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Mandating Interoperability for Online and Mobile Messaging Services Through FTC Rulemaking

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Online and mobile messaging has become nearly ubiquitous in the United States and around the world.[1] In the United States, that market is dominated by a small number of firms such as Meta (Facebook Messenger, Instagram, and WhatsApp) and Apple (iMessage).[2] As in many digital markets, those firms' services benefit from strong network effects and a tendency for tipping toward market dominance for the largest firms. These effects increase the barriers to entry for new messaging service providers.[3] Further, firms like Meta have used their dominance in the messaging market as a wedge to acquire or maintain dominance in adjacent markets, such as personal social networking.[4] These market incentives create significant risks of anticompetitive behavior, including behavior that rises to the level of plausible Sherman Act violations.[5] Meanwhile, we have seen the dominant platforms' privacy and security protections degrade in response to the lack of competitive pressure on their dominance.[6]

Interoperability has the potential to dramatically increase competition in the messaging market, reduce the anticompetitive dominance of the current incumbents, and create incentives for greater privacy and data protection. Numerous scholars and policymakers have proposed interoperability as a promising remedy in digital markets characterized by strong network effects and economies of scale and scope.[7] For these reasons, the European Commission included in its recently approved Digital Markets Act (DMA) a provision mandating interoperability by the largest messaging services operating in the European Union.[8]

This report argues that the FTC can and should implement a similar requirement for the U.S. market under its existing rulemaking authority. We contend that a dominant messaging platform's refusal to interoperate with a competitor that requests interoperability should be understood as both an unfair method of competition and an unfair act or practice in violation of FTC Act § 5.[9] This report begins by laying out the recommended elements of a proposed FTC

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[1] *See, e.g.*, L. Ceci, *Mobile Messaging Usage Reach, by Country*, STATISTA (Sept. 16, 2021), https://www.statista.com/statistics/1263720/mobile-messaging-apps-usage-by-country/.

[2] L. Ceci, *Leading Mobile Messengers in the U.S 2019, By Users*, STATISTA (Jan. 18, 2022), https://www.statista.com/statistics/350461/mobile-messenger-app-usage-usa/; Statista Research Department, Penetration of Leading Messenger Platforms in the United States as of July 2020, STATISTA (Apr. 28, 2022), https://www.statista.com/statistics/294439/messenger-app-share-us-users/.

[3] *See infra* Part II.

[4] *See infra* Section II.B.v.

[5] *See infra* Section II.B.i.

[6] *See infra* Part III.

[7] *See, e.g.*, Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952 (2021); Nikolas Guggenberger, *Essential Platforms*, 24 STAN. TECH. L. REV. 237 (2021); MICHAEL KADES & FIONA M. SCOTT MORTON, WASH. CTR. ECON. GROWTH, INTEROPERABILITY AS A COMPETITION REMEDY FOR DIGITAL NETWORKS (Sept. 2020); FIONA M. SCOTT MORTON, ET. AL., YALE TOBIN CENTER FOR ECONOMIC POLICY, EQUITABLE INTEROPERABILITY: THE "SUPER TOOL" OF DIGITAL PLATFORM GOVERNANCE (July 13, 2021); U.S. HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS 142 (2020) [*hereinafter* U.S. HOUSE INVESTIGATION].

[8] Press Release, European Parliament, Deal on Digital Markets Act: EU Rules to Ensure Fair Competition and More Choice for Users (Mar. 24, 2022), https://www.europarl.europa.eu/news/en/press-room/20220315IPR25504/deal-on-digital-markets-act-ensuring-fair-competition-and-more-choice-for-users.

[9] 15 U.S.C. § 45(a).

messaging interoperability rule. The proposed rule relies upon, but also differs in important ways from, the DMA's recently approved messaging interoperability requirement. It includes considerations for maximizing the proposed rule's procompetitive benefits and privacy and data security protections. Next, this report lays out the legal justification for this rule under the FTC's "unfair methods of competition" authority. We also provide legal justification for this rule under the FTC's "unfair and deceptive acts and practices" authority.

While the FTC will have many considerations to weigh in deciding the exact details of this proposed rule and the legal authorities under which to proceed, the agency should begin the rulemaking process as soon as possible in order to start making those assessments. The benefits to competition and consumers from this rule are clear; the legal authority is strong; and the compliance costs for the covered firms are minimal, since all, or almost all, of the covered firms will already be subject to a similar requirement in Europe. In short, messaging interoperability represents the ideal starting point for FTC pro-competition, pro-privacy rulemaking in digital markets.

I. Elements of the Proposed FTC Rule: A Presumptive Ban on Dominant Messaging Platforms' Refusal to Interoperate

A. Coverage

The proposed FTC messaging interoperability rule should follow the lead of the European Union's Digital Markets Act (DMA) in covering only those firms that surpass a set threshold for dominance. It is the largest and most popular services that benefit most from network effects, which raise significant barriers to entry for competing messaging platforms. Moreover, it may be costly or undesirable for smaller firms (and platforms) to comply with an interoperability requirement.

Following that logic, the DMA's messaging interoperability requirement, as recently approved, will apply to firms designated as "gatekeeper" firms that provide messaging services (number-independent interpersonal communication services). The DMA designates platforms as gatekeepers if they satisfy the following conditions: (1) their annual EU-revenues exceed €7.5 billion in the past financial year, (2) their market capitalization exceeded €75 billion at any point in the previous three financial years, and (3) they have at least 45 million monthly users in the EU.[10]

The EU's designation focuses on the size of the overall platform, including all services it offers. This is a function of the much broader reach of the DMA, which covers a wide range of internet services. While this approach captures messaging apps tied to the largest platforms, it is not well-tailored to policing messaging and would exclude standalone messaging apps. Focusing on revenues and market cap for messaging services alone—treating them as if they were standalone businesses—is also infeasible. Many major internet platforms provide messaging services for free, allowing even very popular and widely-used services to fall below a revenue threshold. Moreover,

[10] Press Release, *supra* note 8.

for these businesses, it is difficult to separate out the value of the messaging service from the value of the overall business for the purpose of determining market cap.

Thus, the FTC's rule should focus specifically on the number of US monthly active users on a messaging service, rather than market capitalization or revenues. Network effects for messaging services are largely derived from the number of users of a platform. Thus, user metrics alone provide sufficient indication of the power of a given platform. For example, a rule could designate any messaging platform as a "dominant" platform if that platform served at least 50 million users in the United States (independent of other services that the firm which operates the messaging service provides) in the past year. Most popular messaging services used by consumers in the US would be covered by this threshold, including WhatsApp (68.1 million US users in 2019),[11] Snapchat (79.7 million in 2018),[12] and Facebook Messenger (180 million in 2022).[13] Apple's native iMessage would likely also be covered by this threshold, though the number of US users is not publicly available.

As part of its rulemaking process, the FTC should conduct a market analysis of the market for messaging services to identify the right monthly-user threshold for designating messaging services as dominant platforms. The FTC should aim to capture the platforms that have "tipped," or threaten to tip, toward a high market share due to strong network effects. Crucially, as discussed below, the messaging market tends toward a "bimodal" distribution—with a small number of services capturing most of the market share and the rest with much smaller market shares.[14] Thus, the FTC's study should be able to readily uncover a threshold at which firms have achieved, or threaten to achieve, dominance.

Firms with messaging services that are presumptively designated as dominant based on the specified US user threshold may petition the FTC to rebut the presumption and be exempted from their dominant status on the basis of other firm, service, or market characteristics. The FTC should grant this petition if and only if the firm can sufficiently demonstrate that despite meeting the user threshold, they do not enjoy a significant dominant position nor significant market power in the market for messaging services.

B. Basic Mandate to Not Refuse Requests to Interoperate

The rule should stipulate that dominant messaging platforms may not refuse a formal request from any platform to interoperate their existing messaging-related services, nor may the firm with the dominant messaging platform refuse a formal request from any platform to interoperate with a messaging service in development upon completion of the service. This

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[11] L. Ceci, *U.S. Number of Whatsapp Users 2019-2023*, STATISTA (July 6, 2021)) https://www.statista.com/statistics/558290/number-of-whatsapp-users-usa/.

[12] Statista Research Department, *Snapchat Usage Penetration in the United States 2020, By Age Group*, STATISTA (Apr. 4, 2020), https://www.statista.com/statistics/814300/snapchat-users-in-the-united-states-by-age/.

[13] Statista Research Department, *Share of Facebook Messenger Users in the United States as of March 2022, By Age Group*, STATISTA (Apr. 28, 2022), https://www.statista.com/statistics/951142/facebook-messenger-user-share-in-usa-age/.

[14] U.S. HOUSE INVESTIGATION, *supra* note 7, at 142.

interoperability functionality must also be provided free-of-charge to both any individual end users as well as the platform requesting to interoperate. By making this free-of-charge to the requesting service, this rule prevents the dominant service from utilizing interoperability as a means of creating additional entry costs for competing services.

The mandate should also specify deadlines by which the dominant platform must make interoperation functional after receiving a request by a competing messaging service/platform. Given that certain functionalities may take longer to build out, the regime can establish timelines for different sets of functionalities. One possible structure would lay out certain deadlines post-enactment, at which point the rule would become binding for those specified functionalities. Once the rule becomes binding for a functionality, a dominant platform providing messaging services must make those functionalities interoperable with a messaging platform/service that requests to interoperate no later than three months following the request. Below, we lay out a sample regime:

Sample Interoperability Mandate

Within three months of the enactment of the rule, the rule becomes binding for the following messaging functions. At this point, dominant platforms must make the following messaging functionalities interoperable with any requesting firm within three months of a request, to the extent the platform offers such services to users of its own app:

(1) End-to-end text messaging between two individual end users; and
(2) Sharing of images, voice messages, videos, emoticons (emojis), message reactions, links to websites, and other attached files in end-to-end communication between two individual end users.

