CPI's North America Column Presents:

Shifting the Burden in Acquisitions of Nascent and Potential Competitors: Not so Simple

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November 2020

I. Introduction

There is a heated debate in antitrust today about what lawmakers, courts, and enforcers should do about mergers between potential competitors. A number of commentators have raised concerns that acquisitions of potential and nascent competitors may be harming competition by enabling the incumbents to take out competitive threats before they mature into significant competitors.[1]

What are nascent and potential competitors? The uses of these terms differ across authors. I use the term "nascent competitor" to describe a firm that is not yet present in the market in a significant way, but may over time develop into a significant competitor. I define the term "potential competitor" as a firm whose competitive significance in a market is not reflected in its current market share. Under my definition, nascent competitors are also potential competitors, but potential competitors also include established firms that are currently not in the market but may enter the market relatively quickly.

Acquiring potential competitors may harm future competition because, but for the acquisition, a potential competitor may develop into a significant competitor to the acquirer in the future.[2] The U.S. antitrust enforcement agencies have a substantial record of challenging mergers where an alleged antitrust violation is the loss of future competition.[3] However, despite numerous previous challenges of mergers between potential competitors, critics argue that there may be under-enforcement of such mergers.[4]

Several scholars and researchers have proposed reforming antitrust to address concerns about acquisitions of potential competitors. A common element of these proposals is shifting the evidentiary burden from the enforcers to the merging parties to demonstrate that the acquisition would not harm competition. Those calling for a shift in the evidentiary burden include the authors of a recent report on digital platforms by the Stigler Center for the Study of the Economy and the State (hereafter, the "Stigler Center Report"), authors of a recent European Commission report on competition policy and digital markets, and numerous other scholars and researchers, including Carl Shapiro, Tommaso Valletti, Diana Moss, Jonathan Baker, Fiona Scott-Morton, Scott Hemphill, and Tim Wu.[5] The long-anticipated House Antitrust Subcommittee majority staff report (hereafter, the "House Report") also called for a "presumption against acquisitions of startups by dominant firms."[6]

In this Article, I caution against adopting current proposals to shift the evidentiary burden to the merging parties. Although the advocates of reform have raised legitimate theoretical concerns about acquisitions of potential competitors, they have not provided any credible empirical evidence for the need of reform. The advocates offer no compelling evidence of under-enforcement of acquisitions of potential competitors.

The proposed reforms to shift the evidentiary burden to the merging parties would cause significant administrability problems. There are three main problems with the proposals. First, the proposals do not clearly identify the set of transactions that would be subject to the evidentiary burden shift. The lack of clarity in the rules for identifying the transactions for which there would be a shift in the evidentiary burden would create confusion, complicate the adjudication of cases, and increase transaction costs. Second, it may be exceptionally difficult for the merging parties to demonstrate that their transaction would not harm future competition even if the possibility of future harm is quite remote. Given the low odds of overcoming the presumptions of harm to competition, the proposed reforms may be tantamount to a prohibition against a broad segment of mergers regardless of their effect on competition. Third, there is no evidence or economic analysis to suggest that the proposed reforms would effectively target anticompetitive transactions.

Rather than enhancing competition, the proposed reforms may harm innovation and the economy. The reforms would likely deter a significant number of transactions, including some that may generate efficiencies and spur innovation. Deterring acquisitions of nascent firms would also limit exit options for investments in risky and innovative startups backed by venture capital. Limiting exit options of venture-backed startups may reduce investments in these firms. Venture capital investments have been an important driver of innovation and economic growth, and reforms that limit acquisitions of nascent firms may lead to less innovation and slower economic growth.

The advocates have not provided a compelling rationale for the proposed reforms. They argue that reforms are needed because acquisitions of potential competitors can harm innovation and lead to other harmful effects as a matter of theory. But this argument has no limiting principle as there is always a theoretical possibility of harm in mergers. Acquisitions of potential competitors can also be beneficial, and the advocates offer no reliable methodology for distinguishing between harmful and beneficial acquisitions. To make a more compelling case for the proposed reforms, the advocates should identify specific harms that the reforms would address, such as diminished levels of innovation or output. The advocates should also show that the reforms would effectively remedy the harms.

