

Acquisitions of “Nascent” Competitors

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Virtually every day we hear about how “big tech” has gotten “too big.” Congressional inquiries of Google, Amazon, Facebook, and Apple fill the business pages regularly.¹ The FTC is investigating,² the Justice Department and State Attorneys General are reportedly about to file suit,³ and enthusiastic academics and politicians are positing expanding antitrust as a way to “rein in” the activities of these firms. One of the most discussed approaches is using antitrust to prevent (or at least inhibit) large technology platforms from acquiring promising start-ups—based on the theory that at least some such acquisitions of these “nascent competitors” eliminate important future competition.⁴ Britain’s Competition and Markets Authority (CMA) and the U.S. Federal Trade Commission recently blocked the planned merger of Illumina and Pacific Biosciences on just that basis.⁵ Other investigations are reportedly pending,⁶ and there even have been some reports of revisiting long-consummated mergers, such as Facebook/Instagram or Google/YouTube.⁷

We believe these efforts are largely misguided. “Nascent competitor” acquisitions tend to add useful new features to products consumers already love, eliminate little or no current competition, supply the acquired firm’s users with far greater support and innovation, and provide a valuable exit ramp for investors, encouraging future investments in innovation. Consumer harm is at best speculative. And most importantly, critics have identified no instances in which meaningful competition has been lost or consumers harmed.

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¹ See, e.g., Steve Lohr, *House Antitrust Panel Seeks Documents from 4 Big Tech Firms*, N.Y. TIMES (Sept. 13, 2019), <https://www.nytimes.com/2019/09/13/technology/amazon-apple-facebook-google-antitrust.html>.

² Press Release, Fed. Trade Comm’n, *FTC to Examine Past Acquisitions by Large Technology Companies* (Feb. 11, 2020), <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies>.

³ Brett Kendall & John McKinnon, *Justice Department, State Attorneys General Likely to Bring Antitrust Lawsuits Against Google*, WALL ST. J. (May 15, 2020), <https://on.wsj.com/30M9TIE>.

⁴ See, e.g., Lina Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019); Jonathan B. Baker & Fiona Scott Morton, *Confronting Rising Market Power*, ECONOMICS FOR INCLUSIVE PROSPERITY (May 2019), <https://econfp.org/policy-brief/confronting-rising-market-power/>; C. Scott Hemphill & Tim Wu, *Nascent Competitors*, U. PA. L. REV. (forthcoming 2020) (manuscript at 79), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3624058; Eleanor M. Fox, *Platforms, Power, and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.-Europe Divide*, 98 NEB. L. REV. 297, 313–14 (2019).

⁵ Press Release, Fed. Trade Comm’n, *FTC Challenges Illumina’s Proposed Acquisition of PacBio* (Dec. 17, 2019), <https://www.ftc.gov/news-events/press-releases/2019/12/ftc-challenges-illumina-proposed-acquisition-pacbio>. The authors’ law firm, Wilson Sonsini Goodrich & Rosati, represented Pacific Biosciences in the transaction.

⁶ Bryan Koenig, *Two Agencies, Two ‘Nascent Competitor’ Merger Challenges*, LAW360 (Dec. 18, 2019). See United Kingdom, Competition and Markets Authority, *Online Platforms and Digital Advertising* (Market Study Final Report, July 1, 2020), https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf.

⁷ Lohr, *supra* note 1.

This is not to say that antitrust should ignore theories of future competition: The standards for intervening in potential competition cases have been too strict and should be expanded, but antitrust intervention should still be based on reasonable probabilities, not ephemeral possibilities.⁸ Nascent competitor acquisitions should not be prevented absent proof of at least a *reasonable* probability of a lessening of competition in the *foreseeable* future.

In the discussion below, we address the degree to which nascent competitor acquisitions empirically have endangered competition, the countervailing benefits these acquisitions can provide, and how legal doctrine might be designed to distinguish the harmful nascent rival acquisitions from the procompetitive or benign.

Potential Competition Law Today

Potential competition doctrine came relatively late in antitrust history. The Supreme Court first touched on potential competition theories under the Clayton Act in three 1964 opinions,⁹ and later addressed “perceived potential competition” in the 1973 *Falstaff* case.¹⁰ But the Court’s only definitive foray into potential competition was the 1974 decision in *United States v. Marine Bancorporation, Inc.*,¹¹ a case which, 46 years later, still stands as the Court’s most recent decision on potential competition mergers. The case involved an acquisition by National Bank of Commerce, a large national bank headquartered in Seattle, of Washington Trust Bank, a local bank operating in Spokane. Prior to the acquisition, National had no operations in the Spokane area, but it did have “a longstanding interest in securing entry into Spokane.”

The Court ruled for the defense, largely on the basis that any actual potential entry would be insignificant. Although the Court declined to state expressly whether the elimination of potential competition could satisfy Section 7’s “lessening” of competition requirement, it did set out what the government would have to prove, identifying five requirements: (1) the target market must be “substantially concentrated”; (2) there must be a feasible means of entry, either *de novo* or through acquisition of a far smaller company (a “toe-hold” acquisition); (3) entry must be probable; (4) the acquiring firm must be one of just a few potential entrants; and (5) there must be evidence that the entry would significantly decrease market concentration or otherwise lead to significant procompetitive effects.¹²

In the wake of *Marine Bancorporation*, challenges based on an actual potential entry theory were rare, and successful challenges rarer still. One notable exception was the FTC’s challenge to a Brunswick outboard motor joint venture with Yamaha, where the court concluded that the “essential preconditions” of *Marine Bancorporation* had been satisfied and upheld the Commission’s order unwinding the deal.¹³ But *Brunswick/Yamaha* was an outlier. In the main, despite

⁸ *Brown Shoe Co. v. United States*, 370 U.S. 294, 323, 325 (1962).

⁹ *United States v. El Paso Nat. Gas Co.*, 376 U.S. 651 (1964) (actual potential entry); *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 281 (1964) (acquisition of a growing maverick rival); *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 173 (1964) (dual potential entry).

¹⁰ *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973).

¹¹ 418 U.S. 602 (1974).

¹² *Id.* at 628–39.

¹³ *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 981 (8th Cir. 1981). Yamaha eventually entered anyway and became a significant competitor.

the advent of pre-merger notification in 1976, actual potential competition challenges were infrequent and the courts remained skeptical.¹⁴

Recognition of Future Markets and Future Effects

By the 1990s, the U.S. enforcement agencies were increasingly emphasizing that enforcement focusing on competitive conditions in future markets was necessary to protect consumers. Most of the cases brought involved pharmaceutical products, where the lengthy FDA approval process makes predictions somewhat easier; but some other enforcement actions looked into the future even in non-pharma markets. And today, technology markets and their effect on innovation are top of mind—while COVID-19 has reinvigorated regulatory scrutiny in pharmaceutical markets.

