UNITED STATES OF AMERICA

Federal Trade Commission

Prepared Remarks of Commissioner Noah Joshua Phillips[1]

Reasonably Capable? Applying Section 2 to Acquisitions of Nascent Competitors

Antitrust in the Technology Sector: Policy Perspectives and Insights From the Enforcers (Virtual)

Charles River Associates and Skadden, Arps, Slate, Meagher & Flom LLP

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Introduction

Our nation's populist antitrust moment puts merger policy on the table, with the market for corporate control and avenues for M&A exit on the chopping block. Reform proposals in the last year include making acquisitions by large companies presumptively illegal, barring those same acquisitions outright, and even banning *all* acquisitions, full stop.[2]

[1] The views expressed below are my own and do not necessarily reflect those of the Commission or of any other Commissioner.

[2] *See*, *e.g.*, MAJORITY STAFF OF SUBCOMM. ON ANTITRUST, COMMERCIAL AND ADMIN. LAW OF THE H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN THE DIGITAL MARKETPLACE: MAJORITY STAFF REPORT AND RECOMMENDATIONS 19-20 (2020) (hereinafter MAJORITY STAFF REPORT); Erik Wasson, *Warren, Ocasio-Cortez Float Long-Shot Bid to Pause M&A in Crisis,* BLOOMBERG (Apr. 28, 2020), https://www.bloomberg.com/news/articles/2020-04-28/warren-ocasio-cortez-propose-temporary-corporate-merger-ban.

A subset of acquisitions play a starring role in Washington, D.C.'s new hostility to M&A, and provide a putative justification for such proposals: the acquisitions by dominant firms of nascent or potential competitors. For example, last year's report by the majority staff of the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law stated that the Federal Trade Commission and the Department of Justice "consistently underestimated—by a significant margin—the degree to which [such] an acquisition would undermine competition and impede entry."[3]

Too little of this policy debate, which contemplates a fundamental rework of merger law, considers what the agencies are actually doing and what the law actually says. For example, the claim that the agencies are unable and unwilling to challenge acquisitions of nascent competitors runs up against the facts. Next week marks my third anniversary as a commissioner, and during my tenure the agencies have prospectively challenged five such acquisitions: in consumer products, life sciences, fintech, and elsewhere.[4] The FTC brought 27 merger enforcement actions in fiscal year 2020, the highest number of challenges in two decades.[5] Those are the facts. But they cut against the narrative, of enforcers asleep at the wheel as

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[3] MAJORITY STAFF REPORT, *supra* note 2, at 394.

[4] FTC Press Release, *FTC Sues to Block Procter & Gamble's Acquisition of Billie, Inc.* (Dec. 8, 2020), https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-block-procter-gambles-acquisition-billie-inc; DOJ Press Release, *Justice Department Sues to Block Visa's Proposed Acquisition of Plaid* (Nov. 5, 2020), https://www.justice.gov/opa/pr/justice-department-sues-block-visas-proposed-acquisition-plaid; FTC Press Release, *FTC Files Suit to Block Edgewell Personal Care Company's Acquisition of Harry's, Inc.* (Feb. 3, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-files-suit-block-edgewell-personal-care-companys-acquisition; FTC Press Release, *FTC Challenges Illumina's Proposed Acquisition of PacBio* (Dec. 17, 2019), https://www.ftc.gov/news-events/pressreleases/2019/12/ftc-challenges-illuminas-proposed-acquisition-pacbio; DOJ Press Release, *Justice Department Sues to Block Sabre's Acquisition of Farelogix* (Aug. 20, 2019), https://www.justice.gov/opa/pr/justice-department-sues-block-sabres-acquisition-farelogix.

[5] *See* FED. TRADE COMM'N, ANNUAL PERFORMANCE REPORT FOR FISCAL YEAR 2020 27 (Jan. 19, 2021), https://www.ftc.gov/system/files/documents/reports/fy-2020-performance-report/fy20_perform_plan_report_update.pdf.

obviously illegal mergers fly through. That latter assessment, of course, generally fails to take the law into account.

