fact and conclusions of law submitted by counsel for appellees.

Available at: <https://supreme.justia.com/cases/federal/us/376/651/>

<sup>24</sup> For further discussion see Hood, R. K. (1976). Potential competition. *Antitrust Bulletin*, 21(3), 485-[ii]

<sup>25</sup> *The United States v. Penn-Olin Chemical Co.* 378 U.S. 158 (1964) In 1960, Pennsalt Chemicals Corporation and Olin Mathieson Company signed a joint venture agreement, each acquiring 50% of the newly formed Penn-Olin Chemical Company, which began producing sodium chlorate in 1961 in Kentucky. The Government seeks to dissolve the joint venture as violating § 7 of the Clayton Act and §1 of the Sherman Act. The parties agree that the line of commerce is sodium chlorate and that the relevant market is in the southeastern part of the United States. The District Court determined that the test under the Clayton Act is whether, as a matter of probability, both companies would have entered the market as individual competitors if Penn-Olin had not been formed. The court found it

established joint-venture between Pennsalt Chemical Corporation and Olin Mathieson Company, created to enter the sodium chloride market in the southeastern United States. In the case of the joint-venture, Pennsalt specialized in the production and distribution of chemicals across the United States, including sodium chloride. Portland, Oregon, was the site of sodium chlorate production. Despite this, it had shipped large amounts of the chemical to the southeast market, which had the highest concentration of sodium chlorate users. Olin never produced the chemicals, and particularly sodium chloride. However, Olin owned a patented process, in which paper manufacturers used sodium chlorate to bleach wood. The US Supreme Court used “potential competition doctrine regarding two joint venture participants, neither of whom was currently active in the particular product market.”<sup>26</sup> (Glader, 2006) The Supreme Court rejected the subjective evidence and stated that during the trial, the number and power of the competitors in the market, the background of their growth, the relationship of their lines of commerce, the competition existing between them, and the power of each in dealing with the other's competitors, among other things (that are specifically for joint-ventures) should be taken into account.<sup>27</sup> While creating the criteria, the Supreme court has not suggested the possible economic proof sources to support the required factual findings. (Hood, 1976) The Supreme Court stated in the decision that “The existence of an aggressive, well equipped and well-financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to the competition which cannot be underestimated.”<sup>28</sup> However, the court concluded based on the evidence that Penn-Olin would not substantially lessen the competition in the market and dismissed the case.

In 1973, the doctrine was analyzed in the case of *The United States v. Falstaff Brewing Co.*,<sup>29</sup> Falstaff was the fourth-largest beer producer in the United States when decided to enter the

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impossible to conclude that both companies would have so entered, and, finding that neither statute had been violated, dismissed the complaint.

Available at: <https://supreme.justia.com/cases/federal/us/378/158/>

<sup>26</sup> Innovation Markets and Competition Analysis Eu Competition Law and US Antitrust Law, Marcus Glader, 2006, page 200

<sup>27</sup> *The United States v. Penn-Olin Chemical Co.* 378 U.S. 158 (1964)

<sup>28</sup> *The United States v. Penn-Olin Chemical Co.* (1964) at [378 U.S. 174](#),

<sup>29</sup> *The United States v. Falstaff Brewing Co.*, 410 U.S. 526 (1973)

New England market through the acquisition of the Narragansett Brewing Company. Narragansett was the largest seller of beer in New England's beer market. In a concentrated oligopolistic market, the presence of a potential competitor on the periphery of the market, seemingly ready to enter if barriers to entry are lowered, may prevent anti-competitive conduct within the market. According to the Supreme Court, a potential competitor can have an impact on the current market situation, and that removing a firm from the market's edge can "have a present anticompetitive effect". (The United States v. Falstaff Brewing Co., 1973) The Court repeated the definition of the potential entrant from *The United States v. Penn-Olin Chemical Co.*, and considered such an entrant as a "perceived potential entrant." The testimony of Falstaff's officers indicated that the firm did not intend to enter the New England's beer market *de novo*. According to the officers, Falstaff only considered enter to the market through acquisition. The District Court, based on the testimony, noted that Falstaff could not be considered as a potential entrant. Later, the Supreme Court noted that "The District Court erred as a matter of law. The error lay in the assumption that, because Falstaff, as a matter of fact, would never have entered the market *de novo*, it could in no sense be considered a potential competitor."<sup>30</sup> The Supreme Court stressed that the important question is not what the company's management says, but considering the firm's financial capabilities and conditions in the market, is it reasonable to consider it as a potential entrant in the market.<sup>31</sup> According to the Supreme court, Falstaff was an "actual potential entrant." The actual potential entrant does not have the same present, procompetitive effect as the perceived potential entrant, but actual potential competition is going to have the competitive effect in the future.<sup>32</sup> In the actual

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Respondent Falstaff, the Nation's fourth-largest beer producer, which was desirous of achieving national status, agreed to acquire the largest seller of beer in the New England market rather than enter *de novo*. The District Court dismissed the Government's resultant suit charging violation of § 7 of the Clayton Act, finding that entry by acquisition, which the court found was the only way that respondent intended to penetrate the New England market, would not result in a substantial lessening of competition.

Available at: <https://supreme.justia.com/cases/federal/us/410/526/>

<sup>30</sup> *The United States v. Falstaff Brewing Co.*, 410 U.S. 532-533 (1973)

<sup>31</sup> *Ibid.*

<sup>32</sup> Actual potential competition occurs when the potential competitor is not having a present procompetitive effect on the market, but considerable evidence exists that the uncommitted firm is going to enter the market. The competitive effect from actual potential competition occurs in the future." Darren Bush and Salvatore Mass, Rethinking the Potential Competition Doctrine, 2004 Wis. L. Rev. 1035, 1046.

potential competition doctrine, the plaintiff carries a high initial burden of objective proof to demonstrate future conduct and performance.

Technically, the potential competition doctrine was divided by the Supreme Court into two separate sub-doctrines: the perceived potential competition doctrine, and the actual potential competition doctrine.<sup>33</sup> (Mark Glick C. R., 2021) The requirements for actual and perceived potential competition doctrine are different, but in both cases, a concentrated market and few other potential entrants “waiting in the wings are a must.”<sup>34</sup> (Tucker, 2011)

Another noteworthy case is *The United States v. Marine Bancorporation, Inc.*, where the Supreme court set out criteria, again. The acquiring bank was a large, Seattle-based bank, the National Bank of Commerce (NBC) which was owned by the Marine Bancorporation. The acquired bank was a medium-sized Washington Trust Bank (WTB), located in Spokane, Washington.<sup>35</sup> (United States v. Marine Bancorporation, Inc, 1974) The government challenged this acquisition on the grounds of violation §7 of the Clayton Act and based the case on the potential competition doctrine. In this case, the criteria are related to commercial banking but are applicable for other fields of commerce too. According to the US Supreme Court, the potential competition doctrine has meaning only as applied to concentrated markets. Other than concentrated markets, the courts require a “reasonable probability of entry’ and the small number of courts require ‘clear proof of entry.’<sup>36</sup> (Tucker, 2011)

In the latest cases, for example, when Nielsen group acquired Arbitron in 2013, the FTC used the potential competition doctrine and concluded that Nielsen and Arbitron were “The two

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<sup>33</sup> Mark Glick, Catherine Ruetschlin & Darren Bush, Big Tech's Buying Spree and the Failed Ideology of Competition Law, p.4 72 Hastings L.J. 477 (2021)

<sup>34</sup> Tucker, D. S. (2011). Potential Competition Analysis under the 2010 Merger Guidelines. Sedona Conference Journal, 12, 273-284. page 273

<sup>35</sup> *The United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974)

The United States brought this civil antitrust action under § 7 of the Clayton Act to challenge a proposed merger between two commercial banks, which would substitute the acquiring bank for the acquired bank in Spokane, Wash. and would permit the former for the first time to participate directly in the Spokane market. The acquired or target bank, appellee Washington Trust Bank (WTB), is a medium-size, state-chartered bank located in Spokane.

Available at: <https://supreme.justia.com/cases/federal/us/418/602/>

<sup>36</sup> Tucker, D. S. (2011). Potential Competition Analysis under the 2010 Merger Guidelines. Sedona Conference Journal, 12, 273-284. page 275

firms most likely to be potential competitors in the future market of national syndicated cross-platform audience measurement service.<sup>37</sup> (Yun, 2019) The FTC concluded that “The effects of the Acquisition if consummated, may be to substantially lessen competition and tend to create a monopoly in the market for national syndicated cross-platform audience measurement services in violation of Section 7 of the Clayton Act...”<sup>38</sup>

## 2. THE POTENTIAL COMPETITION DOCTRINE CONCERNING TO BIG TECH ACQUISITIONS

The potential competition doctrine holds that an acquisition can be violative of the antitrust laws even if there is no present competition eliminated by the acquisition. The doctrine is applicable in instances of proposed market extensions where the acquiring company is not currently a participant in a specific market but seeks to become a participant as a result of the acquisition.<sup>39</sup> (W.E., 1975) The effect of anticompetitive conduct is two-fold: On the one hand, it eliminates the current competition in innovation; on the other hand, it injures consumers.<sup>40</sup>

As discussed above, the protection of potential competitors is one of many goals of competition law, and especially in the digital markets, where potential competitors are pushing Big Tech to innovate and evolve. As a result, the customers are receiving higher quality products for less money. The entry into the market can increase competition and stimulate innovation in a relevant market, which benefits consumers. Incumbent firms can prevent or delay such entry in various ways (Organisation for Economic Co-operation and Development, 2021). Entry barriers in the digital economy are beyond the traditional.<sup>41</sup> (Grunes, 2016)

As mentioned above, the review of some of the most important cases of big tech acquisitions stresses that it is hard to determine if the acquired firm was a potential competitor. The

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<sup>37</sup> See. Yun, J. M. (2019). Potential Competition and Nascent Competitors. *Criterion Journal on Innovation*, 4, 625-638. Page 633

<sup>38</sup> See. The complaint, Nielsen Holdings N.V, Dkt. No. C-4 4 39 2014 WL 869523 ( FTC Feb. 24/2014)

<sup>39</sup> Dorigan, W. E. *The potential competition doctrine: The justice department's antitrust weapon under the section of the Clayton act.* page 417, *John Marshall Journal of Practice and Procedure*, 8(3), 415-436. (1975).

