Comments by the
***Business at OECD* (BIAC) Competition Committee**
to the OECD Competition Committee
Working Party No. 3 (WP3)

Monopolisation, Moat Building and Entrenchment Strategies

June 11, 2024

I. Introduction

1. *Business at OECD* (BIAC) appreciates the opportunity to submit these comments to the roundtable on monopolization, moat building and entrenchment strategies. This topic is of increasing relevance to competition enforcement and to the business community. This draws on previous BIAC contributions addressing innovation[1] and other issues considered by the Competition Committee with respect to digital markets.[2] This contribution covers both enforcement of unilateral conduct and merger enforcement, although, further to the Secretariat's note, greater focus will be devoted to unilateral conduct.

2. Monopolization or dominance, when illegally obtained or maintained, is a serious competition issue worthy of considerable attention. BIAC strongly endorses a focus on those issues by the WP3. Loose descriptive terms such as "economic moat" and "entrenchment," which are increasingly being used by some observers and antitrust authorities in a pejorative sense to describe certain behaviors, however, are not, in and of themselves, helpful in defining or evaluating those abusive and exclusionary practices that should be subject to stringent antitrust enforcement. In short, it is not the (trendy) description of the conduct that is relevant, it is the effect of that conduct.

3. It is acknowledged that certain business strategies may seek to entrench or leverage a company's competitive advantages. But it is important to distinguish between those strategies which result in effects that are anti-competitive – and hence merit enforcement action – and those which may be pro-competitive and efficiency enhancing or neutral. In these latter instances, i.e., in the absence of exclusionary effect, enforcement action is unwarranted, and intervention is likely to result in worse outcomes for customers and consumers. While distinguishing anti-competitive conduct from pro-competitive business strategy can be difficult in practice, applying established economic and competition law principles and theories of harm, as well as evidentiary rigor, is far more likely to yield reliable results than the use of catchy labels. For example, while terms such as "moat building" and "entrenchment" may serve to label certain conduct, they do not adequately capture whether the acts being scrutinized are being undertaken for anti-competitive purposes or for valid, pro-competitive or efficiency enhancing reasons. Nor do they necessarily imply a particular effect on the markets at issue.

[1] OECD, The Role of Innovation in Competition Enforcement – Note by BIAC, DAF/COMP/WD(2023)100 (Nov. 29, 2023), https://one.oecd.org/document/DAF/COMP/WD(2023)100/en/pdf. [hereinafter BIAC Note on Innovation in Competition Enforcement].

[2] OECD, Theories of Harm for Digital Mergers – Note by BIAC, DAF/COMP/WD(2023)73 (June 5, 2023), https://one.oecd.org/document/DAF/COMP/WD(2023)73/en/pdf [hereinafter BIAC Note on Theories of Harm for Digital Mergers].

4. The concept of dominance in a specific product market serves as a starting point because it provides an important and relevant underpinning for considerations of whether entrenchment or leveraging strategies give rise to anti-competitive concerns. Dominance resulting from market power – i.e., the ability of a firm to act independently of competition – should remain at the heart of any theories of harm concerning entrenchment and leverage.[3] Yet, dominance alone does not imply that business strategies relating to complementary, vertical, or product extension markets necessarily harm competition – indeed, a successful company extending its offering to other areas often provides significant consumer benefits.

5. In addition, while there may be specific indicia and considerations regarding market power in the context of digital markets – for example, network effects[4] – this does not fundamentally change the relevance of established competition law principles to address any anti-competitive concerns regarding entrenchment and leveraging in these markets. Nor are these considerations a sufficient justification for taking a completely different approach than in other markets, including in digital markets. BIAC acknowledges, however, the fact patterns (and counterfactuals) that may induce harm in the specific context of digital services are less well-established.

6. In terms of merger enforcement, as with innovation theories of harm discussed by the Competition Committee in December 2023,[5] a key issue in enforcement is the burden of proof and who bears it. There is good reason to maintain the same burden of proof in these cases as those involving other types of harm, like price effects and output reduction. The priority for merger enforcement should remain focused on transactions involving direct competitors, typically competing with each other in the same product and geographic markets.