II. Evidence of under-enforcement

Advocates of reform rely largely on theoretical arguments in making their case for stronger enforcement of mergers between potential competitors. Hemphill and Wu argue that "[g]iven the incentive and ability of incumbents to destroy or coopt innovative threats, avoiding that outcome is an important target for enforcement."[7] They suggest that acquisitions of nascent competitors can harm consumers because nascent competitive threats are "a key source of disruptive innovation" and because displacement of incumbents "often brings multiple benefits to consumers, including an improved product, a new distribution of surplus between producers and customers, and an openness to further entry in this and adjacent businesses."

[8] They further contend that the "risk of lost innovation [from incumbents' actions to destroy or coopt innovative threats] strongly tips the balance in favor of a bias to action."[9]

The theoretical possibility of competitive harm is not reason enough to adopt the proposed reforms. Policy makers should instead consider whether the proposed reforms would target anticompetitive transactions not otherwise enforced, and whether the costs associated with type II errors (false negatives) under current policy outweigh the costs associated with type I errors (false positives).

There is a dearth of empirical evidence on whether there is under-enforcement of potential competition merger cases. It is difficult to identify cases of type II enforcement error in allowing an anticompetitive acquisition to proceed because identifying such cases requires a reliable prediction of the "but-for" world or the outcome but for the acquisition. Indeed, advocates of reform have not demonstrated a single instance where enforcers failed to challenge a potential competitor acquisition that caused significant competitive harm.

A number of advocates point to Facebook's 2012 acquisition of Instagram as an instance of under-enforcement in a nascent competitor acquisition case.[10] However, the advocates offer no evidence to demonstrate that Facebook's Instagram acquisition caused competitive harm. Facebook's Instagram acquisition may have caused competitive harm if (1) but for the acquisition, Instagram would have continued to improve its products and services and would have challenged Facebook's position as the leading social media platform; and (2) post-acquisition, Facebook reduced the level of Instagram's innovation or service quality to protect Facebook's legacy business. There is no basis to conclude that either of these propositions is true.

In fact, Instagram experienced a high level of growth after the Facebook acquisition. The number of Instagram users increased from 30 million at the time of the acquisition, to more than one billion by 2018.[11] It is also unclear how much growth Instagram would have achieved or whether Instagram would have even survived without the Facebook acquisition. Other social media platforms did not fare as well. For example, Path, another photo-sharing application that existed at the time of Instagram's acquisition, did not ultimately survive.[12] Google+, a social media platform launched in 2011, also did not survive in spite of being backed by Google.[13] The recent UK Report of the Digital Competition Expert Panel (chaired by Jason Furman) acknowledges that "[i]t is of course unknown how Instagram would have developed without the [Facebook] merger. Facebook may have aided its development, for example through expertise in social networks and financial investment."[14] A study commissioned by the UK Competition and Markets Authority also found no evidence that Facebook's Instagram acquisition resulted in harm to competition.[15]

A study by Colleen Cunningham, Florian Ederer, and Song Ma (the "Killer Acquisitions" study) finds evidence of competition loss from potential competitor acquisitions in the pharmaceutical industry.[16] Cunningham, Ederer, and Ma define "killer acquisitions" as acquisitions in which an incumbent acquires “an innovative target and terminate[s] the development of the target's innovations to preempt future competition.”[17] They find that between 5.3 percent and 7.4 percent of the acquisitions in the study’s sample (or about 46 to 63 pharmaceutical acquisitions per year) are “killer acquisitions.”[18] The study does not identify specific instances of killer acquisitions but instead estimates the number of killer acquisitions through econometric analysis.

The “Killer Acquisitions” study does not provide empirical support for the proposed reforms to address potential competitor acquisitions. In particular, Cunningham, Ederer, and Ma note that the “the overall effect [of killer acquisitions] on social welfare remains unclear.”[19] Moreover, the study’s criteria for identifying potentially problematic transactions are different from those under the proposed reforms. The critical difference between the “Killer Acquisitions” study and the proposed reforms is that the study examines the effects of “overlaps” in product portfolios between the acquirer’s and target’s projects, whereas the proposed reforms would use other criteria (such as presence in adjacent markets) to identify potentially problematic transactions.[20] Cunningham, Ederer, and Ma explain that it is “crucial to accurately measure overlap between the acquiring firm's portfolio and the target's project and to quantify competition in the relevant product market.”[21]

