DISCRIMINATORY ANTITRUST IN THE REALM OF POTENTIAL AND NASCENT COMPETITION

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Discriminatory Antitrust in the Realm of Potential and Nascent Competition

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One of the most important topics in antitrust is how to analyze potential and nascent acquisitions by the largest digital platforms. Notably, there have been calls to implement "discriminatory antitrust" policies where one set of rules applies to big tech while another set of rules applies to everyone else. However, less attention seems to be paid to the actual empirical evidence. To that end, this article reviews a recent FTC report on big tech acquisitions and finds little to raise alarms. Second, the article examines several recent acquisitions by Spotify, an important technology company that sits outside of the "big tech" classification. If Spotify's recent series of acquisitions can reasonably be considered procompetitive, then why is the same not true (or even possible) for Apple and Amazon within the same product space? Finally, the article summarizes the findings of several recent studies that examined a series of big tech acquisitions. Taken as a whole, these studies indicate insufficient evidence to conclude a systematic concern that large digital technology companies are engaging in anticompetitive acquisitions of potential and nascent competitors.

I. INTRODUCTION

Currently, one of the most important topics in antitrust is how competition agencies and courts should consider acquisitions by "big tech" companies (that is, Amazon, Apple, Google, Facebook, and Microsoft). There are several competing visions. On one end of the spectrum is the view that these companies have strong incentives to engage in anticompetitive acquisitions of nascent and potential competitors;[2] consequently, agencies and courts should implement strong presumptions of harm when big tech companies make acquisitions, which can only be overcome if there are extraordinary efficiency gains.[3] On the other end of the spectrum is the view that there is little reason to change current merger presumptions or to treat acquisitions by big tech companies differently than "medium tech" or "small tech" companies.[4]

Less attention, however, seems to be paid to the actual empirical evidence on big tech acquisitions. To that end, first, this Article reviews a recent FTC report on acquisitions by the largest technology platforms.[5] While the report is largely descriptive using aggregated data and, therefore, offers limited insights, there is little in the findings that raise alarms. Rather, most of the acquisitions are valued below $50 million (and 38.6 percent are valued below $10 million); include a handful of employees; and involve companies that are five years or older. These characteristics do not neatly fit the profile of nascent, upstart entrants that will likely disrupt the alleged monopoly power exerted by the big tech incumbents. Further, when considered within the broader context of venture capital activity, all other startup activity overshadows acquisitions made by the largest technology companies.[6]

Second, as a point of contrast, the Article examines several recent acquisitions by Spotify, an important technology company that sits outside of the "big tech" classification. Specifically, Spotify has expanded beyond its core music streaming business through a series of startup acquisitions — namely, podcasts and audiobooks. While critics of Spotify could point out that it is also engaging in anticompetitive acquisitions of nascent and potential competitors, the more likely reality is that these acquisitions are accelerating Spotify's expansion and entry into new markets. Indeed, if Spotify's recent series of acquisitions can reasonably be considered procompetitive,[7] then why is the same not true (or even possible) for Apple and Amazon within the same product space? In fact, within music streaming, Spotify is the clear market leader ahead of both Apple and Amazon.[8] Administering antitrust law based on the mere identity or market capitalization of a company — rather than on market realities — is engaging in what could be called "discriminatory antitrust." Absent market-based evidence, simply swapping "Spotify" with "Apple" should not mean the law flips a switch and presumes anticompetitive harm.

Finally, the Article summarizes the findings of several recent studies that examined a series of big tech acquisitions.[9] Taken as a whole, these studies indicate insufficient evidence to conclude a systematic concern that large digital technology companies are engaging in

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2 This Article uses the terms "potential competition" and "nascent competition" interchangeably for ease of exposition. However, within antitrust law, there are arguably important differences as potential competition refers to entry that has not yet occurred while nascent competition refers to entry that has occurred but in an adjacent product market. See John M. Yun, *Are We Dropping the Crystal Ball? Understanding Nascent & Potential Competition in Antitrust*, 104 Marq. L. Rev. 613, 621 (2021).

