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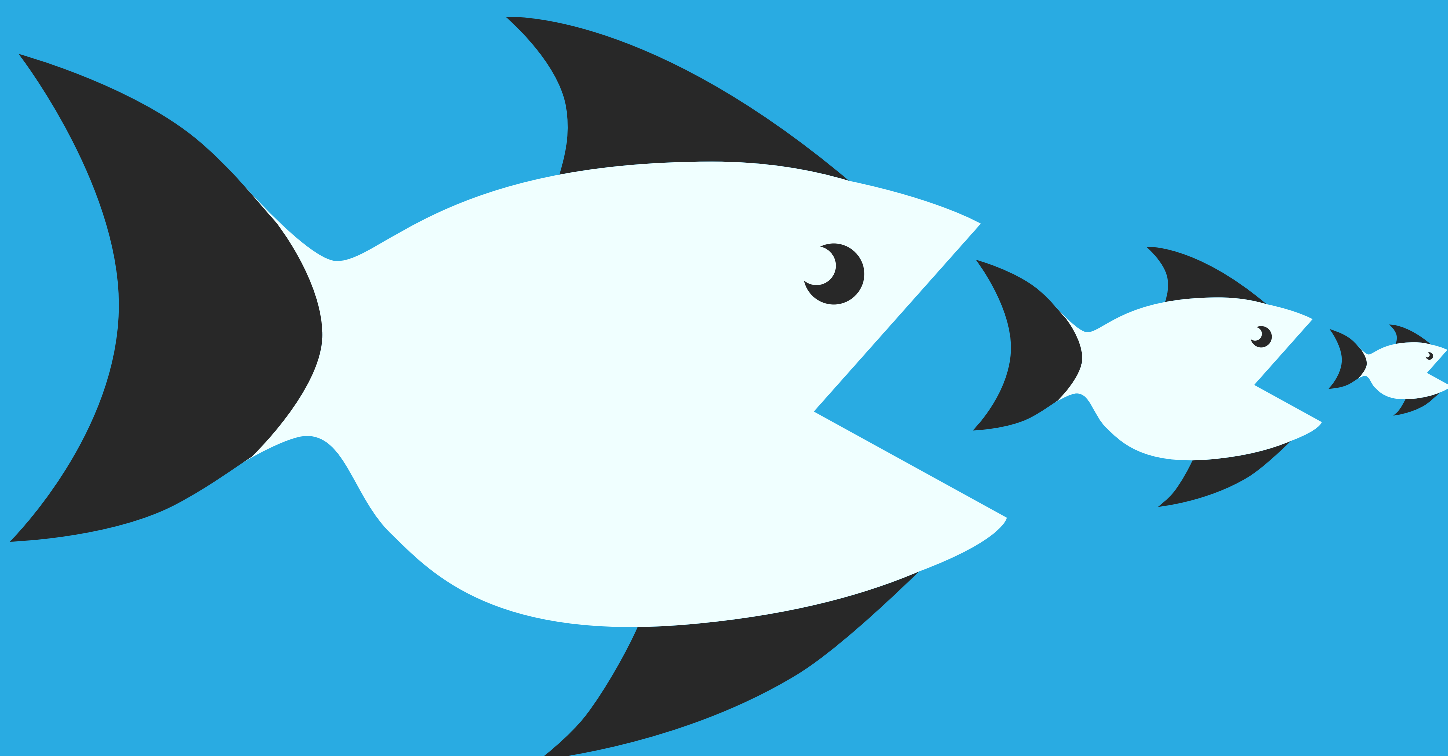

Mergers as Monopolization

CPI COMPETITION POLICY® INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

It has long bubbled under the surface, but there is an inherent tension between the archetypal monopolization/abuse of dominance provisions of global antitrust rules, and the subsequent introduction of merger control legislation.

This is perhaps no more evident than in the parallel sets of rules that hold sway in the two formative antitrust jurisdictions in the world: the U.S. and the EU. Merger control rules, in the form of the U.S. Clayton Act, and the EU Merger Regulation ("EUMR"), respectively, were introduced on the coattails of judicial and regulatory decisions seeking to impose antitrust rules to mergers and acquisitions. Those moves sought to control acquisitive behavior by potentially dominant or "monopolistic" firms, by subjecting such conduct to review under the existing antitrust rules, particularly Section 2 of the U.S. Sherman Act of 1890, and (what is now) Article 102 of the Treaty on the Functioning of the European Union ("TFEU").

The authorities and courts were clearly seeking to fill (what they saw as) a lacuna in the law. But filling this lacuna would prove to be far from a straightforward exercise. The key differences between "antitrust" and "merger control" rules are due not only to the context in which they were enacted, but also to the mechanisms used for their enforcement. What are now known as the "antitrust" rules are enforced *ex post*, whereas the subsequently-introduced "Merger Control" rules are designed to provide for *ex ante* control of potentially anticompetitive mergers. The details and the procedures differ; but, in both cases, the relevant agencies and/or courts are required to assess the potential anticompetitive effects of a given market transaction. This is similarly the dynamic in the the multitude of jurisdictions that take inspiration from the U.S. and EU legislative frameworks.

Taking a charitable interpretation, it perhaps could not have been foreseen at the time of the adoption of these *ex ante* rules that there would be such deep tensions between the two regimes that each represents. These tensions have now come home to roost in terms of the ongoing controversy concerning how antitrust authorities ought to (and can legitimately) treat acquisitions by dominant companies where such actions do not trip the procedural or substantive thresholds used for "merger control." Nonetheless, they could, in principle, nonetheless fall foul of the principles set out in earlier case law.

The pieces in this Chronicle expound on this and other aspects of the growing debate that dances around this tension, which in contemporary terms is expressed using colorful terms such as "killer acquisitions," particularly in the tech sector. In so doing, the actors in such controversies invoke classic themes in the application of law where a specific rule potentially conflicts with another of broader application, not to mention questions of the hierarchy of norms (be it due to the Treaty status of certain rules in the EU, or the fact that key U.S. and EU precedents are interpretations of the foundational texts (the Constitution or the Treaty, respectively).

These themes and tensions raise their heads in multiple ways in the pieces presented in this edition of the Chronicle. This is self-evident from a brief perusal of the themes raised by the articles' opening salvos.

To open, **Mihkel Tombak** notes how many competition authorities operate under provisions for transactions of "minor importance" where the parties involved can avoid mandatory pre-merger notification. Several industries have seen merger waves whereby consolidator firms engage in a strategy of so-called "strategic rollups" – the serial acquisition of numerous small firms in a highly fragmented industry (what some have – perhaps cynically - termed "Sashimi M&A"). The piece examines the literature on sequential mergers. While individual transactions may not raise competition concerns, the author concludes that ultimately, certain merger sequences may warrant the scrutiny of regulators.

Allen Grunes notes the historical fact that mergers and monopolization have traditionally been regarded as separate and distinct branches of antitrust. Recent questions regarding the potential use of Section 2 of the Sherman Act to attack mergers raises the question of whether merger enforcement has been ineffective. However, the real answer may simply be that merger analysis is less developed when it comes to mergers involving nascent competitors. Merger analysis under Hart-Scott-Rodino is a predictive exercise. The "actual potential competition" doctrine, with its stringent causation requirement, adds an additional layer of difficulty. By contrast, Section 2 of the Sherman Act gives the agencies the ability to look back at completed mergers, including those of nascent competitors. Forthcoming revisions to the merger guidelines may address some of these issues.

Building on the themes above, **Richard Pepper & Roque Botas Armero** discuss the Article 102 TFEU prohibition on the abuse of a dominant position interacts with merger control. The EU Commission has generally used this power against dominant companies who have foreclosed rivals and exploited their customers. However, a 1973 European Court judgment, *Continental Can*, held that acquisitions can also infringe Article 102 where they sufficiently strengthen a dominant position. The article provides a brief and timely history of the application of Article 102 to mergers and acquisitions, and addresses an ongoing preliminary ruling request to the European Court of Justice that considers the relevance of the principle following the introduction of the EU Merger Regulation. The tension noted above could not be cast in sharper relief.

Adopting another orphan topic, **David Henry** evokes the often-neglected theme of legal certainty. This principle has long been a core tenet of European merger control; not to mention regulation in all domains worldwide. In his view, this principle risks being eroded through authorities attacking non-reportable transactions. On the one hand, there is the revival of the Article 22 corrective mechanism enshrined in the EU Merger Regulation. Then there is the recent Opinion of the Advocate General in Case C-449/21 - *Towercast*. If followed by the European Court of Justice, in the author's view, there would likely be considerably more uncertainty for the business community with a chilling effect on ultimately benign, or even pro-competitive, transactions.

Taking a satellite view, **Ron Knox** notes how mergers have been a persistent tactic used by powerful companies to grow their power and monopolize markets. In the author's view, for many decades, economists, lawyers, and policymakers have worked to circumvent the functioning of the laws intended to prevent monopolization through mergers and, in doing so, to undermine the will of Congress in passing the Clayton Act and other laws. The author examines the legislative and judicial record supporting the strong enforcement of the anti-merger laws, and proposes that to restore the intent behind the these laws, there should be a significant shift in merger enforcement policy to support open markets.

Ted Tatos analyzes the unique issues raised by the vertical relationship between digital platforms and app developers. In the author's view, this relationship imposes a largely ignored upward pricing pressure on prices. Digital platforms aim to create walled gardens, leveraging lock-in to cabin consumer substitution within the platform's boundaries. Digital marketplace owners always collect a platform fee, or "take rate" regardless of the particular app purchased. This article discusses the attendant effects: (1) upward pricing pressure on apps and in-app purchases as platforms benefit from eliminating price competition within their marketplaces, (2) the limited usefulness of diversion ratios, and (3) recognition that in the event one of the platforms acquires an app purchaser, the upward pricing effects are likely to overwhelm any countervailing elimination of double marginalization, even if this effect could be shown to be merger-specific.

Turning to the specific case of financial services, **Robert C. MacKay** analyzes several aspects of recent changes in the banking industry, some of which correspond to the financial crisis in 2008 and the government's subsequent financial reforms. The banking industry was greatly impacted by the crisis, including the types of banks that persist. Specifically, the piece analyzes the decreasing number of community banks, the tends of increasing banking assets and deposits, the consolidation within the banking industry, and distributional implications related to bank size. In particular, the author looks at how bank merger reviews combine traditional priorities of protecting competition with additional priorities to provide financial stability and services (and thus renders bank merger review distinct from that in other sectors).

Building on this theme, **Lawrence B. Landman** notes how that for (at least) the past thirty years the U.S. and EU competition authorities have claimed to protect competition to innovate. They have also claimed that they can protect competition in so-called "innovation markets." In all these cases however, the authorities have in fact sought to protect competition in hypothetical (or one might say "imaginary") "future markets." Among many novel thoughts raised in this piece, the author shows that U.S. courts have long interpreted the Sherman Act to protect competition in future markets; and notes how those same courts could (and perhaps should) do the same when interpreting the Clayton Act. This article therefore provides useful food for thought as this controversy pans out.

As always, many thanks to our great panel of authors.

Sincerely,

CPI Team

SUMMARIES

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SASHIMI M&As: MONOPOLIZATION BY A THOUSAND ACQUISITIONS

By Mihkel Tombak

Many competition authorities have provisions for transactions of "minor importance" where the parties involved can avoid mandatory pre-merger notification. Several industries have seen merger waves whereby consolidator firms engage in a strategy of "strategic rollups" – the serial acquisition of many small firms within a highly fragmented industry ("Sashimi M&As"). In this article the literature on sequential mergers is reviewed and three industry cases are examined. It is found that there is a path dependency in merger sequences. M&A series which start with the larger entities merged first should make competition regulators wary. Furthermore, how the acquired entities are organized post-merger – that they continue to operate independently can be an indication of a consolidator intending to engage in future M&As within the relevant market. While the individual transactions may not raise competition concerns, ultimately, the merger sequences may warrant the scrutiny of regulators.

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MERGERS AS MONOPOLIZATION

By Allen Grunes

We tend to think of mergers and monopolization as separate and distinct branches of antitrust. Using Section 2 to attack mergers raises the question of whether merger enforcement has been ineffective. But there is another explanation. The legal and economic frameworks are most developed when it comes to strategic horizontal mergers, and correspondingly less developed when it comes to mergers involving nascent competitors. Merger analysis under Hart-Scott-Rodino is a predictive exercise. The "actual potential competition" doctrine, with its stringent causation requirement, adds an additional layer of predictive difficulty. The FTC's losses in Steris/Synergy and Meta/Within are illustrative. By contrast, Section 2 of the Sherman Act gives the agencies the ability to look back at completed mergers, including those of nascent competitors. Although Section 2 requires a showing of monopoly power, its causation requirement is easier to meet than that of the actual potential competition doctrine. Hence it is understandable that both DOJ and FTC are using Section 2 to attack mergers that appear to have been anticompetitive and cemented dominance. The forthcoming revisions to the merger guidelines hopefully will address some of these issues.

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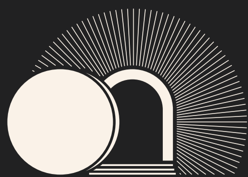

THE RESURRECTION OF THE APPLICATION OF ARTICLE 102 TO MERGERS AND ACQUISITIONS

By Richard Pepper & Roque Botas Armero

Article 102 of the Treaty on the Functioning of the European Union prohibits the abuse of a dominant position. The European Commission has generally used this power to sanction dominant companies who have foreclosed rivals and exploited their customers. However, a 1973 European Court judgment, *Continental Can*, held that acquisitions can also infringe Article 102 where they sufficiently strengthen a dominant position. This article provides a brief history of the application of Article 102 to mergers and acquisitions, and addresses an ongoing preliminary ruling request to the European Court of Justice that considers the relevance of the principle following the introduction of the EU Merger Regulation.

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GAINING A FURTHER STRANGLEHOLD OVER KILLER ACQUISITIONS – BUT AT WHAT COST? THE ADVOCATE GENERAL'S OPINION IN *TOWERCAST*

By David Henry

Legal certainty has long been a core tenet of European merger control. This legal certainty continues to be eroded, however, by virtue of the continued onslaught against non-reportable transactions. On the one hand, there is the revival of the Article 22 corrective mechanism enshrined in the EU Merger Regulation. On the other hand, there is the Advocate General's recent Opinion in Case C-449/21 - *Towercast*. With respect to the latter, and if followed by the European Court of Justice, dominant acquirers could also have to contend with Article 102 TFEU prohibition proceedings before national competition authorities with all its associated consequences. Granted, the Opinion is premised *inter alia* on the need to further close the perceived enforcement gap surrounding anticompetitive killer acquisitions and, in terms of policy objective, is therefore to be lauded. If followed by the European Court of Justice, however, the Advocate General's Opinion is likely to lead to considerably more uncertainty for the business community with a potentially attendant chilling effect on ultimately benign, or even pro-competitive, transactions.

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ENDING MONOPOLIZATION VIA MERGERS: HOW AND WHY TO RESTORE LEGISLATIVE INTENT BEHIND THE U.S. ANTI-MERGER LAWS

By Ron Knox

Mergers have been a persistent tactic by which powerful companies grow their power and monopolize markets. In passing and amending the Clayton Act, Congress intended to prevent monopolization, and in order to reach that goal, limited mergers and corporate takeovers –particularly those involving dominant firms. Congress believed these laws barring monopoly through mergers would create an economy in which firms could enter industries with relative ease and, once there, join a multitude of other firms that would joust in order to best serve their customers and communities. For many decades, however, pro-monopoly economists, lawyers and policymakers have worked to circumvent the functioning of the laws intended to prevent monopolization through mergers and, in doing so, to undermine the will of Congress in passing these laws. In this article, I examine in part the legislative and judicial record supporting the strong enforcement of the anti-merger laws – legislative intent that has been largely cast aside over the past half-century. To restore the intent behind the anti-merger laws – and ultimately to help deconcentrate the economy – I propose a significant shift in our anti-merger enforcement and education that would direct agencies and judges to restrict industrial concentration and support open, democratic markets.