Within two years of the enactment of the rule, the rule becomes binding for the following additional messaging functions. At this point, dominant platform must make the following messaging functionalities interoperable with any requesting firm within three months of the request, to the extent the platform offers such services to users of its own app:

(1) End-to-end text messaging between groups of individual end users and an individual end user;
(2) Sharing of images, voice messages, videos, emoticons (emojis), message reactions, links to websites, and other attached files in end-to-end communication between groups of individual end users and an individual end user; and
(3) Disappearing messages between two individual end users.

Within four years of the enactment of the rule, the rule becomes binding for the following additional messaging functions. At this point, dominant platform must make the following messaging functionalities interoperable for any requesting firm within three months of the request, to the extent the platform offers such services to users of its own app:

(1) End-to-end voice calls between two individual end users;
(2) End-to-end video calls between two individual end users;
(3) End-to-end voice calls between a group chat and an individual end user;
(4) End-to-end video calls between a group chat and an individual end user; and
(5) Disappearing messages between a group chat and an individual end user.

If a messaging service becomes designated as a dominant platform after this rule becomes effective, the rule becomes binding for the firm for each set of functionalities listed above by whichever is later of either six months from the date of its designation as a dominant platform or the original deadlines set (3 months, 2 years, and 4 years following the enactment of the rule, respectively for each set of functionalities). Once the rule becomes binding for this platform for a set of messaging functionalities, it must make those messaging functionalities interoperable for any requesting messaging service within three months of the request.

The proposed rule above differs slightly from that of the DMA by prohibiting dominant messaging services from refusing to interoperate with other messaging services/platforms that request to do so. Under the DMA, dominant firms (called "gatekeepers") must provide a public API or similar technical documentation for interoperation to satisfy their obligations. This rule acknowledges that an API may not be the preferred mechanism by which a requesting firm wishes to interoperate, given that "plugging into" an API of a service which uses a different protocol may require either the requesting firm to change the protocol of its own service (imposing a high cost for interoperation) or for the requesting firm to use a bridge, which may make end-to-end encryption unfeasible. Therefore, this rule leaves it to the requesting firm and the dominant firm to work out a mutually agreed-upon mechanism of interoperation, including but not limited to the use of APIs, bridges, protocols, or shared/open standards. Section F elaborates further on when a dominant firm may refuse requests to interoperate by a specific mechanism, should there be alternative, equally effective mechanisms to interoperate.

C. Additional Conditions of Interoperability

Additionally, unlike the DMA, this proposed rule places limitations on how interoperability must function between the dominant firm's service and the interoperating service. This is done to prevent anticompetitive practices by the dominant firm that may hinder the effectiveness of interoperability or dissuade users from using interoperating services when users would otherwise utilize the interoperating service in the absence of such practices.

First, an effective rule should put limits on the ability of the dominant firm to self-preference its service or use other measures to entice its users to not use the interoperating service.

Second, the dominant firm may not lower the quality of messages sent from their service to the interoperating service in any way, with the exception of removing end-to-end encryption *only* when end-to-end encryption is not technically feasible while interoperating (and after reasonable attempts have been made at facilitating end-to-end encryption). This caveat is included in the case that services which use different protocols may interconnect with a bridge that would not allow for end-to-end encryption.

The proposed rule also implements a minimum privacy standard in order to ensure that requirements to interoperate do not pose serious security threats to the data and privacy of the dominant messaging services' users. This differs from the DMA which requires that the dominant firm implement interoperating functionality "to the extent that the level of security, including end-to-end encryption where applicable, that the dominant firm provides to its own end users is preserved across the interoperable services." The rationale for using a minimum standard of privacy is to eliminate the incentive for dominant firms with messaging platforms to *overinvest* in unreasonably high levels of security and privacy solely to exclude competing messaging service platforms from interoperating.

Assuming that the requesting firm meets a minimum standard of privacy and data security (as defined below in subsection D), the dominant firm should make their messaging services interoperable within the defined time frame. In the case that the firm requesting to interoperate has a privacy/data security standard below that of the dominant firm (but still above the required minimum standard), the dominant firm may notify its end user(s) of this privacy difference when the end user attempts to send messages from the dominant firm's service to the interoperating service. Only in the case where the interoperating service has a lower standard of privacy or data security may the dominant firm be permitted to distinguish the placement or design of the other service in the user experience; this change in placement or design of the user experience may only be done in a way that corresponds to or indicates the reduced privacy/data security protection. Note that the requesting firm is also free to notify users when the dominant firm has lower levels of privacy.

Any interconnection or bridge service— including third-party services used to interoperate the dominant messaging service and the interoperating service—should also meet the minimum privacy standards and data security standards outlined in subsection D. If at any point during the transmission of data from the dominant firm's service to the interoperating service, there is a reduction in privacy or data security— including the loss of end-to-end encryption—relative to the standards of either of the services, the rule should mandate that the user be notified in a conspicuous way. If the dominant firm's service employs end-to-end encryption when sending messages between users within its platform, loss of end-to-end encryption is permitted for interoperating services, so long as the end user is notified in a conspicuous way.

Creating a minimum standard of privacy and data security ensures that dominant firms are not required to interoperate with a platform that places the data and privacy of its users at severe risk. At the same time, the use of a minimum standard allows for privacy differentials between firms without it becoming adopted by the dominant firm as a justification for non-interoperation.

D. Exemptions from the Mandate on the Basis of Minimum Privacy and Data Security Standards

Dominant firms should be prohibited from interoperating with a messaging service that fails to offer reasonable privacy and data security protections. The FTC could establish basic guidelines for what constitutes reasonable privacy and data security protections (in the form of nonbinding guidance) through notice and comment proceedings that solicit input from privacy and security experts and industry representatives. Future adjudications will provide greater clarity and supplement these guidelines, also enabling the FTC to respond to technological changes that impact privacy and security.

On the privacy side, the FTC can build on and update its existing privacy framework, which focuses on privacy by design, informed choice, and transparency.[15] They should do so with reference to data privacy laws in other regimes—such as the EU's General Data Protection Regulation and the California Consumer Privacy Act—both to minimize the burden of compliance and to learn from these examples. On the data security side, the remedies in the FTC's data breach enforcement actions may provide a blueprint for a minimum-security regime. These measures should include data collection, data handling, data storage, and data processing practices. There are a number of private and not-for-profit organizations in both the privacy and security space that can provide input for these guidelines. The FTC may also recognize private security licensing as evidence of compliance with minimum standards.

Failure to meet these standards would be sufficient cause for a dominant firm to deny interoperability with a messaging service on the basis of privacy or security concerns. These guidelines and standards should not be too complex so as to create additional entry barriers for new competitors.

E. Storage, Handling, and Usage of User Data Transmitted Across Interoperating Services

The firm with the dominant messaging service should also only be allowed to exchange personal data with the interoperating service that is strictly necessary to enable effective interoperability. Further, the firm that owns the user should be the only one that is allowed to advertise to or monetize that user. Services should be prohibited from using the personal data from other services' users for any other purpose besides delivering messages. Such prohibited uses should include advertising, training algorithms, learning anything about the user, or earning anything off the user's data.

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[15] U.S. FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESS AND POLICYMAKERS (Mar. 2012), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.

F. Requirement to Make Commercially Reasonable Efforts to Interoperate

It may be prudent to include some possible exemptions for the dominant firm in the case that the requesting firm makes unreasonable (or technically impossible) demands. The dominant firm should be required to make any and all commercially reasonable efforts to accommodate the needs of the requesting firm to make the interoperability work, including translating the necessary messaging data from users on the dominant firm's service into a form that can be used by the firm requesting to interoperate. The FTC could clarify in guidance what it considers to be commercially reasonable efforts.

Dominant firms could also justify a refusal to interoperate with a particular requesting firm based on substantial business justifications. These justifications can include requirements from the firm requesting to interoperate that are not commercially reasonable, provided the dominant firm provides the requesting firm with alternative mechanisms to interoperate that are equally as effective and viable and of equal perceived quality to the end user. As discussed further in the following section, the FTC should be wary of these justifications and should require that the dominant firm meet a heavy burden before justifying a refusal to interoperate with a given firm.[16]

G. Penalties for Non-Compliance

In order to ensure compliance, the FTC should utilize the full range of its existing tools under statute. Ideally, this would include both injunctive relief and civil penalties. While injunctive relief may eventually ensure compliance, the difficulty of catching violations and the cost and time necessary to adjudicate disputes require some civil penalty for non-compliance. Because the agency's ability to secure civil penalties depends on the statutory basis for a rule, this should be a major consideration for the Commission in evaluating the statutory authority it has available.

For a rule promulgated under its unfair methods of competition (UMC) authority, remedies are limited to injunctive relief, though the agency may seek civil penalties for those who violate an injunctive order.[17] However, for violations of its unfair or deceptive acts or practices (UDAP) rules, the agency can assess a maximum penalty of $46,517 per violation,[18] plus seek consumer redress.[19] For the purposes of calculating a penalty, we propose that the number of

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[16] For example, the FTC may have to consider whether the inability to accommodate non-English languages or alphabets would qualify as a substantial business justification, or whether dominant platforms would have to figure out a way to interoperate with other services that use many different languages and alphabets. Though this may be a case-by-case determination, the FTC should generally require that the services figure out a way to interoperate in many, if not all, major languages. The dominant messaging services already have significant existing language compatibility and translation functionalities and should be required to figure out how to apply those to their interconnections with other services—particularly given the importance of messaging services among many non-English speaking and immigrant populations. *See, e.g.*, Farhad Manjoo, *For Many Immigrants, A Common Language: WhatsApp*, N.Y. TIMES (Dec. 21, 2016), https://www.nytimes.com/2016/12/21/technology/for-millions-of-immigrants-a-common-language-whatsapp.html. For more discussion of this question of substantial business justifications, see *infra* Section III.C.
[17] *See* 15 U.S.C. § 45(l).
[18] Commission Rule 1.98(d), 16 C.F.R. Sec. 1.98(d).
[19] 15 U.S.C. § 57b.

violations should be defined as the number of consumers on the non-offending platform that wish to message a user on the offending platform. Basing a rule in whole or in part on UDAP thus gives regulators the ability to make noncompliance more painful.

