

Unclassified

English - Or. English

4 June 2020

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Start-ups, killer acquisitions and merger control – Note by the United States

11 June 2020

This document reproduces a written contribution from the United States submitted for Item 2 of the 133rd OECD Competition Committee meeting on 10-16 June 2020.
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<http://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control.htm>

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JT03462564

United States

1. Introduction

1. In the United States, the Antitrust Division of the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) (together, the Agencies) recognize that competitive markets play an important role in promoting and incentivizing innovation that benefits consumers.¹

2. New entry, as well as expansion by existing firms, can spur innovation that benefits consumers. Innovative firms are often attractive M&A targets. On one hand, incumbent firms seek to acquire pioneering firms and emerging technologies that can be further developed. On the other hand, incumbents may target such firms to eliminate a competitive threat.²

3. Section 7 of the Clayton Act prohibits mergers and acquisitions whose effect “may be substantially to lessen competition, or to tend to create a monopoly.”³ Acquisitions of innovative firms, mavericks, nascent competitors, and potential competitors are reviewable under Section 7. U.S. merger law is generally forward-looking, designed to stop threats to competition “in their incipiency;” but it can be used to challenge and unwind consummated mergers as well.⁴ In addition, transactions may be reviewed under Section 1 of the Sherman Act, which prohibits contracts, combinations or conspiracies in restraint of trade; or Section 2 of the Sherman Act, which prohibits monopolization, attempted monopolization, and conspiracy to monopolize.⁵

¹ See, e.g., U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 6.4 (2010), <https://www.ftc.gov/sites/default/files/attachments/mergerreview/100819hmg.pdf> [hereinafter *Horizontal Merger Guidelines*].

² See Speech, Jeffrey M. Wilder, Acting Deputy Asst. Att’y General for Economics, U.S. Dep’t of Justice, *Potential Competition in Platform Markets*, Hal White Antitrust Conference (June 10, 2019), <https://www.justice.gov/opa/speech/acting-deputy-assistant-attorney-general-jeffrey-m-wilder-delivers-remarks-hal-white>; Speech, Makan Delrahim, Asst. Att’y Gen., U.S. Dep’t of Justice, “*And Justice for All: Antitrust Enforcement and Digital Gatekeepers*,” Antitrust New Frontiers Conference: The Digital Economy & Economic Concentration (June 11, 2019), <https://www.justice.gov/opa/speech/file/1171341/download>; Prepared Statement of the Federal Trade Commission, “Competition in Digital Technology Markets: Examining Acquisitions of Nascent and Potential Competitors by Digital Platforms,” before the U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy, and Consumer Rights (Sept. 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1545208/p180101_testimony_-_acquisitions_of_nascent_or_potential_competitors_by_digital_platforms.pdf. See also Economic Report of the President and Annual Report of the Council of Economic Advisers (Feb. 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/02/2020-Economic-Report-of-the-President-WHCEA.pdf>; OECD Global Forum on Competition, *Merger Control in Dynamic Markets – Contribution from the United States* (Dec. 6, 2019), [https://one.oecd.org/document/DAF/COMP/GF/WD\(2019\)32/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2019)32/en/pdf).

³ 15 U.S.C. § 18.

⁴ *Brown Shoe v. United States*, 370 U.S. 294, 323 (1962); see also Complaint, *United States v. Parker Hannifin Corp.*, No. 17-cv-01354 (D. Del. Sept. 26, 2017) (challenging consummated acquisition).

⁵ 15 U.S.C. § 1, 2. The DOJ enforces the Sherman Act. The FTC enforces Section 5 of the FTC Act, which prohibits “unfair methods of competition,” including violations of the Sherman Act as well as some other types of conduct. See Federal Trade Commission, Statement of Enforcement Principles Regarding “Unfair Methods of Competition”

4. U.S. antitrust law recognizes that mergers among competitors, including nascent or potential competitors, may be anticompetitive, especially “when an industry leader seeks to acquire an up-and-coming competitor that is changing customer expectations and gaining sales.”⁶ This includes the acquisition of a company that is not yet present in a market, but which may have the ability and incentive to enter and compete in the incumbent’s market.⁷ The Agencies understand the importance of competition from firms that threaten to disrupt market conditions by repositioning or offering a new technology or business model, and appreciate that the elimination of such firms through M&A activity can result in a substantial lessening of competition.⁸

5. The Agencies also recognize that acquisitions of existing or potential competitors may result in efficiencies. As further described in the *Horizontal Merger Guidelines* (2010), the Agencies will consider whether the merger has the potential to generate significant efficiencies and thus enhance the merged firm’s ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products. As in any merger analysis, however, cognizable efficiencies must be merger-specific, verifiable, and not result from an anticompetitive aspect of the merger. Ultimately, they must be shown to enhance competition and thus benefit consumers. For example, merger-generated efficiencies may enhance competition by permitting two ineffective competitors to form a more effective competitor, e.g., by combining complementary assets.⁹

2. U.S. Law Addressing Acquisitions of Nascent and Potential Competitors

6. Section 7 of the Clayton Act provides a well-developed legal framework for preventing or undoing mergers that may substantially lessen competition. The *Horizontal Merger Guidelines* set out the framework used by the Agencies to analyze horizontal mergers, including those between an incumbent and a small and growing competitor or a potential entrant. The Agencies take a careful, fact-based approach to assessing the competitive effects of any merger or acquisition, focusing on the particular economic characteristics of the markets affected by the transaction. To that end, the Agencies conduct thorough factual investigations that include economic analysis, the review of relevant documents and information, the taking of testimony, and interviews with parties, customers, and competitors, and other market participants.¹⁰

7. In some industries, market conditions and industry structure are not always static and may change rapidly. Therefore, the Agencies bear in mind that current or past market shares may overstate – or perhaps understate – the current or future competitive significance of industry participants, particularly in industries where innovation and new

Under Section 5 of the Federal Trade Commission Act, 80 FR 57056 (Sept. 21, 2015), https://www.ftc.gov/system/files/documents/federal_register_notices/2015/09/150921commissionpolicyfrn.pdf;

see also *California Dental Ass’n v. FTC*, 526 U.S. 756, n.3 (1999).