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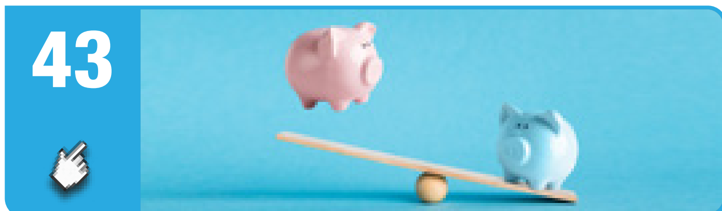
UPWARD PRICING PRESSURE FROM DIGITAL PLATFORMS' IMPOSITION OF TAKE RATES ON APP DEVELOPERS

By Ted Tatos

The vertical relationship between digital platforms and the app developers that ply their wares on such marketplaces (e.g. App Store, Play Store, Oculus Store) imposes a largely ignored upward pricing pressure on prices. Digital platforms aim to create walled gardens, leveraging lock-in to cabin consumer substitution within the platform's boundaries. Digital marketplace owners are largely agnostic to intra-platform substitution, because they collect a platform fee, or "take rate" regardless of its destination. This article discusses the attendant effects: (1) upward pricing pressure on apps and in-app purchases as platforms benefit from eliminating price competition within their marketplaces, (2) limited usefulness of diversion ratios, and (3) recognition that in the event of the platforms acquires an app purchaser, the upward pricing effects are likely to overwhelm any countervailing elimination of double marginalization, even if EDM were shown to be merger-specific.



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BANK MERGERS ARE SYSTEMICALLY IMPORTANT: A REVIEW OF BANK MARKETS AND THE MERGER REVIEW PROCESS

By Robert C. MacKay

I analyze several aspects of recent changes in the banking industry, some of which correspond to the financial crisis in 2008 and the government's subsequent financial reforms. The banking industry was greatly impacted by the crisis, including the types of banks that persist. Specifically, I analyze: the decreasing number of community banks, the tends of increasing banking assets and deposits, the consolidation within the banking industry, and distributional implications related to bank size. I discuss the antitrust motivations for reviewing mergers and how bank merger reviews combine traditional priorities of protecting competition with additional priorities to provide financial stability and services within a community. The outcomes and review processes corresponding to bank mergers are therefore different from those corresponding to mergers in non-banking sectors.

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PROTECTING COMPETITION TO INNOVATE IS PROTECTING COMPETITION IN FUTURE MARKETS: TEN LAW REVIEW ARTICLES LEAVE NO DOUBT

By Lawrence B. Landman

For at least the last 30 years the American and European competition authorities have claimed they can protect competition to innovate. The authorities have at times claimed they can protect competition in an Innovation Market, an R&D Market, or an Innovation Space. In all these cases however, the authorities have actually protected competition in a Future Market, a market for products at least some of which do not exist yet. In a series of 10 law review articles, which the author summarizes here, he has shown not only that the authorities protect competition in Future Markets, he also explains the Future Markets Model, the methodology the authorities actually use to do so. The author also shows why so many authorities exert jurisdiction to review the same transaction when that transaction involves Future Markets. The author also shows why the Future Markets Model explains the authorities' attempts to protect nascent competition. Regarding the United States, the authority explains Future Potential Competition, the doctrine courts must develop and apply so they can protect competition in Future Markets. Finally, the author shows that American courts have already interpreted the Sherman Act to allow them to protect competition in Future Markets, and says they should do the same when interpreting the Clayton Act.

WHAT'S NEXT?

For March 2023, we will feature an Antitrust Chronicle focused on issues related to (1) **China Edition**; and (2) **Interlocking**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2023, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES April 2023

For April 2023, we will feature an Antitrust Chronicle focused on issues related to (1) **Junk Fees**; and (2) **Essential Facilities**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

SASHIMI M&As: MONOPOLIZATION BY A THOUSAND ACQUISITIONS

BY MIHKEL TOMBAK[1]

1 University of Toronto. Mihkel.tombak@utoronto.ca.

Many competition authorities have provisions for transactions of “minor importance” being able to avoid mandatory pre-merger notification. Such thresholds are understandable given the under budgeting of those antitrust regulatory bodies and the daunting caseloads of many regulatory bodies. Under the Hart Scott Rodino Antitrust Improvements Act of 1976 there is a size of transaction test, which the U.S. Federal Trade Commission announced in January of 2022 would be $101 million over which there is a requirement for the parties to file premerger notification reports. In Canada the pre-merger notification- transaction size threshold is $93 million ($ Cdn) for 2022 and when the combined assets in Canada exceed $400 million. The EU bases such a threshold on the turnover of the firms involved, i.e. (i) a combined worldwide turnover of all the merging firms over €5 000 million, and (ii) an EU-wide turnover for each of at least two of the firms over €250 million. There are, however, instances where firms have engaged in merger and acquisition (“M&As”) strategies in highly fragmented industries, where the transactions are below the above thresholds and which should ultimately raise competition concerns. There are many examples of industries undergoing “merger waves.” One salient issue is whether and at what stage should such merger waves be stopped and what indicators, observable to regulators, are reliable signs of anticompetitive merger waves.

Kocourek, Chung & McKenna (2000)[2] describe merger waves at the industry level as “strategic rollups” whereby specific firms (which we will label as “consolidators”) have a strategy to buy up many small firms within a highly fragmented industry (Sashimi M&As). One can also observe a number of instances where the consolidator buys target firms in close proximity to one another, in part, in order to capture some efficiencies. In industries where consumers do not travel far for the good or service, this local preference for targets can also entail a localized increase in market power. This can occur where the price of the good is low relative to the transportation cost or when the demand for a service is more immediate such as for certain health care services.

The subject of this article is that there may be mergers which because of their small size may escape the scrutiny of competition authorities and yet the accumulation of those and many other acquisitions may result in establishments that ultimately do raise antitrust concerns. What follows is a survey of the literature on dynamic mergers and the regulation of the process which indicate conditions and behaviors which may indicate possible antitrust concerns. A few cases – in the tobacco, funeral homes and cardio-vascular surgery industries – where such concerns arose (and are arising) are then also discussed. We then summarize the messages for competition regulation.

I. A SURVEY OF THE LITERATURE ON SEQUENTIAL MERGERS AND THE INTUITION IT PROVIDES

There is a steadily growing literature in the theory of sequential mergers (Kamien & Zang, 1991, 1993[3]; Nilssen & Søgard, 1998[4]; Faulli-Oller, 2000[5]; Horn & Persson, 2001[6]; Tombak, 2002[7]; Nocke & Whinston, 2010, 2022,[8] among others). In much of the earlier analyses monopolization was uncommon. That would suggest that antitrust concerns could be muted. One basis for this was that many models feature “business stealing” whereby the firms in the industry but outside the merger transaction gain sales as the merged entity consolidates output (first noted by Stigler, 1950 and then examined in a single merger context by Salant, Switzer, & Reynolds, 1983)[9].

Kamien & Zang (1990, 1993) model the sequential merger process as a series of interdependent auctions and show that a free riding problem – where firms outside the merger may engage in “business stealing” may inhibit mergers that are profitable. Nilssen & Sorgard (1998) focus on the interrelatedness of sequential mergers and relate it to the business strategy taxonomy of Fudenberg & Tirole (1984).[10] They show

2 Kocourek, P., S. Chung, and M. McKenna, 2000, “Strategic Rollups: Overhauling the Multi-Merger Machine,” *Strategy+Business,* Booz, Allen & Hamilton, Issue 19, Second Quarter, pp.45-53.

3 Kamien, M., & I. Zang, 1990, “The Limits of Monopolization through Acquisition,” *Quarterly Journal of Economics*, 105, pp. 465-499. Kamien, M. & I. Zang, 1993, “Monopolization by Sequential Acquisition,” *The Journal of Law, Economics, and Organization*, Vol. 9, No. 2., pp.205-229.

4 Nilssen T., & L. Søgard, 1998, “Sequential horizontal mergers,” *European Economic Review*, 42: 1683-1702.

5 Fauli-Oller. R., 2000, “Takeover Waves,” *Journal of Economics and Management Strategy*, 9, (2) 189-210.

6 Horn, H.,& L. Persson, 2001 “Endogenous mergers in concentrated markets,” *International Journal of Industrial Organization*, 19:1213-1244.

7 Tombak, M, 2002, “Mergers to monopoly,” *Journal of Economics and Management Strategy*, 11, (3) 511-546.

8 Nocke, V., & M. Whinston, 2010, “Dynamic merger review,” *Journal of Political Economy*, 118(6): 1201-1251. Nocke, V. &, M. Whinston, 2022, “Concentration Thresholds for Horizontal Mergers,” *American Economic Review*, Vo. 112, No. 6, (June) pp. 1915-1948.

9 Salant, S., S. Switzer, and R., Reynolds, 1983, “Losses from Horizontal Merger: The effects of an Exogenous Change in Industrial Structure on Cournot-Nash Equilibrium,” *Quarterly Journal of Economics*, 98, pp. 185-199. Stigler, G., 1950, “Monopoly and Oligopoly by Merger,” *American Economic Review Papers and Proceedings*, 40, pp. 23-34.

10 Fudenberg D. & J. Tirole, 1984, “The fat cat effect, the puppy dog ploy and the lean hungry look,” *American Economic Review*, 74, 361-368.

that the Farrell & Shapiro (1990)[11] criterion for welfare increasing mergers (that the combined effect on consumers and non-merging firms is positive) is not sufficient for sequences of mergers as a particular merger may have the motive of affecting future mergers, i.e. motivate future consumer price increasing mergers or discouraging future price decreasing mergers. The above generally point to the importance of history of the industry – that there is a path dependency of sequences of mergers.

Fauli-Oller (2000) examined takeover waves in a Cournot setting with cost asymmetries and found a positive feedback in that a merger raises the profitability of future acquisitions. This he finds holds for both a consolidator and its rivals. Tombak (2002) analyzes an asymmetric Cournot model with efficiency gains from acquisitions, consolidation being endogenous, and firm acquisitions taking place as sequential (but interrelated) bargaining games. The model, having asymmetric firms, allows for efficiencies from a merger. Another essential feature in this analysis is that the output decision(s) may remain decentralized post-merger. The results of such a study indicate that those firms which are intent on continuing their sequence of mergers (i.e. have a strategy of a "rollup" of the industry) would tend to be those firms which: are bigger and more efficient; are those which post-merger do not centralize their output decisions (at the beginning of the sequence of mergers), and; are those which buy up their more efficient rivals first. The intuition for the consolidator buying up the more efficient rivals first is to eliminate an acquisitions competitor for subsequent acquisitions thereby saving on the purchase prices of ensuing procurements. The insight for leaving post-merger output decisions decentralized is to prevent the "business stealing" phenomenon which would enlarge those subsequent acquisition targets, again with the intent of keeping the price of successive purchases lower. That those consolidators would be the more efficient (and larger) firms means that ultimately there would be an efficiency gain from the series of mergers and that there is an incentive for the firms to endogenously engage in mergers. Furthermore, on this last efficiency point, it would suggest that antitrust concerns might be subdued. Ultimately, if allowed to proceed to the end, such a "strategic rollup" would entail a loss of welfare as the market power effects would in the end dominate the efficiency effect. This last argument is suggestive of an optimal point in the sequence of mergers at which antitrust authorities should intervene as the expression of market power would come with a consolidation of output decision making which would take place when the sequence of acquisitions is halted.

In more recent studies focusing on the regulation of such merger sequences Nocke & Whinston (2010) find conditions under which a myopic regulator would make reasonably good consumer surplus maintaining or increasing decisions. It should be noted that among those conditions are the complete information of all firms of all other firms' merger possibilities and efficiencies. Nocke & Whinston also acknowledge that their conclusion may be weaker when: firms face price competition; when products are differentiated, and; where demand may increase over time. Also on the regulation of merger sequences, Nocke & Whinston (2022) find both theoretical and empirical justification for thresholds based on concentration changes regardless of concentration levels to test whether the merger would have unilateral increase in price. They also find that present U.S. threshold levels are not stringent enough unless the efficiency effects are greater than 5 percent.

In we now turn to examine some cases in light of the theory above. In what follows we scan the cases of: American Tobacco, U.S. Funeral Homes, and the U.S. market for cardiovascular procedures. American Tobacco is interesting because it is well studied and there were a sufficient number of M&A transactions to warrant an econometric analysis (Burns, 1986).[12] The U.S. funeral homes industry is of interest as it involved multiple consolidators and regulatory agencies partially intervened with sanctions on M&As for certain parties in certain geographical areas. The cardiovascular procedure market is chosen as it is an M&A process that is ongoing and shows some features of how sashimi M&As have evolved.

II. THE AMERICAN TOBACCO MARKET AT THE TURN OF THE PREVIOUS CENTURY

Burns (1986) examined the process of purchasing of 43 competitors acquired by American Tobacco Company and two affiliated companies in order to establish dominant positions in the tobacco industry. Ultimately, American Tobacco bought approximately 250 firms in the industry and achieved average market shares during the period 1900-1910 of 68.8 percent, and 73.9 percent in the smoking and fine cut markets, respectively.

While Burns focuses on the predatory pricing effect on purchase prices, there are two other important observations of the behavior of the Company relevant for this commentary. The first observation is that rivals were acquired sequentially and that, American Tobacco tried to buy its largest and most expensive rivals first and then it acquired smaller firms after it was well established in each segment of the industry. Secondly, often when companies were acquired their brands continued to be sold and Burns describes some of those brands as "fighting brands." This indicated the retention of some degree of competition between brands in the product market particularly when American Tobacco was in the process of acquiring competing firms.

11 Farrell, J., C. Shapiro, 1990, "Horizontal mergers: An equilibrium analysis," American Economic Review, 80, 1007-126.

12 Burns, M., 1986, "Predatory Pricing and the Acquisition Costs of Competitors," Journal of Political Economy, 94, 266-296.

III. THE U.S. FUNERAL HOMES MARKET IN THE 1990S

Service Corporation International (SCI), the largest funeral home company in North America, made a takeover offer for the second largest firm in that industry, The Loewen Group, for US$ 4.1 billion on September 24, 1996. Such a takeover would have "remove(d) what has become SCI's impediment to eternal growth: Loewen's emergence as a rival bidder for small prey" (Economist, 1996).[13] The industry generated at the time annual revenue of $16 billion in North America and was highly fragmented (89 percent of the 23,500 funeral homes in the U.S. and Canada were owned by independent operators, Martin, 1996). High barriers to entry exist due to location, zoning and other regulations, the high fixed costs of building new funeral homes, and due to the pre-need sales backlog of existing competitors. The industry had been going through a period of rapid consolidation with the three largest capitalization companies (The Loewen Group, Service Corporation International (SCI), and Stewart Enterprises) making acquisition expenditures totaling approximately $1.2 billion and $1.8 billion in 1994 and 1995, respectively. Loewen has focused on the acquisition of rural homes while SCI and Stewart concentrate on urban properties.

The acquisitions strategy of these large consolidators has been to purchase smaller regional acquisition-oriented companies and small family-owned businesses. "The consolidators place a great deal of importance on the geographic proximity of the property in relation to other properties that they already own, and the ability to acquire a group of properties in a region, because it enables the implementation of clustering strategies. Clustering provides opportunities to capitalize on economies of scale, for example, by enabling a company's various facilities to share vehicles, and employees, to reduce administrative expenses, ..." (Martin, 1996, page 16).[14] Thus, there can be efficiencies due to acquisitions in this industry. Clustering, however, can also generate local market power as indicated by the four consent orders issued by the Federal Trade Commission restricting SCI from making acquisitions in ten areas of the U.S. over certain time periods.

The target firm, Loewen, had also a history of consolidations of family-owned businesses through partners which retain up to 10 percent interest in the future appreciation with the eventual purchase by Loewen of the retained interest. Thus, Loewen has ownership but the operations of the businesses are to some degree decentralized. The Loewen Group made the largest acquisition in the previous two years in North America by securing the right to purchasing Prime Succession for $295 million.[15] Prime Succession was a venture capital backed consolidator who started in 1992 with the objective of being a funeral home/cemetery acquisition vehicle, and rapidly became the fourth largest operator in North America. Hence an incentive for Loewen to make the offer was to "eliminate a strong acquisition competitor" (Martin, 1996, page 14). SCI was ultimately unsuccessful in the takeover bid of Loewen. These cases, both SCI's attempt to acquire Loewen and Loewen's purchase of Prime Succession, illustrate that a motivation for making acquisitions of large competitors could be to eliminate counteroffers for future acquisitions (as found in Tombak, 2002).

IV. THE U.S. CARDIO-VASCULAR MARKET

In the U.S., cardiovascular procedures continue to flow from hospital-based to physician-owned settings leading to increased fragmentation of the market. This has also led to increased incentives of consolidator activity. Despite two actions of the FTC during the 2010-2012 period - the Renown/Health Sierra Nevada Cardiology Associates case and the Providence Health & Services/Spokane Cardiology and Heart Clinics Northwest case[16] consolidations of cardiology offices have kept pace and are even accelerating. Renown had acquired Sierra Nevada with its 15 cardiologists in late 2010. It went on to purchase Reno Heart with its 16 cardiologists in March 2011 bringing Renown to 88 percent of the cardiologists in the Reno area. Furthermore, Renown used non-compete clauses in its contracts with those physicians. The FTC required Renown to suspend the non-compete provisions until at least six cardiologists accepted offers with competing practices in the Reno area. In the Providence case, the U.S. antitrust authorities expressed their concerns to the parties involved and thereafter Providence and Spokane abandoned the transaction.