3 See, e.g. Platform Competition and Opportunity Act of 2021, H.R. 3826, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/3826/text (Senators Klobuchar and Cotton's bill). See also Press Release, Sen. Tom Cotton, Senate Platform Competition and Opportunity Act, https://www.cotton.senate.gov/imo/media/doc/antitrust_one_pager.pdf ("Senator Cotton's legislation establishes a presumption against mergers and acquisitions of potential competitors by the Big Tech companies. A designated firm will have the burden of showing that any purchase of greater than $50 million does not contribute to or sustain its dominant market share. The bill would prevent big tech from further suppressing competition through killer acquisitions.").

4 *Cf.* Invited Statement of Geoffrey A. Manne on House Judiciary Investigation Into Competition in Digital Markets, *Correcting Common Misperceptions About the State of Antitrust Law and Enforcement*, Int'l Ctr. for Law & Econ. (Apr. 17, 2020), https://laweconcenter.org/wp-content/uploads/2020/04/Manne_statement_house_antitrust_20200417_FINAL3-POST.pdf at 2 ("[A]ntitrust law and enforcement policy should, above all, continue to adhere to the error-cost framework, which informs antitrust decision-making by considering the relative costs of mistaken intervention compared with mistaken non-intervention. Specific cases should be addressed as they come, with an implicit understanding that, especially in digital markets, precious few generalizable presumptions can be inferred from the previous case."); see also *id.* at 9-10.

5 Fed. Trade Comm'n, Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An FTC Study (2021), https://www.ftc.gov/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/ [hereinafter the "FTC Report"].

6 See *infra* Section II.

7 For instance, the proposed Sens. Klobuchar and Cotton bill would exempt Spotify from the presumption of anticompetitive harm from acquisitions.

8 See *Share of Music Streaming Subscribers Worldwide in the 1st Quarter of 2021, by Company*, Statista (Nov. 16, 2021), https://www.statista.com/statistics/653926/music-streaming-service-subscriber-share/ (indicating Spotify has a worldwide share of 32 percent in music streaming while Apple Music is second at 16 percent, and Amazon is third with 13 percent).

9 See Oliver Latham et al., *Beyond Killer Acquisitions: Are There More Common Potential Competition Issues in Tech Deals and How Can These Be Assessed?*, CPI Antitrust Chron. 26 (May 2020); Axel Gautier & Joe Lamesch, *Mergers in the Digital Economy* (CESifo Working Paper, Paper No. 8056, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3529012; Elena Argentesi et al., *Merger Policy in Digital Markets: An Ex-Post Assessment*, 17 J. Comp. L. & Econ. 95 (2020).

anticompetitive acquisitions of potential and nascent competitors. The evidence is simply lacking to reliably identify whether the acquisitions are procompetitive or anticompetitive. Of course, some acquisitions present an increased potential for concern and further inquiry, yet this is precisely what is called for in modern antitrust: base inquiries and challenges on market-specific evidence rather than on broad presumptions based on a firm's identity or market capitalization.

II. INSIGHTS FROM THE FTC REPORT ON BIG TECH ACQUISITIONS

In February 2000, the FTC announced that it would use its Section 6(b) authority to collect acquisition data from Alphabet (Google), Amazon, Apple, Facebook (now Meta), and Microsoft, covering a ten-year period from 2010 to 2019.[10] In September 2021, the FTC released a report summarizing the agency's findings based off the collected data.[11]

The report used aggregated data and presented the information in summary statistics, so the conclusionary value of the study is modest. Nonetheless, several key statistics emerged. Focusing on transactions valued above $1 million, there were 616 total transactions across the five companies over the ten years period examined, which is an average of approximately 12 transactions per company per year — or, basically, one a month for each company.[12]

Of these transactions, 78.6 percent were valued below $50 million, and 38.6 percent were valued below $10 million.[13] Further, the majority of the acquisitions valued below $50 million involved companies with between one to ten employees.[14] Of course, the number of employees is not always a reliable indicator of the "importance" or value of a company.[15] Nonetheless, the likelihood is considerably lower, all else equal, that a relatively low-valued startup with minimal staff represents a substantial competitive threat to an entrenched incumbent. Why is it that firms valued below $50 million with a few employees are less likely to raise anticompetitive concerns? Fundamentally, the argument hinges on one key point: it is much easier to replicate a company with relatively low revenues and a few employees than one valued, for example, at $500 million with 100 employees. Indeed, if relatively low revenue and small staff startups routinely and commonly represent competitive threats to incumbents, then this raises questions as to the durability of the alleged monopoly power that incumbents hold and the real extent that there are barriers to entry.