II. Entrenching and Leveraging Competitive Advantages in Business

A. Defining Moats and Entrenchment

7. Any discussion of the legal and policy significance of such terms as "moat building" or "entrenchment" should include a contextualized understanding of the relevant terminology and its ordinary use in business.

8. Commonly attributed to renowned investor Warren Buffett, the term "competitive moat" should be understood as a reflection of the value to investors of a business that has built certain competitive advantages. It is important to note that these advantages most frequently have been attained through superior performance, innovation, or other efficiencies. There are different types of competitive moats and Buffet has previously described firms having such moats as "companies with durable competitive advantages."[6] Commonly described competitive moats include:

- *Reputational/Branding Moat:* These moats represent demand-side brand recognition and loyalty that may make it difficult for competitors to gain market share.
- *Cost or Technology Moat:* These moats provide firms with lower costs as compared to their competitors that may be due to the firm having more advanced technology, greater economies of scale, access to proprietary technology, or more efficient operations.

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[3] OECD, Guidance to Business on Monopolisation and Abuse of Dominance, DAF/COMP(2007)43 (June 17, 2008), https://www.oecd.org/daf/competition/40880976.pdf.

[4] BIAC Note on Theories of Harm for Digital Mergers, *supra* note 2.

[5] BIAC Note on Innovation in Competition Enforcement, *supra* note 1.

[6] Jalaj Maheshwari, *Warren Buffett's Investment Strategies: A Case Study of Investment Approach and Principles of Success*, 8 INT'L J. NOVEL RSCH. DEV. a619, a624 (2023), https://www.ijnrd.org/papers/IJNRD2311068.pdf.

- *Network or Supply Chain Moats:* These moats represent a strong network effect where the value of a product or service increases as more people use it, creating a barrier to entry for competitors.[7]

9. "Entrenchment" often refers to the actions by which a firm's market position can be fortified. Entrenchment strategies can also take many different forms, including constructing barriers to entry for new competitors; investing and developing technological innovation vis-à-vis competitors; vertical integration creating efficiencies, complementarities, and elimination of double marginalization; protecting proprietary technology, including through intellectual property; and self-preferencing.

10. A firm's directors have a fiduciary obligation to its shareholders to maximize business success within the boundaries of the law, whether that be through growth, innovation, or other strategies. While these actions – even if described as "moat building" or "entrenchment" – might increase a firm's market position, they should generally be considered to be the logical extension of such business success and not, in and of themselves, deserving of intervention. Moreover, competition laws encourage market participants to compete aggressively rather than to pull their punches.

11. Competition authorities should not seek to condemn "growth or development as a consequence of a superior product, business acumen, or historic accident."[8] Rather, the potential for firms to establish "dominance" in this manner creates important dynamic incentives for firms to promote economic welfare and improve the price, quality, and choice of goods and services they offer through competition.[9]

B. Entrenchment Scrutiny on Digital Markets

12. In recent years, antitrust authorities and other regulators have shown a rising concern over "entrenched" firms, particularly focusing on large tech firms. The Competition Committee has previously explored this issue as part of a long-running theme on digital markets.[10] Specifically, there is growing concern that a small number of major digital platform firms have become entrenched in a position of exercising market power. One reaction to this entrenchment concern has been a trend towards utility-type regulation of digital markets.

13. For example, the European Union's *Digital Markets Act* (DMA) entered into force in November 2022 with the stated goal of promoting contestability and fairness in digital markets.[11] Specifically, the DMA is based on the classification of certain digital platforms satisfying specific quantitative thresholds as gatekeepers,[12] which are then subject to an extensive list of ex ante obligations.

14. Similar ex ante regulation proposals have emerged across the globe to tackle this concern. For example:

- In the United Kingdom, the Furman Report on digital competition suggested the creation of ad hoc Codes of Conduct for specific platforms possessing a "strategic market status."[13] This proposal led to the *Digital*

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[7] A "regulatory moat" can also result from government regulations or licenses required in order to operate in an industry.

[8] United States v. Grinnell Corp., 384 U.S. 563, 571 (1996).

[9] *See, e.g.*, Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398 (2004).

[10] *See, e.g.*, OECD, Ex-Ante Regulation and Competition in Digital Markets – Note by BIAC, DAF/COMP/WD(2021)79 (Nov. 24, 2021), https://one.oecd.org/document/DAF/COMP/WD(2021)79/en/pdf [hereinafter BIAC Note on Ex-Ante Regulation and Competition in Digital Markets].