It is also worth noting that the “killer acquisition” conduct appears to be addressable under current doctrine, potentially obviating the need for reform to address the conduct. In fact, the only “killer acquisition” example that the authors cite in their paper is Questcor’s 2013 acquisition of the U.S. development rights for Synacthen—an acquisition that was challenged by the U.S. Federal Trade Commission (FTC). The FTC and Mallinckrodt (Questcor’s parent company) settled the matter after Mallinckrodt agreed to license the development rights for Synacthen to another company and pay $100 million in equitable monetary relief.[22]

There are other reasons to be cautious in applying the findings of the “Killer Acquisitions” study to implement significant changes in antitrust policy. The study’s results have not yet been replicated or confirmed by others. Moreover, the study’s findings for the pharmaceutical industry may not apply to other industries.[23] There are also reasons to be skeptical of the study’s findings. The study estimates the number of killer acquisitions as the number of incremental project terminations attributable to purchases by buyers with overlapping projects. But there are alternative explanations for why an acquirer with an overlapping project may be more likely to discontinue the acquired project than other acquirers. For example, the acquirer may be purchasing the project to assess whether it offers any improvements over the overlapping project rather than looking to preempt competition. If the acquired project is inferior to the overlapping project, it would be rational to discontinue the acquired project.

III. Proposals for reform

Advocates of reform propose shifting the evidentiary burden to the merging parties to demonstrate that their acquisitions of potential competitors are not anticompetitive. There are three main problems with the proposals. First, the proposals do not clearly identify which cases would be subject to the evidentiary burden shift. Second, it is unclear how the parties could possibly meet the burden of demonstrating that a transactions is not anticompetitive when the presumed competitive harm is in the future, the harm is speculative, and the presumption does not rely on evidence of likely future entry. Third, there is no evidence to suggest that the proposed reforms would target anticompetitive transactions. To demonstrate the problems with the proposed reforms, I consider the proposals from Carl Shapiro, the Stigler Center Report, Scott Hemphill and Tim Wu, and the House Report.

Shapiro argues that “the agencies and the courts could express greater wariness when a dominant incumbent firm seeks to acquire a firm operating in an adjacent market, especially if the target firm is well positioned to challenge the incumbent’s position in the foreseeable future” by “lowering the evidentiary requirements necessary for the government to prevail in a merger case based on a loss of ‘potential competition.’”[24] Shapiro proposes a standard where “the government could meet its initial burden by showing that the target firm is reasonably likely to become a rival to the acquiring firm in the foreseeable future, even if the target firm has not yet made specific plans to do so.”[25]

Shapiro’s proposed standard fails to articulate clear guidelines for determining when the government would meet its initial burden for blocking the acquisition. It is unclear what principles the courts would apply to determine whether a target firm is “reasonably likely to become a rival to the acquiring firm in the foreseeable future.” How likely is “reasonably likely”? Is a 25 percent probability of entry in the next ten years or a 20 percent probability of entry in the next five years “reasonably likely”? How would a factfinder assess the probability of future entry? How far into the future do the courts need to peer to determine whether rivalry is “reasonably likely”? How robust does the future hypothetical rivalry need to be between the acquirer and target for the government to meet its initial burden? How would a court determine the contours of a future market for assessing the degree of hypothetical future rivalry between the acquirer and the target when the demand characteristics of this future market are unknown? Attempting to answer these questions is an invitation to speculate about future competition and to apply arbitrary rules.

