DIGITAL COMPETITION REPORTS AND MERGER ENFORCEMENT

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I. INTRODUCTION

Digital technology companies and online platforms have revolutionized the way people and businesses work, shop, and interact. The benefits are abundant and clear. Today, however, critics are raising questions — and some are ringing alarm bells — about digital platforms and whether antitrust has failed to sufficiently scrutinize their conduct and allowed them grow too large and powerful. Around the globe, many are asking whether antitrust enforcement has the tools, resources, and ability to tackle deficiencies — perceived or actual — in digital competition and enforcement.

In response, various groups have examined the nature of digital markets, analyzed past antitrust enforcement, considered whether updated antitrust laws and standards are needed, and formulated recommendations for updated antitrust enforcement and policy. This article examines the merger-enforcement recommendations of three reports: the University of Chicago Booth School of Business Stigler Center's *Stigler Committee on Digital Platforms Final Report* ("Stigler Report");[2] the Report of the Digital Competition Expert Panel, *Unlocking Digital Competition*, in the United Kingdom ("UK Report"),[3] and the report by Jacques Crémer and others, *Competition Policy for the Digital Era*, to the European Commission ("EC") (the "EC Report").[4]

II. KEY CONCLUSIONS AND RECOMMENDATIONS

A. Stigler Report

The Stigler Report, released in September 2019, expresses concerns regarding digital platforms and recommends changes to address these concerns. The Subcommittee on Market Structure and Antitrust, in particular, recommends changes to merger enforcement. The Report's key conclusions and recommendations follow.

1. Characteristics of and Special Challenges in Digital Markets

According to the Stigler Report, the nature of digital markets presents particular challenges for merger enforcement. Many digital platforms provide services to consumers without monetary charge; instead, consumers barter their attention and data for services. The Report states that antitrust agencies, economists, and courts evaluating digital-platform mergers lack sophisticated tools to analyze non-price dimensions of competition, making it harder to assess likely harm from digital mergers.

2 Available at https://research.chicagobooth.edu/stigler/media/news/committee-on-digital-platforms-final-report.

3 Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

4 Available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

The Stigler Report raises particular concern about dominant platforms acquiring small firms and potential competitors, which it says could be especially damaging to competition if, absent the acquisition, the acquired firm would have developed into a major competitive threat. But, the Report acknowledges, it is difficult to predict pre-merger whether the acquired firm is likely to develop into a full-fledged competitor or whether the acquisition will instead propel the commercial development and use of the acquired firm's technology. The Report recommends that antitrust agencies develop a better understanding of when acquisitions of nascent competitors might be anticompetitive.

2. Adequacy of Existing Law and Analytical Tools

The Stigler Report generally finds that existing antitrust law and analytical tools are insufficient to handle merger enforcement in digital markets. The Report contends that traditional antitrust tools are "not applicable in multi-sided markets" where one side pays no monetary price; better analytical tools are needed to account for the impact of potential and nascent competitors; and better tools are needed to analyze non-price effects. The Report concludes that legislation may be required to equip antitrust enforcement for the digital age.

3. Adequacy of Consumer Welfare Standard

The Stigler Report indicates that consumer welfare is an important objective, but that this standard, as currently applied, may not suffice in digital markets. The Antitrust Subcommittee's section of the Report largely endorses the standard, but other subcommittees are more critical, stating that the standard may not capture important political effects of concentration in social media and suggesting that in studying the impact of digital platforms on the media industry, the consumer welfare standard should be supplanted by a "*citizen* welfare" standard.

4. Burdens of Proof and Legal Standards

Among the Stigler Report's most significant recommendations are to adopt new presumptions and to raise the burden on merging firms in some circumstances. For example, the Report states that, when an acquisition involves a dominant platform, the dominant firm should bear the burden to prove that the acquisition will not harm competition. Further, the Report suggests that "[m]ergers between dominant firms and substantial competitors or uniquely likely future competitors should be presumed unlawful, subject to rebuttal by defendants." Additionally, the Report states that courts should be more amenable to plaintiffs proving competitive harm through circumstantial evidence, "especially where the propositions in question are not observable and there thus cannot be direct evidence." The Report also recommends new regulation requiring certain merging firms to show that their transaction will "affirmatively promote competition."

5. Creation of Digital Authority and Specialized Court

The Stigler Report proposes that Congress create a specialized agency to regulate digital platforms. This "Digital Authority" (or "DA") would oversee all aspects of digital platforms and would be tasked with "creating general conditions conducive to competition." It would collect data on digital transactions and interactions, and implement "light touch" behavioral solutions to make markets more competitive. The DA would focus on firms with "bottleneck power" — described as arising when "consumers primarily single-home and rely upon a single service provider," which makes it prohibitively challenging and costly for rivals to compete for those consumers.