<sup>40</sup> Bush, D., & Massa, S. (2004). Rethinking the potential competition doctrine. *Wisconsin Law Review*, 2004(4), 1035-1160. Page 1042

<sup>41</sup> See. Maurice E. Stucke & Allen P. Grunes, *Big data and competition policy*, 2016, Paragraph 10.08



reason for this misunderstanding may be the hurdle to defining the relevant market, market shares, and market boundaries.<sup>42</sup> (Jacques Crémer, 2019) According to Merger Guidelines, when agencies identify a potential competition concern, market definition plays two roles: first to specify the line of commerce, and second, it allows the agencies to spot market participants and measure market shares and concentration.<sup>43</sup> Measurement of the market concentration is also important. “The larger is the market share of an incumbent, the greater is the competitive significance of the potential entrant, and the greater is the competitive threat posed by this potential entrant relative to others.”<sup>44</sup>

The agencies can apply the potential competition doctrine in cases where Big Tech acquires the potential competitors. For example, in the case of Google/DoubleClick,<sup>45</sup> the FTC analyzed three principal theories of potential competitive harm in the course of this investigation. One of them was the potential competition theory, and the FTC declared that “For the elimination of this potential competition to be a competitive concern, Google must be uniquely positioned to have a substantial competition-enhancing effect on the third-party ad-serving markets.”<sup>46</sup> To make it clear, the FTC defined that Google had “a leading, but not dominant position in the ad intermediation market.”<sup>47</sup> On the other hand, DoubleClick was “the leading third-party provider of ad serving technology.”<sup>48</sup> (Statement of the Federal Trade Commission Concerning Google/DoubleClick, 2008) Notwithstanding that, in 2008 Google did not have such power and dominant position as it has currently, and this has to be taken into account, this example once again demonstrates how easy is to err while predicting the future anti-competitive effects.

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<sup>42</sup> Jacques Crémer, Yves-Alexandre de Montjoye, & Heike Schweitzer, *Competition Policy for the Digital Era*, European Commission, page 3, (2019) “*In the digital world, market boundaries might not be as clear as in the “old economy”. They may change very quickly.*”

<sup>43</sup> The United States., & United States. (2010). Horizontal merger guidelines. Washington, D.C.: U.S. Dept. Market definition, Paragraph 4

<sup>44</sup> The United States., & United States. (2010). Horizontal merger guidelines. Washington, D.C.: U.S. Dept. Market concentration, Paragraph 5.3

<sup>45</sup> FTC File No. 071-0170 available at:

[https://www.ftc.gov/system/files/documents/public\\_statements/418081/071220googledc-commstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf) <sup>46</sup>

Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> FTC File No. 071-0170, page 6, available at:

[https://www.ftc.gov/system/files/documents/public\\_statements/418081/071220googledc-commstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf)

The Department of Justice will not challenge a potential competition acquisition if entry into the market is easy, and at first sight, there are no visible barriers of entry in the case of most digital markets.<sup>49</sup> Regardless of these structural barriers, demonstrating the difficulty of entering the digital markets is difficult. The application or website is easy to launch, but for start-ups with limited data access, the competitive advantage of large firms' data scale and efficiencies poses a significant barrier to entry.<sup>50</sup> The data barrier is specific to online platform markets. For another thing, competition for user attention forces the dominant firm to compete with platforms and applications operating in a variety of markets. Other barriers of entry and expansion, such as network effects, are caused by data advantage. One more barrier for start-up companies is qualified employees, and the example of Divvyshot, among others, indicates that qualified workers are very valuable to Big Tech. Other barriers to entry include extreme returns to scale and the network effect.

The dominant companies, who are assumed to have the economic power and opportunity to set prices higher than competitive levels, fear the increased supply, lower prices, and smaller market shares that new entrants will bring, so they keep prices lower to discourage new entrants and prevent this outcome.<sup>51</sup> In the case of Big Tech, practice shows that they set standards that ensure their dominant position,<sup>52</sup> regulate the markets, and have an extraordinary pace of acquisitions.

As some authors argue, the doctrine currently is completely unworkable.<sup>53</sup> (Mark Glick C. R., 2021) Hence, the part of the perceived potential competition doctrine has a prospective to be

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<sup>49</sup> Mark Glick, Catherine Ruetschlin & Darren Bush, Big Tech's Buying Spree and the Failed Ideology of Competition Law, pp. 500-501, Hastings L.J. 467 (2021)

<sup>50</sup> Ibid.

<sup>51</sup> See. Hood, R. K. (1976). Potential competition. Antitrust Bulletin, 21(3), 485, page 488

<sup>52</sup> See: relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area (AT.39740 - Google Search (Shopping)) para.650 “the Conduct does not concern a passive refusal by Google to give competing for comparison shopping services access to a proportion of its general search results pages, but active behavior relating to the more favorable positioning and display by Google, in its general search results pages, of its own comparison shopping service, compared to comparison shopping services.”

<sup>53</sup> Mark Glick, Catherine Ruetschlin & Darren Bush, Big Tech's Buying Spree and the Failed Ideology of Competition Law, Hastings L.J. 477 (2021)

transferred as a feasible tool to analyze the elimination of potential competition in the case of Big Tech acquisitions.<sup>54</sup> The competition authorities and the courts should focus on the perceived potential competition doctrine, as it is more realistic to find objective evidence. The issue of the potential competition doctrine is its “extraordinary high burden of proof,” which the plaintiff bears.<sup>55</sup> The argument that the doctrine can only apply to a concentrated market has certain failings.<sup>56</sup> For example, measuring the concentration in the zero-price markets is hard. Another issue is the erroneous market definitions and peculiar barriers to entry in the digital markets. To be more feasible, the doctrine must change the burden of proof from the plaintiff to the defendant, and Big Tech must demonstrate why the future acquisitions could not harm competition.<sup>57</sup>

## CHAPTER III

### 3.1. THE BARRIERS TO ENTRY AND CHARACTERISTICS OF THE DIGITAL ECONOMY

It is vital to scrutinize the issues that the competition authorities are facing due to the peculiarities of the digital economy. The main challenge during the application of the potential competition doctrine is that entry into the digital markets seems easy. As the European Commission noted in the Facebook/WhatsApp case, “Developing and launching a consumer communications app does not require a significant amount of time and investment.”<sup>58</sup> (Facebook/WhatsApp, 2014) Big Tech acts like the regulators of the digital economy. After achieving a dominant position and strong network effects, they set high barriers to entry. (Competition Law 4.0, September 2019) To maintain the dominant position, the technological firm in the first place creates something innovative to generate the positive network effects that strengthen the value on the consumer-facing

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<sup>54</sup> *Ibid.*

<sup>55</sup> Mark Glick, Catherine Ruetschlin & Darren Bush, Big Tech's Buying Spree and the Failed Ideology of Competition Law, p.472 *Hastings L.J.* 467 (2021)

<sup>56</sup> Dorigan, W. E. (1975). The potential competition doctrine: The justice department's antitrust weapon under the section of the Clayton act. *John Marshall Journal of Practice and Procedure*, 8(3), 415-436. / p. 430

<sup>57</sup> For further discussion, see Mark Glick, Catherine Ruetschlin & Darren Bush, Big Tech's Buying Spree and the Failed Ideology of Competition Law, *Hastings L.J.* 467 (2021)

<sup>58</sup> European Commission, *Facebook/WhatsApp*, the decision of 03.10.2014, Comp/M. 7217, para. 119

side of the market. Innovation is the ultimate goal for the firms competing in the digital markets. After the network effect is established, the firm has an access to high volume, velocity, and a variety of data. The data is used for several purposes: to improve the products by exploring the users' needs, to train algorithms and develop AI techniques, and the most relevant for the competition law – data is used as a barrier to entry. Some authors argue that data is not a barrier to entry, because of "the growth in data generated and collected, the widespread use of data analytics, including start-ups and small and medium enterprises."<sup>59</sup> Google also argues that "the barriers to entry are negligible because competition is just one click away."<sup>60</sup> The chairman of one of the largest data collectors noted that Google`s experience is that "you don`t need data to compete online."<sup>61</sup> In some cases, it may be true. For instance, WhatsApp was not collecting data yet had a large user base. But for the companies operating in the two-sided markets, data is a crucial input. With its data advantage, the company attracts advertisers and provides digital advertising services. Big Tech offers not only digital advertising services but also the targeted advertising services. The difference is that ads are exclusively chosen from each user. And at this point, this process repeats itself – the firm attracts more users, accumulates more data, and generates more income. This is how Big Tech maintains its dominant position.