I. Unfair Methods of Competition Rulemaking Authority

The FTC could implement this rule by relying on both its UMC and UDAP authority. The FTC's UMC authority grants the FTC wide authority to prevent harms to consumers and competition in their incipiency. The case law and legislative history suggest that this authority includes (a) violations of the Sherman or Clayton Acts; (b) actions that do not yet violate those acts but threaten to bring about such a violation in the future; (c) violations of the spirit of the antitrust laws; (d) violations of other accepted business practices and mores; and (e) other actions deemed unfair by the Agency to consumers or competition. Although some scholars and policymakers disagree that the FTC Act authorizes substantive rulemaking under the UMC prohibition, the case law, the plain meaning of the statute, and the FTC's intended purpose as an expert antitrust regulator all point toward substantive UMC rulemaking authority.

Dominant messaging platforms' refusals to allow interoperability may fall within category (a) and likely fall within categories (b)-(e) under a reasonable interpretation of the FTC's UMC authority. As a result, the FTC would likely be within its authority to promulgate a carefully-crafted rule for messaging interoperability. The proposed FTC rule should be limited to dominant messaging platforms, based on an annual revenue and user base set by the FTC. It should also allow for platforms to be exempt from the rule if they offer credible business justifications for their refusal to offer messaging interoperability to a particular competitor. A court should defer to the FTC's reasonable interpretation of its enabling statute in reviewing this rule, as the rule lies well within the FTC's traditional uses of its substantive UMC authority and does not represent a question of major economic or political significance.

A. The FTC Has the Authority to Prohibit Harms to Competition and Consumers, Including but Not Limited to Current or Incipient Violations of the Sherman Act.

The FTC Act grants the FTC broad authority to prohibit business practices that harm competition, consumers, and the public welfare.[20] This includes, but is not limited to, violations of other antitrust laws like the Sherman Act or Clayton Act.[21] In addition to practices that currently

[20] U.S. Federal Trade Commission, Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf.
[21] *Id.*; Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 609 (1953) (noting that Section 5 "minimally . . . registers violations of the Clayton and Sherman Acts").

violate another antitrust law, courts and commentators have recognized four other categories of practices that the FTC Act's UMC authority can be used to prohibit.[22]

First, the FTC Act also empowers the agency to "stop in their incipiency acts and practices which, when full blown, would violate [the Sherman and Clayton Acts]."[23] As the Supreme Court put it in another case, "Congress enacted § 5 of the Federal Trade Commission Act to combat in their incipiency practices that exhibit a strong potential for stifling competition."[24] It was, in other words, intended to be a "prophylactic" prohibition.[25]

Second, the FTC Act extends to violations of the underlying spirit or policy of the antitrust laws. According to the Supreme Court in *FTC v. Brown Shoe*, the FTC's "broad power . . . is particularly well established with regard to trade practices which conflict with basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws."[26] The Court has also referred to such practices as those that "bear the characteristics of recognized antitrust violations," even if they do not fall squarely into the category of an antitrust violation.[27] For example, the FTC has previously found Section 5 to reach invitations to collude, which may not be illegal under Sherman Act § 1.[28]

Third, the legislative history and Supreme Court interpretations of the FTC Act suggest that the FTC's authority extends also to a broader set of practices that violate accepted norms of business practice, "good morals," or other "public policy."[29] Although the precise boundaries of those accepted norms, morals, or policies is somewhat unclear, case law suggests that it prohibits two types of violations: violations of "generally recognized business ethics," and "violation[s] of general substantive statutes in cases where the violation has conferred a cost advantage."[30]

Finally, the Supreme Court has stated that the FTC's UMC authority encompasses an even wider variety of practices that violate "public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[31] As such, according to the Court, the FTC Act authorizes the agency to act "like a court of equity" in defining "the congressionally-mandated

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[22] These categories draw from Neil Averitt's influential analysis of Section 5's legislative history, purpose, and case law. *See* Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227 (1980).
[23] FTC v. Motion Picture Advertising Service Co., 344 U.S. 392, 394-95 (1953).
[24] FTC v. Texaco Inc., 393 U.S. 223, 225 (1968).
[25] Fashion Originators Guild v. FTC, 312 U.S. 457, 466 (1941).
[26] 384 U.S. 316, 321 (1966).
[27] Atlantic Refining Co. v. FTC, 381 U.S. 357, 370 (1965).
[28] *See, e.g.*, In re Drug Testing Compl. Group, LLC., 151-0048, 2015 WL 9254822, *8 (F.T.C. Dec. 14, 2015) ("The invitation, if accepted, would be a per se violation of the Sherman Act. The Commission has long held that invitations to collude violate Section 5 of the FTC Act[.]").
[29] FTC v. Gratz, 253 U.S. 421, 427 (1920).
[30] Averitt, *supra* note 22, at 273.
[31] FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972); *see also* Ind. Fed. of Dentists, 476 U.S. 447, 454 (1986) ("The standard of "unfairness" under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons[.]") (internal citations omitted).

standard of fairness."[32] Based on the Act's legislative history, one scholar concludes that this congressionally-mandated standard should be understood to allow the FTC to prohibit conduct "only if it has a significant adverse effect on competition, and only if those effects are not outweighed by other consumer benefits or by *bona fide* business justifications."[33]

The FTC has the authority to prohibit the foregoing categories of practices via either adjudication or rulemaking. The FTC Act authorizes the agency to "make rules and regulations for the purpose of carrying out the [Act's] provisions."[34] In 1973, the D.C. Circuit held that this provision authorized the FTC to promulgate substantive rules, not just procedural rules.[35] Although some critics have argued that the D.C. Circuit decided incorrectly, or that the FTC's substantive rulemaking authority is more limited,[36] the statute's plain meaning and the purpose of the FTC in the antitrust enforcement regime both point toward broad substantive rulemaking authority.[37]

B. Dominant Messaging Platforms' Refusal to Interoperate Reasonably Constitutes an Unfair Method of Competition

A dominant messaging platform's refusal to interoperate with an actual or potential competitor represents precisely the kind of anticompetitive behavior that FTC Act § 5 should be understood to target under any of the case law's and legislative history's definitions of the § 5 power. Such conduct may, in some cases, represent an outright violation of Sherman Act § 2. Even if not, messaging platforms' refusals to interoperate threaten to blossom into full-on antitrust violations, violate the spirit of the antitrust laws, and cause other harms to competition and to accepted norms of industry practice.

1. Dominant Messaging Platforms' Refusals to Interoperate May Constitute Outright Sherman Act § 2 Violations

A dominant messaging platform's refusal to interoperate may, under limited circumstances, rise to the level of a *bona fide* violation of the antitrust laws—most likely under Sherman Act § 2. Proving a Section 2 violation requires showing two elements: "(1) the

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32 *Sperry & Hutchinson Co.*, 405 U.S. at 244; *see also* FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304, 314 (1934) ("[N]either the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories.").
33 Averitt, *supra* note 22, at 275.
34 15 U.S.C. § 46(g).
35 National Petroleum Refiners Assoc. v. FTC, 482 F.2d 672, 698 (1973) ("[T]he Federal Trade Commission is authorized to promulgate rules defining the meaning of the statutory standards of the illegality the Commission is empowered to prevent.").
36 *See, e.g.*, MAUREEN K. OHLHAUSEN & JAMES RILL, U.S. CHAMBER OF COMMERCE, PUSHING THE LIMITS? A PRIMER ON FTC COMPETITION RULEMAKING 10-14 (Aug. 12, 2021), https://www.uschamber.com/assets/archived/images/ftc_rulemaking_white_paper_aug12.pdf.
37 *See* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 375-79 (2020); Justin (Gus) Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 233 (2014); Sandeep Vaheesan, *Resurrecting 'A Comprehensive Charter of Economic Liberty': The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 646 (2017).

possession of monopoly power in the relevant market"; and "(2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[38] Without a doubt, satisfying the second prong with respect to refusals to interoperate is difficult under current doctrine.[39] Still, a dominant messaging platform's decision to refuse to interoperate could, in some cases, satisfy that prong. The FTC can and should use its rulemaking power to identify and prevent this monopolization problem upfront, rather than relying on courts' increasingly constrained, institutionally cautious doctrine to condemn it many years later, if it does at all.