⁶ See Statement of the Commission, *supra* note 2 at 7.

⁷ *Horizontal Merger Guidelines* § 9, Entry: [Complaint ¶ 37, United States v. Westinghouse Air Brake Technologies Corp., et al., No. 16-cv-02147 \(D.D.C. Oct. 26, 2016\)](#).

⁸ *Horizontal Merger Guidelines* § 2.1.5, Disruptive Role of a Merging Party..

⁹ *Horizontal Merger Guidelines* §10, Efficiencies.

¹⁰ *Horizontal Merger Guidelines* § 2, Evidence of Adverse Competitive Effects.

product development are key dimensions of competition.¹¹ The Agencies consider both price and non-price effects in their analyses, recognizing that firms often compete on the basis of quality and innovation, such as new product development, among other factors.¹²

8. The anticompetitive effects of a merger need not be certain to render a merger illegal under Section 7.¹³ Predicting anticompetitive effects with precision can be particularly difficult where the parties do not currently operate in the same relevant market and the competitive effects are predicated on the reasonable likelihood of future competition between the merging parties. In analyzing the potential for competitive harm from a transaction, the Agencies rely on a broad range of evidence, including, but not limited to, strategic plans and other business documents, and public statements of the acquiring and to-be-acquired firm, and inquiry into the rationale for the proposed transaction. The Agencies also consider the acquirer's past successes or failures in bringing to market new or acquired products and the likelihood that the acquired firm would develop into a significant competitor without the merger. Moreover, the Agencies also seek and evaluate the views of competitors and customers of the merging parties, industry experts, and market analysts. Where future competition may depend on the willingness of investors to fund, or continue to fund, new or developing market participants, the Agencies may seek and evaluate the views and future plans of investors.

9. Section 2 of the Sherman Act provides an additional framework for evaluating exclusionary or predatory conduct, including acquisitions that may contribute to the acquisition or maintenance of monopoly power. For example, Section 2 may apply where a monopolist engages in exclusionary conduct (such as an acquisition) to eliminate the potential competitive threat posed by a technology, product, or service, even if it "is not presently a viable substitute" for the acquirer's own technologies, products, or services.¹⁴ Section 2 liability requires proof of monopoly power in a relevant market, and anticompetitive conduct to acquire or maintain that power.¹⁵ A successful monopoly maintenance claim does not require proof that a nascent or potential competitor would actually have developed into a viable substitute, but "whether as a general matter the

¹¹ *Horizontal Merger Guidelines* § 5.2, Market Shares.

¹² Note by the United States, Non-price Effects of Mergers, DAF/COMP/WD(2018) 45, https://www.ftc.gov/system/files/attachments/us-submissions-oced-2010-present-other-international-competition-fora/non-price_effects_united_states.pdf.

¹³ *Horizontal Merger Guidelines* § 1, Innovation and Product Variety.

¹⁴ *United States v. Microsoft Corp.*, 253 F.3d 34, 54 (D.C. Cir. 2001) ("Nothing in § 2 of the Sherman Act limits its prohibition to actions taken against threats that are already well-developed enough to serve as present substitutes.").

¹⁵ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004)("[T]he possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.")(emphasis in original); *accord Retractable Techs., Inc. v. Becton Dickinson & Co.*, 842 F.3d 883, 891 (5th Cir. 2016)("Predatory or anticompetitive conduct, which excludes competitors from a market, is conduct, *other than competition on the merits or restraints reasonably necessary to competition on the merits*, that reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power.")(citation and internal quotation marks omitted; emphasis added); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 308 (3d Cir. 2007)("Anticompetitive conduct may take a variety of forms, but it is generally defined as conduct to obtain or maintain monopoly power as a result of *competition on some basis other than the merits*.")(emphasis added); *Monsanto Co. v. Scruggs*, 459 F.3d 1328, 1338–39 (Fed. Cir. 2006)("To establish a section 2 violation, one must prove that the party charged had monopoly power in a relevant market and acquired or maintained that power by anti-competitive practices *instead of by competition on the merits*.")(citation omitted; emphasis added).

exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to the defendant's continued market power."¹⁶

10. Section 2 analyses also include an evaluation of any procompetitive justifications. When parties come forward with sufficient evidence to review the claimed procompetitive benefits of an acquisition, the Agencies consider whether that acquisition would result in, among other things, new or improved products, increased speed to market of any acquired products, and any benefits in the form of improved innovation, including the ability of the merged firm to conduct research and development more effectively, to the extent those have likely effects on the relevant market.¹⁷ For example, an incumbent digital platform might acquire, through merger, the technology of a nascent or potential competitor because the technology complements or enhances the incumbent's own technology. Additionally, an incumbent may have the financial resources, experience, and other business assets to more efficiently develop and commercialize a nascent or potential competitor's technology, thus making it available to more consumers.

2.1. Agency Experience

11. For years, the Agencies have challenged vertical and horizontal transactions that involve nascent competitors. In so doing, the Agencies have sought remedies to resolve their competition concerns. Where an adequate remedy was not available, the Agencies went to court to seek a decision declaring the merger illegal and enjoining it from closing. Challenges to nascent competitor acquisitions have included transactions where: (i) the merging firms were actual competitors, (ii) deals where, but for the merger, one firm would have faced competition from the target in the future, and (iii) mergers where both firms were working to develop products that would likely compete in the future. Examples of each of these types of cases are discussed below.