The Stigler Center Report proposes a standard where “antitrust law might be revised to relax the proof requirements imposed upon antitrust plaintiffs in appropriate cases or to reverse burdens of proof,” where “[m]ergers between dominant firms and substantial competitors or uniquely likely future competitors should be presumed to be unlawful, subject to rebuttal by defendants.”[26] The Stigler Center Report further proposes that “when an acquisition involves a dominant platform, authorities should shift the burden of proof, requiring the company to prove that the acquisition will not harm competition."[27] However, the proposal does not explain what it means for a target firm to be a "uniquely likely future" competitor.[28] It also appears to apply special rules for acquisitions by a "dominant platform" without defining this term. The Stigler Center Report provides neither a clear definition of what constitutes a "platform" nor a workable methodology for determining when a firm is a "platform."[29]

Hemphill and Wu identify "nascent competition as a distinct analytical category" and propose "a program of antitrust enforcement to protect" nascent competition.[30] They define a nascent competitor as "a firm whose prospective innovation represents a serious future threat to an incumbent."[31] They argue that relevant evidence in the government's *prima facie* showing that an incumbent's acquisition of a nascent competitor is anticompetitive may include evidence of "beginnings of direct competition" or the "existence of competition in markets adjacent to the incumbent's primary market."[32] Hemphill and Wu contend that their "proposed approach is very far from a general ban on the acquisition of unproven companies" and they "would discourage, at most, acquisition by the firm or firms most threatened by a nascent rival."[33]

Hemphill and Wu's proposed antitrust enforcement program is likewise unworkable because it does not explain how a court could determine when a transaction would lead to a presumption of anticompetitive harm. It is unclear how a court would determine whether a particular innovation is a "serious" threat to an incumbent. For example, in the case of Facebook's acquisition of Instagram, how could a court determine whether Instagram was a "serious" threat to Facebook? Instagram did not offer unique or difficult to replicate functionality. At the time of Facebook's Instagram acquisition, Path, another photo sharing application, had functionality similar to Instagram's.[34] What made Instagram a "serious" threat to Facebook?

It is also unclear how courts could distinguish the "beginnings of direct competition" from insignificant direct competition between the merging parties. Hemphill and Wu do not explain why the "beginnings of direct competition" between the merging parties would be a relevant factor for identifying anticompetitive mergers between potential competitors.

It is likewise unclear how the courts would determine when there is "competition in markets adjacent to the incumbent's primary market." For example, Hemphill and Wu do not explain how a court would determine whether a market is "adjacent" to another market. When are two markets adjacent? Are sports cable networks and news cable networks in adjacent markets? Are different types of chemicals in adjacent markets? Are hospitals and outpatient centers in adjacent markets? Hemphill and Wu also do not explain how courts would use the evidence of market adjacency to determine whether the government made its *prima facie* showing that the acquisition in question lessens competition.

The House Report recommends "strengthening the Clayton Act to prohibit acquisitions of potential rivals and nascent competitors."[35] The House Report defines potential rivals as "firms that are planning to enter or could plausibly enter the acquirer's market" and defines nascent competitors as "firms whose 'prospective innovation represents a serious future threat to an incumbent,'" quoting Hemphill and Wu's definition.[36] In addition, the House Report suggests "codifying a presumption against acquisitions of startups by dominant firms, particularly those that serve as direct competitors, as well as those operating in adjacent or related markets."[37]

The House Report's recommendations are likewise unworkable for identifying potentially problematic transactions. How would courts determine when a target "could plausibly enter the acquirer's market"? "[P]lausibly enter" over what period? What is the "acquirer's market"? Does that include markets where the acquirer is a minor participant? How would a court determine when a firm operates in "adjacent or related markets"?

The second problem with the proposed reforms is that the merging parties may face an exceedingly high burden in rebutting the presumption of harm to competition. Under the proposals, the merging parties may need to rebut the presumption of harm even if the acquisition target has no plans to enter the relevant market absent the merger, entry would not occur until sometime in the distant future, and the target's future entry may be unlikely. Merging parties may rebut a government's *prima facie* showing "by producing evidence to cast doubt on the accuracy of the Government's evidence as predictive of future anti-competitive effects."[38] But how do the parties rebut the presumption of competitive harm if significant doubt about the accuracy of the effects is part of the presumption?

In cases where there is a presumption of harm to future competition, the parties' burden would be to offer evidence about future competitive effects. But given that there is often significant uncertainty about future market outcomes, it is unclear how the merging parties could rebut the presumption without engaging in some speculation about what future markets would look like.[39] Analyzing future competitive effects would be especially difficult for dynamic markets undergoing rapid technologic change, frequent entry and exit, and evolving demand. The parties would also find it difficult to rebut the presumptions of harm by claiming that the transaction will generate significant efficiencies, as courts and enforcement agencies have been skeptical about such claims.

