

Opinion **Mergers & Acquisitions****Business is becoming a battle of the giants**

The rise of Amazon, Facebook and Google means antitrust rules need to be rewritten

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DECEMBER 6, 2017

The biggest influence on this week's [\\$69bn deal](#) by CVS Health, the US pharmacy chain, to acquire the insurer [Aetna](#), went unmentioned. The threat of [Amazon](#) selling prescription drugs is shaking up the US healthcare industry.

The same goes for US entertainment, with [Walt Disney holding talks](#) with [21st Century Fox](#) to buy its film studio and cable entertainment channels. Lurking in the background are Amazon and [Netflix](#), which are revolutionising the way people watch films and television.

The common theme — one causing consolidation across a swath of industries — is the belief that to compete with internet giants, companies that are losing revenues to them must turn into giants themselves. The oligopoly of [Alphabet](#), Amazon, [Facebook](#), and Netflix (and Alibaba, Baidu and [Tencent](#) in China) is begetting others.

Australia's competition authority has launched an [investigation into the market power](#) of platforms such as Facebook and Google, which the media buying agency GroupM estimates will attract 84 per cent of [digital advertising](#) excluding China in 2017. But this is only one aspect of a broader antitrust challenge — the fact that corporate giants are emerging everywhere.

Competition enforcers need to find a way to address it coherently. They are struggling not only because the new economy is a revolutionary phenomenon but because it defies the framework of antitrust law. As [Richard Posner](#), the former US federal judge, once wrote: "This problem will be extremely difficult to solve; indeed, I cannot even glimpse the solution."

The framework rests on the idea that the task of antitrust is not to protect small businesses from big ones, but to maximise "consumer welfare" by reinforcing competition. [Robert Bork](#), the judge and legal theorist who pioneered this in 1978, dubbed it "the antitrust paradox" — large enterprises can be good for economic efficiency.

We are experiencing the result of Bork's paradox. Since Penguin and Random House merged in 2013 to gain the heft to negotiate with Amazon over ebook royalties, there has been a stream of mergers prompted by a need to bulk up against internet platforms.

CVS-Aetna is an example. The market values of US retail pharmacies such as CVS and [Rite Aid](#) have fallen, along with those of other chains, because of the growth of [ecommerce](#). Their margins will be squeezed if Amazon becomes a cheap retailer of prescription drugs.

The [merger](#) is an attempt to exploit physical presence by transforming the combination's more than 9,700 stores and clinics into what it winsomely calls "America's front door to quality healthcare" — centres at which Aetna members can get medical advice.

It is also an effort to strike a deal that will be passed by US antitrust authorities, which have blocked horizontal mergers of healthcare companies in the same section of the market. These

included Aetna's \$37bn [attempt](#) last year to merge with [Humana](#), another health insurer, and the proposed merger of their rivals Anthem and [Cigna](#), which was [barred](#) in April.

US antitrust law has been friendlier to vertical mergers among companies in different businesses, such as CVS-Aetna, which Bork did not regard as much of a problem. But the US government is becoming more wary: the Department of Justice is attempting to [block AT&T's](#) proposed \$85bn takeover of [Time Warner](#). An approval of CVS-Aetna is by no means assured.

This makes for a strangely ambivalent approach towards corporate giants. The US is doing little to curb the biggest internet platforms but is taking action against medium-sized companies that aspire to compete with Amazon, Netflix and others at a more equal scale. Bork's paradox is starting to bite.

The school founded by Bork tends to regard new economy oligopoly as a self-correcting problem. Profitable networks are not "particularly secure against competition" because "the more valuable a hoard of buried treasure is, the more rapidly it will be recovered", Judge Posner wrote. Companies such as Facebook will eventually be displaced, just as MySpace once was.

But as time goes by, Amazon grows stronger, and Facebook acquires competitors such as Instagram before they make enough money for antitrust authorities to care, such confidence looks misplaced. Even if it turns out to be true, it simply involves one internet giant being replaced by another — Facebook's advertising franchise being captured by a Facebook II.

The way in which competition law works in the US gives antitrust officials only two choices. They can leave internet oligopolies alone and hamper the efforts of old economy companies to grow bigger too, or can allow an unfettered battle of oligopolies across industries. Neither of these approaches really suits bodies that are supposed to be against business trusts.

Governments have another choice — to recognise that technology has hugely changed the terms of business and that antitrust enforcement must evolve in line with it. This implies a fundamental rethink of how the law promotes competition in the internet age. We cannot submit entirely to giants.

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