2.1.1. Cases Involving Actual Competitors

12. The Agencies have routinely challenged acquisitions by an incumbent firm of a smaller competitor that had, at the time of the acquisition, the potential to expand its market share and competitive significance absent the acquisition.

13. In September 2019, the DOJ sued to block Novelis Inc.'s proposed acquisition of Aleris Corporation in order to preserve competition in the North American market for rolled aluminum sheet for automotive applications, commonly referred to as aluminum auto body sheet.¹⁸ As alleged in the complaint, Novelis had long been one of only a few aluminum body sheet suppliers in North America, while Aleris was a relatively new competitor that—in Novelis's own words—was “poised for transformational growth.” The proposed transaction would concentrate more than half of the domestic production and sale of aluminum auto body sheet, 60 percent of projected total domestic capacity, and the majority of uncommitted domestic capacity under the control of one firm. Prior to filing

¹⁶ *Microsoft*, 253 F.3d at 79 (“Given [the] rather edentulous test for causation, the question in this case is not whether Java or Navigator would actually have developed into viable platform substitutes, but (1) whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power and (2) whether Java and Navigator reasonably constituted nascent threats at the time Microsoft engaged in the anticompetitive conduct at issue.”).

¹⁷ *Horizontal Merger Guidelines* § 10, Efficiencies.

¹⁸ See Complaint, *United States v. Novelis*, No. 1:19-cv-02033-CAB (N.D. Ohio Sept. 4, 2020), <https://www.justice.gov/atr/case-document/file/1199461/download>.

the complaint, the DOJ reached an agreement with defendants to refer the matter to binding arbitration on the issue of market definition if the parties were unable to resolve the competitive concerns with the transaction within a certain period of time. After a 10-day first-of-its-kind arbitration hearing, the arbitrator ruled for DOJ, holding that aluminum auto body sheet constitutes a relevant product market, as the United States had alleged. As a result, Novelis was required to divest Aleris's entire aluminum auto body sheet operations in North America to fully preserve competition.

14. In August 2019, the DOJ challenged Sabre Corporation's proposed acquisition of Farelogix under Section 7.¹⁹ The DOJ alleged that the transaction would allow Sabre, the largest airline booking services provider in the United States, to eliminate a disruptive competitor that had introduced new technology to the travel industry and that was poised to grow significantly. According to the complaint, the transaction would result in higher prices, reduced quality, and less innovation. At trial, DOJ presented evidence that Sabre had a history of engaging in anticompetitive tactics designed to undermine and delay the adoption of Farelogix's technology. In April 2020, the U.S. federal district court issued its opinion, finding that Farelogix was a "disruptor" and a "successful" competitor of Sabre's. It further found that the "evidence suggests that Sabre will have the incentive to raise prices . . . and stifle innovation" following the acquisition.²⁰ Notwithstanding these factual findings, the court denied DOJ's request to block the merger, ruling that it was bound by the Supreme Court's decision in *Ohio v. American Express Co.*²¹ to hold that Sabre and Farelogix do not compete in a relevant market. The DOJ filed a notice of appeal of the court's decision.²² On May 1, 2020, Sabre and Farelogix terminated their merger agreement.²³ On May 12, 2020, the DOJ moved in the Third Circuit to vacate the district court's decision, pursuant to the doctrine from *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), because the merging parties' decision to abandon the merger rendered the case moot, precluding the possibility of challenging the decision on appeal.

15. In 2018, the FTC challenged the merger of CDK Global and Auto/Mate.²⁴ CDK was the market leader in specialized platform business software for franchise automotive dealers. Auto/Mate was a much smaller competitor with an innovative business model that was winning business from larger firms by offering lower prices, flexible contract terms, low fees for third-party apps participating on the platform, free software upgrades and training, and high-quality customer service. Although Auto/Mate was already competing in the market, the FTC was concerned that the acquisition would eliminate its future competitive significance. Auto/Mate's impact on existing platforms indicated that its pre-acquisition market share underrepresented its future market significance and the FTC concluded that the acquisition would have eliminated competition from a key emerging

¹⁹ Complaint, *United States v. Sabre Corp.*, No. 1:19-cv-01548-LPS (D. Del. Aug. 20, 2019), <https://www.justice.gov/opa/press-release/file/1196816/download>.

²⁰ Opinion, *United States v. Sabre Corp.*, 34, 87, Civil Action No. 1:19-cv-01548-LPS (D. Del. April 8, 2020)

²¹ 138 S. Ct. 2274 (2018).

²² Notice of Appeal, *United States v. Sabre Corp.* On April 9, 2020, the UK Competition and Markets Authority blocked the transaction on the grounds that it would stifle innovation and competition. See Bloomberg Law, *U.S. to Appeal Sabre, Farelogix Merger Decision* by Victoria Graham (Apr. 9, 2020), <https://news.bloomberglaw.com/mergers-and-antitrust/u-s-to-appeal-sabre-farelogix-merger-decision>.

²³ See DOJ Press Release, *Statement from Assistant Attorney General Makan Delrahim on Sabre and Farelogix Decision to Abandon Merger* (May 1, 2020), <https://www.justice.gov/opa/pr/statement-assistant-attorney-general-makan-delrahim-sabre-and-farelogix-decision-abandon>.

²⁴ *In re CDK Global*, Dkt. 9382 (complaint filed Mar. 20, 2018).

rival. The parties terminated their acquisition agreement shortly after the FTC issued its complaint.