[11] Francesco Ducci, *Ex Ante Regulation and Antitrust Remedies for Digital Markets*, 67 CAN. BUS. L.J. 65 (2023).

[12] Press Release, Eur. Comm'n, Digital Markets Act: Rules For Digital Gatekeepers To Ensure Open Markets Enter Into Force (Oct. 21, 2022), https://ec.europa.eu/commission/presscorner/detail/en/IP_22_6423.

[13] UNLOCKING DIGITAL COMPETITION: REPORT OF THE DIGITAL COMPETITION EXPERT PANEL 5 (Mar. 13, 2019), https://assets.publishing.service.gov.uk/media/digital_competition.pdf.

Markets, Competition and Consumers Bill according to which companies with strategic market status will be subject to ex ante obligations.[14]

- The Australian Competition and Consumers Commission has similarly recommended service-specific codes for designated digital firms.[15]
- In Germany, Section 19a of the GWB provides for ex ante obligations that apply to "undertakings of paramount significance for competition."[16]
- In Turkey, there are DMA-related draft amendments to the Turkish Competition Law in the pipeline.[17]
- In the United States, several antitrust bills have proposed the introduction of ex ante bans against self-preferencing and other practices by large Big Tech platforms.[18]

15. The regulatory scrutiny reserved for digital firms is a departure from antitrust enforcement for firms in more traditional markets – even those with strong market positions. While regulation in the digital space can be appropriate to address concerns in certain circumstances, ex ante regulation, if not properly calibrated and enforced, may give rise to significant inefficiencies.[19]

C. In the Absence of Anticompetitive Effect, Firms Should be Permitted to Expand Their Offerings and Capitalize on Their Advantages

16. Firms commonly face the opportunity to meet new or broader consumer needs by asking themselves what more they can do with their existing assets, resources, and client base – in the simplest case merely by asking "do you want fries with that?" The result of this type of "leveraging" often improves consumer welfare. For instance, it may result in increased competition in adjacent markets or the development of innovative new products and services, greater convenience, or faster deployment with lower price points. Therefore, leveraging in this sense may in fact be pro-competitive and efficiency enhancing and should not necessarily attract condemnation.

17. Economists use "network effects" to describe contexts in which a good or service offers increasing benefits as the number of users increases. A concern that is often raised by competition authorities is that network effects can be a potential source of market power because larger firms, with more users, can reinforce their incumbency and make it more costly for small or new firms to challenge them.[20] This was a central issue in the antitrust action against Microsoft,[21] for example. However, the Court in that case also found that exclusive agreements between Microsoft and computer manufacturers were designed principally to exclude rival browsers, i.e., Netscape, and did little to improve Microsoft's product.

18. In any event, the presence of network effects does not necessarily imply entrenchment. Rather, they can foster innovation and lead to destabilization of a market leader position.[22] For example, Apple leveraged

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[14] Digital Markets, Competition and Consumers Bill, https://bills.parliament.uk/bills/3453.

[15] AUSTL. COMPETITION & CONSUMER COMM'N, DIGITAL PLATFORM SERVICES INQUIRY: INTERIM REPORT NO. 5- REGULATORY REFORM (Nov. 11, 2022), https://www.accc.gov.au/system/files/.pdf.

[16] Gesetz gegen Wettbewerbsbeschränkungen [GWB] [Competition Act], § 19a, https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0062.

[17] *See also* TURKISH COMPETITION AUTHORITY, THE IMPACT OF DIGITAL TRANSFORMATION ON COMPETITION LAW (Oct. 2023), https://www.rekabet.gov.tr/Dosya/the-impact-of-digital-transformation-on-competition-law-.pdf.

[18] Ducci, *supra* note 11.

[19] BIAC Note on Ex-Ante Regulation and Competition in Digital Markets, *supra* note 10.

[20] *See, e.g.*, Jonathan S. Kanter, *Digital Markets and "Trends Towards Concentration,"* 11 J. ANTITRUST ENF'T143 (2023), https://doi.org/10.1093/jaenfo/jnad030.