13 Economist, 1996, "American takeovers - Barbarians at the pearly gates," September, 28, pg. 87.

14 Martin, D., 1996, "The Death Care Industry," TD Securities Inc., Toronto, Canada.

15 The author notes that Loewen group subsequently filed for bankruptcy which may, in part, have been due to the Prime Succession purchase price weighing on Loewen's cash flows – it is tantalizing to imagine the possibility of a failing firm defense for the SCI bid.

16 Renown/Health Sierra Nevada Cardiology Associates/Sierra Nevada Cardiology Associates, C-4366, FTC File No. 1110101 (final order issued November 30, 2012) (http://www.ftc.gov/enforcement/cases-proceedings/1110101/renown-health-matter) and, Providence Health & Services/Spokane Cardiology and Heart Clinics Northwest, (transactions abandoned on or about February 18, 2011) (https://www.ftc.gov/sites/default/files/documents/closing_letters/providence-healthservices/spokane-cardiology-and-hearts-clinic-northwest/110321providencestatement.pdf).

As noted in a recent presentation by Provident Healthcare Partners (2022)[17] some of this new wave of consolidations have been instigated by private equity investors. It is claimed that private equity has an advantage in that cardiologist feel that it allows them to maintain clinical independence while gaining administrative efficiencies. The involvement of private equity can also make the work of regulators more onerous as there may be less publicly available information on the companies to monitor developments in the industry.

Recent examples include, Ares Management through its US Heart and Vascular group (USHV) completing an acquisition of Pima Heart and Vascular in 2021 and a purchase of Houston Cardiovascular Associates in 2022. Pima Heart was a group of five cardiovascular physicians and the merger brought the number of providers under the USHA umbrella in southeastern Arizona to 61. Houston Cardiovascular is a group of 16 cardiovascular physicians which combined with the partnership USHV announced on July 22, 2022 with Willowbrook Cardiovascular Associates' 6 physicians brings USHV to a total of 22 physicians in the Houston area. Another private equity firm Deerfield Management through Novocardia obtained First Coast Heart & Vascular in 2021 and My Cardiologist in 2022. First Coast was the largest independent cardiovascular physician group in Northeastern Florida with 16 cardiologists. My Cardiologist has 27 cardiologists in the Miami-Dade and Palm Beach counties.

The above two examples in the cardiovascular procedures market (as well as the activities of Bain Capital in Texas and Arizona) are illustrative of the theory taking into consideration the regulatory context – the transactions are each below regulatory thresholds and localized enough to provide efficiencies and local market power. Also, the nature of the transaction and the mode of operation post-merger – that larger cardiovascular practices in a locale were acquired first and that they continue to operate with clinical independence are indicative of an intention to continue to acquire.

V. SUMMARY AND CONCLUSIONS

There are a number of lessons from the above commentary for antitrust regulators. The first is that history matters. There is often a path dependency in the sequences of mergers. Competition watchdogs need to examine the history of the industry and understand how a particular merger may affect the evolution of its market structure. There are indicators which can help with this projection – one is how the consolidator has organized and governed its past acquisitions. An acquirer which centrally controls its acquisitions, in particular, sales and output decisions would be less of a concern than one which allows the acquired enterprises to operate independently.

Another message to competition authorities is that acquisitions may fall below the maximum size of financial transaction for premerger notification and yet the mergers may have outsized effects on the evolution of the market structure. That is, while the transaction may fall outside the purview of the regulators, a small M&A can still have a significant effect on competition – at least on a local (and relevant) market level. Hence the Nocke & Whinston (2022) result that antitrust supervisors should monitor changes in concentration rather than levels may have to done at a more micro-level.

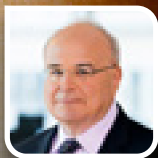
Finally, there are indications that such sashimi M&A strategies may be on the rise. In part, this may be facilitated by private equity consolidators. Such a development, in turn, will make the environment even more challenging for our competition regulators.

17 Provident Healthcare Partners, "A New Wave of Investment and Consolidation in Cardiology," A New Wave of Investment & Consolidation in Cardiology - Provident Healthcare Partners (providenthp.com), accessed January 4, 2023.

MERGERS AS MONOPOLIZATION

Monopoly

BY ALLEN GRUNES[1]



1 Shareholder, Brownstein Hyatt Farber Schreck, LLP. Thanks to Spencer Waller for giving me a road map, although he doesn't bear responsibility for where I traveled. Bruce Hoffman, Jeff Wilder, Tim Wu, and Scott Hemphill have plowed the ground before and readers who want to do a deeper dive should look at their contributions. Finally, thanks to Sam Sadden who is as patient an editor as one is likely to find.

I. INTRODUCTION

At first blush, it may seem a bit odd to talk about mergers and monopolization in the same breath.

After all, merger law is generally forward-looking and predictive (at least since the 1970s, when Hart-Scott-Rodino entered the picture and required premerger notification and a waiting period). Monopoly law is backward-looking and conduct-oriented (with a focus on a single company's power in the market and the conduct used to create, maintain, or expand that power). There are different statutes involved (the Clayton Act and the Sherman Act) and different case law interpreting those statutes.

Plus, when thinking about the sort of conduct that gets challenged in a monopolization case, we don't tend to think about an acquisition that may have taken place years earlier and may have been reviewed by the antitrust authorities at the time.

While it is true Section 7 of the Clayton Act contains a reference to "monopoly," that reference just reinforces the difference between mergers and monopolization. Mergers are illegal if the effect "may be substantially to lessen competition, or to *tend to create a monopoly.*" By its own terms, the merger law is supposed to kick in long before a company has achieved monopoly status.

So, if mergers have resulted in, or contributed to, monopolization, the first question one reasonably may ask is whether merger enforcement has failed in some way.

One possible answer is, of course, "yes." This is a concern we have been hearing for several years now. Just by way of example, the Thurman Arnold Project at Yale puts it this way: "The evidence overall supports the conclusions that interpretations of U.S. antitrust laws have been too lax toward consolidation and that a significant strengthening of horizontal merger enforcement is needed. Antitrust enforcers should be more aggressive in challenging mergers."[2] The Roosevelt Institute sees a relation between lax merger enforcement and increasing market power throughout the economy: "decades of lax merger review and antitrust enforcement gave way to rampant market power."[3] And Senator Amy Klobuchar has posted her concern on Twitter: "It's not just Big Tech. From cat food to caskets, monopolies are developing across markets."[4]

We don't need to go that far, however. We don't need to believe that merger enforcement, as a whole, has been a failure.

The merger framework is good at certain things. It is good at stopping some harmful mergers, especially horizontal mergers between established competitors. For such mergers there is a clear legal framework, established economic tools, and often evidence about current diversion ratios and margins. It is not so good at other things, including acquisitions of unproven startups that may or may not evolve into future competitive threats to the acquirer, and serial acquisitions of companies with little or no revenues and/or small market shares. For the former, it is hard to predict what may become of a "nascent competitor" that may not even be in the same product market as the acquirer. For the latter, it is hard to predict which small acquisition is one too many.[5]

Section 2 may be a better fit than Section 7. We can look back instead of predicting the future. We may see what actually happened after an acquisition. We also may see a pattern of acquisitions that only becomes apparent in hindsight. Documents about intent can be matched against what the acquirer actually did.

The issue is timely, as both the FTC and DOJ have monopolization cases which call into question prior mergers that were reviewed but not challenged at the time: Facebook's acquisitions of Instagram and WhatsApp and Google's acquisition of DoubleClick.

2 Thurman Arnold Project, Yale School of Management, Modern Antitrust Enforcement, https://som.yale.edu/centers/thurman-arnold-project-at-yale/modern-antitrust-enforcement.

3 Adil Abdela & Marshall Steinbaum, Issue Brief, The United States Has a Market Concentration Problem, Reviewing Concentration Estimates in Antitrust Markets, 2000-Present, https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-US-market-concentration-problem-brief-201809.pdf.

4 https://twitter.com/amyklobuchar/status/1372254342296834050?lang=en.

5 Jeffrey M. Wilder, Acting Deputy Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, Potential Competition in Platform Markets, Remarks as Prepared for the Hal White Antitrust Conference (June 10, 2019).

II. ACTUAL POTENTIAL PROBLEMS WITH SECTION 7

Challenging a merger of a possible future competitor under Section 7 poses a number of difficulties. First, as noted, ever since Hart-Scott-Rodino, this is likely to be a predictive exercise, at least for mergers notified under the HSR Act. Prediction even under the best of circumstances is difficult. Second, the "actual potential competition" doctrine, which was developed before the HSR Act, has been interpreted to impose a stringent causation requirement. We can summarize it as follows: But for the acquisition, the target firm would have developed into a formidable enough competitor that its entry would have been procompetitive. Merely stating the causation requirement shows how high the hurdle is.

So, there is something of a double whammy here. We need to predict a merger's effect. And we need to predict what the world would look like without the merger.

The poster child may be the FTC's unsuccessful challenge to the acquisition of Synergy by Steris several years ago. In its press release announcing the filing of the complaint (the vote was unanimous), the FTC stated:

> Today, gamma radiation, generated by the radioactive isotope Cobalt 60, is considered the only feasible method of sterilizing large volumes of dense and heterogeneously packaged products. Only Steris and one other company, Sterigenics, provide contract gamma sterilization services in the United States, according to the complaint. At the time the proposed merger was announced, Synergy was implementing a strategy to open new plants that would provide contract x-ray sterilization services. These services – which currently are not available in the United States – would provide a competitive alternative to gamma radiation, according to the complaint. Because it uses electricity rather than Cobalt 60, x-ray does not raise many of the environmental and regulatory issues associated with gamma sterilization.[6]

Unfortunately for the FTC, the evidence showed that Synergy's new x-ray technology was not ready for prime time and did not meet the company's internal financial tests. The legal standard proposed by the FTC and adopted by the district court required that "the competitor 'probably' would have entered the market" and "its entry would have had pro-competitive effects."[7] The FTC could not make this showing factually. But as Scott Hemphill & Tim Wu have noted more generally, "Under this interpretation of the law, the acquisition of a nascent competitor would be nearly impossible to challenge, given the difficulty in establishing the but-for world with sufficient precision and certainty. Thus, if this approach were the exclusive avenue for challenging acquisitions of nascent competitors, effective enforcement would be impossible."[8]

The FTC brought another potential competition case in its challenge to Meta's acquisition of Within. The FTC alleged that Meta was poised to enter the virtual reality fitness market, but elected to acquire the leading player instead:

> The complaint alleges that Meta is a potential entrant in the virtual reality dedicated fitness app market with the required resources and a reasonable probability of building its own virtual reality app to compete in the space. But instead of entering, it chose to try buying Supernatural. Meta's independent entry would increase consumer choice, increase innovation, spur additional competition to attract the best employees, and yield other competitive benefits. Meta's acquisition of Within, on the other hand, would eliminate the prospect of such entry, dampening future innovation and competitive rivalry.[9]

Once again, however, the agency ran aground on the "but for" causation element. The court was not convinced that it was more likely than not that Meta would have entered this market on its own in the absence of the acquisition. The contemporaneous documents suggested that Meta saw entry as difficult. According to the court, "even more pertinent than the record of Meta's past entries into VR app markets is the evidence that Meta had consciously considered and appeared doubtful of the proposition to build its own independent VR fitness app."[10] The fact that Meta was a large company and clearly recognized the importance of a fitness app to its broader plans was not enough: "To the extent the FTC implies that—based solely on the objective evidence of Meta's resources and its excitement for VR fitness—it would have inevitably found and implemented some unspecified means to enter the market, the Court finds such a theory to be impermissibly speculative."[11]

6 Press Release, Fed. Trade Comm'n, FTC Challenges Merger of Companies That Provide Sterilization Services to Manufacturers (May 29, 2015).

7 *FTC v. Steris Corp.,* 133 F. Supp. 3d 962, 966, 978 (N.D. Ohio 2015).

8 C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879, 1894 (2020) (hereafter "*Nascent Competitors*").

9 Press Release, Fed. Trade Comm'n, FTC Seeks to Block Virtual Reality Giant Meta's Acquisition of Popular App Creator Within (July 27, 2022)

10 Order Denying Plaintiff's Motion for Preliminary Injunction, FTC v. Meta Platforms Inc., No. 5:22-cv-04325-EJD (N. D. Cal. Jan. 31, 2023) at 52.

11 *Id.* at 53. The FTC also tried but failed to establish the "perceived potential competition" theory.

These two cases show the difficulties of using a forward-looking approach to mergers to challenge transactions on a potential competition theory. They show the difficulty with the proving "but for" causation in the absence of an acquisition. And that is true whether, as in *Steris/Synergy*, it was the target that appeared to be on the verge of entering the market with a new and potentially better product, or, as in *Meta/Within*, it was the acquirer that appeared to be on the verge of entering the market itself.

III. THE PLUSES AND MINUSES OF SECTION 2

This brings us to Section 2. Section 2 has certain advantages. First, and most obviously, the merger or mergers have already taken place, so we can look back and see what actually happened. Was one of these mergers the "killer" acquisition? Did the merger raise entry barriers? Did the merger give the acquirer an asset that it was difficult or impossible for others to reproduce? Did the merger make business sense? Was the merger one of a series of mergers that, taken together, led to or preserved dominance?

We can start with *Mallinkrodt* which, although a settled case, is a nice illustration of the use of Section 2 to attack a past merger involving a nascent threat. The thrust of the FTC's claim was as follows:

> Questcor was a monopolist in the U.S. for a drug called Acthar that treated infantile spasms, as well as other conditions. Outside of the United States, another drug that could compete directly with Acthar was sold—Synacthen. The complaint alleged that Questcor had no legitimate business purpose for buying Synacthen, and in fact had chosen not to pursue it. But when it looked like other buyers might emerge, Questcor stepped in and outbid them. As the complaint further alleged, at that point, Synacthen was a nascent competitive threat, and there was significant uncertainty concerning whether it would ever actually mature into such a threat. Of particular note, while the conduct involved a consummated merger, the complaint alleged a violation of Section 2 of the Sherman Act. The case settled with Questcor's new owner, Mallinkrodt, agreeing to pay $100 million in civil monetary relief, and to license Synacthen to another pharmaceutical company.[12]

As this example shows, one obvious element that must be established in a Section 2 case is monopoly power. That already makes the use of Section 2 much more limited than Section 7. In *Steris/Synergy*, the largest company in the industry was a company called Sterigenics, so Section 2 would not have worked. And in *Meta/Within,* the acquirer was not even in the virtual fitness market, and to the extent that the target could be regarded as a "monopoly" (which was debatable), a target selling itself to a larger company does not seem to be an exclusionary or anticompetitive act *from the target's standpoint* (except, perhaps, in the literal sense that all acquisitions "exclude" other buyers).

Assuming monopoly power can be shown, what about causation? Here Section 2 has advantages over the actual potential competition theory in Section 7. As Bruce Hoffman pointed out in a speech when he was Director of the FTC's Bureau of Competition, Section 2 imposes a higher bar in its requirement that there be monopoly power, but a lower bar on causation:

> Now for the lower bar facing monopolization claims—causation. More specifically, Section 2 imposes a somewhat relaxed test for the causal relationship between the exclusionary conduct and the acquisition or maintenance of monopoly power. Some kind of relationship between the challenged conduct and the acquisition or maintenance of monopoly power is clearly needed. But, on the other hand, it's also clear that plaintiff does not need to show that, on the balance of probabilities, in the hypothetical world that would have existed without the challenged conduct, the defendant would not have acquired or maintained the monopoly power that it in fact now enjoys.
>
> The classic statement here is by the entire Court of Appeals for the D.C. Circuit, sitting en banc in Microsoft. The members of that court went out of their way to reject the idea that a plaintiff must strictly prove that the conduct was a but-for cause of the monopoly.[13]
>
> The Microsoft court wrote:
>
> [T]he question in this case is not whether Java or Navigator would actually have developed into viable platform substitutes, but (1) whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of con-

12 D. Bruce Hoffman, Director, Bureau of Competition, Fed. Trade Comm'n, Antitrust in the Digital Economy: A Snapshot of FTC Issues, Remarks at GCR Live Antitrust in the Digital Economy (May 2019) at 6.