One early pharmaceutical case was the FTC's consent order in *The Upjohn Co.*¹⁵ There, both Upjohn and Pharmacia were just “two of only a very small number of firms currently in advanced stages of developing topoisomerase I inhibitors for the treatment of colorectal cancer in the United States.”¹⁶ The market had not yet come into existence, but there the FTC had a strong basis for concluding that future competition would be reduced if the merger were allowed. The Commission obtained a number of other consents in pharmaceutical cases involving products in development, but not yet on the market.¹⁷

Where, however, consent orders were not obtained, the Commission was less successful in court proceedings. In *FTC v. Lundbeck, Inc.*,¹⁸ for example, the leading seller of a treatment for heart conditions in infants acquired a competing product in development. The courts found that the Commission's market definition was flawed and dismissed the case on that basis. More recently, in *FTC v. Steris Corp.*,¹⁹ the FTC lost a challenge to the proposed acquisition of a leading foreign supplier of “gamma sterilization” by a dominant U.S. supplier. The court found the evidence lacking that, but for the merger, the foreign company would have entered the U.S. market. Importantly, neither *Lundbeck* nor *Steris* doubted the significance of future competition in a factually supported case. But the courts were insistent on holding the FTC to its burden of proof.

Although the FTC's pharma specialization gives it far more access to future competition issues, the DOJ has consistently expressed similar views about the significance of future competition. In 1995, then-Deputy Assistant Attorneys General Steven Sunshine and Richard Gilbert authored a significant article on “innovation markets.”²⁰ Antitrust Division complaints since then have con-

¹⁴ See, e.g., *Tenneco, Inc. v. FTC*, 689 F.2d 346, 355 (2d Cir. 1982); *Mercantile Texas Corp. v. Board of Governors of the Fed. Reserve Sys.*, 638 F.2d 1255 (5th Cir. 1981); *BOC Int'l, Ltd. v. FTC*, 557 F.2d 24 (2d Cir. 1977); *FTC v. Atl. Richfield Co.* 549 F.2d 289, 294–95 (4th Cir. 1977); *Fraser v. Major League Soccer*, 7 F. Supp. 2d 130, 141 (D. Mass. 2000), *aff'd*, 284 F.3d 47 (1st Cir. 2002); *Ginsburg v. InBev NV/SA*, 649 F. Supp. 2d 943, 948 (E.D. Mo. 2009), *aff'd*, 623 F.3d 1229 (8th Cir. 2010); see also *Gulf States Reorganization Grp. v. Nucor Corp.*, 466 F.3d 961 (11th Cir. 2006); *Coast Mountain Hardwoods, Inc. v. Weyerhaeuser Co.*, 2004 WL 4076673 (D. Or. Feb. 25, 2004). Even the FTC dismissed its own challenge in *B.A.T. Industries, Ltd.*, 104 F.T.C. 852, 916 (1984).

¹⁵ FTC Docket C-3638 (Feb. 6, 1996).

¹⁶ *Id.* Complaint ¶ 8.

¹⁷ See, e.g., *Ciba-Geigy, Ltd.*, 62 Fed. Reg. 409 (FTC Jan. 3, 1997); *Baxter Int'l*, 62 Fed. Reg. 408 (FTC Jan. 3, 1997); *Hoechst, AG*, FTC File No. 991-0071 (Dec. 7, 1999); *Zeneca Group, PLC*, FTC Docket No. C-3880 (June 7, 1999); see also *Sensormatic Elecs. Corp.*, FTC Docket C-3572 (Apr. 4, 1995) (non-pharma, anti-theft labels).

¹⁸ 650 F.3d 1236 (8th Cir. 2011).

¹⁹ 133 F. Supp. 3d 962 (N.D. Ohio 2015).

²⁰ Richard J. Gilbert & Steven C. Sunshine, *Incorporating Dynamic Efficiency Concerns in Merger Analysis: The Use of Innovation Markets*, 63 ANTITRUST L.J. 569, 597–601 (1995).

sistently mentioned innovation and other future harms as warranting intervention.²¹

It is fair to say then that, at least by the 1990s, U.S. enforcement authorities were focused—correctly—on innovation, future markets, and future effects. These concerns were highlighted when the Justice Department sued Microsoft in 1998.

Microsoft

By the end of the 20th century, potential competition was alive in theory yet not often in practice. The 2001 decision in *Microsoft*,²² however, made clear that future effects were highly relevant. The case did not involve an acquisition but, instead, Microsoft's tactics toward the then-leading Internet browser, Netscape's Navigator, and the leading "virtual machine," provided by Sun's Java product. The D.C. Circuit did not find an attempt to monopolize browsers or virtual machines, as no such relevant markets had been proven. Rather, the court found that both products served as "middleware" on which programs could be run, potentially bypassing Windows and thus posing a future threat to Microsoft's operating system monopoly. On that basis, the court concluded that Microsoft had unlawfully maintained its monopoly of PC operating systems, saying that "it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will—particularly in industries marked by rapid technological advance and frequent paradigm shifts."

Significantly, the court of appeals held expressly that neither Netscape nor Java were current competitors in the operating systems market because neither was sufficiently developed to serve as current substitutes.²³ The court acknowledged that predicating antitrust liability on the exclusion of a "nascent" rival was necessarily speculative, but concluded:

We may infer causation [of maintenance of monopoly power] when exclusionary conduct is aimed at producers of nascent competitive technologies as well as when it is aimed at producers of established substitutes. Admittedly, in the former case there is added uncertainty, inasmuch as nascent threats are merely *potential* substitutes. But the underlying proof problem is the same—neither plaintiffs nor the court can confidently reconstruct a product's hypothetical technological development in a world absent the defendant's exclusionary conduct. To some degree, "the defendant is made to suffer the uncertain consequences of its own undesirable conduct."²⁴

The court did not rule that exclusion of any potential threat would violate Section 2, but it was less than clear about what degree of threat, and on what timeline, the future threat would need to be to warrant antitrust intervention. On the facts in issue, the court found no plausible efficiency justifications, and noted Microsoft's statement (in the course of arguing that Netscape and Java should be included in the relevant market) that "a company like Netscape founded in 1994 can be by the middle of 1995 clearly a potentially lethal competitor to Windows because it can supplant [Microsoft's] position in the market."²⁵

²¹ See, e.g., Complaint ¶ 62(d), *United States v. Bazaarvoice, Inc.*, No. 13-cv-00133 (N.D. Cal. filed Jan. 8, 2014).

²² *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001).

²³ *Id.* at 53–54. "The District Court found, however, that neither Navigator, Java, nor any other middleware product could now, or would soon, expose enough APIs to serve as a platform for popular applications, much less take over all operating system functions." *Id.*

²⁴ *Id.* at 79 (quoting 3 PHILLIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 651c, at 78 (3d ed. 1996)).

²⁵ *Id.* at 79–80.