[21] U.S. v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

[22] Catherine Tucker, *What Have We Learned in the Last Decade?: Network Effects and Market Power*, ANTITRUST, Spring 2018, at 77, https://www.americanbar.org/content/dam/aba/publishing/antitrust_magazine/anti-spring18-3-23.pdf.

its existing user base to create a new streaming service when it launched Apple TV, permitting it to compete with existing streaming incumbents such as Netflix.

19. Courts have acknowledged that it can be difficult to distinguish between vigorous competition and exclusionary acts. The United States District Court for the District of Columbia stated as such in the case against Microsoft: "Whether any particular act of a monopolist is exclusionary, rather than being a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad."[23]

20. There should always be clear evidence of anticompetitive effects before interfering with any leveraging strategy:

> This notion that it is not unlawful to promote one's product in an adjacent market in order to improve the actual or perceived quality of a dominant product in the primary market is important. Absent evidence that the conduct is designed solely or primarily to disadvantage rivals, product improvements typically evidence continued investment and innovation, a strong procompetitive effect of the "self-preferential" conduct. This is especially true of product design decisions. Courts properly have been reluctant to interfere with such decisions absent clear evidence of anticompetitive effects.[24]

21. In its 2013 statement explaining its decision to close its Google investigation, the FTC acknowledged "product design is an important dimension of competition and condemning legitimate product improvements risks harming consumers."[25]

III. Applying Established Economic and Competition Law Principles

22. Existing concepts of dominance, market power and anticompetitive effects continue to provide an appropriate framework for considering when enforcement action may be warranted in respect of unilateral conduct described as moat building or entrenchment, including in digital markets.

23. An approach to competition policy that is grounded on consistent economic principles and applied across all sectors is not just preferable, but necessary. Different sectors of the economy are widely interconnected, and even more so when it comes to digital markets. The constant changes that affect each sector and the inherent complexity of each situation can lead to difficulties in assessing the likely weightings that might apply to a specific sector.[26] Accordingly, any enforcement against leveraging strategies should be informed by concepts of dominance and supported by economic principles and factual evidence.[27]

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[23] 253 F.3d at 58.

[24] Jonathan Jacobson & Ada Wang, *Competition or Competitors? The Case of Self-Preferencing*, ANTITRUST, Fall 2023, at 17, https://www.americanbar.org/content/dam/aba/publications/antitrust/magazine/2023/vol-38-issue-1/full-issue.pdf.

[25] Statement of the FTC Regarding Google's Search Practices, Google Inc., FTC File 111-0163, at 3 (Jan. 3, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf.

[26] OECD, Economic Analysis in Abuse Cases – Contribution from BIAC, DAF/COMP/GF/WD(2021)4, ¶ 11 (Nov. 26, 2021), https://one.oecd.org/document/DAF/COMP/GF/WD(2021)40/en/pdf [hereinafter BIAC Note on Economic Analysis in Abuse Cases].

[27] For example, in the 2022 *Intel* decision, the General Court confirmed the presumption of abuse of dominance can be rebutted if the defendant provides supportive evidence that its conduct is not capable of anticompetitive distortion of competition. This decision confirmed that the Commission must analyze the foreclosure effect by reference to the extent of the dominant position; the conditions and arrangements for granting the rebates; the shares of the market covered by the practices and their duration; and the possible existence of an exclusionary strategy. Case T-286-09 RENV, Intel v. Comm'n, ECLI:EU:T:2022:19.

24. The OECD has advanced a definition of "dominance" as an economic concept that captures "circumstances in which single firm strategies may – or . . . are likely to – have adverse effects on welfare."[28] Abuse of dominance is an area of competition policy where over-enforcement is most likely to discourage investment and innovation by business and to discourage competition. To avoid this undesired effect in pursuing abuse cases, regulators should focus on supporting economic output and facilitating innovation and avoid interventions without a proper analysis.[29]

25. In the context of digital markets, the concepts of dominance and market power that exist in current legislative tools may be applied more flexibly. These concepts nevertheless remain an important economic underpinning for enforcement action. For example, current United States antitrust law only prohibits self-preferencing by a firm with market power in the dominant good and only where competitive harm results:

> [S]elf-preferencing by a dominant firm in a dominant product, such as Google Search, might be anticompetitive to the extent that it unreasonably excludes rivals from a market. But the all-important ingredient is the presence of product-specific market dominance.[30]

26. With regard to unilateral conduct, the concept of dominance should remain a precondition to any enforcement action, while the concept of market power (and with it, proper market definition) should continue to be a predicate for both merger enforcement and enforcement of unilateral conduct.