If the procompetitive and mitigating effects of a merger are just as uncertain as the potential anticompetitive effects, should courts treat the effects symmetrically? Could the parties offer efficiency justifications that are just as speculative (or would occur with equally low probability) as future competition between the acquirer and target? Or could the parties rebut the presumption by arguing that the incumbent will face new rivals when the new rivals' entry is just as uncertain as future competition between the acquirer and target? As a practical matter, it may be impossible for a court to resolve disputes between opposing speculative views about future competition without also speculating about future market outcomes.

The third problem with the proposed reforms is that it is not at all clear that the proposals are targeting the right set of transactions. The advocates of reform offer no empirical basis for identifying potentially harmful transactions. The proposed criteria for identifying potentially anticompetitive transactions lack credible support.

For example, Shapiro, Hemphill and Wu, and the House Report suggest that courts consider whether the acquirer and the target are present in "adjacent" markets in determining whether there is a *prima facie* showing of harm to competition. Notwithstanding the lack of a clear definition of what it means for markets to be "adjacent", there is no empirical basis for using this criterion to identify anticompetitive transactions.

Hemphill and Wu also suggest that "a firm's broader pattern of acquiring nascent competitors" might be evidence of anticompetitive intent in acquiring these firms.[40] However, a pattern of acquisitions of nascent or young firms is perfectly consistent with a procompetitive motive such as engaging in transactions that create synergies. There is no basis for inferring anticompetitive intent from a pattern of acquisitions of nascent firms.

In addition, Hemphill and Wu argue that overpaying for an acquisition relative to offers of other potential acquirers "may suggest an anticompetitive purpose."[41] There is no basis for such an inference. The acquisition price may reflect the value of merger-specific synergies created from combining complementary assets. An acquisition by an alternative buyer may create fewer synergies, leading to a smaller bid for the target. Other firms may also bid less (or not bid at all) because they have a less optimistic view of the target's growth prospects. Hemphill and Wu offer no evidence of any link between a target's acquisition price and likelihood of anticompetitive effects.

The Stigler Center Report notes that the presumption of anticompetitive harm "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."[42] But the merging parties always have access to some information that is unavailable to the enforcers. Shifting the evidentiary burden to the merging parties is not costless. Such a shift would impose significant costs on the merging parties and, without evidence of likely anticompetitive effects, may deter some procompetitive transactions.

IV. Potential harm from over-deterrence

The proposed reforms would likely deter a broad segment of transactions because of the increased risk of an antitrust challenge, higher transaction costs, and delays in completing transactions. The deterred transactions may include procompetitive transactions. Although the proposals would allow the parties to rebut the presumption of anticompetitive harm, merging parties would likely face low odds of overcoming the presumptions even if there is a reasonable likelihood that the merger would yield procompetitive benefits.

Moreover, although the merging parties may ultimately meet their burden of showing that the transaction would not harm competition, the costs and delays of having to make this showing may outweigh the benefits that the parties would derive from the transaction. The prospect of having to rebut a presumption of anticompetitive harm would likely deter some firms from pursuing the merger in the first place. The merger deterrence effects may be especially strong for acquisitions of smaller firms, where the potential value from the deal may be less than the transaction cost. The greater costs of obtaining approvals for transactions may make it prohibitively expensive for smaller acquisitions to go forward and may result in a large firm bias in acquisitions.

Deterring mergers may harm competition and innovation in two distinct ways. The first harm is the loss of procompetitive benefits that the deterred transactions would have created. The procompetitive benefits include efficiencies that could enhance competition and innovation. The second harm is limiting exit options for risky and innovative startups by deterring their acquisitions. Limiting exit options for risky and innovative startups may reduce incentives to invest in such startups.[43] Hemphill and Wu acknowledge that "[i]f acquisitions were unduly curbed, pre-acquisition investments in risky startups might dry up, resulting in lost innovation. Moreover, synergies might be lost, as incumbents steered clear of buying and incubating promising new technologies."[44]