16. In December 2019, the FTC challenged the acquisition of an innovative biotech firm, Pacific Biosciences of California, by an established incumbent, Illumina, as a violation of both Section 7 of the Clayton Act and Section 2 of the Sherman Act. The FTC alleged that Illumina's proposed acquisition of PacBio would substantially lessen current and future competition in a market for next-generation DNA sequencing systems, a rapidly expanding technology used in genetic research and clinical testing, and that the acquisition would unlawfully maintain Illumina's monopoly power. Illumina's systems employed short-read sequencing technology and, at the time of the proposed acquisition, it had a market share of more than 90%. PacBio's platforms employed long-read sequencing technology, and, at the time of the proposed acquisition, it had a market share of approximately 2% to 3%. But despite the current differences between their respective systems, PacBio had made significant technological advancements in recent years, and absent the proposed acquisition, competition between Illumina and PacBio would increase substantially in the future. The FTC also alleged that the acquisition constituted unlawful maintenance of Illumina's monopoly in the U.S. market for next-generation DNA sequencing systems, by extinguishing PacBio as a nascent competitive threat. The FTC alleged that the parties could not verify or substantiate any merger-specific efficiencies, that their procompetitive justifications for the acquisition were pretextual, and that any procompetitive effects flowing from the acquisition could be accomplished through means other than the acquisition.²⁵ The parties abandoned their merger plans after the FTC filed its complaint.²⁶ The UK Competition and Markets Authority (CMA) was also reviewing the transaction, and had issued provisional findings that the merger was anticompetitive.

17. In January 2013, DOJ filed a lawsuit to challenge the consummated acquisition of PowerReviews by Bazaarvoice.²⁷ The complaint alleged that Bazaarvoice's acquisition of PowerReviews eliminated the company's only significant rival in the market for product ratings and reviews platforms used by U.S. manufacturers and retailers to display product ratings and reviews on their websites. Product ratings and review platform providers negotiated prices based on each customer's perceived willingness to pay for the offered product, and that willingness depended upon the alternatives available. The presence of PowerReviews benefited its customers and non-customers alike because its market presence often forced price competition, including substantial discounting, by incumbent Bazaarvoice. On January 8, 2014, following a three-week trial, the district court found that the acquisition would likely have anticompetitive effects and therefore violated Section 7 of the Clayton Act. Bazaarvoice was ordered to divest the PowerReviews business it had unlawfully acquired.

2.1.2. Cases Involving a Threat to an Incumbent from a Future Competitor

18. The Agencies also have challenged acquisitions where the transaction was likely to delay or thwart future competition against the incumbent. Identifying and proving a loss of potential competition can be a challenging predictive exercise. In some markets, such

²⁵ *In the Matter of Illumina, Incorporated and Pacific Biosciences of California Incorporated*, Dkt. 9387 (complaint filed Dec. 17, 2019).

²⁶ *Illumina and Pacific Biosciences Announce Termination of Merger Agreement* (Jan. 2, 2020), <https://www.illumina.com/company/news-center/press-releases/press-release-details.html?newsid=eb4a5eba-6b79-41fd-b932-b89e7cd1cceb>.

²⁷ *U.S. v. Bazaarvoice*, No.13-cv-00133 (N.D. Cal. Jan. 8, 2014).

as pharmaceutical, medical device, and agricultural technology markets, the regulatory approval process may make identification of products in development more transparent than in markets in which entry is not subject to such approval processes.

19. In 2015, the FTC challenged the proposed merger of Steris Corporation and Synergy Health, alleging that the merger would eliminate Synergy as an actual potential entrant into the market for contract radiation sterilization services, or into certain narrower markets for more specific sterilization services. Steris was one of only two companies providing sterilization services to medical device firms in the United States, and Synergy had advanced plans to expand into the United States with a new, and potentially superior, sterilization technology, including securing physical locations for its plant and contracting for the required equipment. After the trial, the court concluded that the Commission had failed to show that Synergy's entry into the U.S. was probable, and declined to grant the injunction.²⁸

20. In 2009, the FTC filed a complaint challenging Thoratec Corporation's proposed acquisition of rival medical device maker HeartWare International, Inc.²⁹ The Commission charged that the transaction would eliminate current and future competition in the U.S. market for left ventricular assist devices (LVADs), a life-sustaining treatment for patients with advanced heart failure. HeartWare was engaged in clinical trials for a device that may have been superior to Thoratec's product. Although regulatory approval for these devices was uncertain, there was sufficient evidence for the Commission to allege that Heartware's LVAD still in development was positioned to be the next LVAD approved by the Food and Drug Administration for sale in the United States, and that Heartware's product represented a significant threat to Thoratec's LVAD monopoly. The few other companies developing LVADs were significantly behind HeartWare in their clinical trials and were unlikely to reach the market as soon as, or be as competitive as, HeartWare's device. The Commission's complaint alleged that no other firm could replace the current and future competition eliminated by the merger. The parties abandoned their proposed transaction after the Commission filed its complaint.

21. In 2007, the DOJ investigated certain vertical concerns in connection with Monsanto's merger with Delta & Pine Land (D&PL).³⁰ The DOJ investigation focused on whether the transaction would harm nascent competition in markets for transgenic cottonseed traits in the Southeast and South-Central United States. Monsanto was the first to develop successful traits. At time when the merger was announced, almost all cotton grown in these regions used Monsanto traits that (i) make cotton tolerant to glyphosate herbicide and (ii) make cotton plants resistant to many insects. The DOJ determined that the transaction would thwart or delay efforts by rival trait developers to bring competing traits to market by depriving those rivals' access to cottonseed material (germplasm) with a proven track record. Ultimately, the parties divested their main horizontal overlap. DOJ also sought and obtained rights and access to germplasm for the divestiture buyers, as well as modification to the terms of certain Monsanto's licenses with third-party seed companies that provided incentives to use only Monsanto traits to the exclusion of traits developed by others.

²⁸ *FTC v. Steris Corp.*, 133 F. Supp. 3d 962 (N.D. Ohio 2015). The Commission dismissed an administrative complaint that sought to permanently enjoin the transaction. *In re Steris Corp., and Synergy Health PLC.*, Dkt. 9365 (May 29, 2015).

²⁹ *In the Matter of Thoratec Corp. and HeartWare Int'l, Inc.*, Dkt. 9339 (complaint filed Jul. 30, 2009).