27. In contrast to the application of the concepts of dominance and market power, the DMA's provisions apply to "gatekeepers," i.e., "core platform services."[31] As cautioned by Frederic Jenny, the DMA's ex ante regulations risk allowing the European Commission (EC) to prohibit practices without having to define relevant markets, to assess market dominance, or to bear the burden of establishing that these practices are capable of restricting competition.[32]

28. Whether Apple has a dominant position in an alleged "performance smartphone market" is one of the issues to be decided in the suit brought by the U.S. Department of Justice (DOJ) and 16 State Attorneys General on March 21, 2024. The suit alleges that Apple has engaged in unlawful exclusionary behavior by, among other things, selectively imposing contractual restrictions on and withholding critical access points from developers.[33] The suit focuses on Apple's ability to leverage what is perceived as a "moat" around the iPhone. The following moats are specifically identified in the complaint:[34]

- Imposing contractual restrictions, fees and taxes on app creation and distribution.[35]
- Using APIs and other critical access points in the smartphone ecosystem to control the behavior and innovation of third parties in order to insulate itself from competition.[36]

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[28] OECD, Abuse of Dominance and Monopolisation – Background Note by Sally Van Siclen, OCDE/GD(96)131, at 7 (1996), https://www.oecd.org/daf/competition/2379408.pdf.

[29] BIAC Note on Economic Analysis in Abuse Cases, *supra* note 26, ¶ 4.

[30] Herbert Hovenkamp, *Antitrust and Self-Preferencing*, ANTITRUST, Fall 2023, at 8, https://www.americanbar.org/content/dam/aba/publications/antitrust/magazine/2023/vol-38-issue-1/full-issue.pdf.

[31] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), 2022 O.J. (L 265) 1, art. 2.

[32] Frederic Jenny, *Competition Law and Digital Ecosystems: Learning to Walk before We Run*, 30 INDUST. & CORP. CHANGE 1143, 1160 (2021), https://doi.org/10.1093/icc/dtab047.

[33] Press Release, Dep't of Justice, Justice Department Sues Apple for Monopolizing Smartphone Markets (Mar. 21, 2024), https://www.justice.gov/opa/pr/justice-department-sues-apple-monopolizing-smartphone-markets.

[34] Complaint, United States. v. Apple Inc., No. 2:24-cv-04055 (D.N.J Mar 21, 2024), https://www.justice.gov/d9/2024-03/420763.pdf.

[35] For example, by leveraging what is referred to in the DOJ complaint as "super apps" and preventing developers from offering cloud streaming apps.

[36] Through messaging, smartwatches, and digital wallets.

29. While Apple has yet to file a formal response, its public statements claim that the lawsuit threatens "the principles that set Apple products apart in fiercely competitive markets." The company argues that its practices allow its products to work seamlessly together and protect its users' privacy.[37]

30. The lawsuit against Apple and other cases brought against Google, Meta, and Amazon in the U.S. and in Europe highlight that existing antitrust laws equip authorities with the necessary tools to bring enforcement action against tech companies they claim to have violated the law:

- The United States and eight state plaintiffs allege that Google has monopolized or attempted to monopolize core markets of the ad tech industry. Specifically, the complaint alleges that Google has eliminated or diminished any threat to its dominance in the ad tech industry by (1) neutralizing and eliminating ad tech competitors through acquisitions, and (2) wielding its dominance across digital advertising markets to force more publishers and advertisers to use its products while disrupting their ability to use competing products effectively.[38]
- The FTC and several other U.S. states have expressed concerns about how Meta might have used its market power to stifle other businesses in the virtual reality space.[39] Although the Court denied the authorities' injunction request, it refused dismiss the complaint, and accepted that the actual potential competition and perceived potential competition theories are viable. The FTC dismissed the claim shortly thereafter.
- In another lawsuit filed by the FTC and States Attorneys General, Amazon is being accused of exclusionary conduct that prevents competition in two markets – the online superstore market that serves shoppers and the market for online marketplace services purchased by sellers.[40]
- Under the EU Merger Regulation, the European Commission prohibited the proposed acquisition of Flugo Group Holdings AB (eTraveli) by Booking Holdings (Booking). The Commission found that the proposed acquisition would have allowed Booking to strengthen its dominant position in the market for hotel online travel agencies, notwithstanding that the target was a main provider of flight travel online services.[41]

