

## **Enforcement Game: Hypothetical Merger Review Elon Musk Merges with ByteDance**

### **Background**

#### *Musk's proto-ecosystem of businesses*

In the end of October 2022, Elon Musk completed the acquisition of Twitter and announced his future vision of how the platform might change.

He proposed certain features to enhance Twitter's monetization scheme. Among them, subscription to a verified Twitter account, revenue sharing with content creators, some payment options for users to buy products and services within the platform.

In an interview, Musk also claimed to have plans for Twitter to turn into a super app, much like Tencent's WeChat.

*"The reason I acquired Twitter is because it is important to the future of civilization to have a common digital town square,"*

Musk wrote in a letter addressed to Twitter advertisers, which he tweeted Thursday.

Apart from Twitter, Musk owns a *proto-ecosystem* of businesses that includes Tesla (with a solar energy sub-business), SpaceX that in turn owns Starlink; he also owns Open AI and Neuralink, and he has been tied to several other companies.<sup>1</sup> Tesla's business is expanding into the mobile market with a new Teslaphone smartphone that is reported to be launched this year. These businesses potentially have complementarities that can unite them into a technology-driven ecosystem.

Musk is a financial mogul with significant economic and political influence. Two of his companies - Tesla and SpaceX - are financially successful with Tesla being among the several most valued public companies and SpaceX valued at \$100 billion which makes it the 2nd most valuable private company in the world behind ByteDance.

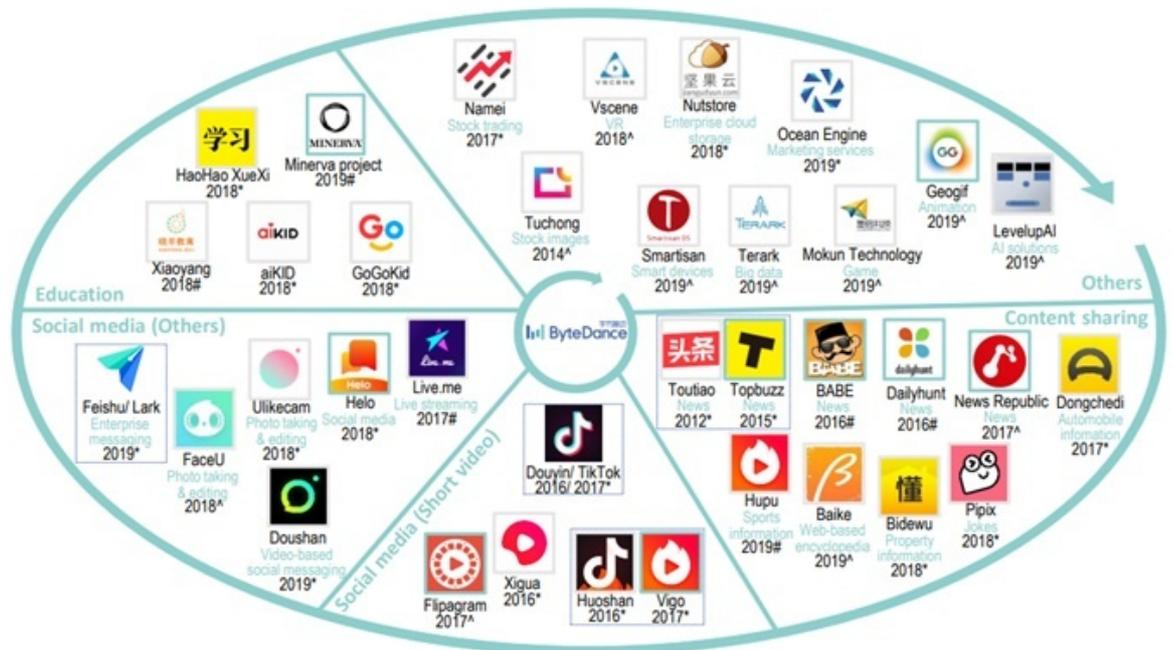
#### *ByteDance's social media empire*

ByteDance is a Chinese mostly social media-oriented private company. It owns several platforms (some operate in China only and have counterparts in other markets and has recently engaged actively in acquisitions). Its social media empire can be a valuable add-on to the global digital square Musk promotes.

