



# An introspection on the FTC's withdrawal of 2020 Vertical

## Merger Guidelines

Nathalie E. NIELSON

PhD Candidate – Université Côte d'Azur – GREDEG (SMR)

**To quote this paper:** N. NIELSON, "An introspection on the FTC's withdrawal of 2020 Vertical Merger Guidelines", *Competition Forum*, 2021, art. n°0028, <https://competition-forum.com>.

**Resume:** *On the 15th of September 2021, 2020 Vertical Merger Guidelines were withdrawn by the Federal Trade Commission only a short year after they were adopted in June 2020. It is possible to find two main points of focus in the Statement of the majority: (1) a necessary reconsideration of the efficiency defense for vertical mergers, by giving less prominence to the elimination of double marginalization and, (2) a critical introduction of digital platforms characteristics.*

*Indeed, there is a need to broaden the theories of harm to competition so that killer acquisitions and creation of kill zones by digital platforms can be assessed in a merger analysis. Furthermore, distinction between horizontal and vertical mergers is becoming increasingly difficult as "many mergers, initially appearing as vertical, if not conglomerate, may turn out to be horizontal ex-post as a result of market convergence"<sup>1</sup>. Hence, better tools to comprehend the nature of mergers are also needed in new guidelines that should be drafted with a careful and nuanced approach.*

Professor Steven C. SALOP wrote beginning of July: "One might expect that the VMGs will be withdrawn and/or revised now that the two dissenters have become part of a Democratic majority with Lina Khan as FTC Chair."<sup>2</sup> This affirmation was proven right as soon as two months later, on the 15<sup>th</sup> of September when 2020 Vertical Merger Guidelines ("2020 VMGs")<sup>3</sup> were

withdrawn, only a short year after they were adopted in June 2020.

First, it needs to be noted that this withdrawal is far from being unanimous. It has been voted 3 votes against 2, Chair Lina M. KHAN, Commissioners Rohit CHOPRA and Rebecca K. SLAUGHTER being in favor, while Commissioners Noah J. PHILLIPS and Christine S. WILSON were

<sup>1</sup> F. MARTY & T. WARIN, "VISA's abandoned plan to acquire Plaid: what could have been a textbook case of a killer acquisition", (2021). *CS CIRANO*, 2021S-39, 4.

<sup>2</sup> S. C. SALOP, "A Suggested Revision of the 2020 Vertical Merger Guidelines (July 7, 2021)" (2021). *Georgetown Law Faculty Publications and Other Works*. 2381.

<sup>3</sup> DoJ & FTC, "Vertical Merger Guidelines", 2020, available at: [https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical\\_merger\\_guidelines\\_6-30-20.pdf](https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf).

opposed to it. In fact, these latter expressed their strong disapproval in a dissenting Statement, stating notably that the Rescission of the 2020 VMGs' will "threaten to chill legitimate merger activity and undermine attempts to rebuild our economy in the wake of the pandemic"<sup>4</sup>. Conversely, the first underlined that 2020 VMGs' did, indeed, represent "a substantial improvement over the 1984 guidelines", yet they still conveyed a "flawed discussion of the purported procompetitive benefits (i.e., efficiencies) of vertical mergers, especially its treatment of the elimination of double marginalization ("EDM")"<sup>5</sup>.

This opposition at the heart of the Federal Trade Commission ("FTC")'s head is symptomatic of the ongoing debate surrounding vertical merger and their "efficiency effect", i.e., the vision that the EDM in vertical integration is viewed as procompetitive<sup>6</sup>. In fact, companies in a vertical relationship – i.e., firms operating at

different stages of production or firms in unrelated businesses (conglomerates) – might each charge consumers a markup, "a double margin"<sup>7</sup>. Indeed, this markup would be charged in the "downstream" market, which is closer to final consumers, and in the "upstream" market, further from consumers. If the companies, in this vertical relationship, were merged into a single firm, the markup would be lower, resulting in lower prices for consumers, since the products "with eliminated double margins become cheaper to sell"<sup>8</sup>. As a result, vertical mergers are generally viewed as generating efficiency gains.

The question of vertical mergers and of "how [it] affects consumer welfare and market efficiency" is thus "long standing [...] in competition policy"<sup>9</sup> – since the *Celler-Kefauver Act*<sup>10</sup> substantially broadened the reach of section 7 of the *Clayton Act* to vertical and conglomerate mergers – as opposed to horizontal mergers, which are under closer

---

<sup>4</sup> FTC, "Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson", Sept. 15, 2021, available at: [https://www.ftc.gov/system/files/documents/public\\_statements/1596388/p810034phillipswilsonstatem entvmgscission.pdf](https://www.ftc.gov/system/files/documents/public_statements/1596388/p810034phillipswilsonstatem entvmgscission.pdf).

<sup>5</sup> FTC, "Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines", *Commission File No. P810034*, Sept. 15, 2021, available at: [https://www.ftc.gov/system/files/documents/public\\_statements/1596396/statement\\_of\\_chair\\_lina\\_m\\_khan\\_commissioner\\_rohit\\_chopra\\_and\\_commissioner\\_rebecca\\_kelly\\_slaughter\\_on.pdf](https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf).

<sup>6</sup> See e.g.: F. LUCO & G. MARSHALL, "Vertical Integration with Multiproduct Firms: When Eliminating Double Marginalization May Hurt

Consumers" (Jan. 15, 2018), available at SSRN: <https://ssrn.com/abstract=3110038> ; S. C. SALOP, "Invigorating Vertical Merger Enforcement", *127 Yale L.J.* (2018). 1962.

<sup>7</sup> M. DELRAHIM, "Harder Better Faster Stronger: Evaluating EDM as a Defense in Vertical Mergers", *Remarks as Prepared for Delivery at George Mason Law Review, 22nd Annual Antitrust Symposium*, Feb. 15, 2019.

<sup>8</sup> F. LUCO & G. MARSHALL, "Vertical Integration with Multiproduct Firms: When Eliminating Double Marginalization May Hurt Consumers", *op cit.*

<sup>9</sup> F. LUCO & G. MARSHALL, "Vertical Integration with Multiproduct Firms: When Eliminating Double Marginalization May Hurt Consumers", *op cit.* 2.