31. Harm to competition resulting from an abuse is very unlikely without dominance. Thus, the establishment of dominance should be informed by a substantive test that seeks to establish persistent market power. This substantive test should identify the specific activities where the firm holds significant market influence, and there must be a clear causal link between that position and the allegedly abusive conduct.

IV. Rigorous Evidence-Based Fact-Finding Remains Paramount

32. As noted above, it can be difficult to distinguish between vigorous competition and exclusionary acts. Notwithstanding the challenge presented, there remains a requirement to adhere to rigorous evidence-based fact-finding and establishment of counterfactuals necessary to establish specific harm in the context

[37] The Associated Press, *U.S. Government Sues Apple For Smartphone Antitrust Violations*, CBC NEWS (Mar. 21, 2024), https://www.cbc.ca/news/business/us-justice-dept-apple-1.7150800.

[38] Complaint, United States v. Google LLC, No. 1:23-cv-00108 (E.D. Va. Mar. 14, 2023), https://www.justice.gov/atr/case-document/file/1566706/dl?inline.

[39] Press Release, Fed. Trade Comm'n, FTC Seeks to Block Virtual Reality Giant Meta's Acquisition of Popular App Creator Within (July 27, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/07/.

[40] Press Release, Fed. Trade Comm'n, FTC Sues Amazon for Illegally Maintaining Monopoly Power (Sept. 26, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/.

[41] Press Release, European Comm'n, Mergers: Commission prohibits proposed acquisition of eTraveli by Booking (Sept. 25, 2023), https://ec.europa.eu/commission/presscorner/detail/en/IP_23_4573.

of digital services. The inquiry regarding potential anti-competitive effects of certain conduct – particularly in adjacent markets – will always be case-specific and require a deep understanding of market dynamics.[42]

33. In his criticism of the singling out of online firms as being inconsistent with good antitrust enforcement policy, Professor Hovenkamp points to the "vast differences" in the extent to which different online and offline products compete with each other: "there is no good substitute for product-specific inquiries into market power and competitive harm from any type of self-preferencing. Concededly, those inquiries are costly, but one reason for them is the extremely large number of false positives that more generalized tests will produce."[43]

34. The standard or burden of proof applicable to a particular agency action (such as merger, dominance, or interim measures) should not change based on a new theory of harm.[44] Therefore, while it may be attractive to require firms to "prove" that their actions constituted legitimate competition rather than acting in an anticompetitive manner – for example, where they are claiming innovation benefits of their actions – this ignores the commercial reality of the role of innovation and the competitive process. The very nature of this process means that it is impossible to know ahead of time what will and will not work: "Because innovation is a process of discovery, it is a serious error to assume that synergies or customer responses are or can be always known in advance."[45]

35. This was exemplified in Microsoft's proposed acquisition of Activision Blizzard, Inc.[46] Several regulatory authorities had concerns with the impact of the merger on cloud gaming services. The latter was seen as an innovative, fast-growing market where Microsoft had an existing strong position. The UK Competition and Markets Authority's (CMA) provisional review raised concerns about the possible impact of the merger on the market for cloud gaming services, noting the latter is poised to grow and become an important conduit for playing games. The CMA rejected Microsoft's claims of significant customer efficiencies outweighing any substantial lessening of competition.[47] Nonetheless, a subsequent investigation revealed that cloud gaming services would be unaffected. This new analysis came to fruition following "a significant amount of new evidence" received by the CMA in response to its original provisional findings.[48]

36. Significant consideration was given to Microsoft's factual financial incentives to make Activision's games, including Call of Duty (CoD), exclusive to its own consoles.