³⁰ See Competitive Impact Statement, *United States v. Monsanto Co.*, No. 1:07-cv-00992-RMV (D.D.C. May 31, 2007), <http://www.usdoj.gov/atr/cases/f223600/223682.pdf>.

2.1.3. Cases Involving Emerging Markets

22. The Agencies have also challenged mergers where both firms had products in development for the same future market. A merger of this kind may reduce competition by bringing separate competitive efforts under common control.³¹ In appropriate cases, the Agencies have required a divestiture of one of the products in development and/or the licensing of intellectual property rights of one or both parties to the merger, so as to support the continued development of future products.

23. In 2018, the DOJ challenged Bayer AG's acquisition of Monsanto, alleging both horizontal and vertical competition concerns. In its complaint, the DOJ emphasized that Bayer and Monsanto were leading competitors in the development of new products and services, and that the acquisition as proposed would have stifled innovation in agricultural technologies that has delivered significant benefits to farmers and consumers.³² To alleviate these concerns, the DOJ negotiated a \$9 billion divestiture of businesses and assets to BASF. Among the divested assets were certain intellectual property and research capabilities, including pipeline research and development projects, and complementary assets necessary to ensure that BASF continues to have the same innovation incentives, capabilities, and scale that Bayer would have as an independent competitor. Most notably, these assets included Bayer's nascent digital agriculture business.³³

24. In 2013, two of the world's largest semiconductor manufacturing equipment makers, Applied Materials and Tokyo Electron, announced a merger that would combine the two leading firms that possessed the necessary knowhow, resources, and ability to develop and supply high-volume non-lithography semiconductor equipment. The DOJ conducted an extensive investigation and found that the existing competitive overlap between specific equipment offered by the two firms was emblematic of a broader competition to develop new equipment. Existing competition indicated that each firm had the "building blocks," the appropriate collection of assets and capabilities, necessary to be successful developers of new equipment.³⁴ As a result, the DOJ had substantial concerns that the merger would diminish competition to develop equipment for the manufacture of next-generation semiconductors. In 2015, Applied Materials and Tokyo Electron abandoned the merger after the DOJ informed them that their proposed remedy was inadequate.³⁵

³¹ Such a merger may also have procompetitive benefits: for example, it may make entry or development of a product more likely, or support more speedy entry, because the merger allows the firms to combine complementary assets. *See, e.g.*, Statement of FTC Chairman Timothy J. Muris, in the Matter of Genzyme Corporation / Novazyme Pharmaceuticals, Inc. (January 13, 2004), <https://www.ftc.gov/system/files/attachments/press-releases/ftc-closes-its-investigation-genzyme-corporations-2001-acquisition-novazyme-pharmaceuticals-inc./murisgenzymestmt.pdf>.

³² *United States v. Bayer AG and Monsanto Company*, Civil Action No. 1:18-cv-01241 (D.D.C. 2018) (complaint filed May 29, 2018), <https://www.justice.gov/atr/case-document/file/1066656/download>.

³³ *See* DOJ Press Release, *Justice Department Secures Largest Negotiated Merger Divestiture Ever to Preserve Competition Threatened by Bayer's Acquisition of Monsanto* (May 29, 2018), <https://www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened>.

³⁴ Nicholas Hill, *et al.*, *Economics at the Antitrust Division 2014-2015: Comcast/Time Warner Cable and Applied Materials/Tokyo Electron*, 47 Rev. Ind. Or. 425, 433 (2015).

³⁵ Press Release, Dep't of Justice, *Applied Materials Inc. and Tokyo Electron Ltd. Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy* (April 27, 2015), <https://www.justice.gov/opa/pr/applied-materials-inc-and-tokyo-electron-ltd-abandon-merger-plans-after-justice-department>.

25. In 2013, the FTC challenged the merger of Nielsen and Arbitron. Both companies were developing national syndicated cross-platform audience measurement services, which would allow audiences to be measured accurately across multiple viewing platforms, such as TV and online.³⁶ At the time of the merger, no firm offered a commercially available service that could perform this function, but demand for such a service was increasing. Evidence showed that Nielsen and Arbitron were the two best positioned firms to develop this service. The FTC alleged that the elimination of future competition between Nielsen and Arbitron would increase the likelihood that Nielsen would exercise market power, and make it more likely that advertisers, advertising agencies, and programmers would pay more for national syndicated cross-platform audience measurement services. To address these concerns, as part of the settlement order, the Commission required Nielsen to divest assets related to Arbitron’s cross-platform audience measurement business, including audience data, and to enter into other licensing arrangements supporting the divestiture.³⁷

2.2. “Killer Acquisitions” and Agency Analysis

26. Commentators have noted that, in certain cases, a firm may acquire another firm merely to terminate or suspend innovative activity or the development of a product perceived to be a competitive threat to the acquiring firm. These transactions, when consummated, are sometimes referred to as “killer acquisitions” because they are said to result in a product or service being “killed” or terminated rather than brought to market. The Council of Economic Advisors articulates this concern as one factor that may motivate a particular acquisition:

*[A]nother debate asks whether dominant platforms are harming competition by buying too many smaller firms, such as start-ups funded with venture capital. It is common for large platforms to acquire smaller firms. The digital economy relies heavily on innovation, and being acquired by an established firm can be an important exit path for initial investors. Acquisition can also be important for a start-up’s success. The acquiring firm may bring marketing, financing, and other business assets that enable the start-up to grow. However, if a start-up is not acquired, it might instead grow into an independent, full-fledged competitor. Some acquisitions may occur precisely to prevent such competition.*³⁸

27. The Agencies are attentive to acquisitions in which an incumbent acquires a firm that could develop into a future competitor, or assets necessary for a firm to develop products or services in competition with the incumbent.