<sup>10</sup> *Celler-Kefauver Act* of 1950; Another statute completed merger law in 1976: the *Hart-Scott-Rodino (HSR) Antitrust Improvement Act of 1976*.

scrutiny by the authorities in charge of merger control, the Department of Justice (“DoJ”), and the FTC<sup>11</sup> (“the Agencies”). As a matter of fact, horizontal mergers occur when firms directly competing, by producing and selling the same products, merge. “If significant in size [they] can reduce competition in a market”<sup>12</sup> in two ways: “(1) by creating or enhancing the ability of the remaining firms to act in a coordinated way on some competitive dimension (coordinated interaction), or (2) by permitting the merged firm to raise prices profitably on its own (unilateral effect). In either case, consumers may face higher prices, lower quality, reduced service, or fewer choices as a result of the merger”<sup>13</sup>.

In presence of such anticompetitive effects, Section 7 of the *Clayton Act* prohibits any merger or acquisition if, “in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a

monopoly”<sup>14</sup>. This risk of monopoly<sup>15</sup> and oligopoly<sup>16</sup> by merger in the words of Professor George J. STIGLER<sup>17</sup> is emphasized in presence of a horizontal integration between important players of a given market.

Consequently, during the Warren Court era – late 50’s and 60’s – “merger analysis was heavily driven by structural presumptions based on market shares and market concentration”<sup>18</sup>, favoring the implementation of a *per se* rule. Indeed, the threshold for control was only a market share of 15% regarding the acquirer and 1% for the “prey”<sup>19</sup>. Furthermore, efficiencies were not yet considered as an acceptable defense as can testify §10 of the 1968 Merger Guidelines: “Unless there are exceptional circumstances, the Department will not accept as a justification for an acquisition normally subject to challenge under its horizontal merger standards the claim that the merger will produce economies”<sup>20</sup>.

---

<sup>11</sup> It must be underlined that mergers “often present both horizontal and vertical elements” and thus both Horizontal Merger Guidelines and Vertical Merger Guidelines can be applied simultaneously; DoJ & FTC, “Vertical Merger Guidelines”, *op cit.* §1. “Overview”.

<sup>12</sup> OECD, *Glossary of Industrial Organisation Economics and Competition Law*, compiled by R. S. Khemani and D. M. Shapiro, 1993.

<sup>13</sup> FTC, Mergers, “Competitive effects”, available at: <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/competitive-effects>.

<sup>14</sup> 15 U.S. Code § 18, *Clayton Antitrust Act of 1914*.

<sup>15</sup> 15 U.S. Code § 2, *Sherman Antitrust Act of 1890*.

<sup>16</sup> 15 U.S. Code §1, *Sherman Antitrust Act of 1890*.

<sup>17</sup> G. J. STIGLER, “Monopoly and Oligopoly by Merger”, *The American Economic Review* (May 1950). Vol. 40, No. 2, 23.

<sup>18</sup> W. J. KOLASKY & A. R. DICK, “The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers”, *Antitrust Law Journal* (2003). Vol. 71, No. 1, 207. 209.

<sup>19</sup> F. MARTY & T. WARIN, “VISA’s abandoned plan to acquire Plaid: what could have been a textbook case of a killer acquisition”, *op cit.*

<sup>20</sup> DoJ, “Merger Guidelines”, 1968, §10. “Efficiencies”, available at: <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11247.pdf>.

However, this strict structuralist approach was soon criticized, for example by Robert Bork<sup>21</sup>, for whom “only mergers creating a firm with 100 percent of the market are certain to create welfare losses and [...] noncollusive oligopolistic behavior rarely results in a significant ability to restrict output”<sup>22</sup>. Altogether, Chicagoans considered the market share/concentration thresholds as too low.

These concerns have been progressively heard, *post* 1982 Baxter Merger Guidelines, as merger law started including non-market share factors in merger analysis – such as market power – and as the efficiency defense became increasingly relied on by guidelines and by courts during the evaluation of potential anticompetitive mergers<sup>23</sup>. It is today unanimously approved as can §10 of the 2010 Horizontal Merger guidelines can show: “Competition usually spurs firms to achieve efficiencies internally. Nevertheless, a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm’s ability and incentive to compete, which

may result in lower prices, improved quality, enhanced service, or new products”<sup>24</sup>.

When proof of efficiency is given, the merger – horizontal, vertical, or conglomerate – must thus be approved since “efficiency is the goal, competition is the process”<sup>25</sup>, a view shared by the European Commission as “the prohibition of mergers is not a popular practice [since] in many cases M&As either do not raise serious competition concerns or they generate efficiency gains that outweigh competitive harm”<sup>26</sup>. As former Assistant Attorney General, Makan DELRAHIM, pins it, the Agencies are “of course committed to approving mergers in which the overall effects is procompetitive. If a merger is likely to lower the combined firm’s price in the market, that is certainly a procompetitive aspect of the merger”<sup>27</sup>. Since EDM should result in a lower price, there is nowadays a presumption of efficiency regarding vertical mergers.

The turning point of this presumption can be traced back to the 1970’s and Chicago School’s growing influence in Antitrust Law.

---

<sup>21</sup> R. H. BORK, *The Antitrust Paradox: A Policy at War with Itself* (New York: Free Press, 1978).

<sup>22</sup> E. GELLHORN, “Reviewed Work(s): The Antitrust Paradox: A Policy at War with Itself by Robert H. Bork”, *Harvard L. Rev.* (Apr. 1979). Vol. 92, No. 6, 1376. 1385.

<sup>23</sup> W. J. KOLASKY & A. R. DICK, “The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers”, *op cit.*

<sup>24</sup> DoJ & FTC, “Horizontal Merger Guidelines”, 2010, §10. “Efficiencies”, *available at:*

<https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf>.

<sup>25</sup> K. HEYER, *Address before the Merger Task Force of the European Commission’s Directorate General for Competition*, Apr. 9, 2002.