Mergers may yield significant synergies that enhance the merging firms' ability to innovate.[45] For example, an acquisition of a startup by an established incumbent may enhance the merging firms' ability to innovate by combining a startup's expertise in a new technology with the established firm's staff of engineers who could effectively deploy the new technology in new products. The Horizontal Merger Guidelines recognize the role of innovation synergies in spurring innovation: "[t]he Agencies also consider whether the merger is likely to enable innovation that would not otherwise take place, by bringing together complementary capabilities that cannot be otherwise combined or for some other merger-specific reason."[46] Innovation synergies are just one mechanism through which mergers may spur innovation. Mergers may also increase innovation incentives by increasing the ability of the innovator to capture the benefits of the innovation.[47] Apart from spurring innovations, mergers may also create efficiencies and costs savings through more efficient use of resources, leading to greater output and lower prices.[48]

Acquisitions may also have a significant role in spurring innovation by providing incentives to invest in innovative startups. Acquisitions of nascent firms by incumbents provide an important exit option for startups backed by venture capital.[49] Exits are a critical part of the venture capital cycle that feeds capital to startup firms.[50] For some firms, entry may not be profitable without the possibility of being acquired by an incumbent.[51] According to the

National Venture Capital Association data, the exits of U.S. companies backed by venture capital funds in 2019 included 836 exits of via mergers and acquisitions and only 82 via an IPO.[52]

Limiting exit options for risky startups would potentially reduce the financial returns for venture capital investors, consequently weakening incentives to invest in such startups.[53] Economic research suggests that venture capital is a significant source of innovation and investment.[54] Given the importance of venture capital for innovative startups and the role that venture capital had in driving growth and innovation in the U.S. economy, limiting acquisition exit options could have negative consequences for innovation, economic growth, and prosperity.

Hemphill and Wu suggest that their proposed standard would not significantly limit exit options for nascent firms because their "proposed approach is very far from a general ban on the acquisition of unproven companies," and they "would discourage, at most, acquisition by the firm or firms most threatened by a nascent rival."[55] However, they offer no workable methodology for limiting the deterrence effects to firms most threatened by a nascent rival. Moreover, there could be a significant reduction in a venture capitalist's return on investment in a startup even if only a single buyer were deterred from acquiring that startup.[56]

V. Conclusion

The proposals to shift the evidentiary burden to the merging parties in cases of potential competitor acquisitions would likely cause significant administrability problems. The proposals do not clearly identify the transactions that would be subject to the evidentiary burden shift. Under the proposals, it would be exceptionally difficult for the merging parties to demonstrate that their merger does not harm future competition even if the possibility of future harm is quite remote. There is also no evidence to suggest that the proposals would target anticompetitive transactions. Workable reforms to address acquisitions of potential competitors require empirical studies that could identify the types of transactions that are likely to produce harmful outcomes. Without such studies, the proposals are engaging in guesswork and speculation and may actually cause more harm than good.

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[1] *See* Tim Wu, *The case for breaking up Facebook and Instagram*, Wash. Post (Sept. 28, 2018), https://www.washingtonpost.com/outlook/2018/09/28/case-breaking-up-facebook-instagram/; *Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms*: Hearing Before the Comm. on the Judiciary Subcomm. on Antitrust, Competition Policy, & Consumer Rights (Sept. 24, 2019) (Written Testimony of Diana Moss), https://www.judiciary.senate.gov/imo/media/doc/Moss%20Testimony1.pdf; *Stigler Committee on Digital Platforms, Final Report*, Stigler Center for the Study of the Economy and the State (2019) [hereafter Stigler Center Report], https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf; Jacques Cremer, Yves-Alexandre de Montjoye, & Heike Schweitzer, *Competition policy for the digital era*, European Commission Report (2019), [hereafter, the EC Report] https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf; Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33(3) J. Econ. Perspect. 69 (2019); and C. Scott Hemphill & Tim Wu, *Nascent Competitors*, U. PA. L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3624058.

[2] In this Article I do not distinguish between mergers and acquisitions and use these terms interchangeably.

[3] *See Start-ups, killer acquisitions and merger control – Note by the United States*, OECD DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE (June 11, 2020), https://one.oecd.org/document/DAF/COMP/WD(2020)23/en/pdf; and *Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms*: Hearing Before the Comm. on the Judiciary Subcomm. on Antitrust, Competition Policy, & Consumer Rights (Sept. 24, 2019) (Written Testimony of Bruce Hoffman), https://www.judiciary.senate.gov/imo/media/doc/Hoffman%20Testimony2.pdf.