28. For example, in 2017, the FTC charged Mallinckrodt (formerly known as Questcor) with unlawful monopolization by acquiring the rights to a drug that threatened its monopoly in the U.S. market for adrenocorticotrophic hormone (ACTH) drugs. In its complaint, the FTC alleged that Questcor enjoyed monopoly power as a result of its control of Acthar, the only U.S. ACTH drug, and that it had unlawfully maintained that monopoly power by acquiring the U.S. rights to develop a competing drug, Synacthen Depot. The FTC alleged that Questcor’s acquisition of the U.S. rights for Synacthen had eliminated the possibility

³⁶ *In the Matter of Nielsen Holdings N.V. and Arbitron Inc.*, Dkt. C-4439 (complaint filed Feb. 28, 2014).

³⁷ See FTC Press Release, *FTC Approves Nielsen Holdings N.V. and Nielsen Audio, Inc.’s Application to Sell its LinkMeter Technology and Related Assets to comScore, Inc.* (Apr. 2, 2014), <https://www.ftc.gov/news-events/press-releases/2014/04/ftc-approves-nielsen-holdings-nv-nielsen-audio-incs-application>.

³⁸ Economic Report of the President, *supra* note 2, at 219. See also Cunningham, Ederer and Ma, *Killer Acquisitions* (March 22, 2019), <https://ssrn.com/abstract=3241707> (unpublished paper attempting to measure and identify the incident of such acquisitions in the pharmaceutical industry).

that another firm would develop it and compete against Acthar. To resolve the FTC's concerns, Questor agreed to sublicense the Synacthen assets, including intellectual property rights, to another firm to commercialize Synacthen in the United States, and further to pay \$100 million in redress of the Defendant's violations.³⁹

29. In 2016, the DOJ challenged Westinghouse Air Brake Technology Corporation's ("Wabtec") acquisition of Faiveley Transport. The DOJ alleged that the transaction, as originally structured, would have substantially lessened competition for the development, manufacture, and sale of various freight railcar brake components. Prior to the acquisition, Faiveley had formed a joint venture with another rail equipment supplier that allowed it to bundle brake components and compete more effectively with the two large incumbents, one of which is Wabtec. In addition, Faiveley had been developing its own control valve, which is the most highly-engineered, technologically-sophisticated component in a freight car brake system, the market for which had been a duopoly for years. With a control valve, Faiveley could more directly compete with the incumbents—even though full commercialization and approval was likely years away. The transaction also would have eliminated future competition for control valves by preventing Faiveley's entry into this market, and would have thus maintained a century-old duopoly between Wabtec and its only other control valve rival. To remedy these concerns, the companies agreed to divest Faiveley's entire U.S. freight car brakes business to Amsted Rail Company, an employee-owned rail equipment company.⁴⁰

30. In 2008, the FTC charged that Inverness Medical Innovations' acquisition of assets of ACON Laboratories, and its interference with that company's efforts to develop and supply consumer pregnancy tests, unlawfully maintained Inverness's monopoly power, and harmed or threatened to harm competition, in a market for consumer pregnancy tests.⁴¹ Through its acquisition of ACON assets, Inverness imposed a covenant not to compete on ACON that limited the scope and duration of its joint venture to develop and market digital consumer pregnancy tests, required ACON to remit to Inverness any profits from that joint venture, and acquired rights to intellectual property developed by ACON and its joint venture partner. The FTC alleged that through these actions, Inverness interfered with ACON's ability and incentive to develop and manufacture digital consumer pregnancy tests, and hampered the joint venture partner's ability and incentive to develop and market competing digital consumer pregnancy tests. The FTC's complaint also identified that Inverness eliminated future competition from water-soluble dye lateral flow consumer pregnancy tests by purchasing ACON's water-soluble dye consumer pregnancy test assets, and by ceasing development and marketing efforts for test products associated with the assets.⁴² To address the FTC's concerns, Inverness agreed to sell the water-soluble consumer pregnancy assets, disclaim any ownership rights for intellectual property

³⁹ *FTC v. Mallinckrodt*, Civil Action No. 1:17-cv-00120 (D.D.C. 2017) (complaint filed Jan. 25, 2017), https://www.ftc.gov/system/files/documents/cases/170118mallinckrodt_complaint_public.pdf; see FTC Press Release, *Mallinckrodt Will Pay \$100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants* (Jan. 18, 2017), <https://www.ftc.gov/news-events/press-releases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-state-charges-it>.

⁴⁰ *United States v. Westinghouse Air Brake Technologies Corp.*, No.1:16-cv-02147 (D.D.C. 2017 filed Oct. 26, 2016), <https://www.justice.gov/atr/case/us-v-westinghouse-air-brake-technologies-corp-et-al>.

⁴¹ See FTC Press Release, *Inverness Medical Innovations Settles FTC Charges That it Stifled Future Competition in U.S. Market for Consumer Pregnancy Tests* (Dec. 23, 2008), <https://www.ftc.gov/news-events/press-releases/2008/12/inverness-medical-innovations-settles-ftc-charges-it-stifled>.

⁴² *In the Matter of Inverness Medical Innovations, Inc.*, FTC File No. 061-0123 (complaint filed Dec. 23, 2008) <https://www.ftc.gov/sites/default/files/documents/cases/2008/12/081223invernesscmpt.pdf>.

developed during the joint venture, refrain from interference with ACON’s ability to transfer or license digital consumer pregnancy test technology to its joint venture partner, and refrain from interference with ACON’s ability to manufacture digital consumer pregnancy test technology for its joint venture partner.