First, the largest messaging platforms are likely to possess monopoly power, given the structure of the online and mobile messaging market. Monopoly power can be shown through either (a) direct proof of a firm's ability to "profitably raise prices substantially above a competitive level," or (b) proof about market structure, namely a firm's "dominant share of a relevant market that is protected by entry barriers."[40] While further FTC market studies may yield direct proof of monopoly power in the messaging market, existing public information about the market structure already demonstrates that monopoly power is likely. Multiple studies have found messaging to be a market characterized by "[n]etwork effects and tipping points" that are "particularly strong."[41] As a result, messaging apps' market share in most countries tends to be "bimodal," with one service reaching 90% or more of the market and the rest at or below 10%.[42] In the United States mobile messaging market, two applications controlled by the same firm reached approximately 71% of mobile users in 2019.[43] Further, messaging platforms' strong network effects make switching to a different messaging provider costly for users.[44] These high switching costs serve as a barrier to entry for new competitor messaging services.[45]

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[38] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966)).
[39] *See* Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004).
[40] *Id.* at 51 (internal citations omitted).
[41] U.S. HOUSE INVESTIGATION, *supra* note 7, at 142; *see also* EUROPEAN COMMISSION, COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT: PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON CONTESTABLE AND FAIR MARKETS IN THE DIGITAL SECTOR (DIGITAL MARKETS ACT) 43 (2020) (describing messaging services as "characteri[zed] by strong network effects").
[42] U.S. HOUSE INVESTIGATION, *supra* note 7, at 142.
[43] L. Ceci, *supra* note 2 (noting Facebook Messenger as the most used mobile messaging app among U.S. adults and WhatsApp as the third most used).
[44] U.S. HOUSE INVESTIGATION, *supra* note 7, at 143; KADES & SCOTT MORTON *supra* note 7, at 7-9.
[45] KADES & SCOTT MORTON *supra* note 7, at 9; FTC v. Facebook, CV 20-3590 (JEB), 2022 WL 103308, *9 (D.D.C. Jan. 11, 2022) (explaining that "there can be little doubt that network effects and switching costs are commonly recognized types of barriers to entry" and citing *Eastman Kodak Co. v. Image Tech Servs., Inc.*, 504 U.S. 451, 476–77 (1992), and *Microsoft*, 253 F.3d. at 55–56); U.K. DIGITAL COMPETITION EXPERT PANEL, UNLOCKING DIGITAL COMPETITION (Mar. 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf [*hereinafter* UNLOCKING DIGITAL COMPETITION] ("Switching and multi-homing by users of platforms can be the antidote to strong network effects, but in many digital markets a combination of the above restrictions [including technical barriers] means that these competitive effects are limited.").

It is true that many messaging users use more than one messaging app, or "multi-home." However, multi-homing does not preclude market power and high barriers to entry. For one thing, multi-homing in messaging is not universal: one survey showed that 34% of U.S. adults used only one app per month, and most used a small number.[46] Moreover, the fact that consumers might have multiple messaging apps does not mean they use these apps in the same way or to the same degree. It is likely that messaging exhibits similar dynamics as social media, where competition authorities have found that users overwhelmingly use putatively competing services as complements to the dominant platform(s), rather than as substitutes.[47] The dominant platform remains "sticky" and retains a high market share, even if users also use a small number of secondary services for specific purposes.[48] In short, the messaging market is characterized by large market shares, a tendency toward tipping in favor of the dominant player, and substantial barriers to entry that together make monopoly power in this market likely.

Dominant messaging platforms' refusal to interoperate may, in some cases, also constitute anticompetitive conduct that satisfies the second prong of the Sherman Act § 2 test. However, the case law has rendered this an uphill climb. To be considered anticompetitive conduct, the behavior must have an anticompetitive effect, meaning it harms "the competitive *process* and thereby harm[s] consumers."[49] Further, those effects must not be outweighed by procompetitive benefits.[50] By raising entry barriers and foreclosing new and potentially innovative entrants into the messaging market, dominant messaging platforms' refusals to interoperate certainly harm the competitive process and consumers. And indeed, although federal enforcers have not brought actions against messaging platforms on this basis to date, enforcers have alleged § 2 violations by other dominant technology providers when the alleged anticompetitive conduct included refusals to interoperate with actual or potential competitors. For example, the FTC's case against Meta for monopolization in the social media market alleged that, among its anticompetitive conduct, Meta blocked other social media and messaging apps' ability to interconnect with Facebook's APIs when those other apps were either existing competitors of or "threatened to develop into competitive threats to" Meta's Messenger and Facebook Blue services.[51] Examples of excluded competitors include the nascent messaging competitor MessageMe and the video sharing app Vine. Meta also conditioned access to important interconnections on "developers' agreement to terms that prohibited competition with [Meta]."[52] Similarly, courts found Microsoft to have violated § 2 by,

[46] *Id.*; U.S. HOUSE INVESTIGATION, *supra* note 7, at 143.

[47] *See, e.g.*, UK COMPETITION & MARKETS AUTHORITY, ONLINE PLATFORMS & DIGITAL ADVERTISING: MARKET STUDY FINAL REPORT 122-23 (July 1, 2020), https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf.

[48] Additional research that looks at market share based on actual usage—e.g., percent of total messages or messaging time spent on a given app—may provide helpful empirical support.

[49] *Microsoft*, 253 F.3d at 59.

[50] *Id.*

[51] First Amended Complaint at 51-52 ¶ 157, FTC v. Facebook, CV 20-3590 (JEB), 2022 WL 103308 (D.D.C. Jan. 11, 2022) [*hereinafter* FTC Facebook Complaint].

[52] *Id.* 46 ¶ 144-45. In its decision on Meta's motion to dismiss in this case, the D.C. District Court left open the possibility that at least some of Meta's interoperability refusals and conditions constituted anticompetitive conduct in violation of § 2 based on the refusal to deal doctrine of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). However, the court did not decide this question because the violations occurred several years before

in part, refusing to allow its Windows operating system to interoperate with Netscape's Navigator and Sun's Java in order to prevent those programs from serving as "middleware" that could one day compete with Windows.[53]

Indeed, refusals to interoperate and equivalent strategies are time-tested examples of anticompetitive conduct by monopolists beyond just the digital markets. Since the Court's 1912 decision in *U.S. v. Terminal Railroad*, antitrust law has prohibited owners of essential facilities or networks from denying use of the facility or network by competitors.[54] This use is a form of interconnection or interoperability.[55] For example, the Seventh Circuit found AT&T to have violated § 2 by refusing to allow competitor MCI to interconnect with local distribution facilities of AT&T's Bell operating companies. As the Court has stated, "It is true that as a general matter a firm can refuse to deal with its competitors. But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal."[56] In numerous instances, courts have found that refusals by a dominant platform or network provider to interoperate with competitors lack "legitimate competitive reasons" and instead constitute anticompetitive behavior.

To be sure, the Supreme Court has, over time, meaningfully narrowed plaintiffs' ability to succeed on those kinds of refusal-to-deal claims.[57] The Court's suspicion toward imposing duties to deal rests on four main concerns, as articulated in *Trinko*. First, the Court argued that compelling firms to "share the source of their advantage" (for example, their network of users and associated data) "may lessen the incentive of the monopolist, the rival, or both to invest in those economically beneficial facilities."[58] In other words, the firm's anticompetitive conduct is outweighed by procompetitive benefits of incentives for investment and innovation. Second, the Court claimed that imposing a duty to deal positions courts as "central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited."[59] Third, the Court worried that requiring dealing between two competitors could facilitate collusion, the "supreme evil of antitrust."[60] Finally, the Court cited "the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm," reiterating its institutional competence concerns.[61] As such, the Court has limited cognizable refusal to deal claims to something like the facts of *Aspen Skiing*, in which the dominant firm "unilateral[ly] terminat[es]"

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the FTC brought the suit and were thus not subject to an injunction under FTC Act § 13(b). *See* FTC v. Facebook, CV 20-3590 (JEB), 2022 WL 103308, *16 (D.D.C. Jan. 11, 2022). Thus, while the court did not allow the refusal-to-deal claim to proceed, it left open the possibility that a more timely challenge on otherwise similar facts could meet the Supreme Court's high bar for an illegal refusal to deal.

[53] *See* Microsoft, 253 F.3d at 74 (D.C. Cir. 2001); *see also* Philip J. Weiser, *Regulating Interoperability: Lessons from AT&T, Microsoft, and Beyond*, 76 ANTITRUST L.J. 271, 279-80 (2009).

[54] *See* U.S. v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383 (1912).

[55] *See* MCI Communications Corp. v. AT&T, 708 F.2d 1081 (7th Cir. 1983), *cert. denied* 104 S.Ct. 234 (1983); Herbert Hovenkamp, *Antitrust Interoperability Remedies*, COLO. L. REV. F. (forthcoming 2022).

[56] Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 483 n.32 (1992).

[57] *See Trinko*, 540 U.S. at 408.

[58] *Id.* at 407-08.

[59] *Id.* at 408.

[60] *Id.*

[61] *Id.*

a "voluntary (and thus presumably profitable) course of dealing."[62] That unprofitable termination of a previous voluntary relationship suggests, to the Court, "willingness to forsake a short-term profit to achieve an anticompetitive end," and thus serves as a clear, outward signal that the refusal's anticompetitive harms outweigh any procompetitive benefits. It serves, in other words, as a more *administrable* source of liability that comports with the Court's own asserted institutional limitations and error-cost analysis.

Even within that narrow test, dominant messaging platforms' refusals to operate may constitute unlawful refusals to deal. Indeed, the facts in the FTC's suit against Meta suggest an *Aspen*-like voluntary course of dealing followed by unprofitable termination.[63] Moreover, the recurrence of anticompetitive refusals to interoperate in cases involving other digital markets with similar market structures and incentives suggests a high risk that § 2 violations could occur in messaging, too.[64] The FTC should not wait for that risk to materialize. Instead, the FTC should presumptively ban refusals to interoperate by dominant messaging providers.