<sup>26</sup> G. PARKER & G. PETROPOULOS & M. Van ALSTYNE, “Platform mergers and antitrust”, *Industrial and Corporate Change* (2021), 1.

<sup>27</sup> M. DELRAHIM, “Harder Better Faster Stronger”: Evaluating EDM as a Defense in Vertical Mergers”, *op cit.*

Before that, legal precedents *du Pont*<sup>28</sup> and *Brown Shoe*<sup>29</sup> articulated a traditional foreclosure theory according to which “vertical mergers may limit competition by eliminating potential purchasers from or suppliers to independent firms who have to sell or buy in competition with the merged parties”<sup>30</sup>. This fear was reflected in the first set of Merger Guidelines, in 1968, in which it was written that “integration accomplished by a large vertical merger will usually raise entry barriers or disadvantage competitors to an extent not accounted for by, and wholly disproportionate to, such economics as may result from the merger”<sup>31</sup>.

The main critic of this theory was Robert Bork<sup>32</sup>, for whom vertical integration would not reduce the net supply available to competitors. Overall, Chicago School considered public enforcement regarding vertical mergers as economically irrational, since these operations should be “invariably highly efficient”, thanks to EDM, while competitive harms would be “unlikely or speculative”<sup>33</sup>.

These critiques were reflected in the 1984 Merger Guidelines. In fact, even if they did recognize three potential competitive harms – increasing barriers to entry through foreclosure, facilitating horizontal collusion and facilitating evasion of rate regulation – they set out very strict conditions for vertical merger challenges<sup>34</sup>. Furthermore, they explicitly stated that the efficiency defense would be given “relatively more weight” when “determining whether to challenge a vertical merger than in determining whether to challenge a horizontal merger”<sup>35</sup>.

Consequently, vertical merger challenges have since been very sparse, with only 66 challenges involving vertical integration between 1994 and April 2020, knowing that some of them had horizontal overlaps<sup>36</sup>. Private litigation is also very rare, and the last vertical case analyzed by the Supreme Court dates to the 1972 merger between *Ford* and *Autolite*<sup>37</sup>. There thus seemed to be a modern consensus summed by Koren WONG-ERVIN: “The generally accepted belief underlying modern antitrust analysis of vertical mergers ... has been that they are generally procompetitive or neutral. This

---

<sup>28</sup> *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

<sup>29</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

<sup>30</sup> M. H. MORSE, “Vertical Mergers: Recent Learning”, *The Business Lawyer* (Aug. 1998)/ Vol. 53, No. 4, 1217. 1222.

<sup>31</sup> DOJ, “Merger Guidelines”, 1968, *op cit*.

<sup>32</sup> R. H. BORK, *The Antitrust Paradox: A Policy at War with Itself* (New York: Free Press, 1978).

<sup>33</sup> S. C. SALOP, “Invigorating Vertical Merger Enforcement”, *op cit*. 1963.

<sup>34</sup> *Ibidem*.

<sup>35</sup> DOJ & FTC, “Merger Guidelines”, 1984, §4.24, “Efficiencies”: <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11249.pdf>.

<sup>36</sup> S. C. SALOP & D. P. CULLEY, “Vertical Merger Enforcement Actions: 1994-April 2020” (Apr. 15, 2020). *available at* <https://ssrn.com/abstract=2684107>.

<sup>37</sup> *Ford Motor Co. v. United States*, 405 U.S. 562 (1972).

belief is supported by a significant body of empirical evidence”<sup>38</sup>.

In the light of this consensus, one could wonder: why was a revision of the 1984 Merger Guidelines needed? They do “no longer reflect [...] agency practice or modern economics”<sup>39</sup>, especially in the wake of Digital Economy and the rise of Digital Platforms, “a few large firms with highly entrenched positions of dominance in some core markets”<sup>40</sup>. In fact, these platforms are starting to rely heavily on different acquisitions strategy, with a total of 855 acquisitions from 1988 to 2020 for the “GAFAM”<sup>41</sup> as shown in Appendix 1<sup>42</sup>, with an intensification of acquisitions in the last decade, as shown in Appendix 2<sup>43</sup>. However, most of these acquisitions fall outside of the

scope of merger review, as much in the United States<sup>44</sup> as in European Union<sup>45</sup>. Hence, academics and numerous reports have recently been expressing concerns about underenforcement of antitrust laws and merger statutes<sup>46</sup>. This has been relied by the FTC Statement, one of the reasons for the withdrawal of the 2020 VMGs’ being that future guidelines should “establish a framework for merger analysis that accounts for features specific to digital markets, including characteristics that can enable dominant firms to capture markets and dissuade entry”<sup>47</sup>. Such characteristics include presence of network effects, multi-sided markets or economies of scale and scope<sup>48</sup>, Big Data, and the creation of “conglomerate ecosystems around their core platform services”<sup>49</sup>.

---

<sup>38</sup> K. WONG-ERVING, “Antitrust analysis of vertical mergers: Recent developments and economic teachings”, *Antitrust Source* (2019). 18(4), 1; See e.g.: M. BECK & F. SCOTT MORTON, “Evaluating the Evidence on Vertical Mergers” (Dec. 31, 2020). available at: <https://ssrn.com/abstract=3554073>.

<sup>39</sup> FTC, “Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines”, *op cit.*

<sup>40</sup> Report J. CREMER & Y.A. de MONTJOYE & H. SCHWEITZER (the “EU Report”), “Competition Policy for the digital era”, *Report for the European Commission*, 2019, p. 112.

<sup>41</sup> Google, Apple, Facebook, Amazon & Microsoft, or “GAMAM” now with Facebook rebranding into Meta.

<sup>42</sup> Total M&As by GAFAM (855) from 1988 to 2020. (b): Average number of M&As per platform per year from 1988 to 2020; G. PARKER & G. PETROPOULOS & M. Van ALSTYNE, “Platform mergers and antitrust”, *op cit.* 6.

<sup>43</sup> Number of GAFAM M&As per firm and year, 2000-2019; *Ibidem*.