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So the precise holding of *Microsoft* is that, without a justification, exclusion of a potential rival that could supplant the monopolist in 18 months may violate Section 2. That seems quite unremarkable. What the decision does not tell us is how much supplanting in how little time is required before the “nascent” threat (net of expected efficiencies) is sufficiently concrete and serious to violate the statute.

As interpreted by some commentators, *Microsoft* presents something of a statutory anomaly. It finds that the exclusion of a nascent rival may violate Section 2 of the Sherman Act. Logic would extend that analysis to the *acquisition* of a nascent rival under Section 2 as well. In fact, some are now arguing, based on *Microsoft*, that an impact on nascent rivalry might violate Section 2 without also violating Section 7 or, put differently, that Section 2 allows for a lower burden of proof than Section 7 of the Clayton Act.²⁶ That seems not just odd, but wrong.

On the facts of *Microsoft*, Section 7 would clearly prohibit the acquisition of companies capable of supplanting a monopoly within 18 months. Section 2 preceded amended Section 7 by 60 years, but in all that time it was ineffective in combating problematic mergers. In fact, the fundamental purpose of amended Section 7 was to outlaw acquisitions that Sections 1 and 2 of the Sherman Act did not reach.²⁷ The presence of a monopolist (versus a non-monopoly acquirer) may be an essential requirement under Section 2, but the presence of a monopolist is surely of major relevance under Section 7 as well. The agencies have challenged acquisitions based on future harms with increasing success over the past 25 years, and the use of Section 7 has not been an obstacle.

Using Section 2, moreover, has a significant enforcement downside. Section 2 has a far more powerful efficiencies defense than Section 7 allows. Courts have held that business justifications can be a complete defense—or at least require balancing—under Section 2.²⁸ In contrast, the burden of proving efficiencies in a Section 7 case is on the defense—and is such a high burden it was never satisfied until *T-Mobile* this year.²⁹ Other commentators have pointed out how this difference is a substantial impediment to the use of Section 2.³⁰

The standards for assessing acquisitions of nascent rivals should be no different—and certainly no broader—under the Sherman Act than under Section 7. But that does not resolve the key questions: How much of a threat is required to trigger intervention? How likely does the threat need to

²⁶ See Jeffrey M. Wilder, Acting DAAG, Potential Competition in Platform Markets 5–6 (June 10, 2019), <https://www.justice.gov/opa/speech/file/1176236/download>; Scott Hemphill, *Disruptive Incumbents: Platform Competition in an Age of Machine Learning*, 119 COLUM. L. REV. 1973, 1988–89 (2019); Hemphill & Wu, *supra* note 4; see generally Complaint, *FTC v. Mallinckrodt Ard Inc.*, Case 1:17-cv-00120 (D.D.C. filed Jan. 25, 2017); D. Bruce Hoffman, Dir., Bureau of Competition, Fed. Trade Comm’n, *Antitrust in the Digital Economy: A Snapshot of FTC Issues 10* (May 22, 2019), https://www.ftc.gov/system/files/documents/-public_statements/1522327/hoffman_gcr_live_san_francisco_2019_speech_5-22-19.pdf.

²⁷ See, e.g., *Brown Shoe*, 370 U.S. at 318 & n.33 (“Congress rejected, as inappropriate to the problem it sought to remedy, the application to § 7 cases of the standards for judging the legality of business combinations adopted by the courts in dealing with cases arising under the Sherman Act.”).

²⁸ Compare *Microsoft*, 253 F.3d at 59 (balancing) with *Oahu Gas Serv. v. Pac. Res., Inc.*, 838 F.2d 360, 369 (9th Cir. 1988) (complete defense); *Morris Commc’ns v. PGA Tour Inc.*, 364 F.3d 1288, 1295 (11th Cir. 2004) (same); *Bell v. Dow Chem Co.*, 847 F.2d 1179, 1186 (5th Cir. 1988) (same).

²⁹ *New York v. Deutsche Telekom AG*, 2020 WL 635499, at *19–26 (S.D.N.Y. Feb. 11, 2020); see ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 379–80 (8th ed. 2017).

³⁰ E.g., Timothy Muris & Jonathan Nuechterlein, *First Principles for Antitrust Review of Long-Consummated Mergers*, 5 CRITERION J. ON INNOVATION 29, 39–40 (2019); Kristen C. Limarzi & Harry R.S. Phillips, “Killer Acquisitions,” *Big Tech, and Section 2: A Solution in Search of a Problem*, CPI ANTITRUST CHRON. (May 2020); Douglas H. Ginsburg & Koren Wong-Ervin, *Challenging Consummated Mergers Under Section 2* (George Mason Univ. L. & Econ. Paper No. 20-14, May 2020).

be? And how soon must the threat be able to materialize into real-world competition? What would the acquiring firm have done absent the acquisition? Those questions require empirical investigation, including whether the potential harm is outweighed by consumer benefits. We turn to those issues now.

What Does the Evidence Tell Us?

During the recent FTC hearings on Competition and Consumer Protection in the 21st Century, a few commentators suggested antitrust authorities should take a more skeptical view of mergers involving large technology firms that purchase smaller rivals.³¹ These concerns have been echoed by others, including *The Economist*.³² Specifically, the commentators assert that by purchasing nascent or potential rivals, large technology firms engage in “killer acquisitions,” ultimately undermining competition in the marketplace.³³ As legal support, they rely on *Microsoft*. These proponents have also argued that orthodox merger analysis is inapposite when analyzing tech-based mergers. They assert that modern day antitrust analysis discounts the harm caused by acquisitions of nascent or potential competitors in markets with network effects and the ability of large tech companies to leverage their position and engage in anticompetitive behavior.

When one takes a closer look at the effects of these mergers, however, one is hard pressed to find empirical evidence of any consumer harm. Output data are available for some of the most discussed transactions and offer one way to assess competitive impact.³⁴ For example, in the Facebook/Instagram transaction from 2012, Instagram had no revenue and only a small number of employees.³⁵ After the purchase, Instagram users grew from 30 million to over one billion³⁶ and Facebook users went from 900 million to over two billion during the same time period.³⁷ A report commissioned by Britain’s Competition and Markets Authority concluded that, since the merger, Instagram has “evolved to a different product, which offers fully-fledged social network function-

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³¹ On October 15–17, 2019, the Federal Trade Commission held its third session in a series of hearings on Competition and Consumer Protection. The third hearing examined, among other things, antitrust frameworks for evaluating acquisitions of nascent competitors or competitors operating in nascent markets. Several participants expressed concerns regarding the current framework and its alleged tendency to underenforce against harmful nascent acquisitions. *See, e.g.*, Comments of Anant Raut, On Nascent Competition in Merger Analysis (2018), https://www.ftc.gov/system/files/documents/public_comments/2019/01/ftc-2018-0088-d-0017-163741.pdf; *see also* papers cited *supra* note 4.