Another interesting finding from the FTC Report is the age of the acquired firms. Of the firms which the FTC had data on (which reduced the sample from 616 to 535), 45.2 percent of the acquired firms were five years or younger, 32 percent were five to ten years old, and 22.8 percent were ten years or older.[16] Thus, most acquisitions involved firms older than five years. This raises the question whether firms older than five (or, certainly, ten) years plausibly represent "nascent" competitors. Undoubtedly, more mature companies can represent a nascent threat if these companies expand from their core business into new areas that then attract the attention of a large incumbent.

Yet, the agencies should be able to clearly identify those instances of expansion and to assess whether the purpose of the acquisition is to stop that emerging business from becoming a significant competitor. In contrast, if the acquisition is over an existing, core business that is over five or ten years old with little to no new market entry/expansion activity, then it certainly reduces the likelihood that the acquired firm represents some unrealized, but potentially threatening, nascent threat. Either the threat is fully mature and, consequently, there should be ample market evidence of the constraining effect of the rival, or the threat is merely theoretical without a firm basis. The point is not to suggest a firm's age can absolutely rule out the plausibility of a nascent threat claim, but the theory of harm must have some basis in market realities. For instance, if a

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

11 FTC Report, *supra* note 5.

12 *Id.* at 13 fig. 5.

13 *Id.*

14 *Id.* at 23 fig. 17.

15 For instance, at the time of Facebook's acquisition of Instagram in 2012, Instagram had a handful of employees and no revenue. Nonetheless, that acquisition was notable for the $1 billion transaction price, which strongly indicated Instagram represented something quite different than a company purchased for less than $50 million. See Kurt Wagner, *Here's Why Facebook's $1 Billion Instagram Acquisition Was Such a Great Deal*, Vox: Recode (Apr. 9, 2017), https://www.vox.com/2017/4/9/15235940/facebook-instagram-acquisition-anniversary; Evelyn M. Rusli, *Facebook Buys Instagram for $1 Billion*, N.Y. Times: DealBook (Apr. 9, 2012), https://dealbook.nytimes.com/2012/04/09/facebook-buys-instagram-for-1-billion/.

16 FTC Report, *supra* note 5, at 25 fig. 21.

firm has been in the market for a decade and has yet to directly compete with an incumbent, then some additional evidence should be required to conclude the acquisition is anticompetitive — let alone, to justify a presumption of anticompetitive harm.

Perhaps the statistic that is the most eye-catching is that the big five tech companies each average one acquisition a month. Without context, however, this number tells us very little. According to one commentary, acquisitions made by big tech represent only a small fraction of overall startup acquisition activity:

> If we say that those $50m-plus deals are the ones where someone might have made money (and even here's [sic] it's only a subset), how does that compare to the rest of the industry? The FTC report says that there were 86 US exits to GAFAM [Google, Apple, Facebook, Amazon, Microsoft] for over $50m from 2010 to 2019. According to the NVCA [National Venture Capital Association], there were 2,100 US VC [venture capital] exits for over $50m in that period. Selling to those five companies was 4% of decent-sized exits.
> …
> The same point applies to the total data set. GAFAM bought 400 US companies from 2010 to 2019 for over $1m, of which 86 were over $50m and 314 were between $1m and $50m. In the same period, the NVCA reports 3,600 US VC exits where a value was disclosed (and 9,600 total).[17]

Of course, these are broad aggregate measures, but the point is that there is a vast amount of entrepreneurial activity and acquisitions happening daily that fall outside the big tech space. Additionally, approximately two-thirds of the venture capital deals during the examined period were in sectors that overlap with big tech markets: information technology (IT), consumer services, business and financial services, and consumer goods.[18]

What emerges from the FTC Report is that an overwhelming number of big tech acquisitions are small (that is, the purchase price is less than $50 million) and involves a handful of employees (that is, between one to ten employees). Further, the acquired companies are often older (that is, over five years old). Of course, without actual details on a particular acquisition, our ability to make policy conclusions is limited. Yet, consider if the opposite were true. Suppose the FTC found that most acquisitions involved firms that were relatively young (less than 5 years old) with a sizeable transaction price (over $50 million) and a large workforce (certainly above a handful of employees). This counterfactual would likely raise the most concern — again, all else equal. Notably, most of the acquisitions do not fit the above profile.