The Report envisions that the DA would review mergers, alongside the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ"), involving "digital businesses with bottleneck power." The DA, however, would have different standards and tools than the FTC and DOJ. The Report also suggests that businesses with bottleneck power should be required to obtain pre-clearance from the DA for any acquisition. The DA's decisions would be subject to judicial review.

The Report also recommends creating a specialist competition court to hear all antitrust cases. The specialized court would have sole judicial review over DA regulatory actions, and could be created as a trial court, appellate court, or both.

6. Merger Reportability

In addition to requiring that all mergers involving digital firms with bottleneck power be reportable to the DA, the Stigler Report also recommends that the Hart-Scott-Rodino reporting thresholds be changed to account for transaction value, or some other criteria, because "simply focusing on turnover is not enough" since many nascent firms have little revenue as they focus on scaling their user base.

B. UK Report

The UK Report was released in March 2019, with recommended changes to the UK's antitrust enforcement policy.

1. Special Characteristics of Digital Markets

The UK Report identifies certain characteristics of digital marketplaces that informed its recommendations, including the importance of data to digital platforms; the frequent feeless provision of services; markets subject to "tipping" and "winner-take-most" dynamics; and the efficiencies and costs associated with concentrated digital markets. The Report identifies several benefits brought about by digital marketplaces, but nonetheless makes several "pro-competition" recommendations related to digital-market mergers.

2. Adequacy of Current Law, Analytical Tools, and Merger Enforcement

The UK Report calls for a "reset" of merger assessment in digital markets, to be more active, more forward-looking, and more focused on innovation. Some of this reset would require legislation. According to the Report, traditional antitrust tools and policies are "important but there is a limit to how much they can accomplish." Rather than try to strengthen traditional tools, which could have unintended consequences, the Report recommends that the UK build competition into digital markets upfront by creating new frameworks, rules, and standards to ensure "space for new companies to innovate and that ensure fair treatment of competitors."

One of the UK Report's overarching strategic recommendations is for the Competition and Markets Authority ("CMA") to prioritize antitrust enforcement in digital markets by taking "more frequent and firmer action" to challenge mergers. In support of this goal, the Report recommends, among other things, that the CMA update its Merger Assessment Guidelines ("MAG") to account for considerations unique to digital marketplaces. Additionally, the MAG revisions would explicitly reference loss of future innovation as a potential unilateral effect and draw attention to the "evidential relevance" of transaction valuations that appear "exceptionally high."

3. Adequacy of Consumer Welfare Standard

The UK Report affirms the consumer welfare standard as the proper guiding principle for antitrust enforcement in digital markets and says that changing the standard carries risk of "unnecessary uncertainty" and "hindering economic activity." According to the Report, "[i]n principle, all of these questions [about digital acquisitions] can inform merger decisions within the current, mainstream framework for competition, centred on consumer welfare." Indeed, the Report states that the standard can account for non-price factors such as quality and innovation, and privacy, even in zero-price markets.

4. Burden of Proof and Legal Standard

The UK Report recognizes that "the majority of acquisitions by large digital companies are likely to be either benign or beneficial for consumers" and rejects putting the burden of proof on merging parties to show their merger is procompetitive. The Report states that a "presumption against all acquisitions by large digital companies is not a proportionate response to the challenges posed by the digital economy."

The Report, however, calls for legislation to allow the CMA to use a "balance of harms" test to evaluate mergers. Under this test, the CMA would not just analyze the likelihood of harm — it would also consider the scale of potential harm. Thus, mergers could be blocked where the *likelihood* of harm is low, but the *magnitude* of possible harm is great. The Report concludes that this test would broaden the scope of mergers that may be found "problematic."

5. Creation of Digital Markets Unit

The Report recommends that the UK create a governmental "digital markets unit" composed of specialists who are tasked with three primary functions: (1) creating and enforcing a code of conduct for digital platforms deemed to have "strategic market status" — essentially large platforms that operate a "key gateway" in one or more digital markets that have many "dependent users" on either side of the platform; (2) enabling greater "personal data mobility" and systems with open standards; and (3) advancing "data openness" to tackle the key barrier to entry, while protecting privacy.