³² *American Tech Giants Are Making Life Tough for Startups*, THE ECONOMIST (Jun. 2, 2018), <https://www.economist.com/business/2018/06/02/american-tech-giants-are-making-life-tough-for-startups>; *see also, e.g.*, Hemphill & Wu, *supra* note 4; Kevin Bryan & Erik Hovenkamp, *Antitrust Limits on Startup Acquisitions* (Mar. 21, 2019), <https://ssrn.com/abstract=3350064>.

³³ *See, e.g.*, Raut, *supra* note 31; Baker & Scott Morton, *supra* note 4, at 4; Hemphill & Wu, *supra* note 4, at 9 (“Where the nascent competitor threatens a monopoly, the case for intervention is strengthened in several respects. First, dominant incumbents have a greater capacity to resist and suppress competition. For example, tech platforms tend to be hard to dislodge. A monopolist also has a larger incentive to suppress an entrant, given that it internalizes most or all of the benefits from doing so.”).

³⁴ *See, e.g.*, Jonathan Jacobson, *Another Take on the Relevant Welfare Standard for Antitrust*, ANTITRUST SOURCE (Aug. 2015), www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug15_full_source.pdf.

³⁵ *See* Kurt Wagner, *Here’s Why Facebook’s \$1 Billion Instagram Acquisition Was Such a Great Deal*, RECODE (Apr. 9, 2017), <https://www.recode.net/2017/4/9/15235940/facebook-instagram-acquisition-anniversary>; Evelyn M. Rusli, *Facebook Buys Instagram for \$1 Billion*, DEALBOOK, (Apr. 9, 2012), <https://dealbook.nytimes.com/2012/04/09/facebook-buys-instagram-for-1-billion>.

³⁶ *See* Wagner, *supra* note 35; Ashley Carman, *Instagram Now Has 1 Billion Users Worldwide*, THE VERGE (June 20, 2018), <https://www.theverge.com/2018/6/20/17484420/instagram-users-one-billion-count>.

³⁷ J. Clement, *Number of Monthly Active Facebook Users Worldwide as of Third Quarter 2019*, STATISTA (Apr. 30, 2020), <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/>.

alities . . . and allows advertisers to place their ads on the platform.”³⁸ A number of social networking functionalities such as photo tagging and direct messaging, along with other new features that have “improve[d] user experience,” were introduced after the merger.³⁹ Because of Facebook’s extensive experience managing high volumes, and its substantial access to infrastructure, Instagram was able to expand output and manage the high volume of content that accompanies such growth. Post-merger, relying on Facebook’s expertise and resources, Instagram was able to robustly enforce its content policy. And Facebook facilitated Instagram’s international expansion by “providing expertise on language translation.”⁴⁰

This does not sound like consumer harm. Critics argue that, without the acquisition, Facebook would have developed its own photo sharing capability. Or that Instagram would have been successful on its own. This may be so, but would Instagram be as good today without Facebook? Would the Facebook offering be anywhere near as good? What we *know* is that users have benefited. Whether they would be even better off without the deal is speculative at best.⁴¹

Priceline’s purchase of Kayak offers another digital platform data point. At the time of the merger, Priceline had several subsidiaries that were online travel agencies (OTAs) whose principal function was to procure consumer travel services from travel service providers (TSPs). OTAs are two-sided platforms, bringing together TSPs and consumers. On the other side of the deal, Kayak was a meta-search site (MSSs) that allowed consumers to search and contrast prices for hotels, airlines, and related travel services. Importantly, MSSs did not have a booking functionality—rather, MSSs referred consumers to OTAs or TSPs. The number of Priceline users in the U.K. has increased by more than 100 percent post-merger, from 5 million in September 2012 to 11.8 million in September 2017. While the report suggests that it is difficult to attribute the entirety of this growth to the merger, the expansion of output is nonetheless noteworthy.

Google’s acquisition of DoubleClick is another example. The FTC examined whether the merger eliminated potential competition between Google and DoubleClick.⁴² The FTC concluded that the “facts failed to support” the notion that the loss in potential competition would be substantial. And the available evidence in the online display market suggests the FTC was right. Prior to the acquisition, a substantial amount of publisher inventory on DoubleClick was going unsold. Conversion of that remnant inventory with Google’s AdSense increased revenue for publishers and benefited advertisers by increasing the reach of their ads. Prices to publishers and advertisers declined substantially following the merger, these reduced prices made DoubleClick’s sophisti-

³⁸ Lear, *Ex-Post Assessment of Merger Control Decisions in Digital Markets* (CMA requested that Lear provide it with an assessment of various mergers) (May 9, 2019), https://www.learlab.com/wp-content/uploads/2019/06/CMA_past_digital_mergers_GOV.UK_version-1.pdf.

³⁹ *Id.* at 58.

⁴⁰ *Id.* at 59.

⁴¹ There are, however, troubling reports about Facebook’s conduct in this regard, specifically that the Instagram acquisition was part of a larger strategy of serial acquisitions to eliminate any potential threat to Facebook’s social dominance, and that the acquisition was designed to make sure Twitter did not get it. *See, e.g.*, Fiona M. Scott Morton & David C. Dinielli, *Roadmap for an Antitrust Case Against Facebook*, OMIDYAR NETWORK (June 2020), <https://www.omidyar.com/sites/default/files/Roadmap%20for%20an%20Antitrust%20Case%20Against%20Facebook.pdf>; Josh Kosman, *Facebook Boasted of Buying Instagram to Kill the Competition: Sources*, N.Y. POST (Feb. 26, 2019). We do not know the specific facts behind these reports. We agree, however, that a serial acquisition strategy or an acquisition designed just to deprive a rival of a valuable feature raise very different issues than a plain-vanilla acquisition of a startup—and could well justify a different outcome. *See* Complaint, *FTC v. Mallinckrodt Ard Inc.*, Case 1:17-cv-00120 (D.D.C. filed Jan. 25, 2017) (acquisition challenged under Section 2 given lack of any legitimate justification).

⁴² Michael Baye et al., *Economics at the FTC: The Google-DoubleClick Merger, Resale Price Maintenance, Mortgage Disclosures, and Credit Scoring in Auto Insurance*, 33 REV. INDUS. ORG. 211 (2008).

cated tools more widely accessible to publishers and advertisers. Consumers received more targeted, useful, and efficient advertisements because the DoubleClick remnant inventory was filled using Google's strong contextual targeting software. Google's hardware infrastructure also led to improved ad delivery times.