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<sup>1</sup> Elon Musk Now Owns Twitter. Here Are the Busy Billionaire's 4 Other Companies and What They All Do. Business Insider. URL: <https://www.businessinsider.com/elon-musk-companies-tesla-spacex-boring-co-neuralink-twitter-2022-4#beyond-musks-core-business-ventures-the-billionaire-has-been-tied-to-at-least-seven-additional-companies-per-the-new-york-times-this-includes-wyoming-steel-an-llc-he-has-reportedly-used-to-purchase-real-estate-21>

Apart from numerous social media platforms (such as TikTok and its Chinese counterpart Douyin), ByteDance has expanded into online healthcare, edtech, is highly successful in gaming and VR (see the scheme below).



ByteDance's growth was reported to have slowed down by 70% in 2021<sup>2</sup> which makes the timing perfect for a hypothetical close cooperation with Elon Musk's businesses. ByteDance's position in the Chinese market has been further weakened recently by the all the fiercer competition from Tencent and other Chinese tech platforms. For Musk, a merger with ByteDance is a fortunate chance to strengthen his positions in the flourishing Chinese market.

There are several *possible intersections* between the two businesses that highlight the potential of the merger. Some of them are as follows:

- Musk mentioned an idea to bring the short-video format to Twitter - a perfect match with any of ByteDance platforms, also in the light of Musk mentioning to revive Vine, a short-video service once shut by Twitter.
- Twitter smoothly enters into the social media ecosystem that ByteDance currently owns enabling data flows throughout the system.
- AI technologies that Musk's companies own can improve the product quality of ByteDance platforms just like ByteDance can provide inputs from its edtech, healthtech, and gaming businesses.

<sup>2</sup>TikTok Owner ByteDance's Revenue Growth Slowed to 70% in 2021. The Economic Times. URL: <https://economictimes.indiatimes.com/tech/tech-bytes/tiktok-owner-bytedances-revenue-growth-slowed-to-70-in-2021/articleshow/89030878.cms?from=mdr>

- In terms of advertising, Musk can compensate for Twitter's loss of ad revenue by redirecting ad flows from ByteDance platforms.
- More generally, Musk's business allows for a huge influx of finance to an already established and highly competitive ecosystem that owns key products with a significant political value.

### **A Hypothetical Merger: Description**

The *structure* of a possible merger is flexible given the complexity of the two businesses: from multiple joint ventures, partial acquisitions and share swaps, to mergers with conglomerate and market-extension effects depending on the type of relations the merger will result in. Any combination would most likely not be strictly horizontal or vertical and would call for an ecosystem theory of harm.

Nonetheless, one can at least forecast the possible financial and technological synergies resulting from the merger despite its actual format – the magnitude of both businesses is so high that any combination can have serious effect on competition.

#### *Some possible consequences for the BRICS economies*

In terms of *market definition*, one would have to deal with many markets in one merger. In some of them, depending on the precise definition, two ecosystems might decrease competition (e.g. TikTok and Twitter in the more general market for social media). For other segments, harm from the merger might not be as visible since conglomerate effects step in (e.g. Starlink and ByteDance's gaming business). Authorities would have to come up with a vision beyond simple market definition given the multiple synergies with a global potential that arise from the merger.

As for *potential theories of harm*, some possible directions to look at might be *innovation theories* since the merger in any format would likely decrease incentives for both competitors and the merged business to innovate; *tying and bundling* opportunities and the degree of autonomy of the merged parts; *leveraging of market power* to markets where the merged entity might not have much presence yet.

Both Musk's proto-ecosystem and ByteDance's social media ecosystem are present in almost all the BRICS jurisdictions which underscores the significance of the correct approach to the merger for these countries:

- For Twitter, almost all the BRICS+ countries have significant Twitter audiences, especially this is true for Brazil and India, 12.15 mln and 11.45 mln users respectively). Twitter is blocked in China and restricted in Russia;
- Tesla has plans to expand to Brazil with government support; China makes almost a

quarter of Tesla's global sales and is expected to advance in China even more; Tesla is not present in Russia and halted plans to expand into India including due to high import duties; in South Africa, Tesla has its solar energy presence;

- Being a Chinese company, ByteDance has an enormous influence over several markets outcompeting giants like Alibaba and fiercely competing with Tencent over social media and gaming;
- TikTok is available and increasingly popular globally apart from India where it is banned; Brazil makes up to 40% of its users in Latin America with 52.3 mln users;
- As of 2022, ByteDance is at the top of mobile app store publishers globally.