2.3. Jurisdiction to Review Mergers Involving Nascent Competition

31. The 2005 OECD Council Recommendation on Merger Review (“OECD Recommendation”) and the International Competition Network’s Recommended Practices for Merger Notification and Review Procedures (“ICN Recommended Practices”) call for notification thresholds to be based on: (i) objectively quantifiable criteria, and (ii) information that is readily accessible to the merging parties. The OECD and ICN recommended practices also call for such thresholds to screen out transactions lacking a material nexus to the reviewing jurisdiction.⁴³

32. In the United States, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (§ 7A of the Clayton Act) requires that parties to certain mergers or acquisitions notify the Agencies before consummating the proposed transaction. Reportability under the Act depends on whether the value held as a result of the transaction and the size of the parties, as measured by their sales and assets, meet the statutory thresholds,⁴⁴ and, if so, whether an exemption applies.⁴⁵ The U.S. premerger notification program allows for efficient and expedient review of approximately two thousand proposed transactions annually by the Agencies.⁴⁶ Premerger notification has vastly improved the Agencies’ ability to identify and prevent anticompetitive mergers, and to avoid the challenges of “unscrambling the eggs.”⁴⁷

33. Although the U.S. premerger notification system subjects most mergers of significant size to premerger review for competition concerns, a transaction does not have to be subject to such review for the Agencies to be able to challenge it under the antitrust laws. Under Section 7 of the Clayton Act – which was enacted many years before the HSR Act – the Agencies can challenge acquisitions of stock or assets, without regard to whether

⁴³ See OECD Recommendation on Merger Review (2005), <http://www.oecd.org/daf/-competition/oecdrecommendationonmergerreview.htm>; ICN Recommended Practices for Merger Notification and Review Procedures, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf.

⁴⁴ The Act generally requires transactions to be notified when: (1) the acquiring or acquired person is engaged in U.S. commerce or in any activity affecting U.S. commerce; (2) the amount of voting securities, or the non-corporate interests that yield control, or assets held as a result of the acquisition is over \$94 million (the size of transaction test); and (3) if a transaction is valued at \$376 million or less, one person has sales or assets of \$188 million or more and the other has sales or assets of \$18.8 million or more (the size of person test). If the size of the transaction is greater than \$376 million, the size of person test does not apply. These notification thresholds are adjusted annually, and are available at: <https://www.ftc.gov/enforcement/premerger-notification-program/current-thresholds>.

⁴⁵ 16 CFR Part 802. *E.g.*, there is an exemption for the acquisition of foreign assets if sales in or into the United States attributable to those assets are \$94 million or less, aimed at ensuring that only transactions with a material nexus to the U.S. are notifiable.

⁴⁶ For annual information on the number of notified transactions, as well as the number challenged or abandoned, see the FTC’s Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, <https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports>.

⁴⁷ An e-filing system for submission of premerger notification filings has been established to handle filings during the COVID-19 coronavirus pandemic. See <https://www.ftc.gov/enforcement/premerger-notification-program/guidance-filing-parties>.

the acquisition requires a premerger notification under the HSR Act, and such challenges can be brought either before or after a transaction is consummated.

34. As a result, another important element of the U.S. merger review regime is the Agencies' ability to review, and if necessary, challenge non-notifiable transactions, including consummated transactions. For example, over the past five years, the FTC has conducted an in-depth review of 15 transactions that were not notifiable under the Act, in addition to the 117 notified transactions where the Commission conducted an in-depth review. Similarly, DOJ conducted in-depth reviews of 18 transactions that were not notified under the HSR rules during this period, in addition to 124 in-depth investigations of notified transactions.

35. Although most of the cases discussed above involved reportable transactions, some were not. For instance, Bazaarvoice/PowerReviews, discussed *infra*, was a non-reportable transaction. In 2013, when Mallinckrodt (then Questcor) acquired the U.S. rights to Synacthen, although it met the HSR size of transaction and person thresholds, the transaction was not reportable because it involved an exclusive license where the licensor retained manufacturing rights. Later that same year, the Agencies revised the HSR Rules to require premerger notification of exclusive license transactions where the licensee acquires all commercially significant rights from the licensor.⁴⁸

36. For reportable transactions, DOJ and FTC staff rely on several sources to learn of the potentially anticompetitive transactions. Often, the Agencies' respective staff will learn about such transactions from their ongoing monitoring of the trade press or other media. For example, the FTC's retail and hospital mergers section subscribes to publications of the National Federation of Retailers and the American Hospital Association, which often report on transactions that do not meet the notification thresholds. DOJ similarly monitors trade press covering the industries subject to its oversight. For instance, DOJ opened its preliminary investigation into Bazaarvoice's consummated acquisition of PowerReviews based on information discovered through its media review.

37. Complaints are another source of information about potentially anticompetitive transactions. Complainants can range from industry participants, such as customers concerned about potential anticompetitive effects arising from a merger between suppliers, to individual citizens or labor unions. Complaints may come to the agencies directly, may be reported in the press, or may be communicated to the Agencies by state or federal government agencies.

38. The investigation of non-reportable transactions proceeds in a manner similar to an HSR investigation. The Agencies are able to obtain documents and information through a Civil Investigative Demand in place of a Second Request. Unlike an HSR investigation, however, the parties to a non-reportable transaction may be able to consummate their deal at any time if all other regulatory approvals have been received. In many cases, however, the parties enter into a timing agreement or hold separate agreement to preserve the viability of the relevant assets during the agency's investigation and any potential challenge.⁴⁹

⁴⁸ 78 FR 68705 (November 15, 2013).

⁴⁹ See, e.g., *In re Otto Bock HealthCare North America, Inc.*, Dkt. 9378, Opinion (Nov. 6, 2019) (defendants agreed to Hold Separate Agreement three months after consummating acquisition of Freedom and prior to FTC complaint), <https://www.ftc.gov/system/files/documents/cases/d09378commissionfinalopinion.pdf>.