Rather than foreclose future competition, following the merger the digital advertising space has attracted several other firms to enter, including Amazon, Verizon, Comcast, Facebook, Apple, and Yahoo.⁴³ Digital advertising spending also has steadily increased, with market experts predicting it will increase nearly 60 percent between 2017 and 2023.⁴⁴ It also recently surpassed TV ad spending for the first time in history—all while Facebook and Google's share of digital ad spending dropped.⁴⁵

Confirming these beneficial effects, a recent *eMarketer* article reported that increased competition means that programmatic service providers have been more transparent about fees; advertisers are doing more to optimize supply paths and avoid resellers, such as taking advantage of ads, txt, and private marketplaces and guaranteed deals make up a larger share of programmatic display spending, which means that there may be less programmatic fees associated with those transactions.⁴⁶

Google's purchases of YouTube (2006) and Waze (2013) are likewise often criticized as undermining competition. At the time of Google's purchase, YouTube had 19.1 million users and 100 million video views per day,⁴⁷ and was facing an existential copyright liability threat. Today, YouTube has some two billion users, usage exceeds five billion views daily, and copyright issues have been managed.⁴⁸ In June 2007, six hours of video were uploaded every minute; by May of 2019 500 hours of video were being uploaded every minute.⁴⁹ As to Waze, while Google powered its navigation services through licensed map data and data gathered through satellite and street views, Waze map data is facilitated by crowd-sourcing and real-time user data.⁵⁰ In the years since the merger, Waze has expanded its usage base, and the CMA-commissioned report concluded that "the merger has enabled Google Maps and Waze to exploit their complementarities and generate efficiencies."

Microsoft's purchase of LinkedIn is another often-cited example of a potentially harmful acquisition—but in the first quarter of 2016 LinkedIn had 433 million members and now has more than 575 million.⁵¹ And finally, the growth and success of Cisco offers perhaps the most persuasive evi-

⁴³ *The 10 Best Display Advertising Networks*, WEBFX, <https://www.webfx.com/internet-marketing/top-display-ad-networks.html>.

⁴⁴ *Digital Advertising*, STATISTA, <https://www.statista.com/outlook/216/100/digital-advertising/worldwide>.

⁴⁵ *U.S. Digital Ad Spending Will Surpass Traditional in 2019*, EMARKETER (Feb. 19, 2019), <https://www.emarketer.com/content/us-digital-ad-spending-will-surpass-traditional-in-2019>.

⁴⁶ Amy He, *eMarketer's New Ad Tech Tax Estimates Show One-Third of Spending Goes to Intermediaries*, EMARKETER (Aug. 5, 2019), <https://www.emarketer.com/content/emarketer-s-new-ad-tech-tax-estimates-show-one-third-of-spending-goes-to-intermediaries>.

⁴⁷ Associated Press, *Google Buys YouTube for \$1.65 Billion*, NBC NEWS (OCT. 10, 2006), <https://nbcnews.to/3fs3F4I>; see also *Youtube Serves Up 100 Million Videos a Day Online*, REUTERS (July 16, 2006), https://usatoday30.usatoday.com/tech/news/2006-07-16-youtube-views_x.htm.

⁴⁸ See *36 Mind Blowing Youtube Facts, Figures, and Statistics* (2017), <http://videonitch.com/2017/12/13/36-mind-blowing-youtube-facts-figures-statistics-2017-re-post/>; M. Rutnick, *YouTube in Numbers*, ANDROID AUTHORITY (Aug. 11, 2019), <https://www.androidauthority.com/youtube-stats-1016070/>; see also Kit Smith, *57 Fascinating and Incredible YouTube Statistics*, BRANDWATCH (Feb. 21, 2020), <https://www.brandwatch.com/blog/youtube-stats/>.

⁴⁹ *Hours of Video Uploaded to YouTube Every Minute as of May 2019*, STATISTA, <https://www.statista.com/statistics/259477/hours-of-video-uploaded-to-youtube-every-minute/>.

⁵⁰ Lear, *supra* note 38, at 77, 84.

⁵¹ Maddy Osman, *Mind-Blowing LinkedIn Statistics and Facts*, KINSTA (Apr. 10, 2020), <https://kinsta.com/blog/linkedin-statistics/>.

dence of the salutary benefits of purchasing nascent firms. In 1991, Cisco was a maker of routers, simple black boxes that allowed computer networks with different protocols to sync with one another. Since that time, it has gone from \$1.2 billion in revenues to over \$51 billion in 2019. Much of this growth has been the consequence of a supercharged acquisition strategy, leading it to briefly becoming the most valuable company in the world.⁵² Indeed,

[Cisco] used acquisitions of key technologies to assemble a broad line of network-solution products during the frenzied Internet Growth period. From 1993 to 2001, Cisco acquired 71 companies, at an average price of approximately \$350 million. Cisco's sales increased from \$650 million in 1993 to \$22 billion in 2001, with nearly 40 percent of its 2001 revenue coming directly from these acquisitions. By 2009, Cisco had more than \$36 Billion in revenues and a market cap of approximately \$150 billion.⁵³

And Cisco's success in employing acquisitions to add to its product lines is partly why it has had such success in the high-tech sector.⁵⁴

The empirical evidence we have of the various acquisitions that critics claim are problematic suggests a substantial increase in output post-merger. Such a significant expansion in output and users is “the complete opposite of what we typically consider an anticompetitive outcome.”⁵⁵ It may well reflect simply good internal development, both pre- and post-acquisition. Much of the concern today, in fact, appears to be with the fact that the acquirors have improved the acquired firm's initial offering and led to greater growth. That should not be a basis to challenge an acquisition.

We do not doubt that there may be some examples of harmful acquisitions of nascent rivals by dominant firms. But we have seen no empirical evidence of harmful acquisitions to date, and the examples some commenters have posited suggest the opposite. Relying on empirical evidence to evaluate competitive effects, especially in high-tech markets, can help shed light on the question of whether a merger or specific business practice is anticompetitive.⁵⁶ This empirical landscape should be considered when formulating rules governing these transactions.

Benefits of Nascent Competitor Acquisitions

Much of the commentary on these issues ignores or fails to recognize that nascent competitor mergers often have significant procompetitive consequences that are routinely overlooked.

First, these acquisitions may offer new features that improve relevant product offerings.⁵⁷ Google's acquisition of ITA provides an example. By providing high-quality flight information, Google search demonstrably improved and enhanced consumer outcomes. Indeed, much of the

⁵² Lawrence M. Fisher, *Cisco's Growth Strategy* (2017), https://www.kornferry.com/content/dam/kornferry/docs/article-migration/Briefings17_Buy&Build.pdf; *List of acquisitions by Cisco Systems*, en.wikipedia.org/wiki/List_of_acquisitions_by_Cisco_Systems.

⁵³ Mark Goedhart, Tim Koller & David Wessels, *The Six Types of Successful Acquisitions*, MCKINSEY & COMPANY (May, 10 2017), <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/the-six-types-of-successful-acquisitions>.

⁵⁴ See Scott Thurm, *Cisco Defies the Odds with Mergers that Work*, Wall St. J. (Mar. 1, 2000), <https://www.wsj.com/articles/SB95187454498765678>.