Moreover, one should consider potential and expected entry of various parts of the merged business into regions where they are underrepresented now, as well as significant global repercussions from the merger that can manifest in the local markets.

#### *Synergies and interdependencies that might arise from the merger*

- **In data:** merging data from social media platforms owned by ByteDance with user data from Twitter creates an unprecedented data pool to fuel the new merged ecosystem. This poses a serious question to the regulators due to the significant concerns for data privacy, especially in the light of the antitrust investigations into Meta's changes in privacy policies;
- **In technology:** ByteDance's success in algorithm research proposes synergies with Musk's AI portfolio; ByteDance's look into self-designed chips<sup>3</sup>, if successful, might increase the technological autonomy of the merged ecosystem; satellite StarLink Internet might be used to provide a competitive advantage to ByteDance's social media platforms and Twitter. Analysis of technology interdependencies requires looking into potential interoperability between the two parts of a merging ecosystem;
- **In investment:** ByteDance had to curb some of its investment efforts recently and this part of the merged business can receive financial boost;
- **In market outreach:** TikTok is a powerful global opinion and promotion instrument, coupled with Twitter that is comparably powerful globally this would create dominance over channels of content distribution in many regional markets, not to mention global ones.

#### *Possible efficiencies (depending on the theory of harm):*

- Speed up Twitter's evolution into a one-stop shop and consumer efficiencies from tying and bundling offers;

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<sup>3</sup> TikTok owner ByteDance explores self-designed chips as China aims for semiconductor self-sufficiency. CNBC. URL:<https://www.cnbc.com/2022/07/19/tiktok-owner-bytedance-explores-self-designed-chips.html>

- Innovation boost with potential repercussions globally;
- More opportunities for advertisers and additional channels of distribution for products and services providers.

### **Reflection Points**

The goal of the case study is to detect the potential for the BRICS+ antitrust enforcement cooperation on the example of a potential big merger in the global digital market. The case study is aimed to help the representatives of the authorities to attempt to jointly outline their common strategy in case they are faced with a similar merger.

#### *Timeline*

Suppose the deal was notified to all the BRICS jurisdictions including potential BRICS members (Argentina and Egypt) at different time points. Apart from the BRICS, the merger was notified in the US and the EU.

#### *Possible challenges to reflect on*

- existence of a legal requirement to coordinate the merger review with national sectoral regulators and the extent on this coordination;
- review timeline limits in your jurisdiction are substantially different from the ones in other BRICS (+) jurisdictions;
- possibility of confidentiality waiver requests and similarity of waiver models in your and remaining jurisdictions;
- general requirements on cross-border confidential information exchange;
- ease of informal exchange with the remaining BRICS (+) authorities and non-BRICS authorities (existence and feasibility of MoUs, cooperation experience, language and other access barriers);
- feasibility of using the Liaison Committee established under the 2016 MoU;
- lack of human and financial resources;
- ability to align remedies and adopt (and adapt) remedies imposed in other BRICS and non-BRICS jurisdictions, prior experience of remedy cooperation;
- path dependence tendencies in merger review.

#### *Clearance with or without remedies*

Some authorities may clear the transaction based on low penetration of with Twitter or ByteDance, or both, on their jurisdictions. Authorities may (or may not) consider Twitter and TikTok in the same relevant market. Conglomerate effects may be looked from different perspectives in this merger. These different perspectives may lead to different approaches to the transaction in different jurisdictions. To what extent would harmonization be desirable?

### *Options for Remedies*

Should authorities consider remedies, some possible ways to design them are:

- Establishing a joint BRICS (+) trustee that will be overseeing the implementation of the merger and its dynamic effects on competition for some time after the merger clearance;
- An order to keep certain businesses separate from each other (e.g. Twitter and TikTok);
- Transparency obligations as to algorithms and key technologies;
- Licensing of intellectual property to level the technology competition;
- Depending on a specific national market, blocking some parts of the merged ecosystem from entering these markets or making it conditional on data and technology sharing with local competitors;
- Social obligations like creating free data and technology pools and technology transfers to share with smaller businesses.