So, today, I will discuss what the agencies have been doing about acquisitions of nascent competitors, how the legal frameworks under Section 7 of the Clayton Act and Section 2 of the Sherman Act apply, the course correction I believe is necessary, and my concern about overcorrection. Some would-be reformers view M&A as fundamentally predatory and wish to "level the playing" field for smaller, less competitive, or more sympathetic businesses by throwing as much sand in the gears as possible. But their Harrison Bergeron[6] vision of competition, handicapping successful businesses, will not so much level the field as tilt the scales dramatically in favor of the government, handing tremendous power to regulators, sapping American competitiveness, and hitting Americans in their pocketbooks.

Acquisitions of Nascent Competitors Under Section 7 of the Clayton Act

First, briefly, Section 7. In 1974, the Supreme Court explained that a Section 7 violation for the acquisition of a potential competitor requires proof that (1) it could enter the market at issue absent the merger, and (2) such entry would produce a likelihood of deconcentration or other significant procompetitive effects.[7] Commentators view these cases as a difficult hill to climb,[8] largely because courts have required the government to show "clear proof"[9] or a "reasonable probability"[10] of the potential entrant coming to market but for the transaction. But the agencies

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[6] KURT VONNEGUT JR., *Harrison Bergeron*, *in* WELCOME TO THE MONKEY HOUSE (1968).

[7] United States v. Marine Bancorporation, Inc., 418 U.S. 602, 633 (1974).

[8] *See, e.g.,* Mark Glick and Catherine Ruetschlin, *Big Tech Acquisitions and the Potential Competition Doctrine: The Case of Facebook* (Inst. for New Econ. Thinking, Working Paper No. 104, 2019), https://econ.utah.edu/antitrust-conference/session_material/Tech%20Acquisitions%20and%20Competition%20Doctrine.pdf.

[9] FTC v. Atlantic Richfield Co., 549 F.2d 289, 294–95 (4th Cir. 1977).

[10] BOC International, Ltd. v. Federal Trade Com., 557 F.2d 24, 28–29 (2d Cir. 1977); Ekco Products Co. v. Federal Trade Com., 347 F.2d 745, 752–53 (7th Cir. 1965); Yamaha Motor Co., v. FTC, 657 F.2d 971, 977–79 (8th Cir. 1981).

have not been shy about seeking to block such acquisitions under Section 7. Most of these cases are resolved either by abandonment or through consent decrees, and a few have been litigated.[11] In 2015, the FTC litigated a challenge to Steris' proposed acquisition of Synergy, under a potential competition theory.[12] Holding that the merger did not violate Section 7, the court found the FTC failed to show that Synergy "probably would have entered" the U.S. market but for the merger.[13]

Acquisitions of Nascent Competitors Under Section 2 of the Sherman Act

Some look to Section 2 of the Sherman Act as an effective alternative to Section 7.[14] *Standard Oil*[15] and *Grinnell*[16] instruct that Section 2 can apply to mergers, but my view is that optimism about its ability to reach far beyond Section 7 is overwrought. First, this concept is in tension with the text and legislative history of Section 7, which the Supreme Court read to establish standards "*less*

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[11] *See, e.g.,* Complaint ¶ 43h, FTC v. Whole Foods Market, Inc., Case No. 1:07-cv-01021 (D.D.C. filed June 5, 2007) (merger between high-end supermarkets "will eliminate potential competition in numerous parts of the country"); FTC v. Staples, Inc., 970 F. Supp. 1066, 1082 (D.D.C. 1997) ("Absent the merger, the firms are likely, and in fact have planned, to enter more of each other's markets, leading to a deconcentration of the market and, therefore, increased competition between the superstores.").

[12] FTC v. Steris Corp., 133 F. Supp. 3d 962 (N.D. Ohio 2015).

[13] *Id.* at 978 (N.D. Ohio 2015). The FTC argued that but for the transaction, Synergy, a UK-based company, would not have discontinued its plans to compete directly with Steris by offering commercialized x-ray sterilization services in the U.S.

[14] D. Bruce Hoffman, Director, Bureau of Competition, Fed. Trade Comm'n, Antitrust in the Digital Economy: A Snapshot of Fed. Trade Comm'n Issues, Remarks at GCR Live Antitrust in the Digital Economy (May 2019), https://www.ftc.gov/system/files/documents/public_statements/1522327/hoffman_-_gcr_live_san_francisco_2019_speech_5-22-19.pdf; Jeffrey M. Wilder, Acting Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Potential Competition in Platform Markets, Remarks as Prepared for the Hal White Antitrust Conference (June 10, 2019), https://www.justice.gov/opa/speech/file/1176236/download; C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879 (2020).