<sup>44</sup> FTC, “Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines”, *op cit.*: “[...] hundreds of

acquisitions that fell below the HSR reporting thresholds”.

<sup>45</sup> G. PARKER & G. PETROPOULOS & M. Van ALSTYNE, “Platform mergers and antitrust”, *op cit.*: “approximately 97% of M&As in these [digital] markets have never been vetted”.

<sup>46</sup> See e.g.: F. SCOTT MORTON & P. BOUVIER & A. EZRACHI & B. JULLIEN & R. KATZ & G. KIMMELMAN & A. D. MELAMED & J. MORGENSTERN, “Committee for the study of digital platforms: Market structure and antitrust subcommittee report,” *Chicago: Stigler Center for the Study of the Economy and the State*, University of Chicago Booth School of Business, 2019; the “EU Report”, Chapter 6.; K. A. BRYAN & E. HOVENKAMP, “Antitrust Limits on Startup Acquisitions”, *Review of Industrial Organization* (2020).

<sup>47</sup> FTC, “Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines”, *op cit.*

<sup>48</sup> See e.g.: H. HOVENKAMP, “Antitrust and Platform Monopoly”, *Faculty Scholarship at Penn Law* (2020). 2192.

<sup>49</sup> European Commission, Proposal for a Regulation on contestable and fair markets in the digital sector (*Digital*

As regard to mergers, these specificities can create different point at issues. First, given the “ecosystem” feature and fluctuation of markets, “many mergers, initially appearing as vertical, if not conglomerate, may turn out to be horizontal ex-post as a result of market convergence”<sup>50</sup>. The initial clear distinction between horizontal and vertical merger may now sometimes be blurry as can show Instagram’s and WhatsApp’s acquisitions by Facebook, respectively in 2012 and 2014. Indeed, Facebook operates in the social network market. Instagram, when it launched was an application that facilitated photo-sharing. Finally, WhatsApp was an application offering mobile messaging services. It is now considered that Instagram also provides personal social networking, and that WhatsApp was a direct competitor to Facebook Messenger, since both provide mobile messaging services. Consequently, the FTC has recently filed a lawsuit against Facebook, in which it is alleged that “Facebook Has Engaged in Anticompetitive Acquisitions to Protect Its Dominant Position”<sup>51</sup>.

Second, given the gratuity of some products and services and their distribution on multi-sided markets, non-market share factors such as market power or the ability to increase prices – raising rivals’ cost – might be harder to analyze in presence of digital platforms. Moreover, the delineation of a relevant market<sup>52</sup> is becoming a more and more complicated of a task.

Most importantly, risks of anticompetitive harms and foreclosure are rising with the use of different strategies, having defensive goals – consolidating the dominant position by neutralizing a potential threat – and offensive goals – leveraging its dominant position and using the acquisition to extend its dominance to a related market<sup>53</sup>. These strategies include killer acquisitions – *i.e.*, “acquisitions result[ing] in a strengthening of dominance [...] by eliminating a competitive threat and by raising barriers to entry for other (potential) competitors, thus further reducing the risk of attacks on a strongly entrenched market position”<sup>54</sup> – and expansion of kill zones, an area in which “platforms might acquire any potential competitors, dissuading others from entering, and thus preventing innovation from serving as the competitive

---

*Markets Act*), COM(2020) 842 final, 2020/0374(COD), Dec. 15, 2020.

<sup>50</sup> F. MARTY & T. WARIN, “VISA’s abandoned plan to acquire Plaid: what could have been a textbook case of a killer acquisition”, *op cit*.

<sup>51</sup> *FTC v. Facebook Inc.*, Case 1:20-cv-03590-JEB, Revised, Doc. 75-1, Aug. 19, 2021.

<sup>52</sup> DoJ & FTC, “Vertical Merger Guidelines”, *op cit*. §3. “Market Definition, Related Products, Market Shares, and Concentration”.

<sup>53</sup> T. MARTY & T. WARIN, “VISA’s abandoned plan to acquire Plaid: what could have been a textbook case of a killer acquisition”, *op cit*.

<sup>54</sup> EU Report, “Competition Policy for the digital era”, *Report for the European Commission*, 2019, p. 111.

threat that is traditionally believed to keep monopoly incumbents on their toes”<sup>55</sup>.

In the face of these potential anticompetitive harms, maintaining a general presumption of efficiency for vertical merger seems to be utopian. Yet, 2020 VMGs’ still gave much prominence to cognizable efficiencies – “merger specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service”<sup>56</sup> – and the elimination of double marginalization, raising risks of false negatives, *i.e.*, a failure to condemn an anticompetitive conduct. There thus needs to be a necessary reconsideration of the efficiency defense (I), which seems to be the path chosen by the FTC, the 15<sup>th</sup> of September Statement condemning the 2020 VMGs’ approach of procompetitive effect by saying it is “legally flawed”. However, such a reconsideration won’t be sufficient, as the Statement underlines, stating it is “critical” to introduce features of digital platforms in future guidelines (II).

### **I. A necessary reconsideration of the efficiency defense**

---

<sup>55</sup> S. K. KAMEPALLI & R. G. RAJAN & L. ZINGALES, “Kill zone” (2020). *available at* <https://papers.ssrn.com/abstract=3594344>.

<sup>56</sup> DoJ & FTC, “Vertical Merger Guidelines”, *op cit.* §6. “Procompetitive effects”.

Despite some welcomed modifications, the 2020 VMGs’ did not incorporate any substantive changes (A) and specially regarding the efficiency effect of vertical mergers associated with the elimination of double marginalization. Even though the 15<sup>th</sup> of September Statement firmly condemned this focus on EDM, this rejection was mixed (B), the withdrawal having been voted with a short majority.

### **A. An absence of substantive changes in the 2020 VMGs’**

The 1984 Merger guidelines had a broad reach as they were aimed towards horizontal and non-horizontal mergers. Since horizontal operations have since been the status of updates, with 2010 Horizontal Merger Guidelines issued by the DoJ and the FTC, it was time for vertical and conglomerate mergers statuses to be revised as well, which was done by the 2020 VMGs’ on the 15<sup>th</sup> of June 2020.