⁵⁵ John M. Yun, *Hearing on Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms*, Prepared Statement Before the U.S. Senate Comm. on the Judiciary Subcomm. on Antitrust, Competition Policy, and Consumer Rights (Sept. 24, 2019) (“When properly formulated, the central forces driving anticompetitive conduct are reductions in output, quality, innovation, and transfers away from consumers to producers. Facebook's acquisition of Instagram does not fit this profile”), <https://www.judiciary.senate.gov/imo/media/doc/Yun%20Testimony.pdf>.

⁵⁶ Cf. Joshua D. Wright, *Does Antitrust Enforcement in High Tech Markets Benefit Consumers? Stock Price Evidence from FTC v. Intel*, 38 REV. INDUS. ORG. 387 (2011) (“Reliance on stock price data, and in particular, evaluation of abnormal returns provides an additional source of information to shed light on these vexing questions [whether conduct is pro or anti-competitive].”).

⁵⁷ Enghin Atalay et al., *Vertical Integration and Input Flows*, 104 AM. ECON. REV. 1120, 1121–22 (2014).

handwringing over the major tech deals over the past several years is simply due to the acquisitions' success. Antitrust law encourages internal innovation, and that includes post-acquisition innovation regarding the acquired product. Nascent competitor acquisitions should not be prohibited retroactively without giving significant consideration to the improvements the acquiring firm has provided.

Second, virtually all of these transactions give the acquired firm greater access to research and development capabilities. The enormous R&D resources at firms like Apple and Amazon facilitate innovative improvements in ways that the acquired firms may have been unable to provide on their own. The improvements in YouTube and DoubleClick's video viewing and advertising were not even contemplated at the time of acquisition and might not have been possible had Google not acquired those firms.

[V]irtually all of these transactions give the acquired firm greater access to research and development capabilities.

Third, relatedly, having a firm with far greater resources will tend strongly to improve the acquired product. Larger firms tend to have greater engineering and distribution capabilities, making the product more widely available and, often, just better. And what evidence we have suggests these resources were put to consumer-enhancing use in the cases of YouTube, Instagram, Waze, and LinkedIn.

Fourth, and very importantly, the vast majority of these acquisitions provide an important exit ramp for investors. Developing a product and then selling it to a Facebook or Apple has become an effective business strategy and is often regarded as a start-up's dream scenario.⁵⁸ As one well-known investor put it, "If the DOJ starts going after tech companies for making acquisitions, venture investors will be much less likely to invest in new startups, thereby reducing competition in a far more harmful way."⁵⁹ In fact, one paper analyzed data on venture capital investments and merger law, finding unsurprisingly that

subsequent VC activity responds to both [positive and negative] shocks. First, the passage of a pro-takeover law in a country is associated with more subsequent VC deals in that country, while the enactment of a business combination antitakeover law in the U.S. has a negative effect on subsequent VC investment.⁶⁰

Finally, even in contexts where the platform company has wholly preempted the field, the evidence indicates that acquisitions of start-ups and other small firms tend not to reduce innovation but to redirect it to new types of inventions.⁶¹

Adopting stricter merger standards with the explicit intention of deterring large-firm acquisitions carries with it considerable risk. The unintended consequences of stricter standards could stifle innovation and prevent the tangible benefits so many large-firm acquisitions have brought to the economy. When Microsoft's tactics were being questioned and ultimately challenged, its defenders suggested that the antitrust laws should be modified (in Microsoft's favor) by recognizing rapid technological change as a defense. Time proved quickly that antitrust was supple enough to

⁵⁸ See Benjamin Joffs & Cyril Ebersweiler, *What Every Startup Founder Should Know About Exits*, TECHCRUNCH (July 31, 2018), <https://techcrunch.com/2018/07/31/what-every-startup-founder-should-know-about-exits/>.

⁵⁹ See Leonard Speiser (@leonardspeiser), TWITTER (June 11, 2019, 5:59 PM), <https://twitter.com/leonardspeiser/status/1138566502250999809>.

⁶⁰ Gordon M. Phillips & Alexei Zhdanov, *Venture Capital Investments, Mergers and Competition Laws Around the World* (last revised, Nov. 11, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3072665.

⁶¹ See, e.g., Wen Wen & Feng Zhu, *Threat of Platform-Owner Entry and Complementor Responses: Evidence from the Mobile App Market*, STRATEGIC MGMT. J. (June 17, 2018), http://fengzhu.info/entry_threat.pdf.

accommodate technological change. Modifying doctrine on that basis would have been a mistake then and would be a mistake today.⁶²

A Suggested Approach

The question of when antitrust should intervene to block or restructure the acquisition of a nascent firm implicates several other inquiries:

- How dominant is the acquiring firm in the market of interest?
- Besides the target, what other threats currently exist to the acquiring firm's dominance?
- How significant a threat does the target firm have to pose? Is it enough if the target can be expected eventually to capture 2% of the relevant market? 5%? 15%? 25%? Does the threat need to be direct?
- How probable does the threat need to be? Is it sufficient if the target's likelihood of market success is 33%? 67%? Does it depend on the severity of the threat?
- How soon is the threat expected to emerge? Six months? Three years? Is FDA or other regulatory approval an issue?
- How likely is it that the dominant firm would have developed the target's product on its own without the acquisition?

These questions are complex enough standing alone, but the contexts in which they arise exacerbate their complexity. Much competition in tech is indirect. Firms often look nothing like each other, but have actual and substantial impacts on each other's business. Amazon is a product search and fulfillment company that is responsible for the most significant competition Google faces and deprives it of significant revenue, as search and search advertising often is not done in the product arena on Google at all.⁶³ That is the case even though the two products look completely unlike each other; monetize differently; and are otherwise completely dissimilar. As another example, Instagram allowed social photo displays, as did Facebook, though that was not its focus. So Instagram competed with some but not most of Facebook's functionality.

With the issues we are discussing here, a key question is whether, but for the acquisition, the target would erode the buyer's monopoly power. The indirect nature of the competition is an important consideration in that inquiry. A smaller company might threaten to take away some of the dominant firm's customers, but its product might just as easily prove to be more of a complement than a substitute—such that combining the two would benefit users rather than harm them.

One can imagine many different approaches to these issues. We might, for example, continue to rely solely on *Marine Bancorporation's* criteria. But given the need to prove that the target is one of a very few potential rivals, and the requirement of proving that, but for the acquisition, the target would significantly decrease market concentration, continued reliance of *Marine Bancorporation* would come close to a regime of per se legality. It would potentially leave many harmful acquisitions untouched, especially in technology fields.

At the opposite end, we can immediately discard any suggestion of simply blocking all small firm acquisitions by dominant players. Doing so would eliminate all of the many benefits these transactions can provide. The proposal of the Stigler Center Committee for the Study of Digital Platforms does not go nearly that far but would increase agency intervention considerably. They argue:

⁶² Jonathan Jacobson, *Do We Need a "New Economy" Exception for Antitrust?*, ANTITRUST, Fall 2001, at 91.