13 *Id.* at 10.

tributing significantly to a defendant's continued monopoly power and (2) whether Java and Navigator reasonably constituted nascent threats at the time Microsoft engaged in the anticompetitive conduct at issue.[14]

Scott Hemphill & Tim Wu concur. Quoting *Microsoft,* they write that the causation test requires merely that the "exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly" to monopoly maintenance, and that the targets of exclusion "reasonably constituted nascent threats."[15]

Of course, there are disadvantages to using Section 2. Monopolization cases tend to consume enormous resources, ordinarily much larger than merger cases. We also need to be careful that we are not punishing success. The grocery store chain A&P was under antitrust scrutiny for much of its corporate existence. The first investigation, launched by the FTC, was terminated in 1929 without action. But, as author Marc Levinson has noted, "that reprieve would prove temporary: A&P would be under federal investigation continuously for the next quarter century."[16]

Another important question is whether this approach has application outside of digital "platforms." Hemphill & Wu suggest there are a number of industries where Section 2 could be an effective enforcement mechanism: "Nascent competition tends to be important in industries marked by rapid innovation and technological change. Software, pharmaceuticals, mobile telephony, e-commerce, search, and social network services are leading examples."[17]

What about a series of small mergers? This issue has taken prominence lately, given the sheer volume of mergers the largest tech firms have engaged in. Again, however, arguably Section 2's reach should be broader than tech. Historically, one of the examples of repeated small acquisitions used to create a monopoly was Standard Oil.[18]

Finally, returning to merger enforcement, the potential competition doctrine probably needs a makeover. As I write this, the federal antitrust agencies are preparing to issue new merger guidelines. Will the new merger guidelines help make Section 7 more effective in acquisitions of nascent competitors? It seems at a minimum that the guidelines are likely to include some discussion of this issue, and thus fill in an important blank.

The current Horizontal Merger Guidelines state that "An acquisition eliminating a maverick firm . . . . in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects." Perhaps the new guidelines should say something like "An acquisition eliminating a nascent competitor whose prospective innovation represents a serious threat to an incumbent is likely to cause adverse effects." Perhaps we will get lucky and there also will be something about mergers that "tend to create a monopoly."

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14 *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001). "[I]t would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will—particularly in industries marked by rapid technological change and frequent paradigm shifts." Id.

15 *Nascent Competitors* at 1898.

16 MARC LEVINSON, THE GREAT A&P AND THE STRUGGLE FOR SMALL BUSINESS IN AMERICA 115 (2d ed. 2019). Notably, however, these investigations and cases did not interfere with A&P's growth or its ability to adapt to changes in how Americans shopped. A&P's decline came about due to a series of management missteps.

17 *Nascent Competitors* at 1887.

18 *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 75 (1911) (" . . . the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the prima facie presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade, and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce.").

THE RESURRECTION OF THE APPLICATION OF ARTICLE 102 TO MERGERS AND ACQUISITIONS

BY RICHARD PEPPER & ROQUE BOTAS ARMERO[1]

1 Richard Pepper and Roque Botas Armero are, respectively, partner and stagiaire in the Brussels office of Macfarlanes LLP. They are grateful for the valuable input of Christophe Humpe; any errors are their own.

Article 102 of the Treaty on the Functioning of the European Union[2] prohibits the abuse of a dominant position. The European Commission has generally used this power to sanction dominant companies who have foreclosed rivals and exploited their customers. However, a 1973 European Court judgment, *Continental Can*, held that acquisitions can also infringe Article 102 where they sufficiently strengthen a dominant position.

This article provides a brief history of the application of Article 102 to mergers and acquisitions, and addresses an ongoing preliminary ruling request to the European Court of Justice that considers the relevance of the principle following the introduction of the EU Merger Regulation.

I. EARLY CASE LAW ON THE APPLICATION OF ARTICLE 102 TO MERGERS AND ACQUISITIONS

The large majority of the Commission's enforcement under Article 102 has related to the behavior of dominant firms who have foreclosed rivals (known as exclusionary abuse) and, to a lesser extent, exploited their customers. However, the text of Article 102 is not exhaustive — in fact it makes scant reference to exclusionary abuse — and several other categories of behavior have been subject to enforcement.

Notably, a 1971 Commission decision found that an acquisition of a competitor had infringed Article 102. The Commission concluded that Continental Can had abused a dominant position in markets for certain light metal containers and metal closures for glass jars, through the acquisition of a rival.[3] The principle was supported by the European Court, which found that an acquisition by a dominant firm can indeed infringe Article 102 where it "*strengthens [the position of the dominant firm] in such a way that the degree of dominance substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one.*"[4] The European Court took issue with the Commission's factual assessment in the case, and annulled the decision. However, the judgment nevertheless provided a firm basis for the principle that Article 102 can sanction acquisitions by dominant companies.

Coming at a time when there was little national merger control in Europe, and some fifteen years before the first EU Merger Regulation entered into force, this provided the Commission with a valuable tool that it leveraged in several cases in the 1970s and 1980s. For instance:

Fortia / Wright Scientific. In the early 1980s Amicon submitted a complaint to the Commission claiming that the anticipated acquisition by Fortia of Wright Scientific would violate Article 102, as it would have increased Fortia's dominant position in the chromatography column market or even led to a monopoly. The Commission requested comments from Fortia and Wright, informing them of the possibility of interim measures. Wright responded by notifying the Commission it had ceased merger negotiations, allowing the Commission to close the file.[5]

Consolidated Gold Fields / Minorco. Following a complaint by Consolidated Gold Fields in the late 1980s against a takeover bid, Minorco offered the Commission assurance that it would sell the platinum interests of Consolidated Gold Fields within a specific time frame, that it would not sell those interests to Anglo American or De Beers, and that Minorco would not meanwhile involve itself in those businesses. Based on those reassurances, the Commission concluded that the complaint should be rejected (although the bid was ultimately prevented by court action in the U.S.).[6]

Tetra Pak. Most prominently, the Commission concluded in 1988 that a 1986 acquisition of Liquipack strengthened Tetra Pak's dominant position in the market for machines and technology used to fill board cartons under aseptic conditions with UHT treated liquids. The Commission found that this violated Article 102 as a result of an exclusive license that Liquipack held and that prevented or at least delayed the entry of a new rival into that market.[7] The European Court upheld the Commission's decision on appeal.[8]

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2 For the purposes of simplicity, we refer throughout to Article 102 as shorthand for Article 102 of the Treaty on the Functioning of the European Union and its predecessors, Article 82/86 of the EC Treaty.

3 Case IV/26811 – *Continental Can Company*, OJ 1972 L 7.

4 Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission*, paragraph 26.

5 *Fortia / Wright Scientific, see* the Eleventh Report on Competition Policy (1981), paragraph 112.

6 *Consolidated Goldfields / Minorco, see* the Nineteenth Report on Competition Policy (1989), paragraph 68.

7 Commission Case IV/31.043 - *Tetra Pak I (BTG Licence).*

8 Case T-51/89, *Tetra Pak v. Commission.*

II. THE ARRIVAL OF THE EU MERGER REGULATION

The first EU Merger Regulation was adopted in 1989, introducing a system of *ex ante* merger control review in the EU. It was a success, providing a well-functioning system that enabled the Commission to review mergers and acquisitions, and was increasingly reinforced by the proliferation of national merger control throughout Europe. In itself, this reduced the need for the Commission to leverage Article 102 when investigating potentially problematic transactions. In addition, the EU Merger Regulation explicitly conceived that it alone would apply to concentrations, disapplying the procedural rules implementing Article 101 and 102.[9] This formulation was broadly maintained in the current form of the EU Merger Regulation, adopted in 2004.[10]

It is, therefore, little surprise that the application of Article 102 to M&A has not been in the spotlight since 1989, even though the European Court's *Continental Can* judgment has not been overturned. However, this started to change with increasing discussion on the implications of acquisitions by large companies of small, innovative rivals with insufficient revenue to trigger mandatory merger control notifications (commonly referred to as "killer acquisitions") especially in the pharmaceutical and digital industries.

In response, the European Commission and several national competition authorities in Europe considered whether to change the thresholds that trigger mandatory filing obligations. Following a consultation in 2016-2017,[11] the Commission decided not to pursue any amendments to the EU Merger Regulation (including because of a lack of political support). It did, however, elect to make greater use of a mechanism under Article 22 of the EU Merger Regulation that enables Member States to request the referral of concentrations to the Commission, including where they did not trigger any national filings. The Commission issued guidance on this new policy in 2021,[12] and is currently defending its ability to make use of Article 22 in front of the European Court following its prohibition of the *Illumina/Grail* deal.[13]

While this policy shift and national legislative amendments[14] have gone some way to addressing concerns about problematic acquisitions of innovative companies, a potential enforcement gap does remain for deals that do not meet the mandatory filing thresholds in Member States, are not eligible for referral under Article 22 of the EU Merger Regulation (e.g. because they could not affect trade between Member States), and/or are not identified called-in for review on announcement.[15]

This has led to debate over the potential application of Article 102 to M&A, culminating in an ongoing preliminary ruling request from the French Court of Appeal to the European Court of Justice, in Case C-449/21 *Towercast v. Autorité de la concurrence and Ministère de l'Économie*.

III. TOWERCAST

The underlying case relates to a completed acquisition in the French television broadcasting sector. Prior to the contested deal, only three companies were active in French terrestrial television broadcasting: TDF (clearly the largest player); TowerCast; and Itas. TDF acquired Itas in 2016 in a deal that did not require prior approval under the EU Merger Regulation or French merger control rules. TowerCast subsequently complained to the French Competition Authority that the transaction amounted to an abuse of a dominant position by TDF.

The authority rejected the complaint on the basis that Article 102 is no longer applicable to a concentration absent anticompetitive con-

9 Article 22, Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings: "*This Regulation alone shall apply to concentrations … Regulations No 17 (6), (EEC) No 1017/68 (7), (EEC) No 4056/86 (8) and (EEC) No 3975/87 (9) shall not apply to concentrations.*"

10 Article 21 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings: "*This Regulation: alone shall apply to concentrations … Regulations (EC) No 1/ 2003 (1), (EEC) No 1017/68 (2), (EEC) No 4056/86 (3) and (EEC) No 3975/87 (4) shall not apply, except in relation to joint ventures that do not have a Community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent.*"

11 Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control.

12 Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of case.

13 Case C-611/22P, *Illumina v. Commission.*

14 Notably, Germany and Austria introduced new mandatory notification thresholds for deals that feature a transaction value above a certain threshold (EUR 400 million for Germany; EUR 200 million in Austria) and the target company is active to a significant extent within the relevant country.

15 That said, in Case T-227/21 *Illumina v. Commission*, the General Court held that a 15 working day time limit for Article 22 referral requests does not start with the announcement of a transaction, but only by the "*active transmission of … sufficient information to enable that Member State to carry out a preliminary appraisal*" (paragraph 204). In this case, it was a Commission letter to the national competition authorities inviting a referral request, rather than the public announcement of the deal, that started the clock. This appears to mean that limitation period might never end in some cases; the issue will form a key part of Illumina's ongoing appeal to the European Court of Justice.

duct that is distinct from the deal. TowerCast appealed the decision to the Paris Court of Appeal. In turn, the Paris Court referred to the European Court of Justice the question of whether a concentration that has not been subject to prior review under EU or national merger control law can be reviewed under Article 102.

The case should determine whether and when Article 102 can apply to M&A following the advent of European merger control. It is still pending judgment by the European Court, but Advocate General Kokott issued an opinion on the matter in October 2022.

Kokott starts by acknowledging that the EU Merger Regulation disapplies the procedural rules for antitrust enforcement with respect to concentrations (paragraph 31). However, the Opinion focuses on the supremacy of Article 102 over the EU Merger Regulation: Article 102 is directly applicable primary law; as a provision of secondary legislation the EU Merger Regulation is not capable of restricting Article 102, but must rather be interpreted restrictively in light of it (paragraphs 29-30). While the EU Merger Regulation may preclude the application of the relevant antitrust procedural rules (paragraph 31), individuals must always be able to enforce their rights under Article 102, and public authorities must always be obliged to protect those rights (paragraph 32).

Kokott disagrees with a view proposed by the French Competition Authority that the EU Merger Regulation enjoys the status of a *lex specialis* (and therefore should take precedence over Article 102 with respect to concentrations), including because the legislature could not have adopted a rule of secondary law that precluded the application of the higher-ranking Article 102 (paragraph 43). Finally, Kokott notes that the supplementary application of Article 102 has policy advantages as it "*is likely to contribute to the effective protection of competition in the internal market, in so far as concentrations which are problematic under competition law do not meet the thresholds under merger control and are therefore not subject, in principle to ex ante control*" (paragraph 48).

So far so good. However, the downside of this approach is of course that both Article 102 and merger control can be applied to one and the same concentration. This is not relevant for transactions that are not subject to prior merger control, which Kokott notes are unambiguously capable of review under Article 102. But it leaves a risk of "double assessment" for concentrations that have already been reviewed under EU or national merger control rules.

To address the issue, Kokott confirms that there may be room for the application of the principle of *lex specialis* to those deals, as the approval of a concentration under merger control law "*exclude[s] the factual existence of abuse within the meaning of Article 102" (paragraph 62). This "reduces the possible supplementary application of Article 102 TFEU in legal practice to those cases which require control under competition law from the outset due to the market power of such an undertaking, but which are not subject to ex ante assessment on the basis of merger control law*" (paragraph 63).

It may be that this is the only way to resolve the tension. However, it is unclear whether Kokott is proposing that a factual finding by a merger control authority would <u>legally</u> exclude a different conclusion under Article 102, or whether this is the <u>practical</u> reality. The former sits uneasily with the observations made by Kokott on the supremacy of Article 102. The latter, however, is a fudge.

At first blush, Kokott's assertion that there is little (if any) consequence of the parallel application of the two regimes seems fair: a finding that a concentration would strengthen a pre-existing position of dominance in a way that "substantially fetters competition" would clearly seem to fall foul of the substantive test under the EU Merger Regulation (whether the transaction results in a significant impediment to effective competition).

Accordingly, any gap between the tests should remain a theoretical issue[16] where the Commission has issued a merger control decision, as national Courts should find it difficult to conclude that a transaction infringed Article 102.[17] However, there would seem to be greater scope for a national court to find an abuse following a merger control decision by the competition authority in a different Member State.[18] This gives rise to the risk of inconsistent approaches between Member States that could be utilized by complainants looking to oppose deals that are not subject to Commission review.

16 For example, could transaction-specific efficiencies result in the approval of an otherwise anticompetitive merger, yet be insufficient for an Article 102 analysis in light of European Court jurisprudence in that area? Very few cases will actually raise issues of this nature, but it bears emphasis that the two regimes do not dovetail into each other in an entirely seamless manner.

17 The European Court has held that national courts ruling on whether certain behavior is compatible with Articles 101/102 cannot take a contradictory position to a prior Commission decision (see Case C-344/98 *Masterfoods v. HB Ice Cream*). There are good reasons to consider this principle would apply here, notwithstanding the distinction between the two regimes.

18 The issue may be compounded by the possibility for Article 101 to also be applied to concentrations. The practical implications of a concentration being subjected to another legal test (whether the merger agreement prevents, restricts, or distorts competition) necessarily invites further complication.

In sum, while the building blocks for the Kokott opinion appear reasonable, there are inherent tensions in the parallel application of merger control enforcement and antirust rules to the same deals. The European Commission and national competition authorities around Europe will be watching with keen interest to see whether the European Court can resolve these issues with some further creative thinking.

GAINING A FURTHER STRANGLEHOLD OVER KILLER ACQUISITIONS – BUT AT WHAT COST? THE ADVOCATE GENERAL'S OPINION IN *TOWERCAST*

BY DAVID HENRY[1]

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I. INTRODUCTION

Legal certainty was once a cornerstone of European merger control. Not long ago, the assertion of jurisdiction rested on bright-line tests typically based on the turnover of the parties to a transaction. A welcome corollary of this was that it provided legal certainty. The recent revival of Article 22 of the EU Merger Regulation ("EUMR") has, however, put paid to that. Non-reportable transactions (including those involving a target with no turnover in the EU) are now at risk of being referred upwards for European Commission ("EC") merger control review.

In a more recent development, Advocate General Kokott (the "AG") opined that Article 102 TFEU has full vitality in the context of non-reportable acquisitions by dominant operators suggesting, furthermore, that a mere straight-out acquisition may fall within the purview of Article 102. If followed by the European Court of Justice ("ECJ"), dominant acquirers will not only have to grapple with the potential risk of an Article 22 upward referral to the EC, but potentially face uncertain, disruptive, and protracted Article 102 prohibition proceedings before national competition authorities ("NCAs") with all its associated consequences. Granted, the Opinion is also premised on the need to further close the perceived enforcement gap surrounding anti-competitive killer acquisitions and, in terms of policy objective, is therefore to be lauded. If followed by the ECJ, however, the AG's Opinion is likely to lead to considerably more uncertainty for the business community with a potentially attendant chilling effect on benign, or even pro-competitive, transactions.