6. Merger Reportability

The UK Report concludes that there is currently no need to change the UK's voluntary reporting system. Moreover, the Report says that the 25 percent share of supply test gives the CMA "flexibility and reach" to address mergers that do not trigger the UK's turnover thresholds but which may have a significant effect on competition and innovation. The Report does propose, however, that companies deemed to have "strategic market status" be required to inform the CMA of all intended acquisitions.

C. EC Report

The EC Report, published in April 2019, also analyzes digital markets and recommends merger-enforcement changes.

1. Key Characteristics of the Digital Economy

The EC Report focuses on three characteristics of the digital economy: "extreme returns to scale," "network externalities," and the role of data as a key input into many online products and services. These characteristics tend to result in strong economies of scope, concentrated markets, and incumbents that are difficult to dislodge. As a result, in terms of merger enforcement, the Report focuses on mergers where dominant platforms acquire small, successful start-ups with quickly-growing user bases and significant competitive potential. The Report recognizes that in many cases such acquisitions will be pro-competitive, but also says that such acquisitions can allow a company to strengthen its hold on a market by eliminating a competitive threat or by raising barriers to entry.

2. Adequacy of Existing Merger Law

The EC Report concludes that the EU Merger Regulation ("EUMR") does not currently need updating, either for jurisdictional or substantive merger-analysis purposes. In general, the Report states that "the basic framework of competition law ... continues to provide a sound and sufficiently flexible basis for protecting competition in the digital era." The Report thus does not advocate a fundamental overhaul of the existing merger control regime, but proposes certain tweaks, particularly in the substantive criteria for analyzing certain digital-market mergers and in the applicable theories of competitive harm.

For example, the EC Report proposes that when a dominant platform or ecosystem that benefits from strong positive network effects and data access acquires a target with currently low revenue but a large or fast-growing user base and high future market potential, the merger should still be analyzed under the "significant impediment of effective competition test," but under revised substantive theories of harm. Specifically, because theories of harm in vertical and conglomerate mergers are often limited to foreclosure effects on actual or potential rivals, or coordinated effects, the Report recommends (1) "inject[ing] some 'horizontal' elements into the 'conglomerate' theories of harm, and (2) assessing whether the acquirer and target operate in the same "*technological space*" or "*users' space*" — i.e. whether "the target is a potential or actual competitive constraint within the technological/users' space or ecosystem." The Report also says that the EC needs to explore innovation-based theories of harm.

3. Adequacy of Consumer Welfare Standard

The EC Report affirms the consumer welfare standard, but calls for reframing its application in digital markets. The Report states that "it has to be implemented differently in a fast-changing world where prices play a very different role compared to traditional industries."

4. Burden of Proof and Legal Standards

The EC Report suggests changes to the burden of proof and legal standards in digital competition cases, but does not recommend a presumption of illegality. It states that:

- "[W]e need to rethink both the timeframe and standard of proof."
- "[S]trategies employed by dominant platforms aimed at reducing the competitive pressure they face should be forbidden in the absence of clearly documented consumer welfare gains."
- "[I]n the context of highly concentrated markets characterised by strong network effects and high barriers to entry … one may want to err on the side of disallowing potentially anti-competitive conducts, and impose on the incumbent the burden of proof for showing the pro-competitiveness of its conduct."
- Where dominant platforms seek to expand into neighboring markets, there may be "a presumption in favour of a duty to ensure interoperability."
- "[W]here an acquisition is plausibly part of such a strategy [by dominant platforms/ecosystems to acquire small firms and avoid users' defection], the notifying parties should bear the burden of showing that the adverse effects on competition are offset by merger-specific efficiencies. This theory of harm does not create a presumption against the legality of such mergers."

5. Merger Reportability

The EC Report acknowledges that, absent a referral from a Member State, the EUMR's purely turnover-based notification requirements may not catch certain anticompetitive digital acquisitions because start-ups' revenue may not trigger these thresholds. But the Report does not recommend reportability changes yet because (a) the current thresholds do not seem to leave serious gaps in enforcement; (b) certain member states have recently adopted transaction-value-based notification thresholds, which the EC should monitor before making any changes; and (c) there is a need for legal certainty and minimized administrative burdens and transactional costs.

The Report does raise the possibility of a new reporting threshold for transactions with "specific characteristics," such as "acquisitions by dominant firms in markets characterised by strong network effects." But, the Report acknowledges, defining such a jurisdictional threshold that allows for legal certainty is "a challenging task."