[15] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

[16] United States v. Grinnell Corp., 384 U.S. 563 (1966).

stringent than those used in applying the Sherman Act."[17] Second, Section 2 presents obstacles to challenging long-consummated mergers in particular.

Why would Section 2 provide hope where Section 7 does not? The answer is the D.C. Circuit's decision in *Microsoft*, the leading case on anticompetitive monopoly maintenance against nascent threats.[18] Of course, it also concerned a technology monopoly. As such, *Microsoft* will likely play a key role in how judges assess challenges to nascent-competitor acquisitions under Section 2, including in the technology space.

Some read *Microsoft* to say that Section 2 liability requires only that the merger was "reasonably capable of" contributing significantly to the monopoly—the implication being that Section 2 requires a lesser degree of certainty in the prospects of the nascent rival than Section 7.[19] But there is more, much more, to *Microsoft* than that.

Along with possession of monopoly power, a Section 2 claim requires "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[20] For our purposes, the question is whether a merger (or set of mergers) is exclusionary or competition on the merits.

Mergers are neither inherently exclusionary nor inherently competition on the merits. *Microsoft* lays out a multi-step framework for distinguishing the former

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[17] Brown Shoe Co. v. United States, 370 U.S. 294, 328-29 (1962) (emphasis added). *See also* Douglas H. Ginsburg & Koren W. Wong-Ervin, *Challenging Consummated Mergers Under Section 2*, COMPETITION POL'Y INT'L (May 3, 2020), https://www.competitionpolicyinternational.com/challenging-consummated-mergers-under-section-2-2; Timothy J. Muris & Jonathan E. Nuechterlein, *First Principles for Review of Long-Consummated Mergers*, 5 CRITERION J. ON INNOVATION 29, 32-33 (2020), https://www.criterioninnovation.com/articles/muris-nuechterlein-consummated-mergers.pdf.

[18] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001). In this case, the nascent competitors had not yet entered the relevant market of interest.

[19] Hoffman, *supra* note 14, at 10-11; Wilder, *supra* note 14, at 5; Hemphill & Wu, *supra* note 14, at 1886-87, 1890.

[20] *Microsoft*, 253 F.3d at 50 (citing *Grinnell*, 384 U.S. at 570–71) (internal quotations omitted).

from the latter. First, the plaintiff must show an "anticompetitive effect"—that the conduct "harm[ed] the competitive *process* and thereby harm[ed] consumers."[21] That shifts the burden to the monopolist, which may advance "nonpretextual claim[s] that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal."[22] If the justifications are not pretextual, we balance the anticompetitive harms against the procompetitive benefits, with the government bearing the ultimate burden.[23]

This approach—including the clear directive to balance consumer harms and benefits—describes the standard Sherman Act inquiry since *Standard Oil*. It also resembles the approach taken under Section 7 to assess the ultimate effect of a merger that may eliminate substantial competition but also generate efficiencies.[24] As applied, however, Section 2 analysis differs substantially from Section 7 in its treatment of the defendant's procompetitive justifications. While the efficiencies defense is notoriously difficult under Section 7 and the agencies approach efficiencies with skepticism,[25] it is not unusual for procompetitive justifications to defeat liability under Section 2.[26] Consider *Microsoft*. Where the defendant offers no

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[21] *Id.* at 58-59 (emphasis in original).

[22] *Id.* at 59.

[23] *Id.*

[24] *See*, *e.g.*, United States v. Baker Hughes Inc., 908 F.2d 981, 982-83 (D.C. Cir. 1990); *See also* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES §§ 2.1.3, 5.3, 10 (2010) (hereinafter HORIZONTAL MERGER GUIDELINES).

[25] Not only must the merging parties adequately substantiate their efficiencies claims, they must also show that the benefits are merger-specific. *See*, *e.g.*, F.T.C. v. Univ. Health, Inc., 938 F.2d 1206, 1223 (11th Cir. 1991); F.T.C. v. H.J. Heinz Co., 246 F.3d 708, 721-22 (D.C. Cir. 2001); Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 790-91 (9th Cir. 2015); HORIZONTAL MERGER GUIDELINES, *supra* note 24, § 10. The Supreme Court has never recognized the efficiencies defense. F.T.C. v. Penn State Hershey Med. Ctr., 838 F.3d 327, 347 (3d Cir. 2016).