II. SALIENT FACTS

TDF Infrastructure Holding S.A.S. ("TDF") had bestowed upon it a legal monopoly on the market for terrestrial television broadcasting in France. Post-liberalisation in 2004, market dynamics were such that only three companies remained on the market, namely TDF (with the largest market share), Itas S.A.S. ("Itas") and Towercast S.A.S.U. ("Towercast"). TDF acquired control of Itas on October 13, 2016 (the "Acquisition").

The Acquisition did not fall within the purview of the *ex ante* mandatory EU and French merger control regimes. This was because the Acquisition did not satisfy the turnover thresholds provided for in the EUMR,[2] and the French Commercial Code.[3] Furthermore, no referral to the EC pursuant to the corrective mechanism enshrined in Article 22 EUMR had been made.[4]

With a view to seeking redress, on November 15, 2017, Towercast complained to the French Competition Authority ("FCA") alleging that the Acquisition constituted an abuse of a dominant position. Towercast was of the view that, via the Acquisition, TDF had impeded competition on the upstream and downstream wholesale markets for digital transmission of terrestrial television services (digital video broadcasting - terrestrial or DVB-T) by significantly strengthening its dominant position on those markets. Citing the seminal *Continental* Can case,[5] the Acquisition was, according to Towercast, an abuse of TDF's dominant position.

On January 16, 2020, the FCA rejected Towercast's complaint (the "Decision"). The FCA found that, while TDF held a dominant position, no abuse of such position had been demonstrated. In the eyes of the FCA, the seminal 1973 *Continental Can* case had been rendered nugatory in the sphere of merger control. Indeed, since the inception of the EU merger control regime in 1989, a clear distinction had been drawn between merger control, on the one hand, and the control of anti-competitive practices under Articles 101 and 102 TFEU on the other. A corollary of this was that the EUMR applies solely and exclusively to concentrations within the meaning of Article 3 thereof, and Article 102 thus finds no application in circumstances where self-standing anti-competitive conduct distinct from a concentration cannot be shown.[6]

2 Council Regulation (EC) No 139/2004 of January 20, 2004, on the control of concentrations between undertakings, (2004) OJ L 24/1 (EUMR), Article 1.

3 See Article L. 430-2 of the French Commercial Code.

4 Article 22 EUMR allows for one or more Member States to request the EC to examine, for those Member States, any concentration that does not have an EU dimension but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.

5 See Judgment of the European Court of Justice (ECJ) of February 21, 1973, Case C 6-72, *Europemballage Corporation and Continental Can Company Inc. v Commission*, ECLI:EU:C:1973:22, para. 26 where the ECJ held: "*Abuse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one.*"

6 See paras. 131 and 140 of Decision nº 20-D-01 of January 16, 2020, where the FCA states that the application of Article 102 TFEU to concentrations had become obsolete following the adoption of Council Regulation No 4064/89. Similarly, with respect to French law, there is a clear line between the merger control rules and the antitrust rules (they are *"incompatibles et inconciliables"*) such that the FCA cannot reach the conclusion that a below-threshold transaction constitutes in and of itself an abuse of a dominant position within the meaning of Article L. 420-2 of the French Commercial Code.

Towercast challenged the Decision before the Paris Court of Appeal. To little surprise, given the patchwork of diverging views on the matter amongst a number of Member States,[7] on July 1, 2021, the Paris Court of Appeal referred the following question to the ECJ for a preliminary ruling pursuant to Article 267 TFEU:

> "Is Article 21 [EUMR] to be interpreted as precluding a national competition authority from regarding a concentration which has no Community dimension within the meaning of Article 1 of that Regulation, is below the thresholds for mandatory ex ante assessment laid down in national law, and has not been referred to the European Commission under Article 22 of [that regulation], as constituting an abuse of a dominant position prohibited by Article 102 TFEU, in light of the structure of competition on a market which is national in scope."[8]

III. THE AG'S OPINION

On October 13, 2022, the AG delivered her Opinion on the Paris Court of Appeal's question.[9] The Opinion could not have come at a more opportune time given the ongoing focus in Europe on the treatment of non-reportable transactions, and the uncertainties which continue to beset this area of merger control law.

The nub of the issue in this case pertains to the relationship between Article 21(1) EUMR and Article 102 TFEU. The former reads as follows:

> "[the EUMR] alone shall apply to concentrations as defined in Article 3, and [Regulation (EC) No 1/2003] shall not apply, except in relation to joint ventures that do not have a Community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent (emphasis added)."[10]

Giving short shrift to the word 'alone' embedded in Article 21(1) EUMR, the AG opined that the EUMR, as a provision of secondary law, cannot circumscribe the reach or direct applicability of Article 102 TFEU which, as a provision of primary law, is superior to the EUMR in the EU hierarchy of norms.[11] As such, Article 21(1) EUMR does not, as a matter of principle, have a "blocking effect" on a parallel or subsequent application of Article 102 TFEU to a concentration within the meaning of Article 3 EUMR.

Furthermore, according to the AG, the *Continental Can* judgment – which admittedly must be seen against the fact that there was no explicit system of EU merger control at the time that it was handed down[12] – allows for the conclusion to be drawn that Article 102 TFEU is fully applicable to the control of concentrations.[13] *Continental Can* therefore remains good law.

That being said, in the eyes of the AG, and with a view to upholding the principle of legal certainty, there is nonetheless room for the application of the principle of *lex specialis derogat legi generali*, notwithstanding the fact that Article 102 TFEU has the status of directly applica-

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7 See e.g. Luxembourg Competition Authority, Decision 2016 FO-04, *Utopia*, of 17 June 2016 which stands in contrast to the situation in Italy where the Regional Administrative Court of Lazio held that a concentration only falls to be assessed on the basis of EU or national merger control rules, see judgment of March 24, 2022, No. 3334.

8 Paris Court of Appeal, judgment nº 20/04300 of July 1, 2021. In support of its claim, Towercast made reference to recital 7 of Regulation 139/2004 which lays down that "Articles [101] and [102], while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted envisaged in the Treaty (emphasis added)."

9 Opinion of Advocate General Kokott of October 13, 2022, Case C-449/21, *Towercast v. Autorité de la concurrence and others*, ECLI:EU:C:2022:777 ("Opinion").

10 See also recital 6 EUMR: the EUMR is "to be the only instrument applicable to […] concentrations [within the meaning of Article 3 EUMR]." See further the following statement made by Sir Leon Brittan Q.C. (then Competition Commissioner) already at the time of the promulgation of the EU Merger Regulation in 1989: "A final point on jurisdiction is the vexed question of Articles [101] and [102]. I know that lawyers are fascinated by this issue. My position is clear. The Regulation cannot alter the meaning of the [TFEU] as laid down by the European Court. However, the Council has in the Merger Regulation repealed Regulation [1/2003] and other procedural regulations in respect of concentrations. This has several consequences. Article [101] is no longer enforceable in national courts in merger cases, but this is not the case for Article [102]. As for the Commission, it will find it very difficult to apply Articles [101] and [102] without the powers and procedures of Regulation 1/2003 and its sister regulations in other fields. Nevertheless, the Commission does have residual, if cumbersome, powers under Article [105]. As a matter of policy, I do not intend to seek the application of the [TFEU] rules in Articles [101] and [102] by any means," Sir L. Brittan Q.C., Address by Sir Leon Brittan to the Bar European Group - London, May 3, 1990: the Law and Policy of Merger Control in the EEC, SPEECH/90/36.

11 See Opinion, *supra* note 9, para. 31 where the AG opined that the prohibition enshrined in Article 102 TFEU is sufficiently clear, precise, and unconditional, thus abrogating the need for a rule of secondary law expressly prescribing or authorizing its application by national authorities and courts.

12 See Opinion, *supra* note 9, paras. 53 and 54.

13 See Opinion, *supra* note 9, para. 52.

ble primary law.[14] In other words, and in terms of practical upshot, a transaction which has been cleared under the merger control rules cannot subsequently be qualified as an abuse of a dominant position under Article 102 TFEU, unless the company in question has engaged in conduct that goes beyond that and which could be found to constitute an abuse.[15] There would therefore be no 'double assessment' of a merger in such scenario, a corollary being that businesses would not have to fear an unwinding order under Article 102 TFEU following merger clearance. Indeed, according to the AG, the imposition of a fine would be more appropriate these circumstances.[16] In practice, therefore, the application of Article 102 TFEU only finds relevance in cases which require control from the outset as a result of the company's market power, but which are not reportable. And, even in such situation, according to the AG, companies would likely only face a fine (rather than a structural remedy) given the primacy afforded to behavioural remedies in Regulation 1/2003 and the principle of proportionality enshrined therein.[17]

Arguably, the AG could have stopped here with her reasoning. The AG goes on, however, to buttress her thinking on the applicability of Article 102 to non-reportable concentrations by drawing attention to *inter alia* the fluidity of Article 102 TFEU's scope of application (especially given that its general examples of abusive practices are not exhaustive).[18] Moreover, and importantly, while the AG's Opinion applies to all industries, emphasis was put on the need to further close the perceived enforcement gap surrounding so-called 'killer' acquisitions to the extent they escape review pursuant to an upward referral to the EC under Article 22 EUMR.[19] Specifically, in the eyes of the AG, Member States – alongside the EC – must, in such circumstances, be able to resort to the (as acknowledged by the AG, weaker) instrument of ex post control under Article 102 TFEU.[20]

IV. COMMENT: A PURSUIT OF KILLER ACQUISITIONS AT THE COST OF LEGAL CERTAINTY?

The AG's Opinion is non-binding yet highly significant. If followed by the ECJ, the chances of which are pretty high statistically speaking, Article 102 TFEU would further tighten the screws on non-reportable transactions. This could, however, come at the cost of introducing a further (unacceptable) layer of legal uncertainty on top of the revived Article 22 EUMR corrective mechanism – *in casu* for operators at risk of being considered dominant – and thus potentially have a chilling effect on what might otherwise be benign or even pro-competitive transactions.

A. A Continued Onslaught on Killer Acquisitions

Nascent operators that gnaw at the fringes of markets are recognised as an important source of fresh ideas, disruptive innovation and provide impetus to the dismantling of inefficient and concentrated markets.[21] There is therefore little doubt that an intention to stifle such emerging operators' ability to deliver lower prices, increased choice and potentially superior quality to consumers through an acquisition is to be thwarted.[22] The issue, of course, is that killer acquisitions often fall outside the scope of merger review and thus remain immune from antitrust scrutiny.[23] This is because, under a mandatory pre-merger notification regime characterised by turnover-based thresholds, where a transaction does not meet these thresholds regulators often cannot assert jurisdiction thereover and the parties thereto are free to proceed to closing.[24]

14 *Lex specialis derogat legi generali* is a legal maxim according to which specific rules are given priority over general rules.

15 See Opinion, *supra* note 9, paras. 60 and 62.

16 See Opinion, *supra* note 9, para. 63.

17 See Article 7(1) of Council Regulation (EC) No 1/2003 of December 16, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

18 See Opinion, *supra* note 9, para. 45.

19 I.e. acquisitions by established and powerful companies of emerging companies, for example in the field of internet services, pharmaceuticals, or medical technology and which do not yet have a large turnover and which operate in the same, neighboring, upstream or downstream markets with a view to eliminating them as competitors and consolidate their own market position. See further in this regard European Commission, Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases (2021) OJ C 113/1 (Article 22 EUMR Guidance).

20 See Opinion, *supra* note 9, para. 48.

21 See OECD (2020), Start-ups, Killer Acquisitions and Merger Control, p. 7 available at https://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf.

22 See F. Ederer, Should Killer Acquisitions be Banned, CEPA, September 24, 2021, available at https://cepa.org/article/should-killer-acquisitions-be-banned/.

23 See C. Cunningham, S. Ma & F. Ederer, Killer Acquisitions, 2018, who conclude, from an essentially U.S. perspective, that there are on average approximately 50 acquisitions per annum in the pharmaceuticals industry where an incumbent may acquire innovative targets solely to discontinue the target's innovation projects and pre-empt future competition, a number of which fly below the merger control radar. The EC also acknowledges that it is clear that some anti-competitive mergers do take place below the notification thresholds at both the EU and national levels, see Commission Staff Working Document - Evaluation of procedural and jurisdictional aspects of EU Merger Control, March 26, 2021, SWD(2021) 66 final, p. 35.

24 See OECD (2020), *supra* note 21, p. 17.

In an attempt to bring killer acquisitions within the ambit of EU regulatory control, therefore, Article 22 EUMR has seen somewhat of a revival to the extent that acquisitions that meet neither the EU nor national merger control thresholds have, rather controversially, become increasingly at risk of being reviewed by the EC[25] – witness in this respect Illumina's acquisition of Grail.[26] In tandem, Article 14(1) of the new EU Digital Markets Act ("DMA")[27] has entered into the fray by requiring that so-called "gatekeepers" *inform* the EC of an intended concentration involving other platform providers active in the digital space.[28] Moreover, the DMA makes specific reference to Article 22 EUMR the upshot being that NCAs can request the EC to examine a (killer) acquisition in the digital arena – regardless of whether it is subject to mandatory review by the EC or an NCA.

The AG's Opinion therefore represents a further bid to gain a stranglehold over below-threshold acquisitions by countenancing the invocation of Article 102 TFEU by both the EC and the Member States in this context. From a policy perspective of seeking to subject anti-competitive killer acquisitions to merger control scrutiny, this development is to be lauded. That said, as we know, all that glitters is not necessarily gold. This will likely be the view taken by companies considered dominant should the ECJ follow the AG's Opinion.

B. An Erosion of Legal Certainty?

The increase in legal uncertainty engendered by the Opinion with respect to non-reportable transactions is unfortunate. This is despite the fact that the AG deems it inconceivable that her findings could lead to any uncertainty when she states at para. 66 of her Opinion that:

> "in view of the settled case-law on the direct applicability of Article 102 TFEU and the judgment in Continental Can, those concerned cannot have developed a belief, in good faith, that that provision would be interpreted differently [in the sphere of merger control]."

A key concern here is that the Opinion suggests that a mere acquisition can itself constitute an abuse of a dominant position. Admittedly, this is tempered by the AG's proviso that "the conditions [for the invocation of Article 102 TFEU must] be met" (particularly, it appears, in the context of a killer acquisition). There is, however, no guidance given by the AG as to what these conditions are, thus leaving dominant companies in an unsatisfactory state of legal limbo. As mentioned, such lack of guidance suggests that a mere acquisition by a dominant player without more could be punished. This could have a chilling effect on what might otherwise be pro-competitive, or at least benign, transactions.

Of course, a finding of dominance is a prerequisite for the invocation of Article 102. However, the determination of dominance, particularly in digital markets, can – as practitioners very well know – be fraught with considerable difficulty.[29] Self-assessment may lead to finding of non-dominance, but this does not rule out a finding of dominance in the eyes of the regulator further down the line.

Dominant acquirers may take – albeit admittedly scant – comfort from the fact that the AG, relying on Articles 7(1), 23 and 24 of Regulation 1/2003,[30] deemed the imposition of a fine the only realistic repercussion in the context of a non-reportable transaction by a dominant operator, suggesting that it is a more appropriate solution than dissolution in the event of breach of Article 102. Despite the AG's attempt to somewhat assuage the fears of the business community, however, structural remedies remain a real possibility. Not only does the EC's decision to impose a structural remedy in *ARA Foreclosure* bear testimony to this possibility,[31] but, importantly, Article 10 of the ECN+ Directive explicitly

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25 See Article 22 EUMR Guidance, *supra* note 19, and the Practical information on implementation of the "Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases" Frequently Asked Questions and Answers ("Q&A") of December 19. 2022 available at https://competition-policy.ec.europa.eu/system/files/2022-12/article22_recalibrated_approach_QandA.pdf.

26 See Commission decision of September 6, 2022, M.10188, *Illumina/Grail*, not yet published and judgment of the General Court of July 7, 2022, Case T227/21, *Illumina, Inc. v. Commission*, ECLI:EU:T:2022:447.

27 Regulation (EU) 2022/1925 of the European Parliament and of the Council of September 14, 2022, on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, (2022) OJ L 265/1.

28 DMA, *Id.*, Article 14(5).

29 See https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/07/UCWG-Report-on-dominance-in-digital-markets.pdf.

30 See Article 7(1) of Regulation 1/2003: where "[…] the Commission […] finds that there is an infringement […] of Article [102] of the Treaty, it may by decision […] impose […] any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy […]."