[4] *See* Hemphill & Wu, *supra* note 1; Wu, *supra* note 1; Stigler Center Report, *supra* note 1; EC Report, *supra* note 1; and Moss, *supra* note 1.

[5] *See* Stigler Center Report, *supra* note 1; EC Report, *supra* note 1; Shapiro, *supra* note 1, Janith Aranze, *DG Comp chief economist: Reverse burden of proof to catch killer acquisitions*, Global Competition Review (Nov. 20, 2018), https://globalcompetitionreview.com/dg-comp-chief-economist-reverse-burden-of-proof-catch-killer-acquisitions; Moss, *supra* note 1; Jonathan B. Baker & Fiona Scott Morton, *Confronting Rising Market Power*, ECONOMICS FOR INCLUSIVE PROSPERITY (May 2019), https://econfip.org/policy-brief/confronting-rising-market-power; and Hemphill & Wu, *supra* note 1.

[6] *Investigation of Competition in Digital Markets,* Majority Staff Report and Recommendations, Judiciary Subcomm. on Antitrust (Oct. 6, 2020) at 394, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

[7] *See* Hemphill & Wu, *supra* note 1, at 13.

[8] *Id.*

[9] *Id.*

[10] *See* Wu *supra* note 1; Hemphill & Wu, *supra* note 1, at 7; and Shapiro *supra* note 1, at 78.

[11] *See* Kurt Wagner, *Here's Why Facebook's $1 Billion Instagram Acquisition Was Such a Great Deal*, RECODE (Apr. 9, 2017), https://www.vox.com/2017/4/9/15235940/facebook-instagram-acquisition-anniversary; 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.

[12] *See* Rafe Needleman, *Path, Instagram, and the Greater Fool Theory*, CNET (April 16, 2012), https://www.cnet.com/news/path-instagram-and-the-greater-fool-theory/; and Harrison Weber, *Path, the Doomed Social Network With One Great Idea, Is Finally Shutting Down*, GIZMODO (Sept. 17, 2018), https://gizmodo.com/path-the-doomed-social-network-with-one-great-idea-is-1829106338.

[13] Chris Fox, *Google shuts failed social network Google+*, BBC (Apr. 1, 2019), https://www.bbc.com/news/technology-47771927.

[14] *Unlocking Digital Competition, Report of the Digital Competition Expert Panel* (March 2019) ¶ 3.86, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

[15] *Ex-Post Assessment of Merger Control Decisions in Digital Markets*, Document prepared by Lear for the Competition and Markets Authority, Final Report (May 9, 2019), https://www.learlab.com/wp-content/uploads/2019/06/CMA_past_digital_mergers_GOV.UK_version-1.pdf.

[16] Colleen Cunningham, Florian Ederer, & Song Ma, *Killer Acquisitions* (Apr. 19, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3241707.

[17] *Id*. at 1.

[18] *Id*. at 6.

[19] *Id*. at 51.

[20] Cunningham, Ederer, and Ma identify the presence of an overlap between the acquirer's and target's drug development projects if the drugs in development are in the same therapeutic class and have the same mechanism of action. (*Id*. at 3.)

[21] *Id*. at 2.

[22] *See Mallinckrodt Will Pay $100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants*, FTC Press Release (Jan. 18, 2017), https://www.ftc.gov/news-events/press-releases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-state-charges-it.

[23] There are unique features of the pharmaceutical industry that complicate comparisons with other industries. (*See* 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).)

[24] See Shapiro, *supra* note 1, at 78.

[25] *Id*.

[26] *See* Stigler Center Report, *supra* note 1, at 98.

[27] *Id.* at 17.

[28] Jonathan Jacobson and Christopher Mufarrige also criticize the Stigler Center Report for lack of clarity in the proposed standard. (*See* Jonathan Jacobson & Christopher Mufarrige, *Acquisitions of "Nascent" Competitors*, 20(1) ANTITRUST SOURCE 1, 12 (Aug. 2020), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/2020/august-2020/aug20_jacobson_8_18f.pdf.)