[26] *See* Ginsburg & Wong-Ervin, *supra* note 17, at n.30 (collecting examples); *see also* Oahu Gas Serv., Inc. v. Pac. Res., Inc., 838 F.2d 360, 368-69 (9th Cir. 1988) (concluding that the jury was improperly instructed because it was not told that the desire to maintain market power—even a monopolist's market power—cannot create antitrust liability if there was a legitimate business justification, and reversing liability based on the defendant's efficiency justification), *cert. denied,* 488 U.S. 870 (1988);

serious justification for the conduct, for example the license restrictions that effectively prevented OEMs from installing rival web browsers, the court declines to credit the justification.[27] But, in evaluating a license restriction that Microsoft defended as a means of protecting its copyrighted material from substantial alteration,[28] or a design feature of Windows defended as conducive to a seamless and appealing user experience,[29] the court subjects them to relatively light scrutiny before accepting them and shifting the burden back to the government.

Note: throughout its evaluation of Microsoft's conduct, the D.C. Circuit says nothing about the requisite likelihood that nascent rivals Netscape Navigator and Java will one day become actual rivals. Only after liability is settled does it turn to this issue, in the section titled "Causation", which contains the oft-cited "reasonably capable" language.[30] Here, the court refuses to require proof that, but for the exclusionary conduct, Navigator and Java would have introduced significant competition to the monopolized market.[31]

Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 126-27 (2d Cir. 2007) (affirming dismissal because defendant's expansion into distribution was most likely in pursuit of increased efficiency, and the plaintiff failed to allege any facts that would plausibly suggest an anticompetitive purpose).

[27] 253 F.3d at 61, 63-64.

[28] *Id.* at 63. The licensing restriction prevented OEMs from launching alternative user interfaces after completion of the boot process. *Id.* As the court explained, "a shell that automatically prevents the Windows desktop from ever being seen by the user is a drastic alteration of Microsoft's copyrighted work, and outweighs the marginal anticompetitive effect of prohibiting the OEMs from substituting a different interface automatically upon completion of the initial boot process." *Id.*

[29] *Id.* at 67. The design feature allowed Windows, under certain circumstances, to launch Internet Explorer, even if the user had selected Netscape Navigator as the default browser. *Id.* According to Microsoft, launching Navigator when a user accessed the Internet through "My Computer" or Windows Explorer "would defeat one of the purposes of those features—enabling users to move seamlessly from local storage devices to the Web in the same browsing window." *Id.*

[30] *Id.* at 78-79.

[31] *Id.* at 79. Instead, the court undertakes a two-part inquiry. First, is the exclusion of nascent threats, as general matter, "the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power"? The Court answers yes, the Sherman Act indeed bars monopolists from "squash[ing] nascent, albeit unproven, competitors at will." Next, did Navigator and Java reasonably constitute nascent threats? The Court concludes that they did,

So does *Microsoft* effectively relax Section 7's requirement to show likely entry, where the acquirer is a monopolist and the target may later compete? That's plausible, for determining causation. The lower court made no finding that Navigator and Java were more likely than not to compete against Microsoft in the near future, and the circuit court was satisfied the two competitors "showed potential".[32] But that interpretation is disputed by some—including one of the D.C. Circuit judges who decided *Microsoft*—and they present reasonable arguments.[33] No doubt this debate will play out in future litigation.

But *Microsoft* tells us at least two more things about Section 2: it gives non-pretextual procompetitive justifications—in the case of mergers, efficiencies—substantial weight, and it does not get us out of the business of weighing consumer harms against benefits.[34] As the court makes clear, we look at effects. If *Microsoft* applies, we need to apply it faithfully, not just a few sentences.

Applying Microsoft

So what does all this mean, in practice?

One key consideration with acquisitions of nascent competitors is how to address the uncertainty of both the procompetitive and the anticompetitive effects that *Microsoft* requires us to balance. Uncertainty is present in all merger analysis, because we cannot observe the post-merger world, or the but-for world, or both. But that uncertainty is compounded when one of the merging parties has not yet entered or reached its full potential. Under these circumstances, we cannot even use

crediting the district court's "ample findings that both . . . showed potential" to threaten Microsoft's monopoly. *Id.*

[32] Findings of Fact ¶¶ 69-77, United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232), https://www.justice.gov/atr/us-v-microsoft-courts-findings-fact#FOF; 253 F.3d at 79.