31 See Commission decision of September 20, 2016, Case AT.39759 - *ARA Foreclosure*, at e.g. para. 147: "No other less burdensome measures can be conceived that would equally effectively remove ARA's remaining possibility to refuse shared use to the part of the household collection infrastructure it owns and ensure access to it."

provides that in the event of a breach of Article 102 "NCAs may impose any [...] structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end."[32]

Moreover, in this context, and as some commentators have noted,[33] what happens if the abusive conduct in question is perpetrated by an acquisition in itself as is suggested by the AG. Surely a fine cannot remedy what would in such case be an *ongoing* abuse. Clearly a structural remedy – as opposed to a fine – would for all intents and purposes be 'necessary' to bring the infringement effectively to an end.

Contemplation of an acquisition is further marred by the uncertainty surrounding whether, despite merger control clearance in one Member State, that self-same transaction could be subject to Article 102 proceedings in a Member State in which the transaction was not notified[34] – noting in this regard that a few Member States have applied Article 102 to review a concentration *ex post*.[35] In addition, the question remains an open one as to for how long an unreportable transaction by a dominant operator would be exposed to an intervention on the basis of Article 102 (and one which could result in structural remedies). Indeed, query whether, *depending on the circumstances*, such open-endedness in the context of a mere unreportable acquisition could in the event clash with the right to good administration set out in Article 41 of the EU Charter of Fundamental Rights, the importance of which has been emphasised in a number of cases?[36] Given that the ECJ often follows AG Opinions, Member States may wish to already start readying guidance as to within which timeframe, and under what conditions, an Article 102 intervention is likely to be made in relation to – to the extent this is what the AG was referring to – a mere non-reportable acquisition by a dominant company.[37] Guidance on the consequences of a finding of infringement would no doubt also be much welcomed given the AG's muddying of the waters in this regard. To not provide such guidance in this context would at the very least be wholly unsatisfactory from the point of view of legal certainty.

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32 Directive (EU) 2019/1 of the European Parliament and of the Council of December 11, 2018, to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, (2019) OJ L 11/3.

33 See T. Lübbig, K, Bojarojc & D. Wylde, Expanding the merger control toolkit - Is this the end of non-reportable M&A for firms that are deemed dominant?, available at https://riskandcompliance.freshfields.com/post/102i164/expanding-the-merger-control-toolkit-is-this-the-end-of-non-reportable-ma-for.

34 See further G. Nur Mingsar, Bridging the 'Regulatory Gap' in EU Merger Control with Towercast (C-449/21) – A Comparison between Member States, Kluwer Competition Blog, November 16, 2022, available at https://competitionlawblog.kluwercompetitionlaw.com/2022/11/16/bridging-the-regulatory-gap-in-eu-merger-control-with-towercast-c-449-21-a-comparison-between-the-member-states/.

35 See e.g. *Utopia, supra* note 7.

36 See Charter of Fundamental Rights of the European Union (2012) OJ C 326/391, Article 41(1): "Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union (emphasis added)." See also judgment of the General Court of November 10, 2017, Case T-180/15, *Icap and Others v Commission*, ECLI:EU:T:2017:795.

37 See H. Janssen & M. Lawall, ECJ Advocate General: Competition authorities may take action against mergers even if notification thresholds are not met, October 21, 2021, available at https://www.luther-lawfirm.com/en/newsroom/press-releases/detail/ecj-advocate-general-competition-authorities-may-take-action-against-mergers-even-if-notification-thresholds-are-not-met.

ENDING MONOPOLIZATION VIA MERGERS: HOW AND WHY TO RESTORE LEGISLATIVE INTENT BEHIND THE U.S. ANTI-MERGER LAWS

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I. INTRODUCTION

Sometime in 2023, the two U.S. federal antitrust agencies, the Federal Trade Commission and the Department of Justice, will issue new guidelines that will govern their approach to analyzing and challenging corporate mergers. The guidelines, the first vision of which were published in 1968 and last updated 13 years ago, have served as rulebooks for the agencies, businesses, and courts as to when a merger or acquisition runs afoul of the antitrust laws.[2]

The 1968 guidelines reflected what was, at the time, the widely-accepted purpose of and intent behind the anti-merger laws: To arrest corporate concentration in its incipiency well before a corporation could gain significant economic and political power. Beginning in the early 1980s, successive versions of the guidelines created an increasingly permissive environment for corporations intending to increase their size and market power through dealmaking. For the past 40 years, this reliance on the merger guidelines at various levels of our regulatory structure has contributed to unprecedented levels of corporate concentration, harming industries and the overall economy.

The new, soon-to-be published guidance will very likely return in principle to those original 1968 guidelines. The heads of both agencies - Lina Khan at the FTC and Jonathan Kanter at the DOJ's antitrust division - have suggested that corporate mergers have led to significant economic harm,[3] and Kanter has questioned whether merger enforcement has been fully faithful to the text of the Clayton Act, including the tendency for mergers to lead to monopoly.[4] Indeed, academic and industrial research has shown that wave after wave of corporate tie-ups have unduly concentrated industries, cost untold thousands of jobs, left industries vulnerable to economic and production shocks, and concentrated vast amounts of political power in the hands of an increasingly small number of mega-firms.

The new guidelines will almost certainly help tamp down the current merger wave and prevent further industrial consolidation. But at this point, after four decades of rapid consolidation, toothless enforcement and pro-bigness court precedents, more is needed to undo the persistent march toward monopolization driven by corporate mergers.

Repairing our anti-merger regime and the economy-wide monopoly power that has resulted from unchecked mergers requires action at all three levels of our enforcement structure. The antitrust agencies must issue guidelines that are far more restrictive of mergers and enforce the law according to those guidelines, past Supreme Court precedent, and original legislative intent. Congress should work to support the work of the enforcement agencies, including holding high-profile hearings on pending mergers and market power, and considering ways to amend the anti-merger laws that restate and clarify Congress' original intent to arrest industrial consolidation in its incipiency. And while the merger guidelines will do significant work in educating federal judges on the standards by which they should judge the legality of mergers, civil society groups critical of monopoly power should launch a program to educate generalist judges on the harmful effects of corporate mergers and Congressional intent in passing the anti-merger laws.

This refocusing of public policy should of course include what are commonly called "mega-mergers," in which two already-powerful firms combine, often giving the new company significant new market share, the ability to foreclose rivals, and so on. Under the Biden administration, this is largely happening. But in order to truly adhere to original Congressional intent, and to stop the slow march of industrial consolidation throughout the economy, policymakers and enforcers must also focus on mergers and transactions that are today often overlooked or difficult to enforce. Policymakers should ban the smaller acquisitions by powerful companies that, brick by brick, build and reinforce the monopoly titans that dominate industries today. They should investigate and when necessary prevent mergers that create the tendency toward monopoly power in an industry that the Clayton Act intends to prohibit. And public merger policy should be deeply critical of vertical and conglomerate mergers and their ability to consolidate economic power.

2 For a detailed history of the federal antimerger guidelines, see "Rolling Back Corporate Concentration: How New Federal Antimerger Guidelines Can Restore Competition and Build Local Power," Stacy Mitchell and Ron Knox, Institute for Local Self-Reliance, June 2022.

3 "Statement of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement," Docket No. FTC 003-2022 (stating, in part, that "Evidence suggests that decades of mergers have been a key driver of consolidation across industries, with this latest merger wave threatening to concentrate our markets further yet…industry consolidation and weakened competition have 'den[ied] Americans the
benefits of an open economy,' with 'workers, farmers, small businesses, and consumers paying
the price.'"(quoting President Biden)).

4 Assistant Attorney General Jonathan Kanter Delivers Remarks on Modernizing Merger Guidelines," U.S. Department of Justice press release, Jan. 18, 2022.

II. RECENT HISTORY vs. LEGISLATIVE INTENT

It's a story that's been told many times: For the past half-century, policymakers and judges, led astray by corporate interests, have embraced bigness through mergers largely for their supposed ability to create economic "efficiencies" in these combinations of companies – a framework commonly called the "consumer welfare standard."[5] The economy-wide corporate concentration that resulted from adherence to this standard has reduced many industries to oligopoly structures in which just three or four companies share monopoly power and monopoly rents in an industry.

The examples of such industries in which mergers have flattened their structures are too numerous to name in this article. But a few examples stand out. Because of a series of unchallenged mergers, we've gone from 10 nationwide airlines in 2000 to just four today - and only three with a significant number of international routes.[6] Mergers have allowed AT&T to reclaim the companies it spun off when its monopoly was broken up in the 1980s and is now an even larger communications conglomerate.[7] Today, just three companies provide nationwide wireless service after T-Mobile was allowed to buy Sprint in 2020.[8] Mergers have left just three or four companies to dominate meatpacking in America.[9] Supermarkets have gone through multiple waves of mergers; in 2019, just four companies accounted for an estimated two-thirds of all grocery sales, with a merger between giants Kroger and Albertsons pending.[10] The list goes on.

Smaller, vertical and conglomerate mergers have also contributed to monopoly dominance. These deals have often gone unchecked or unchallenged by the antitrust agencies, or courts have declined to block the mergers after enforcers intervened.[11] Google, for example, has built its online dominance through a series of smaller acquisitions – DoubleClick, AdSense and AdMob in online advertising, Waze in digital mapping, YouTube in online video, and so on.[12] Amazon similarly has buttressed its online retail monopoly through vertical and conglomerate mergers, including takeovers of supermarket Whole Foods, warehouse robotics firm Kiva Systems, several voice technology startups to create its voice assistant Alexa, among many others.[13] A significant FTC study, published in 2021, showed that the five largest tech firms had acquired 616 total small companies and startups in the decade between 2010 and 2019 that they were not required to report to the antitrust agencies. While the report did not comment as to the effect of these acquisitions on the firms' online dominance, it noted that many of the acquisitions involved technology applications in spaces where the Big Tech firms are active, including mobile technologies, business applications, content, etc. A Congressional investigation found that the Big Tech companies often bought out smaller firms to "neutralize a competitive threat" or kill the acquired companies entirely.[14]

Similarly, vertical mergers have contributed to significant monopoly issues even though the enforcement agencies in recent decades have generally viewed such mergers as either benign or efficiency-enhancing. The vertical mergers between retail pharmacy CVS, health insurer Aetna and pharmacy benefit manager Caremark has given the combined company, CVS Health, the power to abuse smaller, rival drug stores with impunity.[15] The *Live Nation/Ticketmaster* vertical merger has been so damaging, the Justice Department stepped in to punish the combined company for abusing its power.[16]

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5 "The Profound Nonsense of Consumer Welfare Antitrust," Sandeep Vaheesan, The Antitrust Bulletin, 2019.

6 "The runway to the final four," CNN Money, infographic, date unknown.

7 "How AT&T conquered all forms of communication after the government forced it to break up," Matthew Stuart, Business Insider, Mar. 5, 2018.

8 "T-Mobile completes merger with Sprint," Arriana McLymore and Diane Bartz, Reuters, April 1, 2020.

9 "Monopolies in Meat: Endangering Workers, Farmers, and Consumers," Ron Knox, The American Prospect, May 4 2020.

10 "The Economic Cost of Food Monopolies: The Grocery Cartels," Food & Water Watch issue brief, Nov. 2021.

11 For example, the courts denied the Justice Department's recent attempt to block the vertical *AT&T/Time Warner merger.*

12 See, for example, "The acquisitions that made Google a search monopoly," Nicolás Rivero, Quartz, Oct. 20, 2020.

13 "The acquisitions that made Amazon the giant it is today," Qayyah Moynihan and Alberto Payo, Business Insider, June 30, 2019 (Amazon has since made or is proposing a number of other significant acquisitions, including its purchase of film and television studio MGM.

14 "Investigation of Competition in Digital Markets," Majority staff report and recommendations, Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary of The House of Representatives, released Oct. 2020.

15 "How the FTC Protected the Market Power of Pharmacy Benefit Managers," Stacy Mitchell and Zach Freed, ProMarket, Feb. 19, 2021.

16 "Justice Department Will Move to Significantly Modify and Extend Consent Decree with Live Nation/Ticketmaster," Department of Justice press release, Dec. 19, 2019.

A. Congress' Intent — Preventing Monopolization and Its Harms

These acquisitions, large and small, were permitted for myriad reasons. Many were permitted based on promised "efficiencies." Others fell below reporting thresholds under current law. Regardless, it is clear from the legislative record that, when debating and passing the anti-merger laws, Congress' primary concern with corporate mergers was not the potential for rising prices, and they said nothing about the potential for mergers to create any kind of economic efficiency.[17] Instead, lawmakers rightfully worried that the country's permissiveness of corporate mergers was undermining the intent of the Sherman Act to prevent monopolization and all of its harms, specifically the dangerous accumulation of political and economic power in the hands of a few large corporate actors. By preventing those harms, Congress aimed to create a dispersed economy that ensured vitality in every region, with ample opportunity for small businesses to open and thrive.

In a speech to Congress as it debated whether to strengthen the anti-merger provisions of the Clayton Act in 1949, Rep. Emmanuel Celler explained the motivation behind closing loopholes that had allowed waves of corporate mergers across industries. He named industry after industry, including cigarettes, soap, spirits and others, in which monopoly power was accumulated not through mega-mergers between corporate giants, but through the gradual growth of market share via dozens of smaller acquisitions. A stronger anti-merger law that would arrest many corporate mergers "will help to the extent that they will put the brakes upon the evil, the evil tendency of the big fellows to swallow up the little fellows," Celler said.[18]

While lawmakers debating the Clayton Act amendments were rightly concerned with mergers between horizontal competitors, the record also provides evidence that Congress was concerned with other kinds of corporate acquisitions that contributed to a firm's overall power. Lawmakers had cited a series of takeovers that added to the monopoly power of the United States Steel, for example. These cited acquisitions included steel drum makers, a wire cloth fabricator, a cement company, an oil well equipment firm and so on. "This is an example of 'vertical' acquisitions, in which the giant corporation gobbles up its suppliers and customer firms," Senator Estes Kefauver said. In citing both vertical and horizontal mergers, the record is clear that Congress intended the anti-merger laws to apply to a wide swath of corporate dealmaking, and if the law was not amended so, "the theory of competition will have been relegated to the limbo of well-intentioned by ineffective ideals."[19]

The 1950 Celler-Kefauver Act corrected a (now, in retrospect) vast oversight in the Clayton Act – that the Clayton Act's prohibition on mergers only applied to the purchase of a company's shares, rather than of assets. But that was not all the updated anti-merger law hoped to accomplish. Lawmakers in passing the act "built a strong record that the act was aimed at prohibiting merger-induced structural changes falling far short of actual monopoly."[20] The specific change in the standard, to prevent mergers whose effect "may be" to substantially lessen competition, reflected Congress' intent that the law apply to all mergers that resulted in industrial concentration. "The law was designed to forestall anticompetitive mergers in their incipiency, before their adverse effects were experienced or even known with certainty."[21] Crucially, in passing the anti-merger amendments to the Clayton Act, Congress also believed that by arresting anti-competitive corporate mergers, concentrated industries could be effectively de-concentrated through the entry of new competitors to a market.

B. Supreme Court Precedent – Restating Congressional Intent

Following passage of the Celler-Kefauver Act, the Supreme Court decided a series of merger-related antitrust cases that restated lawmakers' intent in passing the law, and created a body of jurisprudence that backed legislative intent to stop the growth of monopoly power in its incipiency. In the most noteworthy and precedential of these decisions, the court made clear its intent to uphold the will of Congress in preventing the rise of monopoly power in its incipiency by blocking mergers that concentrate markets. The Court during this period was crystal clear in its view of, and respect for, Congressional intent. By targeting not just the biggest horizontal mergers, but also smaller buyouts, vertical deals and conglomerate mergers, "Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency, before that trend developed to the point that a market was left in the grip of a few big companies," Justice Hugo Black wrote for the Court's majority in *Von's Grocery*.[22]

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17 "Antitrust's Looser Guidelines; New Rules Breed Wasteful Mergers," Herman Schwartz, The New York Times, May 19, 1985 (the former Senate Antitrust Subcommittee chief counsel wrote that "This preoccupation with economic efficiency ignores Congressional intent and judicial precedent. The legislative history of the antitrust laws contains almost no mention of efficiency, production or price.").

18 Transcript of House Judiciary Committee hearing "Amending Sections 7 and 11 of the Clayton Act," 81st Congress, First Session, May 19, 1949.

19 *Ibid*. p. 17 (Rep. Celler quoting Kefauver from a prior Senate hearing on the bill).

20 "The Celler-Kefauver Act: The First 27 Years," House Judiciary Committee study, 95th Congress, Second Session, Dec. 1978.

21 *Ibid*. p. 18.

22 *United States v. Von's Grocery Co.*, 348 U.S. 270, (1966).

