



# Competition Remedies for the Digital Economy: Focus on the Future

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CADE, August 1, 2019

**remedy** | 'rɛmɪdi | noun

a medicine or treatment for a disease or injury

What is **the disease**?

- Record high concentration of capital
- Growing inequality
- Stagnation of the economic growth and productivity

- Unlike the textbook world of pure competition, **hyperglobalization has led to a considerable concentration of economic power and wealth** in the hands of a remarkably small number of people
- Recent evidence of rising market concentration across several sectors, has revived interest in the links between market power, rent-seeking and income inequality. **Market concentration and rent extraction can feed off one another**, resulting in a “winner-takes-most competition” that has become a visible part of the corporate environment
- As Stiglitz points out, rent-seeking means “getting an income not as a reward for creating wealth **but by grabbing a larger share of the wealth that would have been produced anyway**”

\* UNCTAD Trade and Development Report 2017

«If machines produce everything we need, **the outcome will depend on how things are distributed.** Everyone can enjoy a life of luxurious leisure if the machine-produced wealth is shared, or most people can end up miserably poor if the machine-owners successfully lobby against wealth redistribution. **So far, the trend seems to be toward the second option, with technology driving ever-increasing inequality»**

Stephen Hawking (1948-2018)

«Globalization was supposed to lead to a more competitive market place, but instead, it has provided space for **the growth of global behemoths, who use their market power to extract rents from both sides of the market place**, from small producers and consumers. **Their competitive advantage** is not based just on their greater efficiency; rather, it **rests partly on their ability to exploit this market power** and partly on their ability to use globalization to evade and avoid taxes»

Joseph Stiglitz, Towards A Broader View of Competition Policy // Roosevelt Institute Working Paper. June 2017

# Unfitting treatment

- As market dynamics evolve, **new and carefully measured instruments will be needed**—to deter the abuses by super-platforms and harms from the Frenemy dynamics, to prevent computers from colluding, and to block the road to perfect behavioral discrimination\*
- To deliver on its mandate, American antitrust needs both to return to its broader goals and upgrade its capacities. It needs better tools to assess new forms of market power, to assess macroeconomic arguments, and to take seriously the link between industrial concentration and political influence. It needs to take advantage of all that economics and other social sciences have to offer. **It needs stronger remedies\*\***

\* Ariel Ezrachi, Maurice E. Stucke, VIRTUAL COMPETITION: THE PROMISE AND PERILS OF THE ALGORITHM-DRIVEN ECONOMY (2016)

\*\* Tim Wu, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018)

# Merger remedies: uncharted waters

What has remained largely unchanged throughout these decades, however, has been the relative dearth of detailed evaluations of the effects of mergers and of the effectiveness of merger policy. There are a number of reasons for this, < ... >, **but the result is clear: our understanding of mergers is based on fragmentary evidence, and we know even less about the effectiveness of policy.** This, in turn, has left competition policymakers and other practitioners with inadequate understanding about past mergers and enforcement actions and with inadequate guidance regarding new mergers and policy.

John Kwoka, *MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY* (2015)

# Case of Digital Agriculture

Agriculture is the least digitalized industry among all basic sectors of the global economy\*

Advances in digital technology are influencing farmers more than ever before\*\*

Digital disruption is coming to the agriculture business. Data—as well as the ability to process, analyze, and exchange it—is transforming the entire agriculture value chain\*\*\*

\* McKinsey Global Institute, 2016

\*\* Hugh Grant, ex-CEO of Monsanto, WSJ Global Food Forum, 2017

\*\*\* Boston Consulting Group, “Growing on Data. The New Go-to-Market in Agriculture”, 2018



# Competition analysis (1)

MONSANTO



Letters exchange between Werner Baumann, Bayer's Chairman and Hugh Grang, ex-CEO of Monsanto:

- a combination of Seeds & Traits, Crop Protection, Biologics, and Digital Farming would be a **winning formula**
- the value to be captured by a **globally integrated agriculture platform**