Big Tech operates as a two-sided platform. According to Jacques Crémer, "platform is two-sided when it connects two different and well-identified groups of users."<sup>62</sup> The two-sided platforms are operating in two-sided markets.

Often, in two-sided markets, one side is presented by end-users, and for them, the product or service price is zero. Hence, the customers are making non-monetary contributions. On the other side of the platform, business users are paying the price for placing their advertisements on the

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<sup>59</sup> Organisation for Economic Co-operation and Development, *Data-Driven Innovation for Growth and Well-Being: Interim Synthesis Report*, October 2014, p 35, <http://www.oecd.org/sti/inno/data-driven-innovation-interim-synthesis.pdf>.

<sup>60</sup> Eric Schmidt, Executive Chairman of Google, 'Why Google Works', *Huffington Post*, 20 January 2015, [http://www.huffingtonpost.com/eric-schmidt/why-google-works\\_b\\_6502132.html](http://www.huffingtonpost.com/eric-schmidt/why-google-works_b_6502132.html).

<sup>61</sup> Eric Schmidt, Executive Chairman of Google, 'The New Gründergeist', Google Europe Blog, Posted: 13 October 2014, <http://googlepolicyeurope.blogspot.com/2014/10/the-new-grundergeist.html>.

<sup>62</sup> Jacques Crémer, Yves-Alexandre de Montjoye, & Heike Schweitzer, *Competition Policy for the Digital Era*, European Commission, page 21, (2019)

platform. The dominant consumer-facing platforms also dominate the advertising markets, a tendency exemplified by the Facebook-Google duopoly.<sup>63</sup>

The following part of the thesis reviews the main barriers to entry, and the characteristics of the digital economy, which are uncommon for traditional markets. It is recommended for lawmakers and competition authorities to consider these barriers, and the Digital Markets Act is an example of such consideration. Hence, due to the novelty of the digital markets, the proper implementation of the law is a complex task.

The Digital Economy has specific characteristics that distinguish it from other economic sectors. The main difference between digital and other economic sectors, besides two-sided platforms, are extreme returns to scale, network effects, and the role of data.<sup>64</sup> The combination of platforms' two-sidedness, increased return to scale, strong direct and indirect network effects, more qualified employees, and access to a large amount of data creates a competitive advantage.

Big Tech has such a competitive advantage and ability to act as a regulator and set barriers to entry and expansion. It is recommended for the competition authorities to take into account the above-mentioned factors. An individual approach is required to conclude if entry is easy, or not.

### 3.2. EXTREME RETURNS TO SCALE AND THE NETWORK EFFECTS

Returns to scale are not a new concept; larger firms are frequently more efficient than smaller ones. According to Bundeskartellamt`s executive summary, “Economies of scale are often based on cost advantages where increasing output as a consequence of constant fixed cost reduces the average cost.”<sup>65</sup> The stressed aspect in the digital market is that the returns to scale are *extreme*. It means that the cost of production of digital services is much less than proportional to the number of customers served.<sup>66</sup> Based on the extreme returns to scale, digital platforms have the ability to

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<sup>63</sup> *Ibid.*

<sup>64</sup> Jacques Crémer, Yves-Alexandre de Montjoye, & Heike Schweitzer, *Competition Policy for the Digital Era*, European Commission, page 2, (2019)

<sup>65</sup> BKartA, B6-113/15, *Working Paper – The Market Power of Platforms and Networks*, page 14, June 2016

<sup>66</sup> Jacques Crémer, Yves-Alexandre de Montjoye, & Heike Schweitzer, *Competition Policy for the Digital Era*, European Commission, page 7, (2019)

offer their products for low costs. The rising number of free-of-charge products is a consequence of the extreme returns to scale, and the strong network effects.

Big Tech is the subject of both direct and indirect network effects. When the value of a service or product for one group of users rises (positive network effects) or falls (negative network effects) with the number of users in another group, this is known as indirect network effects.<sup>67</sup> Direct network effects occur between one group of customers when the product's usefulness for each user of the technology or service increases as the number of users increases.<sup>68</sup>

Network effects occur when users choose to use the platform which has the most users already, on the same side or the other side of the platform. (Competition Law 4.0, September 2019) For instance, Google search is characterized by positive indirect network effects, and Facebook, on the other hand, experiences direct network effects. When the user chooses a social network, they usually prefer the network which their family and friends are using.

Strong network effects create a barrier to entry, and the competitive relevance of network effects is important in the two-sided platform-based business models. With increased numbers of customers, Big Tech has access to more data. Strong network effects can create a feedback loop, meaning that better access to data may lead to a competitive advantage, which gives the company the ability to have even more access to data.<sup>69</sup> Therefore, considering that Big Tech experiences network effects, Big Tech can innovate and create more useful products, based on customers' preferences.

### 3.3. THE ROLE OF DATA

The evolution of technology has made it possible for companies to collect, store, and use large amounts of data.<sup>70</sup> This has and will continue to enable considerable changes to the way markets function. Data is one of the key ingredients of AI and smart online services, and a crucial

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<sup>67</sup> BKartA, B6-113/15, *Working Paper – The Market Power of Platforms and Networks*, page 3, June 2016

<sup>68</sup> Jacques Crémer, Yves-Alexandre de Montjoye, & Heike Schweitzer, *Competition Policy for the Digital Era*, European Commission, page 20, (2019)

<sup>69</sup> Report by the Commission 'Competition Law 4.0', *A new competition framework for the digital economy*, Federal Ministry for Economic Affairs and Energy (BMWi), Berlin, Germany, September 2019, page 13.

<sup>70</sup> Jacques Crémer, Yves-Alexandre de Montjoye, & Heike Schweitzer, *Competition Policy for the Digital Era*, European Commission, page 29, (2019) <http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

input to production processes, logistics, and targeted marketing.<sup>71</sup> A consequence of these characteristics is the presence of strong “economies of scope“, which favor the development of ecosystems and give incumbents a strong competitive advantage.<sup>72</sup> As the OECD observed, the advanced use of data and analytics enables Internet firms to scale their business at much lower costs than other Information and Communication Technological (ICT) firms. (OECD, 2015) The competitive relevance of data for Big Tech is immense.

Data has an impact on society, because the predictability of future actions, made possible by the analysis of behavioral patterns, poses the ethical issue of protecting free will in the future, on top of freedom in the present. (Andrea De Mauro, 2014) Issues of privacy and freedom fall from the scope of the thesis, but it shows that Big Data is a complex matter. As the European Competition Commissioner Margrethe Vestager observed, “It isn’t solely a competition issue ... It’s very important for us to be able to say what is competition-related and what is an issue of privacy, ownership, data, [and] how you can be as secure on the net as you can be in the physical world.”<sup>73</sup> Collecting, processing, and exploiting personal data for commercial purposes was seen as a subject of consumer protection law, rather than the competition law.<sup>74</sup> This approach has changed. What is relevant to competition law is that exclusive control over data sources can result in an abuse of dominant position and restrict competition by imposing unfair entry barriers to the market.<sup>75</sup>

### 3.4. THE DEFINITION OF BIG DATA

From the perspective of competition law, the most important type of data is Big Data. Big Data, according to Andrea De Mauro “represents the information assets characterized by such high volume, velocity, and variety as to require specific technology and analytic methods for their

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<sup>71</sup> *Ibid.*

<sup>72</sup> Jacques Crémer, Yves-Alexandre de Montjoye, & Heike Schweitzer, *Competition Policy for the Digital Era*, European Commission, page 7, (2019)

<sup>73</sup> MLex Interview: Margrethe Vestager, MLex Special Report, 22 January 2015 (‘Vestager Interview’), [https://mlexmarketinsight.com/\\_/special-report-pdfs/MLex-Interview-with-Margrethe-Vestager-Jan-2015.pdf](https://mlexmarketinsight.com/_/special-report-pdfs/MLex-Interview-with-Margrethe-Vestager-Jan-2015.pdf)

<sup>74</sup> Organisation for Economic Co-operation and Development, *Big Data: Bringing Competition Policy to the Digital Era*, November 2016, page 5, [https://one.oecd.org/document/DAF/COMP\(2016\)14/en/pdf](https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf)

<sup>75</sup> See. De Mauro, Andrea. (2014). What is big data? A consensual definition and a review of key research topics. Pp.6 10.1063/1.4907823.

transformation into value.<sup>76</sup> Grunes adds the fourth V – the value of data. Each ‘V’ has increased significantly over the past decade.<sup>77</sup> The reason for such an increase is that the users are given away valuable data. In certain digital markets, like social networks, where product prices are zero, users are „paying“ with data, and they are paying a premium. The users are giving away something valuable. As Margrethe Vestager said, “The more data you can collect, the more you know, the better product you can provide, but also the more powerful you will be towards others.”<sup>78</sup>

Another difference between traditional data and Big Data is the time value.<sup>79</sup> Having access to real-time data, and being able to process it gives the firm a major competitive advantage. The gathered real-time data is a key ingredient to innovation. The process of using data for innovation is also known as Data-Driven Innovation – DDI. it allows companies to improve the quality of their products by better understanding and targeting individual consumer needs and developing new products and services.<sup>80</sup> (OECD, 2016) As a result, other competitive advantages, such as network effects, are derived from the data advantage.