Further, it is worth noting that the Court's institutional competence concerns and error-cost framework, as laid out in *Trinko*, would appear to carry less weight in the context of an FTC rule. In promulgating this proposed rule, the FTC could make a determination that dominant messaging platforms' refusals to interoperate have anticompetitive effects that outweigh any procompetitive benefits, even within the kinds of costs and benefits that are cognizable under § 2 doctrine. The FTC would be basing that conclusion on its own study of the market, informed by internal subject matter expertise and external input from the notice-and-comment process. And unlike a generalist court, the FTC would be imposing (and, if a dispute arose, adjudicating) pricing and other terms of the interconnection (e.g., commercially reasonable efforts, privacy protections, etc.) using its same policymaking and adjudicatory expertise. Thus, removed of the Court's administrability and competency limitations, liability for messaging refusals to interoperate under an FTC rule is consistent with the actual legal and economic theory of § 2 violations.

2. Dominant Messaging Platforms' Refusals to Interoperate Represent Incipient Violations of the Antitrust Laws

The risk of *bona fide* § 2 violations by dominant messaging providers suggests that lack of messaging interoperability represents, at a minimum, an incipient violation of the antitrust laws. The Supreme Court has made clear that FTC Act § 5 authorizes the FTC to "combat in their incipiency practices that exhibit a strong potential for stifling competition."[65] Refusals to interoperate in messaging constitute such a practice. The proposed FTC rule thus falls squarely within the FTC's § 5 authority by acting as a "prophylactic" against potential future antitrust violations.[66]

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[62] *Id.*
[63] *See supra* note 51.
[64] For further discussion of the importance of interoperability in digital markets characterized by strong network effects and economies of scale and scope, see, for example, the sources cited in note 7 above.
[65] FTC v. Texaco Inc., 393 U.S. 223, 225 (1968).
[66] *See* Fashion Originators Guild v. FTC, 312 U.S. 457, 466 (1941).

This is demonstrated most clearly by the fact that courts and the enforcement agencies have routinely imposed interoperability requirements to remedy antitrust violations and prevent future ones. As both the enforcement agencies and the Supreme Court have explained, antitrust remedies seek not just to terminate the anticompetitive conduct but also to "prevent[] its recurrence" and "re-establish[] the opportunity for competition in the affected market."[67] In other words, an ideal antitrust remedy is, in part, prophylactic. Thus, for example, the agencies imposed what was effectively an interoperability remedy on Microsoft, requiring it to allow rival internet browsers to access its operating system.[68] The agencies' long-lasting AT&T consent decree also included an equal-access interconnection (i.e., interoperability) requirement, which has been lauded as the most successful part of the post-breakup AT&T regime.[69] In both cases, interoperability not only redressed the monopolist's previous anticompetitive conduct; it also prevented similarly anticompetitive conduct from recurring in the future, when the market incentives would have otherwise made it likely.

For similar reasons, other regulatory bodies have also imposed interoperability requirements as a means of preventing anticompetitive conduct by dominant firms in technology communications markets, including in messaging. In 2001, the FCC required AOL to allow other instant messaging services to interoperate with its dominant AIM instant messaging platform as a condition of the agency's approval of the AOL-Time Warner merger.[70] The FCC found that AOL had "consistently resisted interoperability with other non-licensed [instant messaging] providers" and noted that these refusals, "coupled with the network effects" of the messaging market, "establishe[d] a very high barrier to entry for competitors that contravenes the public interest in . . . competition and innovation."[71] In justifying the need for mandatory interoperability, the FCC explained the instant messaging market's dynamics as follows:

> If one provider achieves a larger market share, either through superior performance or a first mover advantage, then it may not have an incentive to interoperate. If that provider wants to dominate the market, it can adopt a strategy of refusing to interoperate with the other, smaller providers. This, compared to a strategy of interoperation, will make its service less valuable and will hurt its users. But while these ill effects will be relatively slight, because the

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[67] U.S. DEPARTMENT OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT: CHAPTER 9 (updated Mar. 18, 2022), https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-9; *see also Microsoft*, 253 F.3d at 103 ("The Supreme Court has explained that a remedies decree in an antitrust case must seek to "unfetter a market from anticompetitive conduct," to "terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future[.]") (citing *Ford Motor Co.,* 405 U.S. at 577, 92 S.Ct. 1142, and *United States v. United Shoe Mach. Corp.,* 391 U.S. 244, 250, 88 S.Ct. 1496, 20 L.Ed.2d 562 (1968)).
[68] *See Microsoft*, 253 F.3d 34; *see also* Hovenkamp, *supra* note 55, at 14 n.51 (describing the Microsoft remedy as "effectively" an interoperability requirement).
[69] *See* United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982); Richard A. Epstein, *The AT&T Consent Decree: In Praise of Interconnection Only*, 61 FED. COMM'N L.J. 149 (2008); Weiser, *supra* note 53.
[70] Time Warner Inc., 16 FCC Rcd. 6547 (9) (2001) [*hereinafter* FCC AOL Order].
[71] *Id.* at 57 ¶ 129.

> users will still be able to reach most other users, refusing to interoperate will hurt the smaller providers and their users greatly, because their users will not be able to reach most other users. The largest provider's refusal to interoperate will lead to users switching to it from the smaller providers, which will further swell the dominant provider's [database] and shrink the smaller ones'. This will continue until the largest provider's network is the dominant one, perhaps yielding the provider monopoly control of the market. From that point onwards, the dominant network remains dominant, not necessarily because it charges the lowest prices, offers the best quality, or innovates fastest with the features that customers want most, but simply because in the past it gained the most users.[72]

The same reasoning applies in today's online and mobile messaging market: interoperability is a pro-competitive prophylactic. And indeed, FCC rules and legislation have imposed interoperability and portability requirements as procompetitive tools in multiple telecommunications markets, from long-distance calling to mobile phones.[73]

Taken together, these examples reveal the anticompetitive dangers of dominant messaging platforms' refusals to interoperate and the need for interoperability requirements as a prophylactic against Sherman Act violations.

3. Dominant Messaging Platforms' Refusals to Interoperate Violate the Spirit of the Sherman Act

Even if dominant messaging platforms' refusals to interoperate do not always constitute, or even threaten, Sherman Act violations, such refusals likely violate the Sherman Act's underlying spirit or policies. Under that rubric, the Supreme Court has held that the FTC can, within its § 5 authority, prohibit practices that "bear the characteristics of recognized antitrust violations" even if they do not precisely violate those laws.[74]

Dominant messaging platforms' refusals to interoperate bear the key characteristics of antitrust refusals to deal, even where the exact nature of the monopolist's conduct does not suffice to make out a Section 2 violation under existing doctrine. In those cases, refusals to interoperate resemble "no-fault monopolization," or the acquisition and maintenance of monopoly power without anticompetitive conduct.[75] Averitt has argued that the FTC Act's "spirit" authority should extend to no-fault monopolization, given the Sherman Act's "underlying goal of eliminating monopoly power."[76] Averitt bases this argument in large part on the plain meaning of the Sherman

[72] *Id.* at 67-68 ¶ 155.
[73] *See* Tim Wu, *Antitrust via Rulemaking: Competition Catalysts*, 16 COLO. TECH. L.J. 33 (2017) (describing, *inter alia*, the AT&T consent decree and associated FCC rules, the 1996 Telecommunications Act, and the FCC's number portability rules).
[74] Atlantic Refining Co. v. FTC, 381 U.S. 357, 370 (1965).
[75] *See* Erik Hovenkamp, *The Antitrust Duty to Deal in the Age of Big Tech*, 131 YALE L.J. 1483, 1491 (2022).
[76] Averitt, *supra* note 22, at 255.

Act's text.[77] Indeed, a more recent textualist analysis of Sherman Act § 2 contends that the Act should be understood to prohibit no-fault monopolization.[78] At a minimum, this implies that FTC Act § 5 should be read to prohibit no-fault monopolization.[79] Moreover, even the existing Section 2 case law suggests that Section's underlying purpose and spirit is to prevent businesses from "us[ing] their dominance, superior access to finance, or generally prohibited practices to acquire or maintain a monopoly."[80] Dominant messaging platforms' refusals to interoperate undoubtedly represent either no-fault monopolization or, alternatively, the use of dominance to acquire or maintain a monopoly. Either way, FTC Act § 5 prohibits such conduct.

4. Dominant Messaging Platforms' Refusals to Interoperate Violate Business Norms and Morals in the Internet Communication Space

These refusals to interoperate also arguably violate norms of open access and interoperability in online communications and telecommunications more broadly. As the discussion in subsection (b) above demonstrates, interoperability requirements have pervaded the internet and telecommunications space throughout recent history, from instant messaging to mobile phones to long-distance calling. The FCC cited this norm in its order mandating interoperability on AOL instant messaging, arguing that "[i]nteroperability would also continue the long-standing tradition of the Internet being open and interoperable."[81] Indeed, email—a close analogue to messaging—has been characterized by interoperability for decades.[82] As a result, it remains ubiquitous and is, in the words of one commentator, "still the best thing on the internet."[83] In this respect, online and mobile messaging represents something of an outlier—an essential, increasingly ubiquitous communications platform that lacks interoperability and is instead dominated by one or two firms with a history of exclusionary practices. This contravenes established business norms in the communications space and thus arguably violates the FTC Act for that reason, too.