Overall, while the FTC Report is narrow in its scope and detail, there is little in the report that would support overturning legal precedents; passing legislation to implement discriminatory antitrust; and empowering agencies to become de facto regulatory bodies. In the context of all startup activity, big tech acquisitions represent only a small fraction of all startup activity and acquisitions.

III. EXAMINING SPOTIFY'S RECENT ACQUISITIONS

What about the argument that big tech is "big enough" and that, if they want to grow and expand, they should develop their own products and processes "in house," that is, they should vertically integrate? This line of argument disregards the economic concept of comparative advantage. Economist Ronald Coase's work on the nature of the firm explained that the "make" versus "buy" decision is based on the cost of using the market; that is transaction costs.[19] If transaction costs are high, then this incentivizes firms to move production further in-house. This principle does not change due to the mere identity of a company. Thus, if we recognize that companies have different comparative advantages, and market conditions can change, then acquisitions can serve an important role in the efficient growth of a company — irrespective of a firm's size or identity.

For instance, take a "medium sized" technology company like Spotify, which is the leading music streaming platform that disrupted Apple's incumbent iTunes and currently maintains its market leadership, despite the presence of Apple, Amazon, and Google.[20] On December

17 Benedict Evans, *When Big Tech Buys Small Tech*, (Nov. 12, 2021), https://www.ben-evans.com/benedictevans/2021/11/12/when-big-tech-buys-small-tech/.

18 The Wall Street Journal, Tracking Investment by Sector, https://graphics.wsj.com/venture-capital-deals/.

19 See generally Ronald H. Coase, *The Nature of the Firm*, 4 Economica 386 (1937).

20 Spotify entered the digital music market in 2008 by offering a streaming music service, where customers could listen free of charge with advertisements or pay for a premium service. Spotify's entry disrupted the incumbent, Apple's iTunes, which started in 2001. Eventually, Apple discontinued iTunes and launched Apple Music to compete with Spotify.

16, 2021, Spotify announced the acquisition of podcast technology platform Whooshkaa.[21] This follows on the heels of an acquisition made a month earlier on November 11, 2021, when Spotify announced the acquisition of a leading audiobook platform Findaway.[22] Only two years earlier, Spotify acquired two emerging podcasting platforms Gimlet and Anchor.[23] These acquisitions are part of Spotify's self-stated goal to become "the world's leading audio platform."[24] Indeed, Spotify's ambitions have paid off — as it currently commands 381 million users worldwide,[25] and $8.9 billion in annual revenues.[26] Spotify is the clear market leader in streaming music services with double the number of paid subscribers as Apple Music[27] and has overtaken Apple to become the leading platform for podcasts.[28]

The acquisition of Findaway appears to be aimed at becoming a leading audiobook destination as well. Notably, Findaway's 150 employees are 11 times more than the number of employees Instagram had at the time of Facebook's acquisition (that is, 13 employees).[29] Over the past several years, as stated earlier, Spotify has made a series of significant acquisitions.

- **Podz** (June 17, 2021): Described as a "technology company focused on the podcast discovery experience."[30] The purchase price was €45 million (approximately $51 million).

- **Betty Labs Incorporated** (March 29, 2021): Described as "a technology and content creation company focused on creating groundbreaking live audio experiences."[31] The purchase price was €57 million (approximately $65 million).

- **Ringer** (March 6, 2020): Described as "a leading creator of sports, entertainment, and pop culture content" that "allows [Spotify] to expand [its] content offering, audience reach, and podcast monetization."[32] The purchase price was €170 million (approximately $192 million).

- **Megaphone** (December 8, 2020): Described as "a podcast technology company" that "allows [Spotify] to expand and scale its podcast monetization and product offering for advertisers."[33] The purchase price was €195 million (approximately $221 million).

- **Anchor FM** (February 14, 2019): Described as "a software company that enables users to create and distribute their own podcasts."[34] Notably, Spotify explained that that the acquisition allows it "to leverage Anchor's creator-focused platform to accelerate

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21 *Spotify is Building on Megaphone's Capabilities with the Acquisition of Whooshkaa*, Spotify.com (Dec. 16, 2021), https://newsroom.spotify.com/2021-12-16/spotify-is-building-on-megaphones-capabilities-with-the-acquisition-of-whooshkaa/.