## CHAPTER IV

### ACTS AND STANDARDS

#### 4.1. BIG TECH REGULATIONS UNDER THE LEGISLATION OF THE EUROPEAN UNION

The European Commission actively works to comply with the digital future and to regulate Big Tech. In its Communication "Digital Compass: the European Way for the Digital Decade," announced on March 9, the Commission outlined its goal for Europe's digital transformation by

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<sup>76</sup> De Mauro, Andrea. (2014). What is big data? A consensual definition and a review of key research topics. Pp.9 10.1063/1.4907823.

<sup>77</sup> Maurice E. Stucke & Allen P. Grunes, *Big data and competition policy*, 2016, paragraph 2:03

<sup>78</sup> MLex Interview: Margrethe Vestager, MLex Special Report, 22 January 2015 (‘Vestager Interview’), [https://mlexmarketinsight.com/\\_/special-report-pdfs/MLex-Interview-with-Margrethe-Vestager-Jan-2015.pdf](https://mlexmarketinsight.com/_/special-report-pdfs/MLex-Interview-with-Margrethe-Vestager-Jan-2015.pdf)

<sup>79</sup> Organisation for Economic Co-operation and Development, *Big Data: Bringing Competition Policy to the Digital Era*, November 2016, page 6, available at: [https://one.oecd.org/document/DAF/COMP\(2016\)14/en/pdf](https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf)

<sup>80</sup> Organisation for Economic Co-operation and Development, *Big Data: Bringing Competition Policy to the Digital Era*, November 2016, page 8, available at: [https://one.oecd.org/document/DAF/COMP\(2016\)14/en/pdf](https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf)



2030 and advocated developing a set of digital principles. (Commission, 2021) The next decade is going to be a “digital decade”<sup>81</sup> and, as Margrethe Vestager declares, “A fair and secure digital environment that offers opportunities for all, that is our commitment.”<sup>82</sup> (Commission, 2021). The digital principles include internet access, a secure online environment, digital health services, a human-centric digital environment, and administration. Together with the United States, the European Commission launched the EU-US Trade and Technology Council (TTC) at the US-EU Summit in Brussels on June 15, 2021.<sup>83</sup> Besides TTC, the EU and the US have set up a Joint Technology Competition Policy Dialogue that will focus on developing common approaches and strengthening cooperation on competition policy and enforcement in the tech sectors.<sup>84</sup> This cooperation is one step forward in regulating Big Tech.

European Union policymakers have considered a shift from ex-post to ex-ante antitrust intervention.<sup>85</sup> (Madiaga, 2021) Article 101 and 102 of the TFEU is a framework of European competition law, and under that framework, having a dominant position is a pre-existing condition for intervention.<sup>86</sup> These constraints significantly limit the scope for intervention under EU competition law in digital markets (Colomo, 2021, 22 February).

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<sup>81</sup> Commissioner for Internal Market, Thierry Breton, delivered speech at Digital Decade Communication of 9 March “*This is Europe's Digital Decade and everyone should be empowered to benefit from digital solutions to connect, explore, work and fulfill one's ambitions, online as offline. We want to set the digital principles on which a resilient digital economy and society will be built.*” Available at :

[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_2288](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2288)

<sup>82</sup> Executive Vice-President for a Europe fit for the Digital Age, Margrethe Vestager, in her speech at Digital Decade Communication of 9 March noted: „A fair and secure digital environment that offers opportunities for all. That is our commitment. The digital principles will guide this European human-centred approach to digital and should be the reference for future action in all areas. That's why we want to hear from EU citizens.” Available at :

[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_2288](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2288)

<sup>83</sup> European Commission - Press release, EU-US launch Trade, and Technology Council to lead values-based global digital transformation, Brussels, 15 June 2021. Available at:

[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_2990](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2990)

<sup>84</sup> *Ibid.*

<sup>85</sup> Tambiama Madiaga, European Parliament Research Service, PE 690.589 – May 2021

<sup>86</sup> See Ibáñez Colomo, Pablo, The Draft Digital Markets Act: A Legal and Institutional Analysis (February 22, 2021). Available at SSRN: <https://ssrn.com/abstract=3790276> or <http://dx.doi.org/10.2139/ssrn.3790276>

Considering that the Big Tech acquisitions are a type of horizontal merger, the Council Regulation (EC) No 139/2004 is applicable.<sup>87</sup> The definition of the relevant product and geographic market is normally a part of the Commission`s assessment, but in the case of Facebook/WhatsApp, the Commission left alone the exact product market definition while defining the relevant geographic market.<sup>88</sup> (Facebook/ WhatsApp, 2014)

The Guidelines on the assessment of horizontal mergers states that when an undertaking is already active in the relevant market and merges with a potential competitor in this market, it can have “the similar anti-competitive effects to the merger between two undertakings in the same relevant market.”<sup>89</sup> It is applicable for Big Tech acquisitions. There are different opinions of what can be done to prevent future anticompetitive conduct, protect consumers and society. Some academics advocate the changes in the legislation, and others arguing that the existing legal frameworks are enough to prevent such conduct and no significant change can be made.<sup>90</sup>

In December 2020, the European Commission presented the digital services act package: the Digital Services Act (DSA)<sup>91</sup> and the Digital Markets Act (DMA).<sup>92</sup> The shift from ex-post to ex-ante is an attempt to make up leeway.

The acts are designed to create more contestable and fair markets in the digital sector.<sup>93</sup> According to the European Commission, the DSA and DMA have two main goals: “ (1) to create

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<sup>87</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)

<sup>88</sup> Case No COMP/M.7217 – Facebook/WhatsApp, para. 13-34

<sup>89</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings , 58, (2004/C 31/03)

<sup>90</sup> Jacques Crémer, Yves-Alexandre de Montjoye, & Heike Schweitzer, *Competition Policy for the Digital Era*, European Commission, page 124, (2019)

*‘To summarise, we do not believe that the EUMR currently needs a legislative update.’*

<sup>91</sup> Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, Brussels, 15.12.2020 COM(2020)

Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0825&from=en>

<sup>92</sup> Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM(2020) 842 final (hereinafter, the ‘Draft DMA’)

Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en>

<sup>93</sup> See. Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), page 3, 2020

a safer digital space in which the fundamental rights of all users of digital services are protected; and (2) To establish a level playing field to foster innovation, growth, and competitiveness, both in the European Single Market and globally.”<sup>94</sup> (European Commission, 2021)

The proposed Digital Markets Act (DMA) harmonizes rules aimed at regulating the behavior of digital platforms, which are acting as gatekeepers between business users and their customers in the European Union.<sup>95</sup> (Madiega, 2021). To be considered as a gatekeeper, the company should meet the three cumulative criteria. A firm is considered a gatekeeper if it has a strong economic position in multiple EU countries, has a large user base, which is linked to a large number of businesses, and its position in the market is stable over time<sup>96</sup> (Commission, 2021). In the DMA, unlike in Article 102 TFEU, where the authorities need to demonstrate evidence that the firm is dominant, in the DMA, if the firm meets the criteria, it must demonstrate why it should not be labeled as a gatekeeper.<sup>97</sup> On one hand, the burden of proof is on the firm, but it can cause undesirable effects. The case law’s influence on DMA is notable. (Colomo, 2021, 22 February)

This new strategy of the EU is influenced by the fact that existing EU competition rules do not fully address market failures caused by digital gatekeepers' actions, particularly because Article 101 and Article 102 of TFEU<sup>98</sup> investigation procedures necessitate a comprehensive analysis that can only be conducted ex-post (after a competition problem has arisen) and may take too long (Madiega, 2021). If adopted, new rules will change the existing ex-post approach to ex-ante. Therefore, the proposed DMA and DSA may have the potential to secure future anticompetitive

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<sup>94</sup> See. European Commission, Shaping Europe’s digital future, available on: <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>

<sup>95</sup> European Parliament Research Service, Tambiana Madiega, PE 690.589 – May 2021, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690589/EPRS\\_BRI\(2021\)690589\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690589/EPRS_BRI(2021)690589_EN.pdf)

<sup>96</sup> The definition of gatekeepers is available on: [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en)

<sup>97</sup> See Ibáñez Colomo, Pablo, The Draft Digital Markets Act: A Legal and Institutional Analysis (February 22, 2021). P.18 ‘Under Article 102 TFEU, it is for the authority or claimant to show, to the requisite legal standard, that a firm is dominant.’

<sup>98</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2012/C 326/01 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF>

conduct. The DMA appears to permit the Commission to challenge substantial market power, not only the abuse of the dominant position.<sup>99</sup>

The definition of fair and contestable markets is vague at some point. Fairness— as understood in DMA – aims to balance out gatekeepers' competitive advantages. The concepts of fairness and contestability are not defined in terms of competition law principles, and the criteria cited in Articles 101 and 102 TFEU – such as the likelihood of anticompetitive effects or the likelihood that efficiency gains will outweigh any losses – appear to be irrelevant<sup>100</sup> (Colomo, 2021, 22 February). The DMA is designed to provide competitors with a competitive advantage in regulated marketplaces. For example, business users can benefit from the platform's data, while third-party search engines can benefit from the data generated by rivals pursuant to the regime.<sup>101</sup>

The DMA imposes a range of obligations on data sharing, interoperability, and data portability. (Madiaga, 2021)<sup>102</sup> The GDPR does not cover all the issues regarding data sharing, in particular, according to Jacques Crémer<sup>103</sup> (Jacques Crémer, 2019) ‘If the system or mechanism protects individual information efficiently, *anonymous use of individual-level data* would be considered anonymous data from the perspective of the user of the system and so probably fall outside of the scope of the General Data Protection Regulation.<sup>104</sup>

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<sup>99</sup> See Ibáñez Colomo, Pablo, *The Draft Digital Markets Act: A Legal and Institutional Analysis*, page 19, (February 22, 2021).