However, the modernization of these guidelines was a bit timid. Some elements are undeniably improvements such as the definition of non-horizontal mergers, which was only a simple sentence in the 1984 MGs<sup>57</sup> and is much more complete in the

<sup>57</sup> DoJ & FTC, “Merger Guidelines”, 1984, *op cit.* §4. “Horizontal Effect From Non-Horizontal Mergers”: “By definition, non-horizontal mergers involve firms that do not operate in the same market”.

2020 VMGs<sup>58</sup> and the very detailed description of conditions for theories of harm to competition<sup>59</sup>. However, there is no major changes. Indeed, the elements taken in account by the Agencies is more of less the same – market concentration, conditions of entry, market shares – with a few small changes. Competitive harms and their conditions are also quite similar, with a classification in the 2020 VMGs’ between unilateral effects, which can relate to 1984 MGs’ barriers to entry, and coordinated effects, which can translate to the 1984 MGs’ facilitating collusion.

Finally, one section remains steady: efficiencies that could benefit competition and consumers. In 1984 MGs’ continuity, the 2020 VMGs’ recognize that “the Agencies do not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is unlikely to be anticompetitive in any relevant market”<sup>60</sup>. In this case, the “proposed merger’s efficiencies would likely offset the merger’s potential harm to consumers”<sup>61</sup>.

This efficiency defense is logical since vertical mergers can generate benefits, such as better innovation and lower prices, through the combining of complementary assets, the

coordination of R&D... If the companies could not present such a defense to the Agencies and were applied strict thresholds, there would be too much of a risk of false positives, *i.e.*, finding violations of antitrust laws, and thus prohibiting the mergers or imposing behavioral or structural remedies, when the acquisition does not actually hurt competition. This would end up having the effect of hurting consumers by creating disincentives to innovate which is precisely what merger statutes are meant to prevent in the first place.

Nonetheless, even though it is wishful to maintain the possibility of an efficiency defense, it must not be a *quasi*-irrebuttable presumption and must not rely mostly on the elimination of double marginalization, as it is the case in the 2020 VMGs’, which has 16 mentions of EDM in only 12 pages. The importance given to this theory is one of the main reasons of their withdrawal, the Chair and the two Commissioners who voted in favor, stating that “VMGs’ focus on EDM is inconsistent with the statutory text and

---

<sup>58</sup> DoJ & FTC, “Vertical Merger Guidelines”, *op cit.* §1. “Overview” describing strictly vertical mergers, “diagonal” mergers and mergers of complements.

<sup>59</sup> *Ibidem*, §4 “Unilateral Effects” & §5 “Coordinated Effects”.

<sup>60</sup> DoJ & FTC, “Vertical Merger Guidelines”, *op cit.* §6. “Procompetitive effects”.

<sup>61</sup> FTC, “Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson”, *op cit.*

market realities”<sup>62</sup>, an approach rejected by the dissenting Statement<sup>63</sup>.

**B. A mixed rejection of the theory of elimination of double marginalization**

2020 VMGs’ were consistent with the consensus on vertical mergers efficiency stating that “vertical mergers often benefit consumers through the elimination of double marginalization, which tends to lessen the risks of competitive harm”<sup>64</sup>. EDM would indeed confer, amongst others, “incentive to set lower downstream prices”<sup>65</sup> but also should “make the market less vulnerable to coordination” as it would create “incentive to cheat on a tacit agreement”<sup>66</sup>. Hence, Section 6, Procompetitive effects, relies heavily on this theory.

This view is shared by the Dissenting Statement as Commissioners Noah J. PHILLIPS and Christine S. WILSON underlined positive effects of EDM. In fact, according to them: “The merged firm benefits from a lower manufacturing cost for each unit it produces (*e.g.*, each smartphone),

allowing it to compete more aggressively by lowering its price and selling more units, and leaving consumers better off”<sup>67</sup>. They continue by saying that vertical mergers “require an approach that fully accounts for their good as well as their bad effects. Anything less will hurt consumers, not help them”<sup>68</sup>. While this last sentence is undeniably true, this is precisely why there should be new guidelines as “good” effects are omnipresent in 2020 VMGs’.

As a matter of fact, as it is said in the Statement from the majority, “The VMGs identify EDM as the principal reason to treat vertical mergers distinctly from horizontal mergers, claim that EDM “often” causes vertical mergers to benefit consumers”<sup>69</sup>. Yet, this economic theory was first initiated in a very specific scenario: a merger between two single-product monopolists, operating in the same supply chain, both charging monopoly prices pre-merger while the product of one firm is being used as an input by the other. This scenario is not fit to every vertical merger and thus there shouldn’t be a general assumption of efficiency resulting from EDM. Instead, a “more balanced” approach

---

<sup>62</sup> FTC, “Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines”, *op cit.*

<sup>63</sup> FTC, “Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson”, *op cit.*: “The Majority commits two flaws in its analysis. First, they conflate procompetitive effects of a merger with merger efficiencies. Second, they ignore the burden shifting framework adopted by the circuit courts [...]”.

<sup>64</sup> DoJ & FTC, “Vertical Merger Guidelines”, *op cit.* §1. “Overview”.

<sup>65</sup> *Ibidem*, §4. “Unilateral Effects”.

<sup>66</sup> *Ibidem*, §5. “Coordinated Effects”.

<sup>67</sup> FTC, “Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson”, *op cit.*

<sup>68</sup> *Ibidem*.

<sup>69</sup> FTC, “Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines”, *op cit.*

is needed<sup>70</sup>, as “many vertical mergers are harmless or procompetitive, but that is a far weaker statement than presuming all or even most vertical mergers benefit competition regardless of market structure”<sup>71</sup>. Furthermore, price effects should not be the focus in the merger analysis as it is only one of the aspects of consumer welfare, others including innovation effects for example<sup>72</sup>. Giving too much prominence to EDM might raise a risk of concentrating on such pricing effects.