III. COMPARING AND CONTRASTING THE REPORTS

All three Reports share several common themes and recommendations. Perhaps foremost is the theme that digital platforms are challenging traditional methods of antitrust analysis and there may be gaps in merger enforcement, particularly regarding acquisitions by large platforms of small start-ups that might grow into competitive threats. The Reports identify certain characteristics of digital markets that increase competition risks and challenge traditional antitrust tools. All three Reports also largely uphold the consumer welfare standard, though they recognize that its implementation in digital markets may require refinement.

But the Reports differ in key respects. In general, the Stigler Report and UK Report propose significant legislative changes, while the EC Report recommends none (only tweaks to the substantive assessment). For example, the Stigler Report and the UK Report both recommend the creation of a new digital regulator focused on transactions involving digital firms with bottleneck power or strategic market status. The EC Report does not. The Stigler Report goes further than the other Reports and proposes that a specialized antitrust court be created. Additionally, both the Stigler Report and the UK Report recommend that firms with bottleneck power or strategic market status report any proposed mergers. The EC Report recommends further study before changing notification thresholds.

The Reports also differ in whether they would change the burden of proof in merger cases. The Stigler Report suggests (1) requiring dominant platforms to prove that acquisitions would not harm competition; (2) treating mergers between dominant firms and "substantial competitors or uniquely likely future competitors" as presumptively unlawful; and (3) enacting regulations requiring merging digital firms to show their transaction "will affirmatively promote competition." The UK Report recommends against presuming that digital mergers are unlawful, instead calling for a new balance of harm standard to evaluate digital mergers. Likewise, the EC Report does not propose a presumption of illegality against digital mergers, but emphasizes that merging parties should bear the burden to show that any harms are offset by merger-specific efficiencies if an acquisition is plausibly part of a defensive strategy against user defection.

These differences may perhaps be explained (at least in part) by several factors. First, U.S. antitrust law and regulations are more limited compared to the EC, which has a more comprehensive and flexible regulatory framework that can be more readily adapted to the new challenges of the digital economy without major legislative changes. Moreover, the EC Report's authors may have seen the EC as being already more active in scrutinizing digital mergers (and conduct), while the authors of the Stigler and UK Reports may have seen their own jurisdictions as having a more modest digital merger enforcement track record. Finally, the EC merger enforcement regime works in parallel with EU Member States' national merger control laws, which supplement or complement the EUMR. By contrast, in the U.S., states often join FTC and DOJ merger enforcement action and bring merger challenges under federal antitrust law (though there are some recent exceptions). In short, the Reports' differences are not particularly surprising in light of these jurisdictions' substantive and institutional differences.

IV. COMMENTARY ON THE REPORTS

The Reports are commendable in their ambition, thoroughness, thoughtfulness, and intent to achieve an appropriate level of merger enforcement. Through the lens of U.S. merger enforcement, however, some of the recommendations are inadvisable or unnecessary. Our comments focus on the Stigler Report's recommendation for U.S. antitrust enforcement.

First, the proposed creation of the DA is unnecessary. The institutional framework for antitrust enforcement in the U.S. is already expansive and diverse. If it's necessary to invigorate U.S. antitrust enforcement, the existing antitrust agencies are capable — and are in the very process — of doing so. In particular, the FTC has conducted extensive competition hearings, with several focused on digital-competition issues; it formed a Technology Task Force, which has now become a full-blown Division; and it is apparently already conducting retrospective and prospective merger reviews. The DOJ also has ramped up its scrutiny of digital mergers, and there are also large multi-state investigations (though these appear to be conduct investigations). Moreover, the FTC plans to issue guidance on platform competition, vertical merger commentary, and an addendum to the 2006 Horizontal Merger Guidelines commentary to deal with nascent competition and how the agency analyzes non-price effects.[5]

As such, if antitrust enforcement in digital markets needs invigoration, doing so from within the existing antitrust agencies is the best, most efficient way to improve merger enforcement — not establishing a new, overlapping agency. Adding a third entity to U.S. merger enforcement may also confuse merger-enforcement standards. At a minimum, introducing a new enforcement entity in the U.S. is premature.

Second, the Stigler Report's recommendations to (a) shift the burden of proof to defendants in mergers involving a "dominant platform" to show a merger will not harm competition, and (b) to presume unlawful any mergers between dominant firms and "substantial competitors or uniquely likely future competitors," are unwarranted and likely to lead to over-deterrence of beneficial or benign mergers.