<sup>100</sup> See Ibáñez Colomo, Pablo, *The Draft Digital Markets Act: A Legal and Institutional Analysis*, page 30, (February 22, 2021).

<sup>101</sup> See Ibáñez Colomo, Pablo, *The Draft Digital Markets Act: A Legal and Institutional Analysis* page 20, (February 22, 2021).

<sup>102</sup> European Parliament Research Service, *Tambiana Madiaga*, PE 690.589 – May 2021, p.9

<sup>103</sup> Jacques Crémer, Yves-Alexandre de Montjoye, & Heike Schweitzer, *Competition Policy for the Digital Era*, European Commission, page 26, (2019)

<sup>104</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, *OJL 119, 4.5.2016*.

## 4.2. MARKET DEFINITION AND APPLICATION OF SSNIP AND SSNDQ TEST ON THE DIGITAL TWO-SIDED MARKETS

To determine the scope of the relevant market, different tests and standards are used. The most well-known and usable test for traditional, single-sided markets is 'Small but Significant and Non-transitory Increase in Price' (also known as the SSNIP test). According to the US Merger Guidelines, a "small but significant" increase in price, commensurate with a significant loss of competition caused by the merger, depends upon the nature of the industry and the merging firms' positions in it, and the agencies may accordingly use a price increase that is larger or smaller than five percent.<sup>105</sup> In the case of Big Tech, the application of the SSNIP test is difficult due to the market's two-sidedness, where one side is free of charge. (Wilson C Freeman, September 11, 2019).<sup>106</sup>

To understand the reason for this difficulty, the first step is to explore digital two-sided platforms and markets. Traditional, one-sided markets are easy to define compared to two-sided markets. According to Jacques Crémer, "Platform exhibits two-sidedness when it connects two different and well-identified groups of users."<sup>107</sup> The market definition, as the OECD observed, is a challenging task because of the rapidly changing sectors and markets' two-sidedness.<sup>108</sup>

The two-sided markets exist both in digital and non-digital forms. For instance, credit card companies` subsidizing cardholders and charging high prices to merchants is an illustration of two-sided markets that exist in offline, non-digital form.<sup>109</sup> In the digital two-sided markets, common practice is that on one side of the market, users are not paying a price for services. This part of the multi-sided market is referred to as the zero-price market. It is common practice in the case of Big Tech, for example, Google`s search engine, Youtube`s online video and music, Facebook`s social

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<sup>105</sup> U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines § 4 (2010) .

<sup>106</sup> Wilson C. Freeman; Jay B. Sykes. Antitrust and "Big Tech", 2019, page 6

<sup>107</sup> Jacques Crémer, Yves-Alexandre de Montjoye, & Heike Schweitzer, *Competition Policy for the Digital Era*, European Commission, page 21, (2019)

<sup>108</sup> Organisation for Economic Co-operation and Development, Merger Review in Emerging High Innovation Markets, 2002, page 8

available at: <https://www.oecd.org/daf/competition/mergers/2492253.pdf>

<sup>109</sup> Jacques Crémer, Yves-Alexandre de Montjoye, & Heike Schweitzer, *Competition Policy for the Digital Era*, European Commission, page 22, (2019)

network are all offered to users for free. Instead of price, consumers "pay" with data, which is processed and used to attract advertisers on the other side of the market. The commission noted in the Google Shopping Decision<sup>110</sup> that "While users do not pay a monetary consideration for the use of general search services, they contribute to the monetization of the service by providing data with each query. " <sup>111</sup> Therefore, in the end, the products and services are not free for the consumers, and indirectly 'paying' with data should have the same value as paying with actual money. Under the Commission's 2016 guidance on the Unfair Commercial Practices Directive, in some cases, marketing such products as 'free' without informing customers about how their preferences, personal data, and user-generated content will be used may be considered a misleading practice.<sup>112</sup>

As mentioned above, two-sided markets involve two customer groups. There are two possible approaches to capturing their unique structure: defining separate markets for each customer group or defining a single market that encompasses all customer groups.<sup>113</sup> Defining only one side of the market – the one with paying customers is an option, but "one of the first and most important contributions of the theory of two-sided markets is that giving away a product for free may be a profit-maximizing strategy for a firm, even for a monopolist."<sup>114</sup> (Filistrucchi, Geradin, Damme, & Affeldt, 2013) The fact is that each side of the market is co-dependent on the other. Behind the free digital products stands the increased number of consumers, who give away the data. The higher the number of consumers on the "free side" of the market, the more the company generates profit. The mechanism is further discussed in the following paragraphs. Competition on the free side of two-sided markets is present, therefore, it is more appropriate to define a single market that encompasses all customer groups. By not taking into account all sides when defining the relevant market, the real competitive pressure faced by merging firms before and after the

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<sup>110</sup> CASE AT.39740 Google Search (Shopping)

<sup>111</sup> Commission decision of 27.06.2017 in case 39740 *Google Search (Shopping)*, para. 320

<sup>112</sup> Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, document SWD(2016)163 Final, 25 May 2016, page 97.

<sup>113</sup> For further discussion of this point, see Sebastian Wismer & Arno Rasek, "*Market definition in multi-sided markets*" pp. 55-68 in Organisation for Economic Co-operation and Development report *Rethinking Antitrust Tools for Multi-Sided Platforms*, 2018 [www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm](http://www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm).

<sup>114</sup> Market Definition in Two-Sided Markets: Theory and Practice, Lapo Filistrucchi, Damien Geradin, Eric van Damme, Pauline Affeldt, Tilburg Law School Legal Studies Research Paper Series No. 09/2013, page 9

merger would be overlooked. This could lead to a faulty market definition and, as a result, an erroneous decision.<sup>115</sup> (Filistrucchi, Geradin, Damme, & Affeldt, 2013) To conclude, the competition authorities, during the market definition, should consider each side of the market in two-sided digital markets.<sup>116</sup> The European Commission did not explicitly address the question of whether one single market including several groups of customers should be defined in cases concerning the multi-sided market.<sup>117</sup>

The question is if the SSNIP is applicable, on which side should it apply. On one side of the market consumer`s contribution is nonmonetary, an increase in price is unmeasurable. Therefore, if not impossible, it is hard to use SSNIP in the markets.

Instead of the SSNIP test, is proposed to use the "Small but Significant Non- transitory Decrease in Quality" further mentioned as the SSNDQ test.<sup>118</sup> Big Tech actively competing in quality and innovation, rather than price competition. The non-price parameters of competition are as important as price parameters.<sup>119</sup> The main challenge for the SSNDQ test is a lack of tools to explicitly measure quality.<sup>120</sup> When the quality of a product is quantifiable, Even when a component of the quality of the product is quantifiable, consumers might just have different

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<sup>115</sup> Market Definition in Two-Sided Markets: Theory and Practice, Lapo Filistrucchi, Damien Geradin, Eric van Damme, Pauline Affeldt, Tilburg Law School Legal Studies Research Paper Series No. 09/2013, Page 27

<sup>116</sup> Market Definition in Two-Sided Markets: Theory and Practice, Lapo Filistrucchi, Damien Geradin, Eric van Damme, Pauline Affeldt, Tilburg Law School Legal Studies Research Paper Series No. 09/2013,, page 28

<sup>117</sup> For further discussion of this point, see Sebastian Wismer & Arno Rasek, "Market definition in multi-sided markets" pp. 55-68 in Organisation for Economic Co-operation and Developments report *Rethinking Antitrust Tools for Multi-Sided Platforms*, 2018 [www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm](http://www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm).

<sup>118</sup> Organisation for Economic Co-operation and Development, *The role and measurement of quality in competition analysis*; page 8-9, 2013

<sup>119</sup> Maurice E. Stucke & Allen P. Grunes, *Big data and competition policy*, 2016, paragraph.7.04

<sup>120</sup> Jacques Crémer, Yves-Alexandre de Montjoye, & Heike Schweitzer, *Competition Policy for the Digital Era*, European Commission, page 45, (2019)

*This test faces the same difficulties of balancing between the two sides as the SSNIP test. Furthermore, it is unclear how this test could be made operational in practice without precise measurement of quality that would allow competition authorities and courts to determine an equivalent to a 5-10% price increase, and without a way to quantify the effects of the quality degradation on the firm's revenues in order to determine whether such degradation would be profitable.*

preferences and disagree about what characteristics of a product constitute better or worse quality.<sup>121</sup>

The accurate market definition helps competition authorities classify cases, raising competition concerns and, therefore, scrutinizing those cases. Another function of market definition is to differentiate between active competitors, already in the market and potential competitors, waiting to enter the market. Market definition is a handful to identify the barriers to entry.<sup>122</sup> (Organisation for Economic Co-operation and Development, 2012) The problem is that market definition in the case of Big Tech is often inaccurate, due to the peculiarities of the digital economy and the novelty of this sector. The incorrect market definition leads to false positives, and is the core element of erroneous evaluation of mergers and acquisitions. Some authors suggest that it is better to put less emphasis on analysis of the market definition and to focus on theories of harm and a firm`s anti-competitive strategies.<sup>123</sup> (Jacques Crémer, 2019) Therefore, it is recommended that the competition authorities to follow the Commissions` path and avoid exact market definition.<sup>124</sup>