22 *Spotify to Acquire Leading Audiobook Platform Findaway*, Spotify.com (Nov. 11, 2021), https://newsroom.spotify.com/2021-11-11/spotify-to-acquire-leading-audiobook-platform-findaway/.

23 *Audio First*, Spotify.com (Feb. 6, 2019), https://newsroom.spotify.com/2019-02-06/audio-first/.

24 *Id.* ("These acquisitions will meaningfully accelerate our path to becoming the world's leading audio platform.").

25 *About Spotify*, Spotify.com, https://newsroom.spotify.com/company-info/.

26 Spotify, Annual Report (Form 20-F) (Dec. 31, 2020), https://s22.q4cdn.com/540910603/files/doc_financials/2020/ar/4e770a8c-ee99-49a8-9f9e-dcc191807b56.pdf at 5 (revenues of $7.88 million euros).

27 Ryan Henderson, *How Spotify Now Owns the Podcast Supply Chain*, The Motley Fool (Jan. 16, 2021), https://www.fool.com/investing/2021/01/16/the-2-big-reasons-spotify-will-win-podcasting/.

28 Mikey Campbell, *Spotify Overtakes Apple as Top US Podcast, Says Spotify*, AppleInsider.com (Oct. 28, 2021), https://appleinsider.com/articles/21/10/28/spotify-says-it-recently-passed-apple-as-top-us-podcast-platform/.

29 Riddhi Jain, *Music Streaming Service Spotify Plans on Acquiring Findaway*, ITM (Nov. 12, 2021), https://itmunch.com/music-streaming-service-spotify-acquires-findaway/ ("Music streaming app Spotify will be bringing in the entire team of Findaway of about 150 employees."); Ben Remaly, *Senate Proposes Limits on GAFA Acquisitions*, GCR.com (Nov. 8, 2021), https://globalcompetitionreview.com/gcr-usa/department-of-justice/senate-proposes-limits-gafa-acquisitions/ ("The FTC is currently suing to unwind Facebook's $1 billion purchase of Instagram and its 13 employees in 2012.").

30 Spotify, Report of Foreign Private Issuer (Form 6-K) (Oct. 2021), https://s22.q4cdn.com/540910603/files/doc_financials/2021/q3/8aac006e-c0b2-4b52-a682-d5ed53274725.pdf at 8.

31 *Id.*

32 Spotify, Annual Report, *supra* note 25, at 44.

33 *Id.*

34 Spotify, Annual Report (Form 20-F) (Dec. 31, 2019), https://s22.q4cdn.com/540910603/files/doc_financials/2019/ar/Spotify-2020-AGM-Annual-Report-on-Form-20-F.pdf at F-22.

the Group's [Spotify's] path to becoming the world's leading audio platform."[35] The purchase price was €136 million (approximately $154 million).

- **Gimlet Media** (February 15, 2019): Described as "an independent producer of podcast content" that "allows the Group to leverage Gimlet's in-depth knowledge of original content production and podcast monetization."[36] The purchase price was €172 million (approximately $195 million).

- **Cutler (Parcast)** (April 1, 2019): Described as "a premier storytelling podcast studio" that "allows the Group to bolster its content portfolio and utilize Parcast's writers, producers, and researchers in the production of high quality content."[37] The purchase price was €49 million (approximately $55 million).

A reading of the various statements from Spotify executives reveals that they view these acquisitions as a path to "accelerate" their entry into new markets. For instance, according to Spotify, the acquisition of Findaway is to "accelerate Spotify's presence in the audiobook space and will help us more quickly meet that ambition."[38] Further, "Findaway's technology infrastructure will enable Spotify to quickly scale its audiobook catalog and innovate on the experience for consumers, simultaneously providing new avenues for publishers and authors to reach audiences around the globe."[39] Similarly, "Combining Spotify and Findaway and their amazing team and their amazing tech, the idea is to realize th[e] future faster than we ever could as separate companies."[40]

Given the increased calls to make presumptions that market expansions by established companies through acquisitions are inherently anticompetitive and anti-consumer, what is the principled basis to permit market leaders such as Spotify to expand or innovate in podcasts and audiobooks through acquisitions but not Apple or Amazon? In contrast, the modern approach to antitrust, which currently guides agencies and courts, would scrutinize all acquisitions under a rule of reason standard based on market-specific evidence.