[33] Ginsburg & Wong-Ervin, *supra* note 17; Muris & Nuechterlein, *supra* note 17.

[34] If *Microsoft* stands for the proposition that Section 2 asks not whether a nascent competitor was likely to enter the market, but whether it "showed potential" to do so, should courts also credit any efficiencies the merger showed potential to bring about? In other words, should the causation standard apply symmetrically with respect to anticompetitive and procompetitive effects? This is another question that future litigation will have to resolve.

the state of competition just before the merger as a starting approximation of the world absent the merger.

When prospectively considering the acquisition of a nascent competitor, where harms and benefits are unrealized and uncertain, I support an increased willingness to err on the side of enforcement. (To be clear, I support that adjustment for purposes of Section 7 as well.) But I worry about overcorrection, such as a regime that simply bars a monopolist from acquiring *any* firm with some potential, however slight or speculative, to become a competitor; or that ignores efficiencies entirely. The adjustment I propose is for cases with compelling evidence that a nascent rival is one of only a few firms with a decent chance of meaningfully competing against the monopolist *and* that the merger could generate significant cognizable efficiencies. In these cases, I may not have a good sense of what the merger's net effect will be, but concern about false positives is sufficiently low, and the importance of fostering competition sufficiently high, to resolve any ambiguity against the merger.

The balance can change, however, when looking at consummated mergers, especially old ones. In these cases, we have evidence of what happened after the merger. We cannot ignore evidence of reality; and I think we need to weight it above speculation, especially where that speculation is not itself supported by evidence. Depending on what that evidence shows, comparing harms and benefits may now be more straightforward. If, after the merger, prices go up or output goes down relative to some reliable proxy for the but-for world, that should give us confidence that the monopolist's acquisition violated Section 2. Correlatively, if prices actually go down or output actually goes up, and we lack a good reason to believe that would have happened otherwise, those facts ought to weigh heavily against speculation about a better world that might have been.

Think about three buckets. The first bucket, prospective evaluation of an acquisition of a nascent competitor, is speculative harms weighed against speculative benefits. In this scenario, we should more willingly credit the harms. The second bucket, a retrospective evaluation, involves certain harms weighed against speculative benefits. That's easy: the harms outweigh the benefits. It's the third bucket, also a retrospective evaluation but where the benefits are certain but the harms are speculative, where enthusiasm for enforcement under Section 2 using part of *Microsoft* runs into the whole.

Consider a hypothetical. Firm *A* acquired Firm *B* a number of years ago, when Firm *A* had a large share in its relevant market and Firm *B* was a nascent competitor. Since then, *B*'s output has grown remarkably, suggesting that consumers benefited.[35] And a significant portion of that growth resulted from things *A* did—say, promoting *B*'s product, improving it, and integrating it with its own popular product. Without the acquisition, *A* would not have done these things, especially if *B* was a serious threat. Maybe *A* cannot take credit for all of *B*'s growth, but the portion it did produce cannot fairly be considered a pretext. It is a legitimate procompetitive benefit that *Microsoft* dictates should be credited.

Microsoft requires balancing this benefit against anticompetitive harm, as determined by some conception of the world absent the merger. Suppose the inquiry under *Microsoft* is indeed about the consumer benefits that the nascent rival was "reasonably capable" of producing in competition with the monopolist. Then a key question is this: absent the acquisition, was *B* reasonably capable of growing as much—and thus benefiting consumers as much—as it actually did?