## CHAPTER V

### REVIEW OF FACEBOOK`S THE MOST NOTABLE ACQUISITIONS

#### 5.1. FACEBOOK/INSTAGRAM

Facebook has been the dominant personal social networking provider in the United States since at least 2011, according to the FTC.<sup>125</sup> In the social networking market, there is no direct substitute for Facebook, but smaller companies offering complementary or adjacent features can

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<sup>121</sup> Organisation for Economic Co-operation and Development, *The role and measurement of quality in competition analysis*, page 60, 2013

<sup>122</sup> Organisation for Economic Co-operation and Development, *Market definition* DAF/COMP(2012)19 page 28

<sup>123</sup> Jacques Crémer, Yves-Alexandre de Montjoye, & Heike Schweitzer, *Competition Policy for the Digital Era*, European Commission, page 3, (2019)

<sup>124</sup> See. Case No COMP/M.7217 - Facebook/ WhatsApp, para. 13-34

<sup>125</sup> See. Case No.: 1:20-cv-03590



gather user attention, diverting engagement and profits away from the network, even if the smaller firm is not competing in social networking.<sup>126</sup>

Instagram was founded in March 2010 and by the time of its acquisition, had 13 employees and 27 million active users. Instagram was the mobile native photo-sharing social network application, which enabled its users to communicate with other users by taking, sharing, editing, and commenting on photos. According to the FTC, Instagram became an existential threat to Facebook's social networking monopoly as users increasingly demanded and prioritized personal social networking services on their smartphones and connected with friends and family through photo-sharing.<sup>127</sup> The FTC conducted a private investigation and the details are unknown. The Office of Fair Trading (OFT) also conducted the investigation and described Instagram as a “free mobile phone photo application. It functions by allowing users to take photos, apply digital filters to those photos, and then share those photos on the Instagram network or via other social networks, including Facebook.”<sup>128</sup>

Mr. Zuckerberg, Facebook's CEO, warned his colleagues in an email prior to the acquisition in 2011 that “if Instagram continues to kick ass on mobile or if Google buys them, then over the next few years they could easily add pieces of their service that copy what we're doing now, and if they have a growing number of people's photos, then that's a real issue for us. They're growing extremely quickly right now. It seems like they double every couple of months or so, and their base is already -5-10m users ... In the time it has taken us to get our act together on this[,] Instagram has become a large and viable competitor to us in mobile photos, which will increasingly be the future of photos.”<sup>129</sup>

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<sup>126</sup> Ibid.

See also. During a 2018 congressional hearing, Facebook CEO Mark Zuckerberg responded to the question "Who's your biggest competitor?" by insisting that the company competes in three main categories, rather than facing a direct competitor in one primary market. Zuckerberg also mentioned that a typical American uses eight different communications software applications, but did not mention that Facebook owns several of them. *Transcript of Mark Zuckerberg's Senate Hearing*. U.S. Senate 115th Congress, 2nd Session Sess. (2018)

<https://www.washingtonpost.com/news/the-switch/wp/2018/04/10/transcript-of-Mark-Zuckerberg's-senate-hearing/>.

<sup>127</sup> See. Case No.: 1:20-cv-03590

<sup>128</sup> Office of Fair Trading, *Full Text of the Decision Regarding the Anticipated Acquisition by Facebook Inc of Instagram Inc*, No. ME/5525/12 August 22, 2012

<sup>129</sup> See. Case No.: 1:20-cv-03590 paragraph 5-12; 84

Facebook accumulated a large percentage of its revenue by advertising. Targeted advertising on social networks is very successful. By the time of the acquisition, Instagram did not have any advertising revenue. Social networks provide a more refined form of advertising because every user in the social network has their own credentials and unique network. The most possible reason for being ad-free was that Instagram has not had the network effects yet. It was a strategic business decision.<sup>130</sup> The former Facebook Vice President of Product Management and Instagram investor, Matt Cohler, advised the company to pursue growth first without monetization in order to achieve the network effects that would drive advertising revenue later.<sup>131</sup>

In 2012, by the time of acquisition, many companies developed the first mobile applications while Facebook was still using Hybrid apps, built with HTML5 and similar technologies that were used for the web. HTML5 was slow on mobile phones and, according to Mr. Zuckerberg, CEO of Facebook, “choosing HTML5 over native was the biggest mistake.”<sup>132</sup> While Facebook struggled with its HTML5 based strategy, Instagram, as a mobile native application, started to develop network effects and became a potential competitor to Facebook.<sup>133</sup> Analyzing that Facebook, in the period leading up to the launch of Instagram's Android app, Facebook purchased Lightbox.com, a mobile social photo sharing application designed for Android, and acquired the above-mentioned Divvyshot, which was also a photo-sharing app, indicates Facebook had intended to enter into the photo-sharing mobile application market.

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<sup>130</sup> For further discussion of this point, see. Sebastian Wismer & Arno Rasek, “*Market definition in multi-sided markets*” pp. 55-68 published in Organisation for Economic Co-operation and Development report Rethinking Antitrust Tools for Multi-Sided Platforms, 2018. [www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm](http://www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm) )

<sup>131</sup> Glick, Mark A. and Ruetschlin, Catherine and Bush, Darren, Big Tech’s Buying Spree and the Failed Ideology of Competition Law: The Example of Facebook (December 11, 2020). Hastings Law Journal, page 28 Forthcoming, U of Houston Law Center No. 2020-A-42, Available at SSRN: <https://ssrn.com/abstract=3746728> or <http://dx.doi.org/10.2139/ssrn.3746728>

<sup>132</sup> At TechCrunch Disrupt in San Francisco, Facebook CEO Mark Zuckerberg delivered speech and stressed that “The biggest mistake we’ve made as a company is betting on HTML5 over native“. 11/09/2012 ([https://www.youtube.com/watch?v=jXkm9FqPKqQ&ab\\_channel=CNET](https://www.youtube.com/watch?v=jXkm9FqPKqQ&ab_channel=CNET) )

<sup>133</sup> After identifying two significant competitive threats to its dominant position—Instagram and WhatsApp—Facebook moved to squelch those threats by buying the companies, reflecting CEO Mark Zuckerberg’s view, expressed in a 2008 email, that “it is better to buy than compete.” ([https://www.ftc.gov/system/files/documents/cases/051\\_2021.01.21\\_revised\\_partially\\_redacted\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_complaint.pdf) p.2)

Previously, in 2012 the FTC cleared Facebook's acquisition of Instagram without taking any actions. While the investigation was closed, it is unclear how it was conducted. On December 9th, 2020, the Federal Trade Commission sued Facebook for illegal monopolization.<sup>134</sup> According to the complaint, "Facebook targeted potential competitive threats to its dominance." This is objective evidence that Instagram was perceived as "Facebook's threat", and if the FTC conducted a proper investigation, this acquisition had a ground to be challenged under the perceived potential competition doctrine. Through this acquisition, Facebook, on the one hand, neutralized its rival in the social networking market, and also, by acquiring a mobile-native, photo-sharing social network Facebook entered into the online social photo services market.<sup>135</sup>

## 5.2. FACEBOOK/WHATSAPP

Around 2010, the ubiquitous adoption of smartphones significantly changed the way that users consumed digital services. People shifted from desktop computers to mobile devices.<sup>136</sup> By that time, WhatsApp offered an instant messaging service with hundreds of millions of users worldwide<sup>137</sup>. Similar to Instagram, WhatsApp is a mobile-native application. The mobile messaging application was one of the fastest-growing application categories due to the increased use of mobile devices.

It was incorporated in 2009 and was the only other free texting service, except for Blackberry's BBM, which only worked among BlackBerries.<sup>138</sup> Later, the app switched from free

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<sup>134</sup> FTC sues Facebook for illegal monopolization, December 9, 2020 available at: <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization>

Available at: <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization>

<sup>135</sup> Glick, Mark A. and Ruetschlin, Catherine and Bush, Darren, Big Tech's Buying Spree and the Failed Ideology of Competition Law: The Example of Facebook, (December 11, 2020). *Hastings Law Journal*, page 32

<sup>136</sup> *See*. Case No.: 1:20-cv-03590 para.78

<sup>137</sup> FTC, *Letter From Jessica L. Rich, Director of the Federal Trade Commission Bureau of Consumer Protection, to Erin Egan, Chief Privacy Officer, Facebook, and to Anne Hoge, General Counsel, WhatsApp Inc.*, April 10, 2014, [https://www.ftc.gov/system/files/documents/public\\_statements/297701/140410facebookwhatapltr.pdf](https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatapltr.pdf)

<sup>138</sup> Parmy Olson, *Exclusive: The Rags-To-Riches Tale Of How Jan Koum Built WhatsApp Into Facebook's New \$19 Billion Baby*, *Forbes*, February 19, 2014,

to paid, and for later service adopters, the price was approximately \$1.<sup>139</sup> WhatsApp offered its users a good user experience and top privacy protection.<sup>140</sup> In 2011 Facebook launched its messaging application – Facebook’s Messenger. In April of 2014 Facebook’s Messenger had 200 million users while WhatsApp, by the time of the acquisition had 465 million users.<sup>141</sup> In February of 2014, Facebook acquired the messaging application, WhatsApp, for 19 billion USD.