In sum, proposed legislation like Senators Klobuchar and Cotton's bill, "Platform Competition and Opportunity Act," would treat market leaders like Spotify significantly more favorably than lagging rivals Apple, Amazon, and Google. Why? Simply because Apple, Amazon, and Google fit some arbitrary definition of "big tech." Over the entire history of the antitrust laws, agencies and courts have never implemented a discriminatory regime where the mere identity of a company triggers a different set of legal rules. Such an approach, in instances such as Spotify, would only serve to further entrench the market leader while hindering the ability of rivals to challenge for market leadership.

IV. THREE RECENT STUDIES EXAMINING BIG TECH ACQUISITIONS

Finally, this Section[41] reviews three recent studies that examine acquisitions made by Google, Amazon, Facebook, Apple, and Microsoft for evidence of anticompetitive harm.[42] Broadly, all three studies do not reach firm conclusions either in an anticompetitive or procompetitive sense. Indeed, the evidence is either mixed or consistent with both hypotheses. Additionally, none of the studies use a control group such as an examination of acquisitions by technology companies outside of the big five (Google, Amazon, Facebook, Apple, and Microsoft) or track the progress of contemporaneous rivals to the acquired nascent or potential competitor.

Latham et al. examine acquisitions by Google, Amazon, Facebook, and Apple ("GAFA") between 2009 and 2020, and conclude "only a small proportion of transactions could begin to fit the 'killer' narrative."[43] Rather, "the vast majority have been about GAFA acquiring new capa-

35 *Id.*

36 *Id.*

37 *Id.*

38 Press Release, Spotify, Spotify Announces Acquisition of Audiobook Leader Findaway (Nov. 11, 2021), https://investors.spotify.com/financials/press-release-details/2021/Spotify-Announces-Acquisition-of-Audiobook-Leader-Findaway/default.aspx.

39 *Id.*

40 Sarah Perez, *Spotify Expands Into Audiobooks with Acquisitions of Findaway*, Tech Crunch (Nov. 11, 2021), https://techcrunch.com/2021/11/11/spotify-expands-into-audiobooks-with-acquisition-of-findaway/ (quoting Nir Zicherman, Spotify's head of Audiobooks).

41 This section is based on Yun, *supra* note 2, at Part IV.

42 See Latham et al., *supra* note 9; Gautier & Lamesch, *supra* note 9; Argentesi et al., *supra* note 9.

43 See Latham et al., *supra* note 9, at 27 (defining "killer acquisition" more broadly than instances where the acquired product was discontinued, but rather focus on the narrative that big tech acquisitions are motived by a concern that the target firms could evolve into a challenger to their core monopoly).

bilities and positioning themselves to enter new markets."[44] Specifically, the authors filtered all 409 acquisitions to determine whether they met a "core business" filter.[45] They find only 33 of the acquisitions (8 percent) fit this filter; further, of these 33 acquisitions, the authors emphasize that they "are not saying that the transactions surviving these filters were killer acquisitions."[46]

The authors argue, nonetheless, that this could mean that there is a concern about "reverse" killer acquisitions, where the purchaser eliminates its own development and product and uses the acquired product instead. It is not clear, however, that even if a reverse killer acquisition were to occur, that this would be detrimental to innovation. For instance, combining the best of two development processes in order to bring a more innovative product to market faster is a potential cognizable efficiency rather than a theory of harm.[47] Similarly, in assessing this theory, one cannot simply assume internal development would occur or would occur at the same degree of efficiency as the acquired assets.[48]

Gautier & Lamesch similarly examine acquisitions from big tech platforms and find "that many GAFAM [Google, Amazon, Facebook, Apple, and Microsoft] acquisitions are driven by the desire to purchase valuable R&D inputs, such as the technology, IP rights and/or people of the target firms."[49] Focusing on killer acquisitions,[50] of the 175 deals they examined over the period from 2015-2017, they "find no evidence in our sample that killer mergers are widespread, but just one potential case that would have deserved closer investigation by competition watchdogs."[51] The potential case is Facebook's 2016 acquisition of the "rapidly popular" photo filter app Masquerade.[52] Similar to Latham et al., Gautier & Lamesch certainly consider the possibility that some of the acquisitions were intended to increase market power rather than realize efficiency gains. Indeed, either conclusion could be construed as consistent with their evidence. Ultimately, however, they explain "[t]he answer to this question is far from obvious and would need a case by case analysis."[53]

