



August 18, 2018

United States Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue NW, Suite CC-5510  
Washington, DC 20580

*Re: Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201*

## **Issue 6: Evaluating the competitive effects of corporate acquisitions and mergers**

### **I. Introduction**

These comments are submitted in response to the U.S. Federal Trade Commission (FTC)'s announcement regarding hearings on competition and consumer protection in the 21st Century.<sup>1</sup> The Computer & Communications Industry Association (CCIA)<sup>2</sup> commends the FTC for seeking a better understanding of the legal and policy challenges that arise with the digitalization of the global economy and CCIA welcomes the opportunity to provide its views on the variety of competition issues raised.

To ensure that tech-related innovation continues to play a positive role in the U.S. economy, sound competition policy and antitrust enforcement both must play a crucial role in ensuring that competition exists across markets. Merger control, as part of the antitrust toolkit, remains a key element in ensuring that the economy remains dynamic. Competition authorities in the United States and abroad have applied merger control rules vigorously in recent years. This includes transactions where the merger effects on innovation and competition have been analyzed, particularly in the case of R&D intensive industries.

CCIA believes that antitrust authorities should continue to enforce merger control rules and evaluate transactions based on sound economic analysis that focuses on real and potential harm to consumer welfare. Given the growing politicization of antitrust overseas, it is crucial for U.S. authorities to continue to advocate for this evidence-based approach abroad.

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<sup>1</sup> Press Release, FTC Announces Hearing on Competition and Consumer Protections in the 21st Century (June 20, 2018), <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st>.

<sup>2</sup> CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. Our members employ more than 750,000 workers and generate annual revenues in excess of \$540 billion. A list of CCIA members is available at <https://www.cciagnet.org/members>.



## II. Harm to Innovation

The FTC should continue to apply an evidence-based antitrust framework that incorporates innovation as an element of the competition analysis. Evaluating the impact of the transaction on innovation, along with price and product quality, is not new. When applying merger control rules, competition authorities have long analyzed the impact that transactions could have on innovation, particularly when there are overlapping markets, as has been the case for many pharmaceutical deals.<sup>3</sup>

While some competition experts have suggested that it is a difficult exercise to predict how innovation will be impacted by a particular transaction, antitrust authorities have managed to analyze harm to innovation in a number of cases. Authorities analyze harm to innovation on a case-by-case basis and, among other factors, industry-specific elements such as market concentration, R&D output, and innovation efforts from merging parties and competitors.

The examples included below illustrate how the current competition framework is well-equipped to tackle competition challenges that may arise in the context of innovation-centered transactions.

(1) *Nielsen/Arbitron*: The FTC challenged the Nielsen/Arbitron merger on the grounds of harm to innovation.<sup>4</sup> Nielsen offered a leading TV audience measurement service, while Arbitron offered similar services for radio. Because at the time of the merger both companies were developing a cross-platform audience measurement service, the FTC argued that the merger could harm innovation. The FTC required a divestiture of competitive assets to protect future competition in the market for cross-platform audience measurement even though the service itself was still in development.<sup>5</sup>

(2) *NXP/Freescale*: The FTC also examined NXP Semiconductors' \$11.8 billion acquisition of Freescale Semiconductor and the impact it had on innovation.<sup>6</sup> In this merger, the FTC

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<sup>3</sup> Remarks of FTC Commissioner Deborah Majoras, Antitrust Enforcement in the Pharmaceutical Industry: Success and Challenges (May 16, 2007), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/remarks/051607aci\\_pharma.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/remarks/051607aci_pharma.pdf).

<sup>4</sup> Nielsen Holdings N.V. and Arbitron Inc., F.T.C. File No. 131-0058 (2013), <https://www.ftc.gov/enforcement/cases-proceedings/131-0058/nielsen-holdings-nv-arbitron-inc-matter>.

<sup>5</sup> Press Release, FTC, FTC Puts Conditions on Nielsen's Proposed \$1.26 Billion Acquisition of Arbitron (Sept. 20, 2013), <https://www.ftc.gov/news-events/press-releases/2013/09/ftc-puts-conditions-nielsens-proposed-126-billion-acquisition>.

<sup>6</sup> NXP Semiconductors N.V., F.T.C. File No. 151-0090 (2016), <https://www.ftc.gov/system/files/documents/cases/151125nxpcmt.pdf>.



settled the case requiring divestitures to remedy the anticompetitive effects of the transaction. Former acting FTC Chairwoman Maureen Ohlhausen summarized the FTC's concern regarding the impact on innovation by stating that:

Higher prices are obviously a fundamental concern in reviewing mergers of close competitors. The loss of competition to innovate and to develop better, faster, more efficient products, however, can be just as concerning - particularly in the technology area, where the essential competition often is not on price, but rather on product features.<sup>7</sup>

### **III. International Implications of Merger Review**

The FTC must be cognizant of the international implications of a potential merger. In a globalized economy, many transactions are subject to multiple merger control rules. There is significant variation in merger review thresholds in terms of what types of transactions are subject to review, as well as significant variations in the merger review process in terms of the level of international cooperation, timeline, and information required. A lack of standardization in these thresholds and procedures injects unnecessary friction, costs, and complexity into mergers that span multiple jurisdictions.

In most cases, there is international convergence when dealing with merger control. Notwithstanding, there has been a recent trend of foreign antitrust authorities expanding antitrust theories of harm in the context of merger reviews, which could impact negatively the incentives of international businesses to pursue efficient deals that benefit consumers. Divergence occurs, not only in the enforcement of novel theories of harm outside the United States, but also with regard to the review of conglomerate effects theory of harm. This divergence is especially damaging to the technology industry where products and services are inherently global in nature.