The significant difference between WhatsApp and Facebook’s business models was that WhatsApp did not sell ads and did not collect data from its users, while Facebook collected and analyzed data in order to serve advertisements on behalf of advertisers.<sup>142</sup> By the time of the acquisition, Messenger was free of ads. In this regard, they had a similar approach. In this environment, WhatsApp featured its users as a private instant messaging application, without advertisements and data collection. As the CEO of Facebook, Mark Zuckerberg said later, “The future is private.”<sup>143</sup> This statement once again emphasizes that through the WhatsApp acquisition, Facebook not only got rid of its rival, but also entered the private instant messaging market.

The founder of WhatsApp, Jan Koum wrote in his blog: “*At WhatsApp, our engineers spend all their time fixing bugs, adding new features, and ironing out all the little intricacies in our task of bringing rich, affordable, reliable messaging to every phone in the world. That’s our product and that’s our passion. Your data isn’t even in the picture. We are simply not interested in any of it*”<sup>144</sup>

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Available at: <https://www.forbes.com/sites/parmyolson/2014/02/19/exclusive-inside-story-how-jan-koum-built-whatsapp-into-facebooks-new-19-billion-baby/?sh=659743692fa1>

<sup>139</sup> *Ibid.*

<sup>140</sup> *See.* Case No.: 1:20-cv-03590 para.113

<sup>141</sup> Number of monthly active WhatsApp users worldwide from April 2013 to March 2020, Published by Statista Research Department, Jul 14, 2021 available at: <https://www.statista.com/statistics/260819/number-of-monthly-active-whatsapp-users/>

Number of monthly active Facebook Messenger users from April 2014 to September 2017, Published by Statista Research Department, Jan 27, 2021 available at: <https://www.statista.com/statistics/417295/facebook-messenger-monthly-active-users/>

<sup>142</sup> *See.* Case No COMP/M.7217 – Facebook/WhatsApp. March 10, 2014. *Para.70*

<sup>143</sup> At Facebook’s annual F8 developer conference in 2019, Zuckerberg introduced a new, privacy-focused vision for the entire Facebook platform, stating “The future is private.” Available at: [https://www.youtube.com/watch?v=Aqv6UeavLSI&ab\\_channel=DailyMail](https://www.youtube.com/watch?v=Aqv6UeavLSI&ab_channel=DailyMail)

<sup>144</sup> Jan Koum, *Why We Don’t Sell Ads*, WhatsApp Blog, June 18, 2012, <https://blog.whatsapp.com/?p=245>.

The Federal Trade Commission cleared the acquisition and notified Facebook and WhatsApp about their obligations<sup>145</sup>. In the letter, which FTC sent to Facebook`s and WhatsApp`s representatives, were emphasized that “FTC has made clear that, absent affirmative express consent by a consumer, a company cannot use data in a manner that is materially inconsistent with promises made at the time the data was collected, and that such use of data could be an unfair practice under Section 5.”<sup>146</sup>

The European Commission conducted an investigation of the transaction.<sup>147</sup> The investigation is publicly available and the examination is possible. The commission defined the relevant market as consumer communication apps for smartphones and the geographic market “for consumer communication apps at least EEA-wide, if not worldwide.”<sup>148</sup> The Commission noted that “the consumer communications sector is a recent and fast-growing sector which is characterized by frequent market entry and short innovation cycle, in which large market share may turn out to be ephemeral.”<sup>149</sup>

The European Commission also evaluated the potential for Facebook to gain market power in social networking by combining the two platforms, and Facebook submitted that integration between WhatsApp and Facebook would pose significant technical difficulties.<sup>150</sup> The

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<sup>145</sup> *FTC notifies Facebook, WhatsApp of privacy obligations in light of the proposed acquisition, April 10, 2014*  
<https://www.ftc.gov/news-events/press-releases/2014/04/ftc-notifies-facebook-whatsapp-privacy-obligations-light-proposed>

<sup>146</sup> *FTC, Letter From Jessica L. Rich, Director of the Federal Trade Commission Bureau of Consumer Protection, to Erin Egan, Chief Privacy Officer, Facebook, and to Anne Hoge, General Counsel, WhatsApp Inc., April 10, 2014,*  
[https://www.ftc.gov/system/files/documents/public\\_statements/297701/140410facebookwhatapltr.pdf](https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatapltr.pdf)

<sup>147</sup> *See. Case No COMP/M.7217 – Facebook/WhatsApp. March 10, 2014.*

Case M.7217 – Facebook/WhatsApp Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004, March 10, 2014

<sup>148</sup> *See. Case No COMP/M.7217 – Facebook/WhatsApp. March 10, 2014,para.62*

For the purposes of the present case, the exact boundaries of the market for social networking services, in particular, whether consumer communications apps such as Facebook Messenger and WhatsApp fall within the scope of such a potential market can be left open, since the Transaction would not give rise to serious doubts as to its compatibility with the internal market under any alternative market definition.

<sup>149</sup> *See. Case No COMP/M.7217 – Facebook/WhatsApp. March 10, 2014,para.99*

<sup>150</sup> *Case No COMP/M.7217 – Facebook/WhatsApp. March 10, 2014,para. 138*

Commission explicitly informed Facebook about its obligation to supply correct and non-misleading information, and also warned about the possible fines.

The outcome of the investigation was that the transaction does not give rise to serious doubts as regards its compatibility with the internal market with respect to the market for consumer communications apps and the potential market for the provision of social networking services.<sup>151</sup>

Later, on 17 May 2017 the Commission has fined Facebook €110 million for providing incorrect or misleading information during the Commission`s 2014 investigation under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (1), and in particular Article 14(1) of that Regulation.<sup>152</sup> The Commission noted that at the time of the review of Facebook`s acquisition of WhatsApp, Facebook was aware or should have been aware that automated matching between a user`s Facebook and WhatsApp accounts was or would have been possible.<sup>153</sup> The Commission considered that the violation committed by Facebook was serious since a company had an obligation to provide correct and non-misleading information in a merger investigation.<sup>154</sup>

The latest evidence, provided by the FTC clarified the feasibility of the perceived potential competition doctrine in the case of the Facebook/WhatsApp acquisition. The element of perceiveness is demonstrated in Facebook`s CEO Mark Zuckerberg`s emails to his colleagues, where he expressed his attitude towards Facebook`s perceived competitors: “It is better to buy than compete.”<sup>155</sup>

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<sup>151</sup> Case No COMP/M.7217 – Facebook/WhatsApp. March 10, 2014, para.142-163

<sup>152</sup> See. Final Report of the Hearing Officer — Case M.8228 — Facebook/WhatsApp

*OJ C 286, 30.8.2017, p. 4–5* available at: [https://ec.europa.eu/commission/presscorner/detail/pl/IP\\_17\\_1369](https://ec.europa.eu/commission/presscorner/detail/pl/IP_17_1369)

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid.*

<sup>155</sup> See. Case No.: 1:20-cv-03590 para 5-12

## CONCLUSION

The thesis aimed to determine if the potential competition doctrine was feasible for Big Tech acquisitions. The analysis clarified that the main issues for the doctrine to consider feasible for Big Tech acquisitions were the high burden of proof, incorrect market definition, and no entry barriers.

The findings during the analysis confirmed that the perceived potential competition doctrine is a workable tool for competition authorities to challenge Big Tech acquisitions, specifically after analyzing Facebook acquisitions. The analysis in the fifth chapter confirmed the importance of perceptiveness in the cases of the Facebook/Instagram and Facebook/WhatsApp acquisitions. The internal documents of Facebook indicated that Facebook perceived Instagram and WhatsApp as potential rivals, and instead of competing, acquired them to enter into new markets through these acquisitions. Therefore, providing relevant, objective evidence is possible if the authorities emphasize the element of perceptiveness. It is recommended for the courts to consider reducing the burden of proof. However, the actual potential competition doctrine is not achievable with its high burden of proof and inefficiency.

The thesis advocates that less emphasis should be made on the indirect market definition and determination of market shares. As is demonstrated in the fourth chapter of the thesis, SSNIP and SSNDQ tests are not very workable in the case of two-sided markets, where Big Tech operates. The incorrect market definition is highly probable due to the market's two-sidedness. The consequence of inaccurate market definition is the imprecise evaluation of acquisitions. Therefore, it is recommended that the agencies and courts focus on the identification of anti-competitive strategies. Further research is recommended to examine the relevant tests of market definition in the case of two-sided markets, especially when one side of the market is free of charge.

This thesis also analyzes the issue of whether the potential competition doctrine, perceived and actual, is not applicable if there are no visible barriers to entry. The thesis advocates considering data advantage as a barrier to entry. Data is used to develop artificial intelligence, improve products, train algorithms, and, therefore, innovate and compete. For technology companies operating in the two-sided digital market, data is a crucial input to innovate and compete. Big Tech has access to big data, which is even more important for competing.

The fifth chapter of the thesis uses Facebook acquisitions to illustrate Big Tech's anti-competitive strategies. This finding can be extended to other Big Tech acquisitions, but a case-by-

case analysis and individual approaches are required due to the fact each case is unique from the point of view of the competition law.