Finally, Argentesi et al. examine mergers over the period between 2008 and 2018 involving Google, Facebook, and Amazon.[54] While their examination is generally more descriptive, they find "there are considerable difficulties in understanding the competitive implications of acquiring a young firm as, at that stage in its life cycle, its evolution is still uncertain, and thus, it is very difficult to determine if the target will grow to become a significant competitive force."[55] This finding aptly summarizes the challenge agencies and courts face when assessing mergers involving a theory based on eliminating a nascent competitor. The authors also do a thoughtful review of the UK's Competition and Markets Authority's ("CMA") decisions to clear both the *Facebook-Instagram and Google-Waze* acquisitions.[56] While they make compelling arguments on both sides of the debate, they do not reach a firm conclusion.[57]

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44 *Id.* at 34.

45 This filter looks for either a direct horizontal overlap or whether the acquisition involved a target that was "vertically-related to that core business and could plausibly grow into a competitive threat." *Id.* at 31.

46 *Id.* (emphasis in original).

47 See U.S. Dep't of Just. & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) at § 10 ("When evaluating the effects of a merger on innovation, the Agencies consider the ability of the merged firm to conduct research or development more effectively. Such efficiencies may spur innovation but not affect short-term pricing.").

48 On this question, a beneficial study would be to examine the failure rate of various products and product developments at large platforms. There is certainly no shortage of large profile product flops. See, e.g. Eric Griffith, *The Biggest Tech Product Flops of the 2010s*, PCMag (Dec. 2, 2019), https://www.pcmag.com/news/the-biggest-tech-product-flops-of-the-2010s (citing, e.g. Amazon Fire Phone, Facebook Home, Facebook Deals, Facebook Email, Facebook Places, Facebook Gifts, Google Glass, Google Nexus Q, Google TV, Microsoft Kinect).

49 See Gautier & Lamesch, *supra* note 9, at 27.

50 The authors, again, use a broader definition for killer acquisition. See *i*d. at 2 ("This type of merger is now referred to as a killer merger: the firm acquires a target which develops a technology that can be used to compete with its own products in the future and the acquisition kills the competitive threat.").

51 *Id.* at 4.

52 *Id.*

53 *Id.* at 27.

54 See Argentesi et al., *supra* note 9.

55 *Id.* at 103-04.

56 At the time of those acquisitions, the competition authority in the UK was the Office of Fair Trading (OFT).

57 Regarding Facebook-Instagram, the authors conclude: "[T]he effect of the Authorities' decision to clear the merger on consumer welfare depend on the balance between likely anticompetitive effects and efficiencies, which in turn heavily depend on the selected counterfactual. … [P]erhaps… Facebook's role in the development of Instagram with respect to advertising was significant." *Id.* at 125-26. Regarding *Google-Waze*, the authors conclude: "[T]he merger has enabled Google Maps and Waze to exploit their complementarities and generate efficiencies. These efficiencies are clearly merger-specific and should be taken into account when assessing whether the decision has proved to be beneficial or detrimental to consumers." *Id.* at 130.

The main takeaway from these studies is that potential and nascent competition cases are challenging — not because we somehow "know" these are anticompetitive mergers but cannot easily prove it — but because these theories of harm are inherently speculative. Further, there are no control group comparisons, such as with non-GAFAM acquisitions including by companies like Spotify, nor is there tracking of competitors to the acquired startups (e.g. the competitors to Instagram and WhatsApp at the time of their acquisitions). Most importantly, the results from these studies do not definitely support a transition to a regulatory approach to antitrust.

V. CONCLUSION

There is certainly no shortage of calls to fundamentally transform antitrust agencies into regulatory bodies where one set of rules apply to one group and another set to everyone else.[58] Such a radical restructuring of antitrust demands extraordinary evidence that the current laws are fundamentally broken with rampant consumer harm due to agency inaction or judicial error. The current and available empirical evidence shows little support for such drastic legal and policy changes.

58 In addition to the Klobuchar-Cotton bill, several recent reports have also called for various regulatory antitrust proposals for large digital platforms. See, e.g. Stigler Ctr. for the Study of the Econ. & the State, Stigler Comm. on Digit. Platforms: Final Rep. 16–21 (2019), https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf/; Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf/.

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