3. Policy Initiatives Related to Nascent Competition

39. The FTC recently conducted a series of hearings to examine whether adjustments to competition policy are necessary to address changes in the economy, evolving business practices, and new technologies.⁵⁰ In particular, hearings held on October 17, 2018, assessed the appropriate antitrust framework for evaluating *Acquisitions of Nascent and Potential Competitors in Digital Technology Markets*.⁵¹ Participants discussed many of the issues raised by the OECD Competition Committee relating to nascent acquisitions, and the FTC received public comments on this topic.⁵² The consensus view at the hearings was that the current antitrust laws are effective and adaptable to the digital platform environment. Additionally, participants agreed that the prospective loss of future competition is a viable theory of anticompetitive harm that the Agencies have used to challenge transactions in the past, and could continue to rely upon in the future.

40. On July 23, 2019, the DOJ announced that it was reviewing the practices of market-leading online platforms.⁵³ The review focuses on whether and how market-leading online platforms have achieved market power and are engaging in practices that have reduced competition, stifled innovation, or otherwise harmed consumers. The goal of the review is to assess the competitive conditions in the online marketplace to ensure that companies compete on the merits to provide services that users want. If violations of law are identified, the DOJ will proceed appropriately to seek redress.

41. On February 11, 2020, the FTC issued Special Orders pursuant to Section 6(b) of the FTC Act to five large technology firms: Alphabet (including Google), Apple, Amazon, Facebook, and Microsoft.⁵⁴ The FTC's Special Orders require these firms to provide information about prior acquisitions not notified to the Agencies under the HSR Act, including information and documents on the terms, scope, structure, and purpose of transactions that each company consummated between January 1, 2010 and December 31,

⁵⁰ Federal Trade Commission, *Hearings on Competition and Consumer Protection in the 21st Century* (Jun. 18, 2018), <https://www.ftc.gov/policy/hearings-competition-consumer-protection>.

⁵¹ Federal Trade Commission, *FTC Hearing #3: Multi-Sided Platforms, Labor Markets, and Potential Competition* (Oct. 15-17, 2018), <https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century> (see public comment questions relating to “Acquisitions of Nascent and Potential Competitors in Digital Technology Markets”).

⁵² See Federal Trade Commission, *Competition and Consumer Protection in the 21st Century*, Transcript at 168-375 (Oct. 17, 2018), https://www.ftc.gov/system/files/documents/public_events/1413712/ftc-hearings_session_3_transcript_day_3_10-17-18_1.pdf, and Public Comments, <https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century>. See also Public Comments submitted in response to FTC Hearings Initial Topic 6: Evaluating the Competitive Effects of Corporate Acquisitions and Mergers, <https://www.ftc.gov/policy/public-comments/2018/07/initiative-759>.

⁵³ Press Release, U.S. Dep't of Justice, *Justice Department Reviewing the Practices of Market-Leading Online Platforms* (July 23, 2019), <https://www.justice.gov/opa/pr/justice-department-reviewing-practices-market-leading-online-platforms>.

⁵⁴ See FTC Press Release, *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>. Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. § 46(b), authorizes the FTC to solicit information from businesses for research or non-enforcement purposes.

2019.⁵⁵ This information will help the FTC evaluate whether the Agencies are getting adequate notice of transactions that might harm competition in the digital economy.

42. On February 12, 2020, the DOJ partnered with Stanford University to hold a workshop on Venture Capital and Antitrust. The workshop explored trends in venture capital investment from the 1990s through 2020, with a focus on what antitrust enforcers can learn from investors about how to identify nascent competitors in markets dominated by technology platforms. The workshop also addressed proposed solutions to concerns that competitive alternatives to the market-leading platforms are not attractive investment opportunities. The program brought together venture capitalists, academics in law and business, and other tech industry stakeholders to explore the practical considerations that early stage investors face when calculating the risks of investing in a startup and exit strategies.

4. Conclusion

43. For decades, the Agencies have made combatting anticompetitive conduct in the technology sector is a top priority. In 2019, the FTC created the Technology Enforcement Division (TED) in the Bureau of Competition, focused on investigating anticompetitive conduct and mergers in the digital economy, including by digital platforms.⁵⁶ In addition to allocating nearly two dozen full-time staff attorneys to TED and drawing on the expertise of PhD economists in the Bureau of Economics, the FTC has hired technologists to enhance its institutional expertise. Today, DOJ's Technology and Financial Services Section is tasked with enforcing the antitrust laws in high-tech industries and digital markets.⁵⁷ From 2002 until 2017, the section was known as the Networks & Technology Enforcement Section. Before that, it was known as the Computers and Finance Section.

44. The Agencies are cognizant of concerns regarding transactions that may substantially lessen competition, including killer acquisitions in digital and other markets, and are committed to ensuring that technology markets remain competitive. The Agencies will continue to evaluate their approach to identifying and investigating acquisitions of nascent and potential competitors that may lessen current or future competition. Existing statutory tools—including Section 7 of the Clayton Act and Section 2 of the Sherman Act—provide powerful tools to protect consumers from acquisitions and other conduct that threatens to harm nascent and potential competition. The Agencies will continue to make vigorous and effective use of those tools to protect competition.

⁵⁵ Under the HSR of 1976, businesses are required to file premerger notification for acquisitions above a certain monetary threshold. However, the lack of reporting requirements for smaller transactions has historically omitted small business acquisitions from federal antitrust review. Since 1976, premerger notification filings for transactions valued above \$50 million were required in the United States pursuant to the HSR Act. In 2000, Congress amended the HSR Act to require the annual adjustment of these thresholds based on the change in gross national product. As of February 28, 2020, the premerger notification and report are required if the transaction is above \$94 million. See <https://www.ftc.gov/news-events/blogs/competition-matters/2020/01/hsr-threshold-adjustments-reportability-2020>.

⁵⁶ See FTC Press Release, *FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets* (Feb. 26, 2019).

⁵⁷ See U.S. DEP'T OF JUSTICE, ANTITRUST DIV., *Technology & Financial Services Section*, <https://www.justice.gov/atr/about-division/tfs-section>.