In *Brown Shoe, Von's Grocery, Pabst*, and other cases, the Court built a body of jurisprudence against mergers that pushed industries toward concentration, including those between suppliers and sellers. It did this by repeatedly lifting the voices of lawmakers in enacting the 1950 anti-merger act. Justice William Brennan wrote in Brown Shoe: "Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum."[23] Meanwhile, the Court's decision in *Philadelphia National Bank* created case law around mergers-to-oligopoly in which the industry and geographic market tended toward concentration.[24]

In these decisions, the Court saw concentration not as an isolated incident, but as a cascade, in which concentration begets concentration in an industry and throughout a supply chain. If the intent of the anti-merger laws was to prevent monopolization, that required law enforcers and courts to prevent those first instance mergers that could trigger a chain reaction of concentration, a cascade of corporate tie-ups that would eventually lead to the pooling of immense power. The Court time and again took an originalist view of the anti-merger laws and agreed that mergers, even those that resulted in a relatively small share of a market, must be prevented in order to avoid an industry tumbling into corporate dominance. These decisions not only ensured that markets remained open, diverse and democratic, but they also demanded that courts interpret the law in accordance with Congressional intent, not according to their whims or political viewpoints.

Combined, assertive agency enforcement and instructive Supreme Court decisions served to keep most industries from further concentrating, and allowed for entry sufficient enough to deconcentrate markets that had come to harbor monopoly power post-World War II. "Strict public policy toward horizontal mergers has…prevented merger-induced increases in market concentration in many industries, thereby opening opportunities for deconcentration to occur."[25]

The midcentury U.S. dairy industry remains a prominent example of an industry in which strong anti-merger policy led to deconcentration. After years of rapid consolidation, the FTC sued the four largest dairy companies in 1956, challenging a series of prior acquisitions. After those cases and others in the industry, the average number of acquisitions by the eight largest dairies dropped from 71 a year between 1950 and 1955, to just three per year after 1963. "I am confident that it," the FTC's merger policy in the industry, "has encouraged the survival and growth of many small and medium size businesses which otherwise would not have been able to compete effectively with the biggest dairies," former FTC chief economist Willard Muller reported to Congress.[26] Dairy was among several industries that experienced a period of deconcentration in the 1950s and 1960s following the passage of the Celler-Kefauver amendments, perhaps most notably including the U.S. steel industry. "I cannot emphasize too strongly the central role which antimerger policy has played in permitting deconcentration in some industries and preventing further increases in others," former FTC Chairman Paul Rand Dixon told lawmakers.[27]

C. Pro-Bigness Merger Policy

By the late 1970s and early 1980s, legal scholars and others aligned with corporate power forcefully shifted federal merger policy against the democratic will of Congress in passing the anti-merger laws by convincing policy makers, including President Ronald Reagan, that antitrust enforcement should only be used against the very largest horizontal mergers.[28] Pro-monopoly actors from the then-burgeoning cottage industry of "law and economics," including the conservative economist Henry Manne, began hosting privately-funded seminars for federal judges to steer them away from court precedent and democratic intent when judging antitrust cases, including mergers.[29] Those who helped undermine U.S. anti-merger policy - along with many other economic policies in place since the mid-20th century - found little resistance. Broadly, there was a general acceptance among policymakers, Congress and the public that big was indeed better, and that the era of worrying about the dangers of monopoly was behind us.

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23 *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962).

24 *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

25 "The Celler-Kefauver Act: The First 27 Years," p. 21.

26 "Concentration Trends and Merger Activity in U.S. Manufacturing Industries Since World War II," Willard F. Mueller, March 1967 (presented during the hearing, "Status and Future of Small Business in the American Economy, Select Committee on Small Business, United States Senate, 90th Congress, First Session.

27 Testimony of Paul Rand Dixon, "Status and Future of Small Business in the American Economy, Select Committee on Small Business, United States Senate, 90th Congress, First Session.

28 A Richard Posner & George Stigler Memo: "Throttling Back on Antitrust: A Practical Proposal for Deregulation," ProMarket, April 28, 2022 (the memo, pushed for the abolition of prohibitions against vertical and conglomerate mergers; although that has never become official enforcement policy, such prohibitions have largely occurred in practice).

29 "Ideas Have Consequences: The Impact of Law and Economics on American Justice," Elliott Ash, Daniel L. Chen, and Suresh Naidu, National Bureau of Economic Research working paper series, February 2022 (finding that, "On antitrust, the post-Manne judges tend to make pro-merger decisions, which would clearly benefit the business interests funding the program.").

Such views of bigness and the benefits of corporate mergers were not universal; influential antitrust thinkers pushed back against the turning tide, to little avail. In 1981, former FTC commissioner (and future chairman) Robert Pitofsky explained to Congress the risk of permitting mergers that consolidated industries, but didn't result in a big market share or an oligopoly structure. "[W]hen you clear one of these mergers at 15 or 20 percent, that is not the only consequence of the decision," Pitofsky said. "Because if you clear 20 percent, today, there is a domino effect."[30] By permitting one smaller merger, he explained, the agencies must then approve another similar merger in the same industry, and another, until concentration in the industry eventually reaches oligopoly levels. And if the agency permits such mergers in one industry, it only makes sense that they must permit similar mergers in every other industry. "So we are talking about a major change in economic policy," he said.[31]

III. THREE PROPOSALS FOR REDUCING HARMFUL MERGERS

And so it was. Today, perhaps more than any other moment in the past half-century, policy makers and indeed the American people have an opportunity to reclaim Congressional intent in the way we police corporate mergers, and expand on our anti-merger statutes to make clear which kinds of corporate tie-ups should be permitted, and which should not. Thankfully, none of these measures are far-fetched; many are already in progress, or have been credibly proposed by lawmakers or agency officials. What is needed, then, is action. Here are three proposals for reducing harmful mergers, and promoting market structures that are conducive to the kind of deconcentration needed to restore open markets and democratic economies.

A. Strengthen the Merger Guidelines and Aggressively Enforce the Anti-Merger Laws

Revising the current 2010 version of the merger guidelines and the more vigorous enforcement of the current antimerger law are both happening, and will likely continue to happen, under the current administration and leadership at the antitrust agencies. Already, the persistent, decades-long wave of corporate consolidation has been somewhat tamed by simply having more aggressive enforcement officials at the agencies.[32] The agencies sued to block 10 mergers last year, the most in at least a decade, according to law firm research. The same study showed that 60 percent of all "significant" merger investigations led to the deal collapsing, another record for the agencies.[33]

The forthcoming merger guidelines have tremendous potential to guide enforcement actions, educate judges on the proper analysis of merger challenges, and deter corporate actors from proposing dangerous mergers in the first place. As my organization explained in our submission to the agencies and in a companion report, the success of the forthcoming guidelines should be measured by the extent to which they help to craft an enforcement policy that deconcentrates industries over time. To do so, the guidelines should introduce a host of policies that, in total, serve to foster decentralized markets, including bright line prohibitions on some mergers and significant limitations on other dealmaking based on industry structure and trends toward consolidation.[34]

Specifically, the guidelines should include clear structural presumptions against mergers that concentrate markets or give additional power to already-dominant firms, in line with the Clayton Act's prohibition of mergers that tend to create a monopoly. The new guidelines should invigorate enforcement that is "guided by the structure of the market, including how concentrated it is and how open it is to new entrants," we write in our submission.[35] As we explain, the guidelines should also instruct the agencies to examine mergers that fall below these concentration presumptions "based on an analysis of market structure with the aim of fostering industries that are decentralized and host to a vibrant mix of competitors."[36] Structural issues should include markets with too little diversity in firms, few small businesses, high barriers to entry, trends toward consolidation, and so on.

30 Mergers and Acquisitions: Oversight Hearings before the Subcommittee on Monopolies and Commercial Law, of the Committee of the Judiciary, House of Representatives, 97th Congress, First Session, 1981.

31 *Ibid*. p. 216.

32 "Dealmakers brace for slow 2023 recovery after global M&A sinks," Anirban Sen & Pamela Barbaglia, Bloomberg, Dec. 21, 2022 (noting that, among other factors, global dealmaking had been slowed by "a tougher antitrust climate.").

33 "Biden antitrust enforcers block deals at a record pace," Alexei Alexis, CFO Dive, Feb. 1, 2023.

34 "Rolling Back Corporate Concentration: How New Federal Antimerger Guidelines Can Restore Competition and Build Local Power," Mitchell & Knox.

35 *Ibid*. p. 24.

36 *Ibid*. p. 25.

The guidelines should create other merger enforcement rules that promote more diverse industries and dispersed economic and political power. For example, the guidelines should include a presumption against vertical mergers in concentrated markets, and generally promote enforcement that is critical of vertical mergers, in line with Congressional intent when passing the Celler-Kefauver Act. We also recommend that "the guidelines express clear presumptions against mergers that create buyer power at even lower thresholds than mergers between sellers."[37]

Issuing merger guidelines that are critical of consolidation and promote decentralized markets can influence corporate officers and federal judges. For corporations, guidelines that promote strong enforcement and include clear structural presumptions against mergers would likely deter many corporate merger ideas before they leave the boardroom. And the merger guidelines have historically influenced federal judges when considering merger challenges.[38] We can expect new guidelines more critical of corporate consolidation through mergers to do the same.

B. Promote Anti-Merger Enforcement in Congress

The 1950 Celler-Kefauver amendments to the Clayton Act remain crucial to our ability to prevent harmful mergers and stop the rise of monopolization in its incipiency. That law remains relevant and active today. However, myriad factors mentioned above have functionally undone the will of Congress and created an enforcement environment in which only the largest horizontal mergers can be consistently successfully challenged. While the other policy suggestions here can help restore the functionality to the Celler-Kefauver Act, Congress should take actions that support the agencies and promote anti-merger enforcement that makes the intent of the law clear for courts, companies, and enforcers.

Lawmakers could help clarify the legal standard of the Clayton Act by highlighting and investigating consolidation issues in industries, including on pending or completed mergers. Congress has historically carried out extensive examinations of industrial concentration and the effectiveness of the law in preventing monopolization and abusive conduct.[39]Congress' recent record of investigating industries and mergers is extensive and impressive. The House antitrust subcommittee's months-long investigation of monopolization among the Big Tech companies led to both a thorough examination of the ways tech monopolies used mergers to grow their power, and recommendations for ways to improve antimerger enforcement through structural presumptions.[40] Lawmakers have held hearings on the effect of mergers among hospitals and agribusinesses.[41] Hearings examining the pending merger between supermarkets Kroger and Albertsons, and the closed merger of Live Nation and Ticketmaster, exposed the dangers of increasing buyer power and harms caused by vertical takeovers.

New legislation may also serve to strengthen the anti-merger laws in two important ways: It could expand the legal standard to include a clear structural basis for illegality under the law, so that any merger beyond a certain size would tend to create a monopoly under the law. And an amended Clayton Act could ban acquisitions by firms with a dominant share of a market or those that exhibit clear dominant behavior. Under an expanded anti-merger program, the merger guidelines would also include these prohibitions. But amending the Clayton act to include more specific structural prohibitions would enshrine these changes into law. Lawmakers have already proposed some of these changes in various forms.[42]

C. Educate Federal Judges About the Concerns and Intent Behind the Anti-Merger Laws

Groups who support corporate power and advocate for the neutering of antitrust enforcement have for decades conducted an organized program of judicial education and training that pushed the consumer welfare standard and "law and economics" pseudo-science. Early research suggests this effort has been successful in creating skepticism of antitrust enforcement and a more permissive environment for corporate mergers.[43]

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37 *Ibid*. p. 27.

38 Hillary Greene, "Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse," William & Mary Law Review, 2006-2007.

39 Beginning even before the passage of the Sherman Act in 1890, Congress has examined numerous industries, mergers and the general effectiveness of the antitrust laws, including examining concentration in the oil, steel, finance, music, agriculture, and heath care industries, to name just a few. See for example, "Antitrust Policy and Competition," Hearing Before the Joint Economic Committee, 98th Congress, First Session, Nov. 14, 1983 (Rep. Dan Lungren introduced the hearing by saying, in part, that "Innumerable speeches, hearings, and pieces of legislation have been motivated by the fear of growing industrial concentration and, as a result, many proposals have been advanced in this Congress and in some Federal agencies to deter mergers or break up corporations allegedly wielding excessive monopoly power."

40 "Investigation of Competition in Digital Markets," Majority staff report and recommendations, Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary of The House of Representatives, released Oct. 2020.

41 "Antitrust Applied: Hospital Consolidation Concerns and Solutions," Senate Subcommittee on Competition Policy, Antitrust, and Consumer Rights, May 19, 2021; "Consolidation and Competition in the U.S. Seed and Agrochemical Industry," Senate Judiciary Committee, Sep. 20, 2016.

42 Senators Amy Koburchar & Elizabeth Warren, among other co-sponsors, have in the past two years introduced bills that attempt to strengthen the merger laws in various ways.

43 "Ideas Have Consequences: The Impact of Law and Economics on American Justice," Ash, Chen & Naidu.

There is at least anecdotal evidence that law school classes being taught by progressive antitrust thinkers are growing in popularity. When Lina Khan was teaching at Columbia Law School in 2020, her class on antimonopoly tradition was deeply popular. "It was massively over-subscribed," Khan said in a law school article. "It's extremely encouraging that there is so much interest in this area."[44] Students in classes led by Khan, former White House official Tim Wu and others are likely to contribute to a clearer understanding of the intent behind and purpose of the antitrust laws among future lawyers and judges. Changes to the intellectual makeup of the judiciary will happen in time.

To help that change along, it is worthwhile for those in favor of progressive anti-merger enforcement to educate federal judges on what Congress intended when drafting the anti-merger law – namely, that lawmakers recognized dangers posed by the widespread use of mergers to seed and grow market power, threatening both economic and political democracy. Rather than making law, courts exist to ensure the enforcement of the laws reflects the democratic intent of the people's representatives when drafting those laws. In the case of the Clayton Act and the Celler-Kefauver amendment, Congress believed that economic concentration "would impair economic opportunity, deprive individuals of control over their own lives, and threaten the very existence of free enterprise and political democracy," and prescribed anti-merger action to combat and prevent that concentration.[45] Educating federal judges on the history of the law, and the important Supreme Court cases breathing jurisprudence into that history, would be important and useful work.

Educating federal judges on the history of the law, and the important Supreme Court cases breathing jurisprudence into that history, would be important and useful work. Such a program of judicial education could potentially be carried out by an academic center, such as the Utah Project on Antitrust and Consumer Protection, organized through the University of Utah by economists and scholars supporting progressive antitrust policy. This strategy, together with strong agency guidelines and vigorous oversight by Congress, would help restore the intent and efficacy of the nation's anti-monopoly laws.

44 "Antitrust Scholar Lina Khan Joins Faculty," Columbia Law School, published Dec. 2020.

45 "Modernization of Antitrust: A New Equilibrium," Eleanor Fox, Cornell Law Review, 1981.

UPWARD PRICING PRESSURE FROM DIGITAL PLATFORMS' IMPOSITION OF TAKE RATES ON APP DEVELOPERS

BY TED TATOS[1]

1 The author is an adjunct professor of economics at the University of Utah and consults at Econ One Research. He served as an outside economist to the Federal Trade Commission in the agency's challenge of Meta's acquisition of Within. This essay levies no criticism whatsoever at the opinion denying the preliminary injunction. The points raised here are largely orthogonal to the decision and focus on lessons learned that merit application when applying the theory of potential competition in future acquisitions by digital platforms.

I. INTRODUCTION

The potential anticompetitive effects attendant to horizontal shareholding have drawn increasing scrutiny in recent literature. Economists define horizontal shareholding as ownership of substantial shares by entities that compete with each other in horizontal markets.[2] Of course, such conduct may occur for innocuous reasons such as the establishment of a joint venture that enhances innovation or increases output. However, such examples appear more as exceptions rather than the rule.

Instances of horizontal shareholding that could harm competition are legion. Private equity behemoths BlackRock and Vanguard figure among the top shareholders of every major airline in the United States.[3] Horizontal shareholding has characterized defendants in various antitrust matters. The Writers' Guild of America recently ended a bitter standoff against talent agencies WME, CAA, ICM, and UTA over the agencies' practice of extracting packaging fees rather than charging commissions. Such fees included ten percent of syndicated of gross syndication fees that a show may receive; to the extent agencies contributed to packaging talent, they would effectively share such fees, becoming de facto horizontal shareholders of common assets.

Horizontal shareholding also features prominently in collegiate athletics in the United States, an economic model characterized by a cartelized collusive wage-fixing agreement. Individual conference members each share in the aggregate winnings, including football bowl games and post-season basketball tournaments. Members also share in media deals and major conferences such as the "Power Five" now broadcast games on their own channels.

Shareholding by digital platforms can exhibit both horizontal and vertical characteristics. These entities often extract platform fees, or a "take rate" of sellers' revenues from transactions consummated within the platform. For many digital platforms, such rates have synchronized (with modest exceptions) at 30 percent, the nearly identical take rate charged by Apple on its App Store (for distribution of mobile apps on the iPhone), by Google on its Play Store (for distribution of mobile apps on Android-based phones), and by Meta on its Oculus Store (for distribution of VR apps on the Oculus headset).