5. Dominant Messaging Platforms' Refusals to Interoperate Violate the Congressional Policy of the FTC Act by Harming Competition and Consumers

Finally, a presumptive ban on dominant messaging platforms' refusals to interoperate falls under the FTC's broad authority to act as a "court of equity" to promote the Act's public policy of fair and open competition.[84] The above sections explain how the current lack of messaging interoperability harms competition in the messaging market and may violate the Sherman Act in

[77] *Id.* at 256.
[78] *See* Robert H. Lande & Richard O. Zerbe, Jr., *The Sherman Act Is a No-Fault Monopolization Statute: A Textualist Demonstration*, 70 AM. U. L. REV. 497 (2020).
[79] *Id.* at 585 ("[FTC Act] Section 5 could be used as a way to implement no-fault if the Court is willing to undertake a textualist analysis of Section 2 but is reluctant to overturn *Trinko* and other Section 2 precedent.").
[80] Sandeep Vaheesan, *The Morality of Monopolization Law* 2, WM. & MARY L. REV. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3929159.
[81] FCC AOL Order, *supra* note 70, at 69 ¶ 131.
[82] KADES & SCOTT MORTON, *supra* note 7, at 14.
[83] Alexis C. Madrigal, *Email Is Still the Best Thing on the Internet*, THE ATLANTIC (Aug. 14, 2014), https://www.theatlantic.com/technology/archive/2014/08/why-email-will-never-die/375973/.
[84] *Sperry & Hutchinson Co.*, 405 U.S. at 244; Averitt, *supra* note 22, at 275.

at least some instances. However, the competitive harms of messaging monopolization extend beyond the messaging market alone. Recent experience shows that dominant technology firms can and have used refusals to interoperate with messaging competitors as a means of foreclosing competition in adjacent markets.

Most notably, the FTC found significant evidence that Meta (then Facebook) shut down interoperability functions on its messaging service not just to prevent the growth of its messaging competitors, but also to prevent them from entering the personal social networking market and competing with Facebook Blue.[85] Meta CEO Mark Zuckerberg himself expressed worry about messaging competitors "using messages as a springboard to build more general mobile social networks."[86] Another Meta executive said that prospect "might be the biggest threat we've ever faced as a company."[87] This fear led Meta to both exclude messaging rivals from interoperability and to buy its biggest nascent messaging competitor, WhatsApp.[88] Because messaging serves as a "springboard," in Zuckerberg's words, to competition in other markets—in particular, markets like personal social media that currently lack robust competition—requiring interoperability in messaging would promote fairer and more open competition in those markets as well. It would also reduce the outsized power of firms, particularly Meta, that dominate both the personal social media and the messaging markets in the United States.[89]

Thus, a ban on refusals to interoperate in messaging would undoubtedly promote the public policy aims of the FTC Act and thus fall within the agency's broad authority.

C. The FTC's Rule Should Target Dominant Messaging Platforms and Be Structured as a Rebuttable Presumption

In order to best fit within its FTC Act authority and fulfill the Act's purpose, the FTC's rule prohibiting messaging platforms from refusing to interoperate should apply only to dominant messaging platforms. The harms to competition and consumers laid out above result, for the most part, from refusals by *dominant* firms. It is those firms whose messaging services have benefited from the strong network effects, barriers to entry, and tipping points that render them the "essential platforms" for further competition.[90] Indeed, it is for similar reasons that the Sherman

[85] FTC Facebook Complaint, *supra* note 51, at 35 ¶ 108; *id.* at 51-52 ¶ 157 ("The third group of targets [for Facebook's exclusionary refusals to interoperate] were promising apps that offered mobile messaging services, that were existing competitors of Facebook Messenger, or that threatened to develop into competitive threats to Facebook Blue.").
[86] *Id.* at 35 ¶ 108.
[87] *Id.*
[88] *Id.* at 41 ¶ 126 ("Facebook has kept WhatsApp cabined to providing mobile messaging services rather than allowing WhatsApp to become a competing personal social networking provider, and has limited promotion of WhatsApp in the United States.").
[89] In addition, it is worth noting that this proposed rule would require firms to enable interoperability for many of the same kinds of features that would be required under a social media interoperability requirement. Our proposed rule for messaging could thus allow both the FTC and the regulated parties to develop learnings that could pave the way for a future social media interoperability regime (imposed either through a later rule or as an enforcement remedy).
[90] *See* Guggenberger, *supra* note 7 (describing dominant digital platforms as "essential platforms").

Act § 2 targets only those firms with monopoly power. The FTC Act's legislative history similarly demonstrates a particular concern about anticompetitive and otherwise unfair conduct by dominant firms.[91]

In defining dominance for the purpose of this rule, the FTC should draw from the European Union's Digital Markets Act (DMA). As discussed above, the DMA covers only firms that exceed (a) either a given market valuation (€75 billion) or annual turnover within the EU (€7.5 billion), and (b) and number of users (45 million monthly end users and 10,000 business users). The FTC should conduct its own market analysis to determine the appropriate thresholds for U.S. purposes. That said, it would make sense to cover similar firms as the EU covers because those firms will already have had to enable messaging interoperability to comply with the DMA. At that point, complying with the FTC's rule will require minimal additional cost or technical complexity.

In addition, as discussed in the previous section, the FTC's rule should allow for exceptions if a dominant messaging provider can show sufficient business justifications for a given refusal to interoperate. Given the strong case, detailed above, that refusals to interoperate harm competition and consumers, a dominant firm should not be able to exempt itself from this rule altogether. However, it is possible that requests to interoperate from specific firms may present particularly large challenges for the dominant firm, which could merit an exception. For example, the requesting firm may have privacy or data security standards that would fail to protect the data of the dominant firms' users. Alternatively, the requester's technical specifications may be impracticable for the dominant firm to accommodate. The FTC's rule should function as a strong presumption of illegality and allow covered firms to present business justifications to rebut this presumption. Specifically, covered firms should be given the opportunity to show that their refusal of a given request to interoperate is "necessary to achieve a legitimate business aim and that the practice is the least restrictive means of doing so."[92] The firm should have the burden to prove this justification based on "specific, credible evidence, not just assertions about theoretical efficiencies."[93]

D. An FTC Prohibition on Dominant Platforms' Refusals to Interoperate Would Merit Chevron Deference by Courts

As the above sections demonstrate, the proposed FTC rule fits comfortably within any reasonable interpretation of FTC Act § 5's prohibition on unfair methods of competition. Under *Chevron*, courts should defer to agencies' reasonable interpretations of ambiguous statutes.[94] Section 5's UMC prohibition is classically ambiguous.[95] Indeed, the Supreme Court has called the

[91] *See* Vaheesan, *supra* note 19, at 665 ("[T]he members of Congress who drafted the [FTC Act] wanted to prevent dominant businesses from using their power to drive out smaller rivals and close markets to competitors.").
[92] *Id.* at 681-82.
[93] *Id.* at 682.
[94] Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).
[95] Jason (Gus) Hurwitz, Chevron *and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 248-49 (2014) ("Nearly every word of the statute is rife with ambiguity[.]").

UMC standard "by necessity, an elusive one."[96] FTC Act § 5 also meets the other requirements for *Chevron* deference, including being the province of a single agency. Further, a rule promulgated under § 5 would meet *Mead*'s requirement that the agency's interpretation be enacted through an action "carrying the force of law."[97] For those reasons, multiple scholars have argued that an FTC UMC rule should qualify for *Chevron* deference, though there remains some disagreement and debate.[98]

Crucially, the specific FTC UMC rule proposed herein would likely not transgress the Supreme Court's recent limitation on *Chevron* deference, the major questions doctrine. Under the major questions doctrine, courts will deny *Chevron* deference to agency interpretations that implicate "questions of deep 'economic and political significance.'"[99] Instead, courts will typically conduct their own, independent interpretation of the agency's authorizing statute to determine whether the challenged regulation falls within its bounds.[100] Although the exact bounds of what constitutes a "major question" remains unclear, the Court has twice insisted that the doctrine applies only in "extraordinary cases."[101] Further, the agency rules to which the Court has applied this doctrine involve truly economy-wide implications, such as the FDA's authority to regulate tobacco products, the Department of Health & Human Services' interpretation of whether the Affordable Care Act's tax credits cover federal health insurance exchanges, the Environmental Protection Agency's authority to regulate certain pollutants, and the Occupational Health & Safety Administration's authority to promulgate a COVID test-or-vaccinate policy on all U.S. businesses with more than 100 employees.[102] In all these cases, the challenged rule covered "a significant portion of the American economy" and relied upon an "unheralded [statutory] power."[103]

By contrast, the proposed FTC messaging interoperability rule would apply to a small number of firms (likely fewer than five) in a single market. Further, it falls squarely within the FTC's traditional uses of its antitrust authority, which centrally involves identifying and prohibiting anticompetitive conduct by dominant firms. Indeed, as discussed above, the antitrust enforcers have frequently imposed bans on refusals to interoperate, including in digital markets.

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[96] FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986) (citing FTC v. Cement Inst., 333 U.S. 683 (1948)); *see also id.* at 454 ("[T]he courts are to give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as 'unfair.'").
[97] United States v. Mead Corp., 533 U.S. 218, 227 (2000).
[98] *See* Hurwitz, *supra* note 95; Chopra & Khan, *supra* note 37, at 377-79.
[99] King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)); *see also* Kevin O. Leske, *Major Questions About the Major Questions Doctrine*, 5 MICH. J. ENV'T & ADMIN L. 476, 496-97 (2016)).
[100] Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 AD. L. REV. 475, 481 (2021). That said, some recent cases have held, instead, that a rule that falls into the major-questions exception should be struck down on that basis alone, rather than merely receiving reduced interpretive deference. *See, e.g.*, Nat'l Fed. of Ind. Bus. v. Dep't of Lab., 595 U.S. __ (2022). Professor Sunstein refers to that alternative approach as the "strong" version of the major questions doctrine. Sunstein, *supra*.
[101] *Brown & Williamson*, 529 U.S. at 159.
[102] *See id.*; King v. Burwell, 135 S. Ct. 2480; Utility Air Regulatory Group v. EPA, 573 U.S. 302 (2014); Nat'l Fed. of Ind. Bus. v. DOL, 595 U.S. __ (2022).
[103] *Utility Air Regulatory Group*, 573 U.S. at 324 (quoting *Brown & Williamson*, 529 U.S. at 159).