For all these reasons, 2020 VMGs’ seemed to be flawed. There is a need to correct it, not by deleting the efficiency defense and EDM, but by adapting it to today’s market reality in a new draft for vertical mergers guidelines. It must be done quickly though as an absence of guidelines can provoke legal uncertainty for companies, a concern expressed by the Dissenters<sup>73</sup>.

However, it needs to be done carefully as these directions are only soft-law – hence, not

binding – and may not be followed by courts if too “revolutionary”. Furthermore, depending on the political context, new guidelines could also be withdrawn rapidly. Indeed, the rescission of 2020 VMGs’ fit perfectly into the ongoing intensification of antitrust laws and merger statutes as the FTC has recently announced the reinstatement of its use of prior approval provisions<sup>74</sup> and has brought “the highest number of FTC merger enforcement actions in a single year since 2001 (28)”<sup>75</sup>. Nonetheless, even though the Biden administration is very active in the antitrust field, with the symbolic nomination of Neo-Brandesian Lina M. KHAN as FTC Chair, it may not be the case for future administrations<sup>76</sup>. This point must be considered when drafting new guidelines, which should also include a section on digital platform characteristics.

## **II. A critical introduction of digital platforms characteristics**

---

<sup>70</sup> S. C. SALOP, “Invigorating Vertical Merger Enforcement”, *op cit.* 1974.

<sup>71</sup> M. BECK & F. SCOTT MORTON, “Evaluating the Evidence on Vertical Mergers”, *op cit.* 3.

<sup>72</sup> M. DELRAHIM, “Harder Better Faster Stronger: Evaluating EDM as a Defense in Vertical Mergers”, *op cit.*

<sup>73</sup> FTC, “Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson”, *op cit.*

<sup>74</sup> FTC, “Statement of the Commission on use of prior approval provisions in merger orders”, Oct. 25, 2021, *available at* [https://www.ftc.gov/system/files/documents/public\\_statements/1597894/p859900priorapprovalstatement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf).

<sup>75</sup> FTC, “Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter Regarding the FY 2020 Hart-Scott-Rodino Annual Report for Transmittal to Congress”, *Commission File No. P110014*, Nov. 8, 2021, *available at* [https://www.ftc.gov/system/files/documents/public\\_statements/1598131/statement\\_of\\_chair\\_lina\\_m\\_khan\\_joined\\_by\\_rks\\_regarding\\_fy\\_2020\\_hsr\\_rep\\_p110014\\_-\\_20211101\\_final\\_0.pdf](https://www.ftc.gov/system/files/documents/public_statements/1598131/statement_of_chair_lina_m_khan_joined_by_rks_regarding_fy_2020_hsr_rep_p110014_-_20211101_final_0.pdf).

<sup>76</sup> As it has been the case for the past years, See *Supra*, Introduction; S. C. SALOP & D. P. CULLEY, “Vertical Merger Enforcement Actions: 1994-April 2020” *op cit.*

The combination of economic characteristics for digital platforms raises substantial issues in merger enforcement. First, the functioning in an “ecosystem” and the fast evolution of markets make it more complex to assess the nature of mergers (A). Second, these platforms can engage in new anticompetitive strategies linked to acquisitions to entrench a dominant position or raise barriers to entry of the market, making it necessary to broaden theories of harm to competition (B) in merger guidelines, especially in the face of the asymmetry of information between digital platforms and the Agencies.

**A. A complexification of the assessment of the nature of mergers**

Digital platforms usually follow a pattern of creating a “core platform service”<sup>77</sup> and then expanding into related markets, creating digital ecosystems “in which platforms and complementary products work together smoothly”<sup>78</sup>. For example, Google was initially a digital search engine. It has now developed many other activities around this historical activity, including a Web browser (Google Chrome), an email service (Gmail), a mobile operating system (Google Android), a

price comparison product (Google Shopping) or also a navigation app (Google Maps). This ecosystem feature combined with the rapid fluctuation of markets provokes uncertainty on the nature of mergers, as mergers who may appear to be vertical or conglomerate *ab initio*, may, *in fine*, be considered as horizontal<sup>79</sup>.

Geoffrey PARKER & al. examine Google’s 2013 acquisition of Waze as an example<sup>80</sup>. They observe that it initially would be classified as a vertical merger, as Waze system used “location information at two levels” – the updating on accidents and police activity and improving the maps – and hence “Google continues to run Waze as a standalone system that is available on the competing Apple iOS system as well as Google Android”<sup>81</sup>. However, Google Maps gradually started including those same features, with the notification of traffic accidents for example. The authors conclude that this “absorption of capability into the Google core [...] begins to raise the likelihood that this could be viewed as a horizontal merger if Google should begin to

---

<sup>77</sup> European Commission, Proposal for a Regulation on contestable and fair markets in the digital sector (*Digital Markets Act*), COM(2020) 842 final, 2020/0374(COD), Dec. 15, 2020.

<sup>78</sup> L. M. KHAN, “Separation of Platforms and Commerce”, *Columbia L. Rev.* (May 2019). Vol. 119, No. 4, 973. 1092.

<sup>79</sup> See *Supra*, Introduction; F. MARTY & T. WARIN, “VISA’s abandoned plan to acquire Plaid: what could have been a textbook case of a killer acquisition”, *op cit.*

<sup>80</sup> G. PARKER & G. PETROPOULOS & M. Van ALSTYNE, “Platform mergers and antitrust”, *op cit.* 9.

<sup>81</sup> *Ibidem*, 9.

foreclose rivals' access to Waze functionality"<sup>82</sup>.

A final case that could illustrate this complexification in the assessment of a merger is Amazon's deal, announced in May 2021, to buy movie studio Metro-Goldwyn-Mayer Pictures (MGM) for 8.45 billion dollars<sup>83</sup>. Amazon is primarily an online retail marketplace. MGM is a media company that produces and distributes feature films and television programs. Those are completely unrelated businesses; hence, it appears to be a conglomerate merger. However, Amazon, in its ecosystem, has developed its own service, Prime Video, which can be considered as a streaming entertainment service, competing with Netflix or Disney +. As part of this service, Amazon also provides production and coproduction services to produce shows like *Fleabag* or the prospective *Lord of the Rings* series. Hence, if you consider the entire ecosystem, what appeared to be a conglomerate merger in the first place, might potentially be horizontal, Amazon and MGM both providing production services for films and television programs, even if it isn't Amazon's primary activity.