> While the CMA's original analysis indicated that this strategy would be profitable under most scenarios, new data (which provides better insight into the actual purchasing behaviour of CoD gamers) indicates that this strategy would be significantly loss-making under any plausible scenario. On this basis, the updated analysis now shows that it would not be commercially beneficial to

[42] For example, price fluctuations – and high prices in particular – are critical and efficient signals to businesses to adjust their supply, expand, invest, or innovate. *See* BIAC Note on Economic Analysis in Abuse Cases, *supra* note 26, ¶ 7.

[43] Hovenkamp, *supra* note 30, at 9.

[44] Fed. Trade Comm'n v. Meta Platforms Inc., 654 F.Supp.3d 892 (N.D. Cal. 2023); Meta Platforms, Inc. v. Competition and Markets Authority, [2022] CAT 26, para. 108 (CAT).

[45] David Foster & Tara Chapman, *The Limits of Leveraging*, FRONTIER ECON., https://www.frontier-economics.com/uk/en/news-and-insights/articles/article-i9219-the-limits-of-leveraging/.

[46] Oli Welsh, *Everything That Happened With Microsoft's Acquisition of Activision Blizzard*, POLYGON (Oct. 13, 2023), https://www.polygon.com/23546288/.

[47] Press Release, Competition & Mkts. Auth., Microsoft / Activision Deal Could Lead to Competition Concerns (Sept. 1, 2022), https://www.gov.uk/government/news/microsoft-activision-deal-could-lead-to-competition-concerns.

[48] Press Release, Competition & Mkts. Auth., CMA Narrows Scope of Concerns in Microsoft-Activision Review (Mar. 24, 2023), https://www.gov.uk/government/news/cma-narrows-scope-of-concerns-in-microsoft-activision-review.

> Microsoft to make CoD exclusive to Xbox following the deal, but that Microsoft will instead still have the incentive to continue to make the game available on PlayStation.[49]

37. The *Microsoft/Activision* deal illustrates the pivotal role of evidence and thorough investigation in antitrust matters. Despite facing similar concerns across agencies from different jurisdictions, the deal has been signed off by the CMA, the EC, and (despite an attempt by the FTC to block the deal) received a preliminary nod by U.S. courts.[50] Following an in-depth investigation, the EC concluded, among other things, that Microsoft would have no incentive to refuse to distribute Activision's games to Sony, a strong rival in the cloud gaming industry.[51] Even if Microsoft decides to withdraw Activision's games from PlayStation, the EC found this would not significantly harm competition in the consoles market.[52]

38. Although the acquisition continues to make its way through the U.S. legal system, the FTC's concern (and those of other agencies) that Microsoft would prevent Activision's content from being played on rival devices and services has not been supported by evidence. The U.S. District Court for the Northern District of California rejected FTC's request to enjoin the merger.[53] While the court agreed that the merged firm would have the *ability* to foreclose CoD games because it would own the series, it did not find that the firm would have the *incentive* to foreclose. The court reached this conclusion by examining Microsoft's commitments to its board of directors, competitors, and its internal communications, all of which indicated no intention of making CoD exclusive to Xbox.[54]

V. Conclusion

39. Competitive advantages serve as crucial drivers of business expansion and advancement that benefit consumers, often as a result of superior performance, innovation, and operational efficiency. While certain business strategies may exploit these advantages to the detriment of competition, it is essential to discern between anti-competitive practices which merit intervention and those that do not and instead might enhance efficiency and promote healthy market dynamics. Competition authorities should not take a position that discourages businesses – even dominant businesses – from making investments and taking the risks of entering new markets. Striking this balance requires a rigorous approach, where enforcement policies align with established principles of evidence-based theories of harm and avoid impeding pro-competitive strategies. Ultimately, safeguarding consumers requires that regulation and enforcement be informed by existing competition laws and economic principles in conjunction with a rigorous evidentiary analysis.

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49 *Id.*

50 *FTC v. Microsoft Corp.*, 137 HARV. L. REV. 1010 (2024).

51 Press Release, European Comm'n, Mergers: Commission Clears Acquisition of Activision Blizzard by Microsoft, Subject to Conditions (May 15, 2023), https://ec.europa.eu/commission/presscorner/detail/en/IP_23_2705.

52 *Id.*

53 Fed. Trade Comm'n v. Microsoft Corp., 681 F. Supp. 3d 1069 (N.D. Cal. 2023).

54 *FTC v. Microsoft Corp*., 137 HARV. L. REV. 1010 (2024).