Therefore, it is recommended:

1. For the competition authorities to rethink the barriers to entry and expansion in the digital multi-sided markets and change the erroneous approach that entry in the digital markets is easy. Also, to take into account the element of perceptiveness, if the evidence exists, as it was in the case of Facebook`s acquisitions, they challenge the acquisition. In the case of rethinking entry barriers, the perceived potential competition doctrine will be more feasible for Big Tech acquisitions.
2. For lawmakers to obligate the dominant technology firms to data sharing, as is suggested in the proposed Digital Markets Act. Data sharing will eliminate the entry barriers in the digital markets and, therefore, will have a pro-competitive effect.
3. For the courts to consider reducing the burden of proof.
4. For researchers, it is recommended that they examine the relevant tests of market definition in the case of digital two-sided markets, where one side is free of charge, and the other side, represented by advertisers, who are paying monetary contributions.

To summarize, the rapid, often revolutionary, development of the world's digital economy, requires such a swiftly adaptable approach from the law, as well illustrated above with the doctrine of potential competition.



## BIBLIOGRAPHY

### Normative Acts:

1. The Sherman Antitrust Act of 1890
2. Celler-Kefauver Antimerger Act of 1950
3. Clayton Act 1914
4. The U.S. Department of Justice & Federal Trade commission Horizontal Merger Guidelines 1968
5. The U.S. Department of Justice & Federal Trade commission Horizontal Merger Guidelines 1984
6. The U.S. Department of Justice & Federal Trade commission Horizontal Merger Guidelines 2010
7. the Treaty on European Union and the Treaty on the Functioning of the European Union, 2012/C 326/01
8. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)
9. Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03)
10. Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, Brussels, 15.12.2020 COM(2020)
11. Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM(2020) 842 final (hereinafter, the 'Draft DMA')
12. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4.5.2016.

### Court Practice and decisions:

1. The United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964)
2. The United States v. Penn-Olin Chemical Co. 378 U.S. 158 (1964)

3. The United States v. Falstaff Brewing Co., 410 U.S. 526 (1973)
4. The United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974)
5. Office of Fair Trading, *Full Text of the Decision Regarding the Anticipated Acquisition by Facebook Inc of Instagram Inc*, No. ME/5525/12 August 22, 2012
6. Case No COMP/M.7217 (March 10, 2014).
7. Federal Trade Commission V. Facebook Inc., Case No.: 1:20-cv-03590, 01 13, 2021).
8. Statement of Federal Trade Commission Concerning Google/DoubleClick, FTC File No. 071-0170 (2008)
9. CASE AT.39740
10. *See*. Final Report of the Hearing Officer — Case M.8228 — Facebook/WhatsApp, *OJ C* 286, 30.8.2017

#### Scientific Literature:

1. Jacques Crémer, Yves-Alexandre de Montjoye, & Heike Schweitzer, *Competition Policy for the Digital Era*, European Commission, 2019
2. OECD, *The Role and Measurement of Quality in Competition Analysis*, 2013
3. Darren Bush and Salvatore Mass, *Rethinking the Potential Competition Doctrine*, *Wis. L. Rev.*, 2004
4. John Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 *Univ. of Penn. L. Rev.* 2015
5. The Bundeskartellamt, working paper - *The Market Power of Platforms and Networks, Executive Summary*, June 2016
6. William E. Dorigan, *The Potential Competition Doctrine: The Justice Department's Antitrust Weapon under Section 7 of the Clayton Act*, 8 *J. Marshall J. PRAC. & PROC.*, 1975
7. Colomo, P. I. *The Draft Digital Markets Act: a legal and institutional analysis*. London School of Economics - Law Department, 2021
8. 'Competition Law 4.0'. *A new competition framework for the digital economy*. Berlin: Federal Ministry for Economic Affairs and Energy (BMWi) Public Relations, 2019
9. Madiega, T. *Digital markets act*. European Parliamentary Research Service, EPRS. 2021

10. Filistrucchi, L., Geradin, D., Damme, E. v., & Affeldt, P. (2013). Market Definition in Two-Sided Markets: Theory and Practice. *Tilburg Law School Legal Studies Research Paper Series*, 50.
11. Glader, M. (2006). *Innovation Markets And Competition Analysis: Eu Competition Law and Us Antitrust Law (New Horizons in Competition Law and Economics)*. Edward Elgar Publishing Limited.
12. Glick, Mark A. and Ruetschlin, Catherine and Bush, Darren, Big Tech's Buying Spree and the Failed Ideology of Competition Law: The Example of Facebook (December 11, 2020). *Hastings Law Journal*
13. Organisation for Economic Co-operation and Development.. (2015). *Data-Driven Innovation: Big Data for Growth and Well-Being*.
14. Organisation for Economic Co-operation and Development. (2016). *Big Data: Bringing Competition Policy to the Digital Era*. OECD.
15. Organisation for Economic Co-operation and Development. (2012). *Market Definition*.
16. Organisation for Economic Co-operation and Development. (2018). *Quality considerations in the zero-price economy – Note by the European Union*. Organisation for Economic Co-operation and Development.
17. Organisation for Economic Co-operation and Development. (2021). *The concept of potential competition – Summaries of contributions*. Organisation for Economic Co-operation and Development.
18. Tucker, D. (2011). Potential Competition Analysis under the 2010 Merger Guidelines. *Sedona Conference Journal*, 273-284.
19. Hood, R. K. (1976). Potential competition. *The Antitrust Bulletin*, 485-508.
20. Maurice E. Stucke & Allen P. Grunes, *Big data and competition policy*, 2016, : Oxford.
21. W.E., D. (1975). The potential competition doctrine: The justice department's antitrust weapon under the section of the clayton act. . *John Marshall Journal of Practice and Procedure*, 415-436.
22. Wilson C Freeman, J. B. (September 11, 2019). *Antitrust and "Big Tech"*. Congressional Research Service.
23. Yun, J. (2019). Potential Competition and Nascent Competitors. *Criterion Journal on Innovation*, 625-638.

24. National Venture Capital Association (NVCA), 2020
25. De Mauro, Andrea. (2014). What is big data? A consensual definition and a review of key research topics
26. Organisation for Economic Co-operation and Development, Merger Review in Emerging High Innovation Markets, 2002
27. Sebastian Wismer & Arno Rasek, “*Market definition in multi-sided markets*” , Organisation for Economic Co-operation and Developments report *Rethinking Antitrust Tools for Multi-Sided Platforms*, 2018
28. Various Editors, The ABC's of Clayton 7: Amendment of 1950, Brown Shoe, The Court, and Current Complexities, 10 Vill. L. Rev. 734, (1965).

Other sources:

1. Durkee, A. Amazon’s Biggest Acquisitions Have Allowed It To Become A Marketplace For Nearly Everything. Forbes, 2021
2. Tim Wu & Stuart Thompson, The Roots of Big Tech Run Disturbingly Deep, New York Times, June 7, 2019
3. Apple Inc. Apple Reports Third Quarter Results, 2021, August 29
4. Cicilline Opening Statement At Big Tech Antitrust Hearing, 2020, July 29
5. Koum, J. Why We Don’t Sell Ads,. WhatsApp Blog, June 18, 2012
6. How to make your early-age startup valuable for acquisitions, Abdo Riani, Forbes, March 6, 2020;
7. Technology industry M&A total deal value worldwide 2004-2020, Kimberly Mlitz, June 21 2021, Statista.com
8. William Turvill, Quintopoly? Five tech companies now earn 46% of global ad revenues as news media left behind, Pressgazette, June 30, 2021
9. Nicholas Carlson ‘This Sandwich Is Good, But Getting Bought By Facebook Is Better!’, Businessinsider, 2010
10. Eric Schmidt, Executive Chairman of Google, ‘Why Google Works’, Huffington Post, 20 January 2015

11. Eric Schmidt, Executive Chairman of Google, 'The New Gründergeist', Google Europe Blog, Posted: 13 October 2014
12. Margrethe Vestager, MLex Special Report, 22 January 2015 ('Vestager Interview'), [https://mlexmarketinsight.com/\\_/special-report-pdfs/MLex-Interview-with-Margrethe-Vestager-Jan-2015.pdf](https://mlexmarketinsight.com/_/special-report-pdfs/MLex-Interview-with-Margrethe-Vestager-Jan-2015.pdf)
13. European Commission - Press release, EU-US launch Trade, and Technology Council to lead values-based global digital transformation, Brussels, 15 June 2021
14. Transcript of Mark Zuckerberg's Senate Hearing. U.S. Senate 115th Congress, 2nd Session Sess, 2018
15. FTC, Letter From Jessica L. Rich, Director of the Federal Trade Commission Bureau of Consumer Protection, to Erin Egan, Chief Privacy Officer, Facebook, and to Anne Hoge, General Counsel, WhatsApp Inc., April 10, 2014
16. Parmy Olson, Exclusive: The Rags-To-Riches Tale Of How Jan Koum Built WhatsApp Into Facebook's New \$19 Billion Baby, Forbes, February 19, 2014

Online sources:

1. <https://eur-lex.europa.eu>
2. <http://www.ssrn.com>
3. <http://www.oecd.org>
4. <https://law.justia.com>
5. <https://www.ftc.gov>
6. <https://forbes.ge>
7. <https://supreme.justia.com/>
8. <https://www.statista.com>
9. <https://www.internetlivestats.com>
10. <https://digital-strategy.ec.europa.eu/en/>
11. <https://www.europarl.europa.eu/>
12. <https://www.washingtonpost.com/>
13. <https://www.youtube.com>

14. <https://nvca.org>
15. <https://www.nytimes.com/>
16. <http://googlepolicyeurope.blogspot.com>

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