⁶³ See, e.g., Adam Levy, *Is Google Amazon's Biggest Competitor?*, NASDAQ (Dec. 26, 2019), <https://www.nasdaq.com/articles/is-google-amazons-biggest-competitor-2019-12-26>.

Mergers between dominant firms and substantial competitors or uniquely likely future competitors should be presumed to be unlawful, subject to rebuttal by defendants. This presumption would be valuable, not because it would identify anticompetitive mergers with precision, but because it would shift the burden to the party with the best access to relevant information on issues of competitive effects and efficiencies from the merger.⁶⁴

We do not recommend altering burdens of persuasion. Although the Stigler Committee proposal addresses the issue of Section 7 underenforcement in these instances, it has two problems. First, as the preceding discussion of actual outcomes demonstrates, there is really no case for substantially altering merger rules for nascent rival acquisitions. Second, although the qualification of “uniquely likely” makes the Committee’s proposal more limited and more sensible, defining that term would be essential for the proposal to work. Does unique mean one? Three? Since we are talking about inventions of new things, and new things can come out of teenagers’ garages, divining whether a rival is “uniquely” situated to compete in the future will not be easy. It is surely correct, however, when the Committee points out that the merging firms have the best (and sometimes the only) information on the potential efficiencies from the merger. But the solution is not to alter the burden of persuasion. It is to make sure that the merging parties bear the burden of persuasion (or “going forward”) on these points.

[W]e do not agree that the “technology gap” or “superstar firms” are the problem or are even a problem.

Kevin Bryan and Erik Hovenkamp have offered another solution that does not go quite as far as the Committee’s, but would lead to significantly increased intervention. They “argue in favor of intervention in situations where a highly dominant incumbent acquires a startup whose technology could plausibly influence competition if rivals are excluded from using it.”⁶⁵ Alternatively, they would prevent acquisitions by firms with a “pattern of acquiring promising startups and then declining to license competitors.” They believe such a policy would improve market conditions by reducing acquisitions they believe enhance the “technology gap” between startups and “superstar” firms. They assert that the problem is not the traditional antitrust concern that future ‘potential competitors’ are being bought, but rather that startup acquisitions affect the technological gap and thereby influence competition and market structure.

Although the factors Bryan and Hovenkamp identify can be significant in a given case, we do not agree that the “technology gap” or “superstar firms” are the problem or are even a problem. In fact, recent scholarship by David Autor and his coauthors suggests that increased productivity by “superstar firms” *has driven* the recent observed increase in concentration. They find that, “[i]f globalization or technological change push sales towards the most productive firms in each industry, product market concentration will rise as industries become increasingly dominated by superstar firms.”⁶⁶ The authors further find that the industries concentrating the fastest are the ones with the fastest growth in productivity. Finally, and most importantly, the authors find that these effects are consistent across international jurisdictions, ruling out the assertion that more lax antitrust scrutiny in some jurisdiction is the cause. With all of the technological advances seen over the past 50 years, much of it from large firms or firms that became large, antitrust policy needs to be careful not to adopt measures that would inhibit further innovations.

⁶⁴ *Stigler Committee on Digital Platforms, Final Report*, STIGLER CTR. FOR THE STUDY OF ECONOMY AND THE STATE 98 (2019), <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms—committee-report—stigler-center.pdf?a=en&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E>.

⁶⁵ Bryan & Hovenkamp, *supra* note 32, at 2–4.

⁶⁶ David Autor et al., *The Fall of the Labor Share and the Rise of Superstar Firms*, Q.J. ECON. (forthcoming), <https://economics.mit.edu/files/12979>; see also Sam Peltzman, *Productivity and Prices in Manufacturing During an Era of Rising Concentration* (May 10, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3168877.

Framing the issue as a “technology gap problem” means preventing large firms from one of the most promising ways to improve their product and benefit users, and would be counterproductive. If a large firm improves, the gap is larger. That is a good thing. If the same benefits are obtained by a large firm able to expand output, the greater number of users translates into greater aggregate consumer benefits. Google buying DoubleClick may “increase the technology gap” by increasing use of both, forcing everyone else to catch up. That is what antitrust encourages because it leads to concrete consumer benefits.⁶⁷

If nascent competitor acquisitions present a problem at all, it is when and if they eliminate significant potential competition that would otherwise occur. If the acquisition retards the development of new products or features, consumers are harmed and the transaction should be prevented. If the acquisition does not have that effect, however, then preventing acquisitions would retard innovation by eliminating the incentive of a profitable exit ramp and by stopping the acquirer from using one of the best methods of improving its product offering. We should not want any of those consequences.

Instead, the enforcement goal should be to encourage product improvement acquisitions except in those real but comparatively unusual contexts where meaningful competition is likely to be lost. Our approach to the questions identified above is designed accordingly:

- *Dominance.* If a stricter standard is to be applied, its application should be limited to truly dominant firms. If the acquirer has a high market share but still faces significant competition, the acquisition’s adverse effects, if any, would be mitigated.
- *Threat level.* The degree of threat to the acquirer’s dominance is important. If the target is always going to be a niche player, preventing the acquisition will not erode the acquiring firm’s dominance. The level of significance is necessarily arbitrary. But if the target’s best case is just 3 percent or so of the dominated market, that cannot be enough. We suggest a requirement that the target is likely to capture 10 percent or more of the dominated market in the foreseeable future before antitrust enforcement is even contemplated. Some of the competition in issue may be indirect, but absent something like a 10 percent minimum in the market of interest, the effect will not be sufficiently significant to warrant scrutiny.
- *Probability.* If there is no probability that the nascent firm will become a significant competitor, there is no sound basis to block the deal. There should be some proof of a real probability that the target will enter or become a competitor. The law has always placed the burden of proving adverse effects on the government and required the government to prove a reasonable probability of a lessening of competition to prevail on a merger challenge.⁶⁸ There is no basis for a different standard here.⁶⁹ What is a “reasonable” probability, however, may vary with the circumstances.⁷⁰ Typically, one would want a showing of a 50.01+%

⁶⁷ Hemphill & Wu, *supra* note 4, propose a focus on the acquiring firm’s intent. That approach would be promising in the rare cases where it is clear either that the only purpose was to quash a nascent threat or purely to improve an existing product. Most cases will have mixed motives, however, and while intent can be illuminating, the evidence needs to be viewed with great care.

⁶⁸ *Brown Shoe*, 370 U.S. at 323, 325. More recently, in *Princo Corp. v. ITC*, 616 F.3d 1318 (Fed. Cir. 2010), the court was evaluating whether removal of a “nascent threat” was anticompetitive. The court said: “While the suppression of nascent threats can be construed as anticompetitive behavior under certain circumstances, Princo had the burden of showing that the hypothesized agreement had an actual adverse effect on competition in the relevant market. . . . What Princo had to demonstrate was that there was a ‘reasonable probability’ that the Lagadec technology, if available for licensing, would have matured into a competitive force in the storage technology market.” *Id.* at 1338 (citations omitted).