Whereas in the United States, competition authorities and tribunals have been skeptical towards conglomerate effects of mergers and other non-horizontal-based theories of harm, the same cannot be stated of foreign competition authorities. These divergent views on conglomerate effects (or lack thereof) in the context of the GE/Honeywell merger produced significant legal and political friction in 2001.<sup>8</sup>

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<sup>7</sup> Remarks of F.T.C. Commissioner Maureen Ohlhausen, Jan. 26, 2016, [https://www.ftc.gov/system/files/documents/public\\_statements/910843/160126skaddenkeynote.pdf](https://www.ftc.gov/system/files/documents/public_statements/910843/160126skaddenkeynote.pdf).

<sup>8</sup> Michael Elliot, *The Anatomy of the GE-Honeywell Disaster*, TIME (July 8, 2001), <http://content.time.com/time/business/article/0,8599,166732-2,00.html>.



Recent cases seem to indicate a growing interest in conglomerate and non-horizontal theories of harm, especially with regard to merging parties selling complementary products. This concern includes the consideration of interoperability between one party's products and a rival's competing downstream product, to favor their own downstream product.

For example, the European Commission (EC) conditionally cleared the Broadcom/Brocade merger, with commitments covering non-discrimination measures and firewalls, to resolve concerns about technical degradation of interoperability and/or misuse of confidential information.<sup>9</sup> In the Microsoft/LinkedIn merger, the EC imposed commitments regarding access to Microsoft's application programming interfaces (APIs) and options for customers to disable LinkedIn features in order to resolve concerns about the integration of LinkedIn into Microsoft's programs and denial of access to competitors to its APIs.<sup>10</sup>

CCIA believes that convergence in the antitrust field is key to enabling further innovation, and ensuring that consumers are offered better products and services. Regulatory asymmetries should not become a barrier to growth, and thus, the FTC's advocacy for harmonization in the international sphere remains of utmost importance.

#### **IV. Conclusion**

Sound antitrust enforcement will continue to be key to maintaining competition in the different technology markets. Ensuring that merger decisions regarding R&D-intensive markets such as tech transactions are grounded in strong evidence is fundamental to maintaining the right incentives for companies to innovate, and for continued economic growth.

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<sup>9</sup> Press Release, European Commission, Mergers: Commission Clears Acquisition of Brocade by Broadcom, Subject to Conditions (May 12, 2017), [http://europa.eu/rapid/press-release\\_IP-17-1309\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1309_en.htm).

<sup>10</sup> Press Release, European Commission, Mergers: Commission Approves Acquisition of LinkedIn by Microsoft, Subject to Conditions (Dec. 6, 2016), [http://europa.eu/rapid/press-release\\_IP-16-4284\\_en.htm](http://europa.eu/rapid/press-release_IP-16-4284_en.htm).



## Annex

Per the FTC's request for empirical research regarding the topics at issue in the hearing announcement, CCIA offers the following additional resources.

- D. Daniel Sokol, *Troubled Waters Between U.S. and European Antitrust*, 115 MICH. L. REV. 955 (2017).
- Frank T. Rothaermel *et al.*, *Balancing Vertical Integration and Strategic Outsourcing: Effects on Product Portfolio, Product Success, and Firm Performance*, 27 STRAT. MGMT. J. Gerard Hoberg & Gordon Phillips, *Product Market Synergies and Competition in Mergers and Acquisitions: A Text-Based Analysis*, 23 REV. FIN. STUD. 3773 (2010).
- Gordon M. Phillips & Alexei Zhdanov, *R&D and the Incentives from Merger and Acquisition Activity*, 26 Rev. Fin. Stud. 34 (2013).
- Harry J. Sapienza *et al.*, *The Self-Determination Motive and Entrepreneurs' Choice of Financing*, COGNITIVE APPROACHES TO ENTREPRENEURSHIP RESEARCH (Jerome A. Katz & Dean A. Shepherd eds., 2003).
- Herbert Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703 (2017).
- Herbert Hovenkamp, *The Chicago and Harvard Schools and the Dominant Firm*, HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (2007).
- Jaideep C. Prabhu *et al.*, *The Impact of Acquisitions on Innovation: Poison Pill, Placebo, or Tonic?*, 69 J. MARKETING 114 (2005).
- James C. Cooper *et al.*, *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639 (2005).
- Jan Bena & Kai Li, *Corporate Innovations and Mergers and Acquisitions*, 69 J. FIN. 1923 (2014).
- Laurent Fresard *et al.*, *Vertical Acquisitions, Integration and the Boundaries of the Firm*, working paper (2017), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2242425](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2242425).
- Michael Salinger, *Vertical Mergers*, THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS, VOL. 1 (Roger D. Blair & D. Daniel Sokol eds. 2014).
- Nandini Lahiri & Sriram Narayanan, *Vertical Integration, Innovation, and Alliance Portfolio Size: Implications for Firm Performance*, 34 STRAT. MGMT. J. 1042 (2013).
- Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 FORDHAM L. REV. 2497 (2013).
- Sam Ransbotham & Sabyasachi Mitra, *Target Age and the Acquisition of Innovation in High-Technology Industries*, 56 MGMT. SCI. 2076 (2010).
- Simi Kedia *et al.*, *When Do Vertical Mergers Create Value?*, 40 J. FIN. 845 (2011).



- William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1.
- William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43 (2000).
- William P. Rogerson, *Economic Theories of Harm Raised by the Proposed Comcast/TWC Transaction* (2015), THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY 7th ed. (John E. Kwoka, Jr. & Lawrence J. White eds. 2018).