[29] The Stigler Center Report acknowledges that "[t]he term 'Digital Platform' lacks a consistent definition—different companies may be characterized as a platform in different environments." (Stigler Center Report, *supra* note 1, at 7.)

[30] *See* Hemphill and Wu, *supra* note 1, at 3.

[31] *Id.* at 2.

[32] *Id.* at 27.

[33] *Id.* at 3.

[34] *See* Needleman, *supra* note 12.

[35] *See* House Report, *supra* note 6, at 394.

[36] *Id*.

[37] *Id*.

[38] Chicago Bridge & Iron Co. v. FTC, 534 F.3d 410, 423 (5th Cir. 2008).

[39] The state of future competition would depend on numerous factors that are difficult to forecast such as future entry and exit, other mergers, investments and repositioning by market participants, technological progress, changes in regulations, shifts in demand, and other factors.

[40] *See* Hemphill and Wu, *supra* note 1, at 30. *See* also Jeffrey M. Wilder, Acting DAAG U.S. DEP'T OF JUSTICE, *Potential Competition in Platform Markets* (June 10, 2019), https://www.justice.gov/opa/speech/file/1176236/download.

[41] *See* Hemphill and Wu, *supra* note 1, at 30.

[42] *See* Stigler Center Report, *supra* note 1, at 98.

[43] *See* EC Report, *supra* note 1, at 111.

[44] *See* Hemphill and Wu, *supra* note 1, at 15.

[45] *See* Carl Shapiro, *Competition and Innovation: Did Arrow Hit the Bull's Eye?* In The Rate and Direction of Inventive Activity Revisited. University of Chicago Press. Press, 365-370, 382-394; and EC Report, *supra* note 1, at 111.

[46] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 6.4 (2010) [hereafter HORIZONTAL MERGER GUIDELINES].

[47] *See* Shapiro, *supra* note 45, at 365-370, 382-394. Also, *see* HORIZONTAL MERGER GUIDELINES, *supra* note 46, § 10. ("The Agencies also consider the ability of the merged firm to appropriate a greater fraction of the benefits resulting from its innovations.")

[48] HORIZONTAL MERGER GUIDELINES, *supra* note 46, § 10.

[49] *See*, e.g., EC Report, *supra* note 1, at 111. Also, *see Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms*: Hearing Before the Comm. on the Judiciary Subcomm. on Antitrust, Competition Policy, & Consumer Rights (Sept. 24, 2019) (Written Testimony of Patricia Nakache) at 5, https://www.judiciary.senate.gov/imo/media/doc/Nakache%20Testimony.pdf. ("M&A activity has always been an important avenue for liquidity for risk-taking entrepreneurs and investors, and … it has become even more so in recent years, with technology incumbents the most active acquirers of technology startups.")

[50] *See* Paul Gompers and Josh Lerner, *The Venture Capital Revolution*, 15(2) J. ECON. PERSPECT. 145, 152 (2001). ("Each aspect of the venture cycle is related to each other. One inevitable consequence of our organizational scheme is that the exiting of venture capital investments has an important influence on the raising of venture funds and venture capital investing.")

[51] See Eric Rasmusen, *Entry for Buyout*, 36(3) J. Ind. Econ. 281 (Mar. 1988).

[52] National Venture Capital Association 2020 Yearbook, at 36, https://nvca.org/wp-content/uploads/2020/04/NVCA-2020-Yearbook.pdf.

[53] *See* Nakache, *supra* note 49 at 5. ("If the government makes it more challenging for incumbents to acquire these companies, this will have the devastating effect of making it less attractive to launch a new enterprise and for people like myself to fund and partner with those companies. The end result will be harm to the American innovation economy.")

[54] *See* Ana Paula Faria & Natália Barbosa, *Does venture capital really foster innovation?* 122 Econ. Lett. 129 (2014); and Samuel Kortum & Josh Lerner, *Assessing the Contribution of Venture Capital to Innovation*, 31(4) RAND J. Econ. 674 (2000).

[55] *See* Wu and Hemphill, *supra* note 1, at 3.

[56] This may occur when the buyer is willing to pay higher prices for the startup than other potential buyers. The buyer's high willingness to pay to acquire the startup is consistent with an anticompetitive motive but may also reflect the value of expected synergies from the acquisition.