⁶⁹ See Kristin Limarzi & Gregory Werden, *Forward-Looking Merger Analysis and the Superfluous Potential Competition Doctrine*, 77 ANTITRUST L.J. 109 (2010).

⁷⁰ See Hemphill & Wu, *supra* note 4, at 13.

likelihood. Otherwise, we would be blocking a merger that is *not likely* to hamper competition. But what if the prospective harm is COVID-19 or something less deadly but still really serious? You would clearly need to block the deal even if the probability is less than 50%. But those cases will be rare. We suggest that the standard should be 50.01+% or a showing that the merger needs to be prevented because the potential harm is so severe that it cannot be risked. That will be a very high standard.

What is a “reasonable” probability, however, may vary with the circumstances.

- *Timing.* How soon the nascent rival will become a threat is closely related to the issues of the size and probability of the threat. But if the probability is that the target will not get a 10 percent share for 10 years, projecting that far out involves too many layers of speculation. Absent an unusually long product development cycle, the threat should be expected to be realized in two to three years to be considered meaningful. Recall that, in *Microsoft*, it was conceded that Netscape would become a “lethal” threat in 18 months.
- *Efficiencies.* The degree and proximity of the competitive threat must be contrasted with the expected consumer gains from the merger. As with current practice, the burden should rest with the defense. But the greater the expected benefits, and the more remote or speculative the competitive threat, the more likely it should be to allow the transaction through.
- *Counterfactual.* If the acquiring firm would have developed further its own offering of the target firm’s product or service, the loss of that development should be factored into the analysis. But given the uncertainty inherent in that effort, there should be especially compelling evidence that consumers would be better off had the merger not occurred.⁷¹

Given the high level of current concern over technology firm dominance, the *Marine Bancorporation* requirements seem too strict. The potential for significant efficiencies and product improvement, which the decision largely ignores, should not be discounted. But the structural requirements should be relaxed. For one, it should not be required that there be no more than two or three other potential entrants, as *Marine Bancorporation* demands. In light of the unknowable nature of who is inventing what, it should be sufficient to show that there are not more than five companies *known* (through media reports or the parties’ documents) to be developing the same product. The target firm must have something special for its acquisition to be harmful, but unless there are a limited number of such firms, the effect of an acquisition of one of several will not matter very much.⁷² The requirement that the target be expected to substantially deconcentrate the market if not acquired should also be relaxed. Given the uncertainties, having to prove that a nascent threat will have that effect is too high a burden. It should be sufficient to show that competition would likely be increased, with a real potential (if not a likelihood) for such substantial deconcentrating effect.

The timing of any challenge to a nascent rival merger is an important consideration too. We are all used to the regime of pre-merger notification we have had for over 40 years. But in response to the inherent uncertainty in ascertaining whether a nascent competitor will become an effective

⁷¹ See Ilene Gotts & Richard Rapp, *Antitrust Treatment of Mergers Involving Future Goods*, ANTITRUST, Fall 2004, at 100. Gotts and Rapp track a dozen pharmaceutical cases where mergers were blocked and find varying outcomes in getting viable products to market.

⁷² Recognizing the difficulty of determining whether “the acquired firm is likely to “steal” business from the incumbent in the foreseeable future,” the EC’s Giulio Federico and U.S. Professors Scott Morton and Shapiro propose a “sliding scale” method of addressing these acquisitions. Specifically, the degree of likelihood should be lower the greater the incumbent’s market power. Giulio Federico, Fiona Scott Morton & Carl Shapiro, *Antitrust and Innovation: Welcoming and Protecting Disruption*, in INNOVATION POLICY & THE ECONOMY 125, 150–53 (Josh Lerner & Scott Stern eds., 2020). Although we suspect the authors would intervene more frequently than we suggest, a sliding scale approach such as this makes good sense.

competitor, Scott Hemphill and Tim Wu make the valid point that challenges can come after consummation, as was the experience in almost every case prior to Hart-Scott-Rodino in 1976.⁷³ It is true enough that the agencies will know more about the transaction after completion, and there is ample authority for unwinding a merger many years after completion,⁷⁴ but this power should be used only sparingly and with much caution.⁷⁵

The central problem is the potential for penalizing innovation and success. Challenging a transaction like Microsoft/LinkedIn just because LinkedIn has gotten much bigger and successful would be perverse. It would penalize the independent development antitrust encourages and would deter even the most beneficial mergers. Intervention post-merger should focus on instances where innovation has slowed, prices increased, or user growth stalled. Those cases are likely to be very few and far between.⁷⁶

Conclusion

Acquisitions of startups and other “nascent” potential competitors are much in the news. But apart from theories of competitive harm, actual adverse effects on consumers have not been shown for the vast majority of these transactions. The concern really is one of “big is bad”—but that has never been a rule of U.S. antitrust law, and unless we want to abandon the welfare of consumers, it should not be.

The only legitimate competition concern over these acquisitions is the possibility of eliminating significant future competition. That is a real and significant concern. But over the past 50 years, the courts have developed a large body of law and enforcement policy governing the subject, focusing on the interest of competition and consumers. That law continues to be up to the task and, with just minor tweaking, should be the direction antitrust continues to pursue. ●

⁷³ Hemphill & Wu, *supra* note 4, at 18–21.

⁷⁴ See *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

⁷⁵ See *Muris & Nuechterlein*, *supra* note 31.

⁷⁶ There are a number of important related issues on which we have views but lack space to address in any detail and leave for another day. One is whether a series of acquisitions is best approached under Section 2 rather than proceeding under Section 7 against only the last in the series but obtaining relief directed at prior acquisitions as well. We believe both routes may be appropriate depending on the facts. A second is whether an acquisition can be challenged where it is lacking any efficiency justification and designed simply to preclude the target from being acquired and used by a smaller rival. We agree that it should, but we urge caution in ensuring that the intent evidence is used sparingly and only with evidence of probable effect—and where truly reflective of a company’s objectives. We also agree that acquisitions lacking any efficiency justification should be treated more harshly, provided there is still evidence of probable anticompetitive effects. A third is the scope of the *duPont* holding doctrine. *DuPont*, 353 U.S. 586 (1917 stock acquisition challenged some 40 years later on the basis of effects occurring years later from the “holding” of the stock). We believe it should be limited to partial stock acquisitions, and that acquisitions for control should be assessed at the time the acquisition is made. Doing otherwise threatens to penalize the acquirer for making effective product improvements. And yet another is whether retaliation for a start-up’s refusal to sell merits scrutiny under Section 2. Cf. Bryan Clark, *Facebook Is Killing Snapchat with the Format It Created*, THE NEXT WEB (May 21, 2018), <https://perma.unl.edu/YLE9-B359>. We believe it can, but to the extent product improvements are involved, they and the requirement to show effects would pose a challenge to any case.