Regarding this matter, new guidelines should thus: (1) recognize the possibility of vertical and conglomerate mergers to evolve into horizontal mergers along with markets evolution, (2) include the definition of "digital ecosystems" and draw the necessary conclusions on the merger analysis, and (3) introduce the possibility to review mergers – with strict conditions – if market evolution changes their initial nature. This last possibility might also constitute a useful tool to correct the initial asymmetry of information between the Agencies and companies, asymmetry which makes "identifying and analyzing individual exclusionary tactics [...] challenging" and specially when "the affected market will change over time"<sup>84</sup>. Additional tools to broaden theories of harm to competition are thus needed in new merger guidelines.

#### **B. A potential broadening of theories of harm to competition**

As the majority Statement highlights, there is a need to pay "greater attention to the broader set of tactics that firms may use to raise rivals' costs"<sup>85</sup>. Indeed, even if 2020 VMGs' give seven detailed examples, non-

---

<sup>82</sup> G. PARKER & G. PETROPOULOS & M. Van ALSTYNE, "Platform mergers and antitrust", *op cit.* 9.

<sup>83</sup> J. PORTER, "Amazon buys MGM for \$8.45 billion", *The Verge*, May 26, 2021; This merger is actually under review by the FTC: *Reuters*, "FTC extends probe of Amazon, MGM deal", July 9<sup>th</sup>, 2021.

<sup>84</sup> FTC, "Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner

Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines", *op cit.*

<sup>85</sup> FTC, "Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines", *op cit.*

exhaustive, in which foreclosure could occur<sup>86</sup> – such as “Creating the need for two-level entry” or “Raising the input costs of rival with bargaining” – these scenarios, by themselves, are unfit regarding killer acquisitions and creation of kill zones, two strategies used by digital platforms to deter innovation in a specific market and avoid the rise of disruptive innovation.

In the scenario of killer acquisitions, the acquirer is not looking to integrate the product or service. Its only purpose is to stop its development to prevent the competitor from becoming a threat or a maverick, *i.e.*, “a firm that plays a disruptive role in the market”<sup>87</sup>. To resume, “incumbent firms may acquire innovative targets solely to discontinue the target’s innovation projects and preempt future competition”<sup>88</sup>, maintaining monopoly power, by “terminating” the innovative product before he’s brought to the market. The FTC seems to imply, in its revised complaint, that Facebook has engaged in such killer acquisitions – even though the term is not used – which can be seen through this quote: “Maintaining its monopoly through

acquisition was a natural choice for Facebook”<sup>89</sup>.

However, this theory has been criticized as it has been developed in the market of pharmaceutical industry<sup>90</sup>, more precisely in the biotech industry, which has very distinct specifics that do not correspond to digital platforms. Indeed, in digital markets, “information structures and the identification of potential competitors can be much more difficult to ascertain”<sup>91</sup> than in pharmaceutical markets, which have clearer delimitation and information flow. Accordingly, creation of kill zones might be a more adequate theory for digital platforms, as it is slightly different.

In the “kill zone” scenario, platforms acquire “any potential competitors”, entrenching their dominant positions and dissuading other competitors from entering the market<sup>92</sup> since cost of entry would be too high. Indeed, since the platform has a “gatekeeper position”, *i.e.*, a position that allows it to control access to consumers, data, and the market altogether, the acquisitions strengthen its informational advantage and allow it to encourage customers to stay on the platform

---

<sup>86</sup> DoJ & FTC, “Vertical Merger Guidelines”, *op cit.* §4. “Unilateral effects”.

<sup>87</sup> DoJ & FTC, “Horizontal Merger Guidelines”, 2010, *op cit.* §2.1.5. “Disruptive role of a Merging Party”.

<sup>88</sup> C. CUNNINGHAM & F. EDERER & S. MA, “Killer acquisitions” (2020). *available at*: <https://doi.org/10.1086/712506>.

<sup>89</sup> *FTC v. Facebook Inc.*, Case 1:20-cv-03590-JEB, Revised, Doc. 75-1, Aug. 19, 2021.

<sup>90</sup> C. CUNNINGHAM & F. EDERER & S. MA, “Killer acquisitions” (2020), *op cit.*

<sup>91</sup> G. PARKER & G. PETROPOULOS & M. Van ALSTYNE, “Platform mergers and antitrust”, *op cit.* 13.

<sup>92</sup> S. K. KAMEPALLI & R. G. RAJAN & L. ZINGALES, “Kill zone”, *op cit.*

– to single-home. In the end, “as both a market player and a private regulator, the dominant firm can displace or disadvantage its competitors using self-preferencing or other strategies”<sup>93</sup>. Hence, the threat of a maverick is killed in the bud, as barriers to entry are too high for potential competitors to even try investing in that market. The acquisitions “subsequently reduce market entry rates and decrease the supply of venture capital funding and investment available to start-ups that operate in the target product market of tech giants’ acquisitions”<sup>94</sup>.

These two strategies thus risk deterring innovation and creating foreclosure. Even though, not all acquisitions from digital platforms fall under their scope, it is mandatory to address those concerns. Regarding this matter, a bill, H.R. 3826, the “Platform Competition and Opportunity Act of 2021”, if adopted, would prohibit “covered platforms”<sup>95</sup> – the largest online platforms – from engaging in mergers whose sole purpose is to eliminate competition and enforce monopoly power. However, so far it is only a proposition that may never pass Senate and Congress, or that might take time to be adopted. In the meantime, a solution is needed, which can be given through new

merger guidelines. Nevertheless, 2020 VMGs’ framework for assessing harms to competition was not enough to include killer acquisitions and kill zones as these scenarios would not meet the conditions set up in the guidelines. A new draft should thus incorporate broader theories of harm to competition that could provide assessing these risks.