With respect to the former, shifting the burden to merging parties to prove their transaction's lawfulness overturns over 100 years of antitrust jurisprudence. Any perceived or actual underenforcement against digital mergers does not warrant such a radical shift — particularly when evidence of the extent of any such underenforcement is lacking. Indeed, the key transactions that digital-merger critics point to were reviewed by U.S. (and foreign) antitrust authorities, suggesting that these transactions did not substantially lessen competition or there was insufficient evidence to bring a case. Even if any such agency decisions are questionable in light of post-merger developments, that is an insufficient basis to upend the burden of proof in all future merger cases and hold a *select type of merger in one particular industry* to a different standard than all others. Indeed, we are aware of no comparable area of civil law where defendants to government enforcement actions bear the ultimate burden — and antitrust merger enforcement should not be the pilot project. Moreover, shifting the burden to defendants would be unfair because, unlike the government, merging parties do not have pre-complaint subpoena power to collect evidence from other industry participants to defend their merger.

5 Julie Masson, U.S. FTC Call for Additional Resources Against Tech Companies, Global Competition Review (Nov. 18, 2019), at https://globalcompetitionreview.com/article/1211013/us-ftc-calls-for-additional-resources-against-tech-companies.

Likewise, presuming select types of mergers to be unlawful in one industry is inadvisable. Again, such a presumption overturns a century of antitrust law, and begins to approach the *per se* treatment for certain criminal antitrust violations. Mergers should not be presumptively condemned like naked restraints of trade that history and experience teaches have a pernicious effect on competition and lack any redeeming virtue. This is especially true where these very digital competition Reports note the benefits of digital platforms. Indeed, the UK Report notes that the majority of acquisitions by large digital firms are "likely to be either benign or beneficial for consumers," and concludes that a "presumption against all acquisitions by large digital companies is not a proportionate response."

Finally, we question certain other statements in the Stigler Report. For example, the Report says that courts should not presume efficiencies from vertical transactions, citing to *Ohio v. American Express Co*. But *American Express* is not a merger case, and the most recently litigated vertical-merger case did not presume efficiencies.[6] The Report also says that shifting the burden of proof will help the DA by making it the merging parties' job to demonstrate efficiencies. But under the Horizontal Merger Guidelines and existing case law, merging parties already bear that burden.

The Report also claims, in a section on mergers, that the *Credit Suisse* and *Trinko* decisions have "greatly expanded the industries and conduct that have become ... exempt from antitrust scrutiny." But neither case has precluded any government merger enforcement action, and just recently a private plaintiff succeeding in winning a merger case.[7] Lastly, the Report's statement that a tougher enforcement statute is needed "in light of the difficulty of winning antitrust cases in current U.S. courts" is undermined by the FTC and DOJ's winning record in merger cases over the past decade. The only merger losses over that period were in the *LabCorp/Westcliff*, *Steris/Synergy*, and *AT&T/Time Warner* cases. The agencies' court victories greatly outnumber these losses. While critics would argue that the agencies may have played it safe with the cases they brought, just counting litigated cases fails to account for mergers that were deterred in the face of likely antitrust enforcement and the several consent orders imposed in technology- and data-related mergers.[8]

V. CONCLUSION

The Stigler, UK, and EC Reports are commendable, thought-provoking studies that contain ideas worthy of consideration. In fact, the Reports are already proving influential, having added to the momentum behind calls for more aggressive enforcement. But given existing enforcement mechanisms and recently enhanced efforts by U.S. (and foreign) antitrust enforcers to address competition issues in digital markets, some of the Reports' recommendations are unnecessary, inadvisable, and, at best, should be delayed until the results of antitrust enforcers' current efforts to invigorate enforcement can be assessed.

6 See United States v. AT&T Inc., 310 F. Supp. 3d 161 (D.D.C. 2018), aff'd 916 F.3d 1029 (D.C. Cir. 2019) (recognizing that the elimination of double-marginalization is a "standard benefit" of vertical mergers, but not presuming such efficiencies; rather, the court affirmed *Baker Hughes'* burden-shifting framework and stated that defendants may overcome the government's *prima facie* case by showing that efficiencies will outweigh harm; the court also expressed skepticism of the position, "as a matter of law and logic," that in a vertical-merger case, the government must "account for all of defendants' proffered efficiencies as part of making its prima facie cases.").

7 *Steves & Sons, Inc. v. Jeld-Wen, Inc.*, No. 3:16-cv-545 (E.D. Va. March 13, 2019).

8 See, e.g. Final Decision & Order, *In re Nielsen Holdings N.V.*, Dkt. No. C-4439 (FTC Feb. 28, 2014); Final Judgment, *U.S. v. Google Inc.*, No. 1:11-cv-00688 (D.D.C. 2011).

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