The FTC has also previously enforced against a broader range of refusals to deal by monopolists under its § 5 authority.

In short, the proposed rule is precisely the kind of reasonable agency interpretation to which courts should, at least in theory, defer under even the Supreme Court's latest, more restrictive administrative law cases.

II. Unfair or Deceptive Acts or Practices Rulemaking Authority

The FTC should also base its messaging interoperability rules on its broad authority to issue rules targeting unfair or deceptive acts or practices (UDAP). Under the FTC Act, the Commission may issue "rules which define with *specificity* acts or practices which are unfair or deceptive acts or practices."[104] This authority includes creating affirmative "requirements" to avoid such acts or practices.[105] A rule could thus declare that a lack of messaging interoperability among dominant messaging platforms constitutes an unfair practice, and then set out affirmative requirements for meaningful interoperability. UDAP authority provides another legal hook that rests on a large body of existing rules and favorable judicial rulings, which would bolster rulemaking under UMC authority. While mandatory interoperability may appear to be a policy innovation, it is grounded in existing legal authority and has analogues in previous rulemakings.

As a threshold matter, one might argue that interoperability is really a competition issue that can *only* be addressed under UMC authority. However, there is a long history of FTC promulgating rules based on both the UDAP and UMC prongs of the FTC Act. For example, the rule at issue in *National Petroleum Refiners* addressed both "an unfair method of competition *and* an unfair or deceptive act or practice."[106]

The FTC refuted a similar concern with the promulgation of the Eyeglass Rule in 1978.[107] The relevant provision of the rule requires optometrists and ophthalmologists to release copies of prescriptions to their customers so that they could shop around when purchasing eyeglasses.[108] At the time, many optometrists refused to release prescriptions, forcing their patients to buy eyeglasses from them. This refusal harmed consumers both by limiting consumer choice and by preventing meaningful competition in the eyeglass market. Responding to the assertion that this must be a competition rule because it "affect[s] the structure and workings of the market," the Commission noted that the distinction between UDAP and UMC authority "rests on the victims of the injury, not upon any fundamental aspect of the action itself."[109] The Commission continued:

> If the action injures competitors or the competitive system, it is an unfair method of competition. If the same action causes injury to consumers it is an unfair or deceptive act or practice. Many unfair or

[104] 15 U.S.C. § 57a(a)(1)(B) (emphasis added).
[105] *Id.*
[106] 482 F.2d at 674 (emphasis added).
[107] 43 Fed. Reg. 23,992 (codified at 16 C.F.R. § 456).
[108] *Id.*
[109] *Id.* at 24,003.

> deceptive trade practices with which the Commission is concerned would meet either test. . . . [A]s long as the requisite consumer injury is present, the Commission's authority to promulgate rules is clear. If such rules have the ancillary effect of improving the competitive system, this is a bonus, not a disablement.[110]

Message interoperability is a prime example of an action both impacting consumers and competition. There are numerous consumer harms that result from the lack of interoperability, both directly and from harm to competition. Moreover, to the extent harm to competition has been constrained by the courts to mean harm to consumer welfare, the distinction between the two is even less significant.

For an act or practice to be considered "unfair," it must (1) "cause[] or [be] likely to cause substantial injury to consumers," (2) "not [be] reasonably avoidable by consumers," and (3) "not outweighed by countervailing benefits to consumers or to competition."[111] "Unfairness" does not require blatantly unscrupulous activity and is not limited solely to "conduct involving deception, coercion or the withholding of material information."[112] Refusing messaging interoperability meets all three criteria.

A. Withholding Messaging Interoperability Causes Substantial Harm

Withholding messaging interoperability causes meaningful, substantial injury to consumers. Substantial injury often involves monetary harm,[113] but this need not be the case. Furthermore, "An act or practice can cause "substantial injury" by doing a "small harm to a large number of people, or if it raises a significant risk of concrete harm."[114]

1. Reducing Privacy, Security, and Quality

The lack of messaging interoperability restricts consumer choice, both by preventing consumers from choosing messaging apps that offer the mix of privacy protection, data security, or other features that they desire, and by allowing apps to reduce privacy, security, and other measures of quality for existing, locked-in users. In the absence of interoperability, the user of a messaging app can only message other users on that messaging app.[115] This means that a consumer will typically choose a messaging app that already has a critical mass of recipients. In the U.S., only a few apps actually have a meaningful share of the population—including iMessage, Facebook

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[110] *Id.*
[111] 15 U.S.C. § 45(n); *see also* U.S. FED. TRADE COMM'N, FTC POLICY STATEMENT ON UNFAIRNESS (Dec. 17, 1980), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness [*hereinafter* FTC POLICY STATEMENT].
[112] FTC POLICY STATEMENT, *supra* note 111.
[113] *Id.*
[114] F.T.C. v. Neovi, Inc., 604 F.3d 1150, 1157 (9th Cir. 2010).
[115] UNLOCKING DIGITAL COMPETITION, *supra* note 45.

Messenger, Snapchat, and Whatsapp.[116] This prevents users from exercising meaningful choice and subjects them to whatever privacy or other quality measures a dominant platform chooses to impose.

This dynamic creates very high switching costs that locks users into a dominant messaging apps,[117] allowing apps to meaningfully change the competitive terms after achieving a critical mass of consumers. This is precisely what happened after Facebook acquired WhatsApp.[118] After making public assurances that WhatsApp data would not be shared across its services, Facebook took a series of steps to undermine the privacy protections enjoyed by WhatsApp users. This included sharing information across Facebook services including "users' phone numbers, profile photos, status messages and IP addresses for the purposes of ad targeting, fighting spam and abuse and gathering metrics."[119] This later expanded to include sharing metadata from WhatsApp internally and with law enforcement.[120]

Finally, the fact that many consumers may multi-home—i.e., use multiple messaging apps—does not imply that users do in fact have a meaningful choice of platforms. As discussed above, it is very likely that consumers have a main service on which they rely for the vast majority (if not all) of their communication.[121] If a consumer has concerns about tracking activity by Facebook Messenger or Whatsapp, they may be able to convince some friends to switch over to a new app, but it is unlikely they can delete their Messenger or Whatsapp account entirely without losing access to a meaningful segment of their contacts. Thus, even users with multiple apps are typically locked into the dominant platforms and forced to provide their data and other information to those platforms.

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[116] L. Ceci, *Most Popular Mobile Messaging Apps in the United States as of September 2019, By Monthly Active Users*, STATSTA (Apr. 15, 2022), https://www.statista.com/statistics/350461/mobile-messenger-app-usage-usa/. While many people "multi-home," or use multiple message apps, the decision to use a particular app for any particular conversation has implications for the data you choose to share and the privacy protections enjoyed. Moreover, "in many digital markets a combination of the above restrictions means that [switching and multi-homing] are limited." UNLOCKING DIGITAL COMPETITION, *supra* note 45, at 36.

[117] EUROPEAN COMMISSION, COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT (Dec. 15, 2020), https://eur-lex.europa.eu/resource.html?uri=cellar:57a5679e-3f85-11eb-b27b-01aa75ed71a1.0001.02/DOC_1&format=PDF.

[118] This is also precisely what Facebook did in the social media market, another market with similar network effects, in which the company initially competed and won market share by offering a more privacy-focused social network, then meaningfully reduced privacy protections after achieving dominance. Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy,* 16 BERKELEY BUS. L. J. 48 (2019).

[119] Peter Elkind, Jack Gillum & Craig Silverman, *How Facebook Undermines Privacy Protections for Its 2 Billion WhatsApp Users*, PROPUBLICA (Sep. 7, 2021) https://www.propublica.org/article/how-facebook-undermines-privacy-protections-for-its-2-billion-whatsapp-users; *see also* Stigler Comm. on Digital Platforms, *Sub-committee on Market Structure and Antitrust Report, in* STIGLER COMMITTEE ON DIGITAL PLATFORMS FINAL REPORT (2019), https://perma.cc/RWV9-KRL5.

[120] While it is the change in a longstanding policy that was most concerning, the degree of data sharing is itself problematic. As the Australian competition authority notes, "The sharing of this data does not appear to be necessary to provide WhatsApp's instant messaging service and may not be what many users expect." AUSTRALIAN COMPETITION & CONSUMER COMM'N, DIGITAL PLATFORMS INQUIRY: FINAL REPORT (June 2019), https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf.

[121] *See* supra III.B.1.

The WhatsApp example demonstrates how the lack of interoperability and consequent lack of meaningful choice harms consumers by reducing privacy and data security. Both the lack of choice in itself and the reduction in quality enabled by user lock-in and network effects may be considered harms to consumers. An FTC study could further substantiate privacy and security harms and address additional quality-related harms resulting from lack of choice.

2. Harms to Competition in the Messaging Market and Beyond

As we demonstrated in the discussion of UMC authority, the lack of messaging interoperability meaningfully reduces competition in the market for messaging. It also prevents the rise of messaging apps that might someday become a source of competition in adjacent markets, including social media and business communication tools. This reduction in competition reduces quality—like privacy and data security—and reduces overall innovation. These harms also reflect injuries to the consumer.