<https://media.bayer.com/baynews/baynews.nsf/id/Bayer-Offers-to-Acquire-Monsanto-to-Create-a-Global-Leader-in-Agriculture>

# Competition analysis (2)



The EU Commission:

- Monsanto's FieldView platform is **the leading digital agriculture platform worldwide**
- The advent of digital agriculture increases the potential anticompetitive effects in case if Bayer and Monsanto were to bundle or tie their sales of pesticide products and seeds

The US DoJ:

The digital agriculture **becomes the “glue”** that binds the products together and represents the core of any future integrated solution in agriculture input supply

# Competition analysis (3)



The EU Commission:

Definition of the relevant product market:

**Markets for digitally-enabled agronomic prescriptions**

Digital agriculture consists in the collection of data and information about farms **with the aim of providing tailored advice or aggregated data to farmers**

# Competition analysis (4)

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FAS Russia:

Technological transformations, including digitalization worldwide, have become key to understanding competitive dynamics in the agricultural sector

FAS has conducted the market analysis “for the factors of agricultural production relevant to the merger review including **emerging market for integrated agrotechnological solutions that has been recently formed in a process of ongoing systemic technological and business transformations within the agricultural sector**”.

# Competition analysis (5)

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FAS Russia has considered that the merging parties have unique capacity **including crucial big genetic data**; breakthrough technologies of genetic editing allowing the design of biotechnology seeds with predicted characteristics and at the same time avoidance of regulatory scrutiny aimed at the control of cultivation of genetically modified organisms; **as well as big data and algorithms for digital farming.**

All this may allow the united company unilaterally and without substantial deterrence from other players to increase its market power in a technologically changing environment. This may lead to a substantial elevation of the entry barriers for market player lacking some of those **unique technical and data capacities**

# Competition analysis (6)

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In the context of the accelerating pace of innovation in the agrotechnology sector, FAS Russia the most probable scenarios for market transformation including changes in their competitive structure and dynamics in the short and medium term perspectives

These changes are caused by an ongoing systemic shift in the agrotechnology markets that requires from companies **if they want to be globally competitive to provide integrated (packaged) solutions to farmers** which includes customized seeds, targeted crop protection solutions, **as well as digital solutions based on big data analysis** (with regards to soil, climate and other agronomic parameters) collected and processed within the digital farming platforms

# Remedies (1)



“The largest negotiated merger divestiture ever required by the United States” and “one of the largest divestitures in the history of EU merger control”

EU Commission:

We have approved Bayer's plans to take over Monsanto because the parties' **remedies, worth well over €6 billion, meet our competition concerns in full.** Our decision ensures that **there will be effective competition and innovation in** seeds, pesticides and **digital agriculture markets also after this merger**

US DoJ:

Although our friends at the EC were also working on their own review, **we worked closely with them to coordinate our remedies**

# Remedies (2)



US DoJ:

None of the competitive problems, including the areas of vertical concern, were attempted to be managed using **behavioral dictates**

The relief we obtained is purely structural. Bayer has agreed to divest itself of all of the businesses and assets needed **to fully address both our horizontal and our vertical concerns with the transaction**

After those transition commitments have passed, the market structure obtained in the settlement will remain, and **throughout it will remain flexible to innovation and evolution in the industry**



# Remedies (3)



EU Commission:

Bayer has committed to grant a license to its entire global digital agriculture product portfolio and pipeline products to ensure continued competition on this emerging market

Later, the Commission approved Bayer's request to replace its original commitment to grant a license with a commitment to divest its global digital agriculture assets and products (**except 6 key employees**).

The buyer (BASF) will grant to Bayer a temporary license back to these assets and products excluding North America

# Remedies (4)



FAS Russia applies access and behavioral remedies focusing on promotion of competition and reduction of entry barriers in the agrotechnology sector

The merging parties are requested to **provide non-discriminatory access for independent developers and service providers to their digital farming platforms to avoid potential foreclosure**