Some documents show that *A* was concerned about the competitor *B* might one day become, and that the acquisition was motivated in part by the goal of eliminating that threat. This evidence appropriately raises red flags, but it is not the entire ball game. For one, the case law—including *Microsoft*—makes

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[35] Some may be quick to argue this growth demonstrates that *B* would otherwise have become a significant competitor, and *A*'s acquisitions was therefore profoundly anticompetitive. But that argument assumes too much. Reverse the factual premise—*B* did not grow post-merger—and the same logic would conclude the acquisition had no anticompetitive effect. But perhaps *B* did not grow because *A* bought it to shut it down, in a so-called "killer" acquisition, which could certainly raise real antitrust concerns. Without an understanding of why *B* grew, and what role *A* played, the fact of *B*'s growth alone supports only weak inferences about the but-for world.

abundantly clear anticompetitive intent does not itself trigger liability.[36] And how probative of the but-for world are these documents? Did their authors have good foundation for the expectations they expressed? And what can events after the merger tell us about the reliability of their predictions, and how B might have fared absent the merger? For example, suppose that *A*'s documents also express concern about several other fast-growing nascent threats at the time of the acquisition. Since then, some of these have failed, despite having much promise and funding. Others remain, but none competes closely with *A*'s product or can boast *B*'s growth. Faced with evidence of real and significant consumer gains from the merger, conjecture by executives that competition might have arisen in its absence is simply too speculative to find, in the words of *Microsoft*, "the requisite anticompetitive effect" for a Section 2 violation.

Merger Policy Going Forward

Of course, my hypothetical is not the norm, as the vast majority of merger challenges are prospective, and most consummated-merger investigations occur soon after the fact, not years later. The critical issue is how to move forward. I support an increased willingness to err on the side of enforcement when a large incumbent firm seeks to merge with a nascent rival. And that is *exactly* the error-cost recalibration in which the agencies have been engaged during the last few years. While the FTC has decades of experience challenging acquisitions of nascent competitors,[37] observers would not be wrong to note a recent uptick.

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[36] *Microsoft*, 253 F.3d at 59 ("Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct.").

[37] *See*, *e.g.*, FTC v. Atl. Richfield, 549 F.2d 289, 293-94 (4th Cir. 1977); BOC Int'l Ltd. v. FTC, 557 F.2d 24, 25 (2d Cir. 1977); Tenneco, Inc. v. FTC, 689 F.2d 346, 355 (2d Cir. 1982); Yamaha Motor Co. v. FTC, 657 F.2d 971 (8th Cir. 1981). FTC staff reports identify fifteen merger enforcement actions involving potential competition concerns in the pharmaceutical industry and another three enforcement actions in the medical device industry from 2000 to 2009. HEALTH CARE DIV., BUREAU OF COMPETITION, FED. TRADE COMM'N, OVERVIEW OF FTC ACTIONS IN PHARMACEUTICAL PRODUCTS AND DISTRIBUTION 65-67 (2019), https://www.ftc.gov/system/files/attachments/competition-policy-guidance/overview_pharma_june_2019.pdf; HEALTH CARE DIV., BUREAU OF COMPETITION, FED. TRADE

Illumina/PacBio,[38] Edgewell/Harry's,[39] Proctor & Gamble/Billie[40] are all nascent acquisitions the FTC has stopped during my tenure. The DOJ has been active too, with cases like Sabre/Farelogix and Visa/Plaid.[41]

Against this backdrop of enforcement, the criticisms ring hollow. When pushed for examples of anticompetitive acquisitions of nascent competitors the agencies supposedly missed, the critics curiously come up short. They predictably cite to a handful of acquisitions by the world's largest technology companies.[42] But even if the antitrust agencies missed a few mergers, to support dramatic change in the law we ought to find a systematic bias in approving anticompetitive mergers (that is, false negatives) or blocking procompetitive mergers (that is, false positives).[43] The recent enforcement leaves the case for systematic bias against enforcement more than wanting.[44]

COMM'N, OVERVIEW OF FTC ANTITRUST ACTIONS IN HEALTH CARE SERVICES AND PRODUCTS 7, 88, 98 (2019), https://www.ftc.gov/system/files/attachments/competition-policy-guidance/overview_health_care_june_2019.pdf.

[38] FTC Press Release, *FTC Challenges Illumina's Proposed Acquisition of PacBio* (Dec. 17, 2019), https://www.ftc.gov/news-events/press-releases/2019/12/ftc-challenges-illuminas-proposed-acquisition-pacbio.

[39] FTC Press Release, *FTC Files Suit to Block Edgewell Personal Care Company's Acquisition of Harry's, Inc.* (Feb. 3, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-files-suit-block-edgewell-personal-care-companys-acquisition.

[40] FTC Press Release, *FTC Sues to Block Procter & Gamble's Acquisition of Billie, Inc.* (Dec. 8, 2020), https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-block-procter-gambles-acquisition-billie-inc.