3. Looking for Precedent in the Eyeglass Rule

The Eyeglass Rule provides a useful comparison for analyzing the harms imposed by the lack of interoperability. In promulgating the rule, the FTC similarly focused on how refusals to release patients' prescriptions both harmed consumers by reducing their immediate ability to shop for eyeglasses from the seller of their choice and by creating a barrier to meaningful consumer choice in the eyeglass market. The Commission explained how refusals to release prescriptions created "'lost opportunity' costs attributable to the lack of comparison shopping caused by the outright refusal to release prescriptions,"[122] prevented consumers from "selecting the dispenser of their choice," and denied consumers the ability "to utilize the information which does exist to seek out the mixture of quality and price which best satisfies their needs."[123] Widespread refusal to release prescriptions also prevented new entry from would-be competitors in the eyeglass market. The result of the inability to shop around and reduced entry was an increase in prices. Here, the harm is in the form of reduced privacy and other qualitative metrics. The longstanding Eyeglass Rule, which has withstood judicial challenge,[124] thus provides a useful precedent for the action contemplated here.

B. Harms Imposed by a Lack of Messaging Interoperability are not Reasonably Avoidable

An injury is reasonably avoidable where the market itself can police the harmful conduct. The requirement of reasonable avoidability reflects a policy preference for such a market-based correction over regulatory intervention. According to the FTC's Policy Statement on Unfairness:

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[122] 43 Fed. Reg. 23,992 (codified at 16 C.F.R. § 456).

[123] U.S. FEDERAL TRADE COMM'N, STAFF REPORT ON ADVERTISING OF OPHTHALMIC GOODS AND SERVICES AND PROPOSED TRADE REGULATION RULE (May 1976), https://www.ftc.gov/reports/staff-report-advertising-ophthalmic-goods-services-proposed-trade-regulation-rule-16-cfr-part-456.

[124] Am. Optometric Ass'n v. F.T.C., 626 F.2d 896 (D.C. Cir. 1980) (upholding the prescription release provision while striking down other portions of the regulation).

> Normally we expect the marketplace to be self-correcting, and we rely on consumer choice—the ability of individual consumers to make their own private purchasing decisions without regulatory intervention—to govern the market. We anticipate that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory. [125]

However, regulatory interventions may be required to police

> certain types of seller conduct or market imperfections [that] unjustifiably hinder consumers' free market decisions and prevent the forces of supply and demand from maximizing benefits and minimizing costs. In such instances of market failure, the Commission may be required to take corrective action. Such corrective action is taken 'not to second-guess the wisdom of particular consumer decisions, but rather to halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking.'[126]

There are a number of situations in which this "corrective action" may be necessary. An injury is not reasonably avoidable where consumers lack "a free and informed choice,"[127] or where "consumers are not, as a practical matter, able to shop and bargain over alternative remedial provisions."[128] This may occur where consumers are presented with form contracts on a take it or leave it basis, where highly technical language is used in the contracts, and where consumers' own "limited ability and incentive to search out better contracts is compounded by creditors' lack of incentive to advertise or compete on the basis of remedies."[129]

The lack of messaging interoperability creates precisely the situation that requires regulatory intervention. The lack of interoperability prevents consumers from making the free market decisions that would allow them to pick an app that offers the privacy and security protections they prefer. It is precisely because of the lack of interoperability that the privacy and security harms consumers face cannot be avoided. Moreover, the market will not induce any company to unilaterally offer interoperability without an intervention by regulators. While smaller players in the market have an incentive to make their messaging interoperable with larger players, no large player would voluntarily give up the barrier to entry that their closed system and major user base provides. Thus, this is the situation in which the lack of incentive of industry players prevents competition from providing a solution.

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[125] FTC POLICY STATEMENT, *supra* note 111.
[126] Am. Fin. Servs. Ass'n v. F.T.C., 767 F.2d 957, 976 (D.C. Cir. 1985) (citing FTC Policy Statement).
[127] F.T.C. v. Neovi, Inc., 604 F.3d 1150, 1158 (9th Cir. 2010).
[128] Am. Fin. Servs. Ass'n v. F.T.C., 767 F.2d at 976.
[129] *Id.*

C. *The Benefits of Mandatory Interoperability Outweigh Its Costs*

Finally, for the Commission to intervene, it must find that a practice is "injurious in its net effects."[130] This requires balancing "the potential costs that the proposed remedy would impose on the parties and society in general."[131] Enabling interoperability may require messaging platforms to make some technical investments. However, many platforms already rely heavily on APIs to interface between various components of their products.[132] Thus, interoperability may be as simple as making those APIs public.[133] Moreover, to the extent the entities covered and the requirements imposed map onto messaging interoperability requirements under the DMA, an FTC rule would impose little to no additional cost. This counsels for maximal alignment with the DMA, unless there are compelling reasons to deviate. Requirements that go beyond or differ materially from the DMA may be justified so long as their benefits exceed their costs.

The core provisions that distinguish our proposal from the DMA relate to privacy and data security. The requirement that dominant platforms ensure their counterparties meet minimum privacy and data security standards and ensure that the interconnection meets certain standards does impose an additional burden on the regulated parties. However, this additional burden can be justified on the grounds that such a requirement is necessary to preserve security and privacy, particularly in the absence of a general data security or privacy law.

On the other hand, there are a few provisions of the proposal that might lower costs vis-a-vis the DMA. First, our proposal allows covered parties to determine the best means of interoperability. This allows parties to determine the most cost-effective means of compliance. Relatedly, our proposal allows platforms to enable interoperability on a case-by-case basis, rather than be made generally accessible via APIs. Finally, our proposal provides a defense to interoperability requirements for demands that are commercially unreasonable. While the exact bounds of reasonability will need to be determined through case-by-case adjudications, this escape valve should lower the cost of compliance.

One potential "cost" is the risk that a poorly constructed interoperability scheme actually puts consumer privacy and security at greater risk. This would be a particularly perverse result, given privacy and security harms are central to the consumer injury here. Our proposal addresses this risk through minimum standards. This approach may actually have the effect of boosting privacy and security protections by ensuring all major players meet a certain baseline threshold. Ensuring that interoperability does not hinder privacy also justifies allowing messaging platforms some flexibility to take actions that might be otherwise noncompliant for the purposes of ensuring privacy. This includes the ability to indicate when an interoperating service may be less private or secure, which may have the effect of discouraging users from messaging people on those services,

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[130] FTC POLICY STATEMENT, *supra* note 111.
[131] Am. Fin. Servs. Ass'n v. F.T.C., 767 F.2d at 975.
[132] *See* Brian Pagano, *Understand the Power of Internal APIs*, INFO. WK. (June 13, 2018), https://www.informationweek.com/devops/understand-the-power-of-internal-apis (describing benefits of using internal-facing APIs).
[133] There may also be some additional security measures needed when making APIs public. *See* Peter Bosch, *Internal vs. External APIs*, CISCO TECH BLOG (Oct. 6, 2021), https://techblog.cisco.com/blog/internal-vs-external-api.

and the mandate to deny interoperability to firms that do not provide a reasonable level of privacy or data security. There is some balance required to preserve privacy and security while maximizing competition; however, a well-constructed regime would enhance both.

D. Additional Considerations: Breadth of Application

To conclude, we briefly address concerns that might arise from the choice of tool—rulemaking over adjudication—and the breadth of such a tool. One concern is whether the requisite showing of harm is generalizable beyond the examples provided. That is, maybe WhatsApp's lack of interoperability has caused harm, but is that true across the board? While it may be easier to demonstrate the harms through individual adjudications, there is significant evidence of industry-wide harm to competition and consumers. A lack of interoperability has directly impacted market structure and consumer choice, such that there are only a few examples of dominant platforms capable of causing harm. These major players have a demonstrated incentive and ability to reduce privacy protections or other measures of quality on their users. So long as the rule is targeted at these dominant platforms, it is not overly broad.

A rule is also significantly more effective at moving the whole industry. Individual adjudications and enforcement actions are slow and costly, putting much of the initial burden on the agency. Moreover, individual adjudications might break down the market power of individual targets, but in the absence of industry-wide interoperability, this might create a game of whack-a-mole, where new dominant apps replace the old ones each time a major enforcement action is brought.[134] Putting in place an ex ante, default rule, then allowing for disputes over coverage, relevant privacy and security standards, and commercially reasonable interoperability requests provides the flexibility of adjudications while placing the initial burden to comply on dominant messaging apps. Finally, the adoption of mandatory interoperability in the EU removes many of the concerns over cost otherwise raised by an industry-wide rule.

We do however believe that more information would help bolster such an ambitious rulemaking. The FTC should use its market study authority to build a much stronger record on which to build mandatory interoperability. No major regulatory market study in the United States has focused specifically on messaging, and it would be helpful both from a policy and legal perspective to establish this record. However, such research can and should be completed expeditiously, building upon existing extensive studies on the power of major tech platforms writ large.

III. Conclusion

Mandatory interoperability is a powerful tool to combat the harm dominant messaging platforms have imposed on consumers and their competitors. The FTC should follow Europe's lead and create a messaging interoperability regime for the U.S. While the FTC should adopt much of the DMA's approach, there are opportunities to expand both its competitive benefits and the

[134] Obviously at some point, a credible threat of enforcement action would likely incentivize voluntary interoperability, but given the pace of adjudications, this will likely take much longer than rulemaking.

privacy and security protections it offers. The latter is particularly important in a regulatory regime (the United States) that lacks major nationwide privacy and data security rules.

The FTC should promulgate this rule under both its authority to regulate "unfair methods of competition" (UMC) and its authority to regulate "unfair or deceptive acts or practices" (UDAP). This would enable the agency to use this rulemaking as an opportunity to flex its UMC authority, while bolstering the rule with legally firmer precedent and providing for civil penalties for first time offenders available under UDAP rules. However the Commission proceeds, such a rule has enormous potential to meaningfully engender competition in mobile messaging and tangential markets. This rule would also provide an important test case for the FTC's ability to engage in creative rulemaking that can address market power in the modern economy.