## Conclusion

Even though Big isn’t necessarily bad, it can be problematic. Risk of monopoly by merger is no longer exclusively a horizontal merger matter but also a vertical and conglomerate one. Hence, “it is time to address these concerns and invigorate vertical merger enforcement to protect a vibrant competitive process, innovation, and consumer welfare”<sup>96</sup>. However, it needs to be done with a careful and nuanced approach to avoid creating false positives and disincentives to innovate – start-ups sometimes looking forward to being bought by bigger companies and these companies looking, among others, to improve the quality of their products – and ultimately a harm to consumers, which is precisely what was trying to be avoided in the

---

<sup>93</sup> T. MARTY & T. WARIN, “VISA’s abandoned plan to acquire Plaid: what could have been a textbook case of a killer acquisition”, *op cit.* 5.

<sup>94</sup> G. PARKER & G. PETROPOULOS & M. Van ALSTYNE, “Platform mergers and antitrust”, *op cit.* 14.

<sup>95</sup> H.R. 3826, “Platform Competition and Opportunity Act of 2021”, §3. “Definitions”, available at: <https://www.congress.gov/117/bills/hr3826/BILLS-117hr3826ih.pdf>.

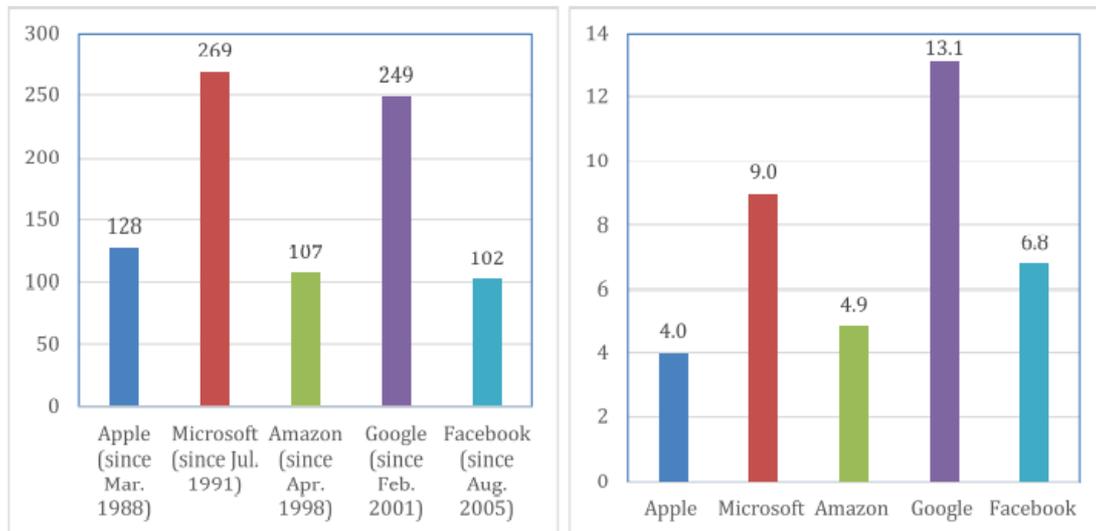
<sup>96</sup> S. C. SALOP, “Invigorating Vertical Merger Enforcement”, *op cit.* 1994.

first place. New merger guidelines should be promptly issued, for a matter of legal certainty and predictability, that should include characteristics of digital platforms and give less prominence to the efficiency effect of vertical merger via elimination of double marginalization – even though this defense

must remain possible since there can undeniably be benefits to merger, through quality improvement, better innovation, and lower prices.

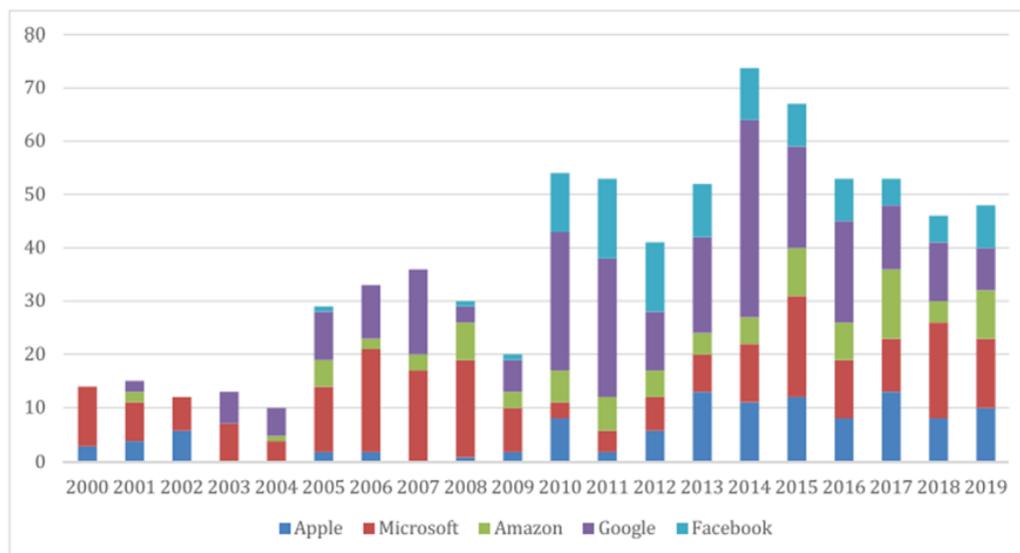
**Nathalie NIELSON**

Appendix 1: Total M&As by GAFAM (855) from 1988 to 2020. (b): Average number of M&As per platform per year from 1988 to 2020; G. PARKER & G. PETROPOULOS & M. Van ALSTYNE, “Platform mergers and antitrust”, *Industrial and Corporate Change* (2021). 6.



**Figure 1.** (a): Total M&As by GAFAM (855) from 1988 to 2020. (b): Average number of M&As per platform per year from 1988 to 2020

Appendix 2: Number of GAFAM M&As per firm and year, 2000-2019; G. PARKER & G. PETROPOULOS & M. Van ALSTYNE, “Platform mergers and antitrust”, *Industrial and Corporate Change* (2021). 6.



**Figure 2.** Number of GAFAM M&As per firm and year, 2000–2019