[41] DOJ Press Release, *Justice Department Sues to Block Visa's Proposed Acquisition of Plaid* (Nov. 5, 2020), https://www.justice.gov/opa/pr/justice-department-sues-block-visas-proposed-acquisition-plaid; DOJ Press Release, *Justice Department Sues to Block Sabre's Acquisition of Farelogix* (Aug. 20, 2019), https://www.justice.gov/opa/pr/justice-department-sues-block-sabres-acquisition-farelogix.

[42] MAJORITY STAFF REPORT, *supra* note 2, at 149-60.

[43] *See*, *e.g.*, Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2 (1984).

[44] Jeffrey T. Macher & John W. Mayo, *The Evolution of Merger Enforcement Intensity: What do the Data Show?*, J. OF COMPETITION L. & ECON. (Feb. 2021), https://academic.oup.com/jcle/advance-article-abstract/doi/10.1093/joclec/nhaa037/6124659; Jeffrey T. Macher et al., *The Evolution of Judicial Standards: Evidence from Litigated Merger Trials* (Mar. 22, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3809174.

In a world where banning all M&A is proffered as a serious policy proposal, no one should discount the possibility of antitrust enforcement generating false positives, either. The competitive impact of nascent-competitor acquisitions is, by their very nature, speculative; and the evidence we normally use to evaluate a merger harder to find.

While the acquisition of a nascent competitor can certainly harm consumers and innovation, it can also unlock consumer value. It could significantly increase the probability that a product or technology develops, speed its arrival to market, or combine a good idea or a cool app or product with a mechanism for improving it, sustaining growth, and bringing it to a much wider audience.[45] These are the benefits that dramatic reform proposals threaten.

Factor in the skepticism the agencies traditionally apply to efficiency claims, the opposition from certain enforcers to their recognition at all,[46] and the increasingly prevalent hostility to M&A, and presumptions start to look a lot like bans and a lot of probably-good deals get blocked. Policies aimed at "deterrence" will chill even the thought of merging. I have real concern about what that would mean for America's start-up ecosystem, one of our national economic strengths, and the market for corporate control. The United States leads the world in ground breaking innovations in everything from information technology to molecular biology. While everyone wants to back the company that IPOs as a unicorn, the fact is that, for many smaller companies, exit through acquisition remains the only option.[47] That,

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[45] John M. Yun, *Potential Competition, Nascent Competitors, and Killer Acquisitions*, *in* THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY 652, 662 (Joshua D. Wright & Douglas H. Ginsburg, eds., Nov. 11, 2020), https://gaidigitalreport.com/wp-content/uploads/2020/11/The-Global-Antitrust-Institute-Report-on-the-Digital-Economy_Final.pdf.

[46] *See*, *e.g.*, Statement of Commissioner Rohit Chopra, *In the Matter of Sycamore Partners, Staples, and Essendant*, File No. 181-0180 (Jan. 28, 2019), https://www.ftc.gov/system/files/documents/public_statements/1448335/181_0180_staples_essendant_chopra_statement_1-28-19_0.pdf.

[47] David Emanuelson & Danielle Drory, *The Potential Chilling Effects of Lowering Standards for Tech M&A Enforcement*, 34 ANTITRUST ABA 14 (2020), https://www.americanbar.org/content/dam/aba/publishing/antitrust_magazine/atmag-spring2020/sprng20-emanuelson.pdf.

in turn feeds important investment. Management in America also is kept on its toes, in a way that is not true in Europe. Lawmakers and antitrust enforcers alike must carefully consider how merger policy can help maintain a robust and efficient M&A environment and not discourage entrepreneurship and shareholder activism that benefit society.

Conclusion

We want technology companies to compete, innovate, and provide value to consumers. Most of us, myself included, want all companies to do that. When it comes to nascent-competitor acquisitions, there are justifiable concerns that dominant companies may purchase rivals before they can mature; and I think we need to continue to guard against that. But enforcement should be based on facts, and follow the law. My agency's track record of vigorous enforcement in this area shows we will not shy away from bringing these cases where the evidence warrants it, and are willing to take risks. We can and do stop bad mergers (nascent or not), but over-regulating will stop good ones, too. And that, I hope we can all agree, does no good at all.