Amazon also imposes a take rate, known as a "referral fee," on a merchant's sales on its e-commerce site, ranging from as low as 6 percent (personal computers) to as high as 45 percent (Amazon device accessories).[4] One estimate places Amazon's combined take rate, after including advertising and fulfillment fees, at over half a merchant's revenues by 2022.[5] Whether similarities between the take rates that Apple, Facebook, and Google charge developers are the product of circumstance, collusive agreement, or perhaps mere conscious parallelism bears no relevance to the issues raised herein. The matter of import lies with the effects that these fees have on pricing and competition.

Dominant platforms, by charging such fees tethered to vendors' revenues, become *de facto* shareholders of third-party input providers. The platform extracts a share from every provider regardless of whether the platform even offers any other service beyond controlling the marketplace itself. This fact distinguishes digital platforms that impose a take rate on input providers from acquiring entities in other economic sectors that do not impose a take rate on the other. The take rate allows the platform to internalize substitution among products, including in response to price hikes, that it does not own. All things equal, the platform would prefer higher app prices to lower prices, particularly free apps, as a 30 percent share of a larger revenue base is worth more than a 30 percent share of a smaller revenue base.

Diversion ratios, metrics of particular interest within a merger or acquisition context, capture the percentage of the consumers who switch to substitute products ($j=1...n$) in response to a price increase on a product k. The diversion ratio between k and j reflects the percentage of those who rejected the price increase and ceased purchasing product k and who switched to substitute product j. The diversion ratio informs the ability of the merging entity to retain sales that would have gone to one of the merging partners in response to a price increase imposed by the other. In other words, to the degree that consumers substitute between the merging parties' products, the merged entity can retain such sales in the event of a price increase.

2 . Einer Elhauge, *Horizontal Shareholding*, 129 Harv. L. Rev. 1267, Mar. 10, 2016, available at https://harvardlawreview.org/2016/03/horizontal-shareholding/.

3 . José Azar, Martin C. Schmalz & Isabel Tecu, *Anti-Competitive Effects of Common Ownership*, 73(2) J. Finance (2018) at Table 1. Other economists have developed a theoretical framework for upward pricing pressure in vertical mergers. See, e.g. Serge Moresi & Steve Salop, *vGUPPI: Scoring Unilateral Pricing Incentives in Vertical Mergers*, 79(1) Antitrust Law Journal 185-214 (2013). The contribution to the literature offered herein is agnostic to the vertical or horizontal positioning of the merging firms and focuses on the profit-maximizing incentives of dominant digital platforms.

4 . *What It Costs to Sell on Amazon in 2023*, Repricer.com, Dec. 13, 2022, available at https://www.repricer.com/blog/amazon-seller-fees/.

5 . Spencer Soper, *Amazon Is Taking Half of Each Sale From Its Merchants*, Bloomberg, Feb. 13, 2023 (citing Marketplace Pulse), available at https://www.bloomberg.com/news/articles/2023-02-13/amazon-amzn-takes-half-of-each-sale-from-2-million-small-businesses?leadSource=uverify%20wall.

Notably, the control of the marketplace that permits the imposition of a take rate relieves the platform from this substitution restriction. The destination product need not be a substitute or even related in any economically meaningful way to product *k*. The platform captures any consumer budgetary realignment, whether in response to a price increase on one product or otherwise. As a result, diversion ratios in the case of digital platforms may provide limited insight into the nature of product substitution for purposes of defining a relevant antitrust market.

Consider the following example. Suppose a digital platform acquires an app currently priced at $19 per month. The platform then imposes a subscription price increase from $19 to $20 per month. Prior to the price increase, the app enjoyed 100,000 subscribers, but after the price increase, the number falls to 95,000, a 5 percent unit loss. Suppose further that rivals' apps on the platform capture some portion of the going-forward expenditures associated with those lost 5,000 units. Prior to the acquisition, a non-platform entity ("NPE") priced the app in a way to maximize the standalone profit of the app. After the acquisition, the platform-owning entity ("POE") faces a new pricing calculus. While the NPE would lose the entirety of those 5,000 units if it were to raise prices, because the captured sales by rival apps remain on the platform, the POE retains its take rate on those expenditures. This suggests the profit-maximizing app price for the POE exceeds that for the NPE. Thus, while the NPE concerns itself with consumer spending on its own product(s), the ambit of the POE's concern extends to consumer spending across all products within its platform. These NPE and POE strategies can be distinguished as product-based and budget-based, respectively.

II. NON-ACQUISITION SCENARIO

To the extent any switching occurs *between* products on the platform, the platform's profits depend on the change in the consumer's spending. Let us consider the possible scenarios subsequent to a price increase, beginning with the non-acquisition scenario with the POE and the NPE app developer as independent entities. In this case, both the platform and the app developer look to benefit when the app developer raises its price and the inelastic or inframarginal consumers accept the increase.

However, multiple possible paths appear when certain consumers decide to reject the price increase. In the first case, suppose the consumer spends the same total amount on the platform, but does so on different products; in this scenario, the platform owner remains unaffected (with limited exceptions). Indeed, the platform owner may become even better off to the extent that the consumer, instead of purchasing a single higher-priced application, uses the funds to purchase multiple lower-priced applications. In this case, to the extent that the consumer more willingly accepts a price increase (i.e. exhibits greater price elasticity) at lower prices, the platform may be even better off in the long-term.

Of course, this observation begs the question of why users would switch to unrelated products in response to a price increase on a specific app. In response, one might find it useful to distinguish between exploratory substitution and functional substitution. In an antitrust context, the latter would refer to the traditional use of cross-price elasticities to determine the substitute products used to define a relevant antitrust market. Exploratory substitution would factor into the consumer decision particularly under limited information, such as a novel platform or one undergoing rapid change and innovation. In this scenario, one might expect consumers, particularly price elastic ones, to "test the waters" among various products available on the platform. Failing to acknowledge the information deficit prompting the consumer to explore a broader range of products that she would have under full information. Thus, by conflating exploratory and functional substitution, an analysis of market shares in developing market risks understating the ability of a dominant firm to raise prices.

In the second, case, suppose the consumer explores off-platform options. In this event, both the POE and the app developer are worse off. The POE aims to transform its platform into a walled garden and cabin product substitution and consumer churn within its walls, but not beyond. The POE benefits from lock-in or other factors that inhibit inter-platform switching; the walled-garden scenario allows a POE to benefit from higher prices across the entirety of its platform. POEs have little appetite for price competition among platform app developers, as consumers cannot easily switch across platforms anyway and lower prices to consumers mean lower revenues from take rates. Of course, app developers face a different consideration, as any defection in response to the price increase, regardless of whether the departing customers remain on the platform, reflects a complete loss.

III. ACQUISITION SCENARIO

Suppose that the POE acquires the app developer. In doing so, it now captures 100 percent ownership share compared to the previous 30 percent it withheld in the form of a take rate. The question relevant to assessment of merger effects rests with whether the platform's incentives change in favor of lowering the app price.

Further, as observed above, the POE has little to no incentive to engage in price competition within its domain. It must consider not only the signal that it sends to apps that compete with its own acquired entity but also the overall purchase or in-app pricing. Again, the POE profit maximizes across the platform, not just across its owned apps.[6] As explained above, vertical integration by a POE puts upward pricing pressure on the price of the app, as some portion of the departing customers and expenditures can be recaptured through the take rate.

But vertical integration could also put downward pressure on the price by virtue of avoiding the imposition of the take rate entirely. As the theory goes, the consumer price reflects the marginal costs of both the developer and the platform. The acquisition removes the former, so this elimination of double marginalization ("EDM") "theoretically" incentivizes the platform to pass on the savings to the consumer. Put differently, a standalone app presumably sets its price to accommodate the 30 percent take rate imposed by the platform owner (assuming it faces marginal costs such as music licensing fees). Because the acquired app would now pay its POE parent for the take rate post-merger — an internal transfer — the POE would no longer consider this fee when pricing the app. To understand the economic significance of this downward effect one would consider the pass-through rate of the app.

The pass-through rate will turn on the shape of the demand faced by the app. For example, linear demand prescribes a pass-through rate of 50 percent of the incremental costs attributable to the take rate. When the acquired app is dominant in its market, economic theory predicts that the pass through of incremental costs owing to the take rate would be mitigated. For example, logit demand predicts that a firm will pass through one minus its market share; an app with nearly say 80 percent share would thus pass through only 20 percent of the cost decrease owing to the avoidance of the take rate. Moreover, if the POE were to drop the price of the newly acquired app, it would invite rival apps to drop prices in response, lowering the value of the POE's 30 percent equity stake in all apps. As explained above the POE's profit-maximizing interests militate against such a price war. For these two reasons, the upward pricing pressure identified above would likely overwhelm the downward pricing pressure of any EDM.

One factor does militate against raising prices for subscriptions compared to one-time in-app purchases ("IAPs"). Moderating price increases on subscriptions allows app developers to attract consumers for a longer period, cutting down on acquisition costs (i.e. effective cost per acquisition or "eCPI").[7] But such motivations do not extend to one-time IAPs. Recent analysis has shown that price increases in one-time IAPs (36 percent increase) have far outpaced those on annual or monthly subscription IAPs (19 percent).[8] These findings motivate two conclusions: (1) evaluations of EDMs should draw a distinction between these two categories with respect to digital platforms that involve the sales of such products, and (2) declines in the growth of subscription prices should not be attributed to EDM to the extent they reflect strategic pricing that would have occurred in the absence of the acquisition. Attendant to the latter, judiciary analysis of any EDM arguments should not only require specificity and support for any EDM arguments, but also verify that such claims are merger-specific.

Finally, the cost of acquisition should figure in any evaluation of pricing pressures that accompany a merger or acquisition. When purchasing an app developer, a platform incurs a lump-sum cost and must recoup it over time. While, relative to the app developer, the POE enjoys a higher margin because it does not incur the platform fee, the POE has already paid for doing so. Lowering the price only extends the period required to recoup its investment.

IV. LESSONS FOR FUTURE POTENTIAL COMPETITION CASES

Potential competition cases rest on the threshold issue of whether the acquiring firm has a reasonable probability of entering the market *de novo* absent the acquisition. As a general matter, no apparent reason exists to restrict the ambit of harms to the potential, particularly if certain competitive harms accrue regardless of whether the acquiring firm would have entered. For example, the price effect that identified *supra,* owing to the internalization of a former pricing externality made possible by a take rate, does not depend on *de novo* entry in the absence of the merger. Regulatory agencies, plaintiffs, and fact finders should recognize the upward pricing pressure that a POE can impose by virtue of platform ownership, even when potential competition represents the dominant theory of harm in a case involving a POE as the acquiring firm.

Conceptually, other possible harms hinge on but-for *de novo* entry of the acquiring firm. For example, an economist might show that, when the POE entered de novo, its entry caused greater disruption among incumbent apps compared to when the POE entered via acquisition. The "disruption differential" across the two entry paths could constitute a merger-specific harm. Such harm would occur to the extent that the

6 A platform's profit maximizing calculus includes any owned hardware required to access the platform itself (e.g. Meta's ownership of the Oculus headset).

7 . Adam Blacker, *The average price of in-app purchases have increased 40% on iOS and 9% on Google Play since last year*, Apptopia, Sept. 13, 2022, available at https://blog.apptopia.com/app-store-iap-prices-are-increasing.

8 . *Id.*

POE acquires the leader in an app category, cementing its lead and rendering other competitors unable to mount a meaningful challenge despite potentially offering a superior product or despite greater innovative ability. To the extent the POE owns the dominant app in a category, entrants may view challenging its dominion a lost cause given the disparity in financial wherewithal.

The competitive benchmark would occur if the POE were instead to enter *de novo*, atomizing the market shares of the existing firms and spurring competition. Given the litany of acquisitions by dominant platforms, one suspects that the historical record could inform the existence of such harm, which would fall directly under the ambit of the potential competition doctrine.

BANK MERGERS ARE SYSTEMICALLY IMPORTANT: A REVIEW OF BANK MARKETS AND THE MERGER REVIEW PROCESS

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I analyze several aspects of recent changes in the banking industry, some of which correspond to the financial crisis in 2008 and the government's subsequent financial reforms. The banking industry was greatly impacted by the crisis, including the types of banks that persist. Specifically, I analyze: the decreasing number of community banks, the increasing banking assets and deposits, the consolidation within the banking industry, and distributional implications related to bank size. I discuss the antitrust motivations for reviewing mergers and how bank merger reviews combine traditional priorities of protecting competition with additional priorities to provide financial stability and services within a community. The outcomes and review processes corresponding to bank mergers are therefore different from those corresponding to mergers in non-banking sectors.

I. INTRODUCTION

The enforcement of antitrust policy intends to protect competition and avoid related inefficient market outcomes, which include customers paying higher prices, reduced market output, decreased product quality, or diminished incentives for producers to innovate. Mergers that are suspect of violating antitrust laws might include those that: (1) lessen competition or tend to create a monopoly;[2] (2) constitute a contract or conspiracy in restraint of trade;[3] or (3) constitute an unfair method of competition.[4] The Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") have provided guidance on criteria they use to determine whether or not a merger will lead to sufficient loss to competition.[5] Generally, the guidance of these enforcement agencies seeks to avoid mergers that "create, enhance, or entrench market power or to facilitate its exercise."[6]

In the banking sector, mergers of national banks, state banks, and nonmember insured banks are reviewed by the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("Federal Reserve"), and the Federal Deposit Insurance Corporation ("FDIC"), respectively.[7] In addition to the criteria used to review mergers in non-financial sectors, the banking enforcement agencies have an additional charge to review a merger's impact on ensuring financial stability, including the impact on the merged entity on the community it serves.[8]

Over the last 30 years, there has been consolidation in the banking sector. Given the additional criteria to review mergers and the unique role of banking in the economy, it is worth understanding what types of mergers are occurring in the banking industry and considering whether too few banking mergers are being denied.[9] While most bank mergers may be executed without negatively impacting efficiency in the banking industry, there may be antitrust implications if the market becomes too concentrated. As mentioned above, the direct result of mergers that harm competition can be that customers pay higher prices, reduced output of financial services, and diminished quality and innovation within the industry, as suggested above.

Additional potential indirect effects of bank mergers may impact other industries due to the way the banking industry interacts throughout the economy. The 2008 financial crisis highlighted some of the moral hazard risks that can exist when banks are considered to be systemically important banks and/or "too big to fail." In describing the problem, the Financial Stability Board stated, "(f)inancial institutions may become so large and complex or interconnected that their distress or failure would cause serious harm to the financial system and the economy."[10]

2 See section 7 of the Clayton Act, 15 U.S.C. § 18.

3 See section 1 of the Sherman Act, 15 U.S.C. § 1.

4 See section 5 of the FTC Act, 15 U.S.C. § 45.

5 U.S. Department of Justice and the Federal Trade Commission, "Horizontal Merger Guidelines," issued August 19, 2010, "Vertical Merger Guidelines," issued June 30, 2020.

6 U.S. Department of Justice and the Federal Trade Commission, "Horizontal Merger Guidelines," issued August 19, 2010, p.2. Adverse competitive effects where a merger leads to no changes in the behavior of non-merging parties is referred to as "unilateral effects." Adverse competitive effects where a merger leads to "increasing the risk of coordinated, accommodating, or interdependent behavior among rivals" is referred to as "coordinated effects."

7 See the Bank Merger Act, 12 U.S.C. § 1828(c) and the Bank Holding Company Act, 12 U.S.C. § 1842.

8 See Director Rohit Chopra, "How Should Regulators Review Bank Mergers?" Consumer Financial Protection Bureau, Dec. 9, 2021.

9 Divestiture, in contrast to an outright denial of a proposed merger, may be an acceptable resolution to loss of competition in the market. The "1995 Banking Guidelines" state,

> "(w)here a proposed merger causes a significant anticompetitive problem, it is often possible to resolve the problem by agreeing to make an appropriate divestiture… A divestiture will resolve the problem if it ensures the presence of a strong and vigorous competitor that replaces the competition lost because of the merger."

See DOJ, "1995 Banking Guidelines," "Bank Merger Competitive Review – Introduction and Overview (1995)," current as of 9/2000.

10 See Financial Stability Board, "Evaluation of the Effects of Too-big-to-fail Reforms: Final Report," 31 March, 2021.

For this paper, I will first review the banking industry and recent trends, including bank mergers within the last twenty years. Next, I will discuss mergers through the lens of current antitrust priorities, and how bank merger reviews differ from non-bank merger reviews. Finally, I will provide some concluding thoughts.

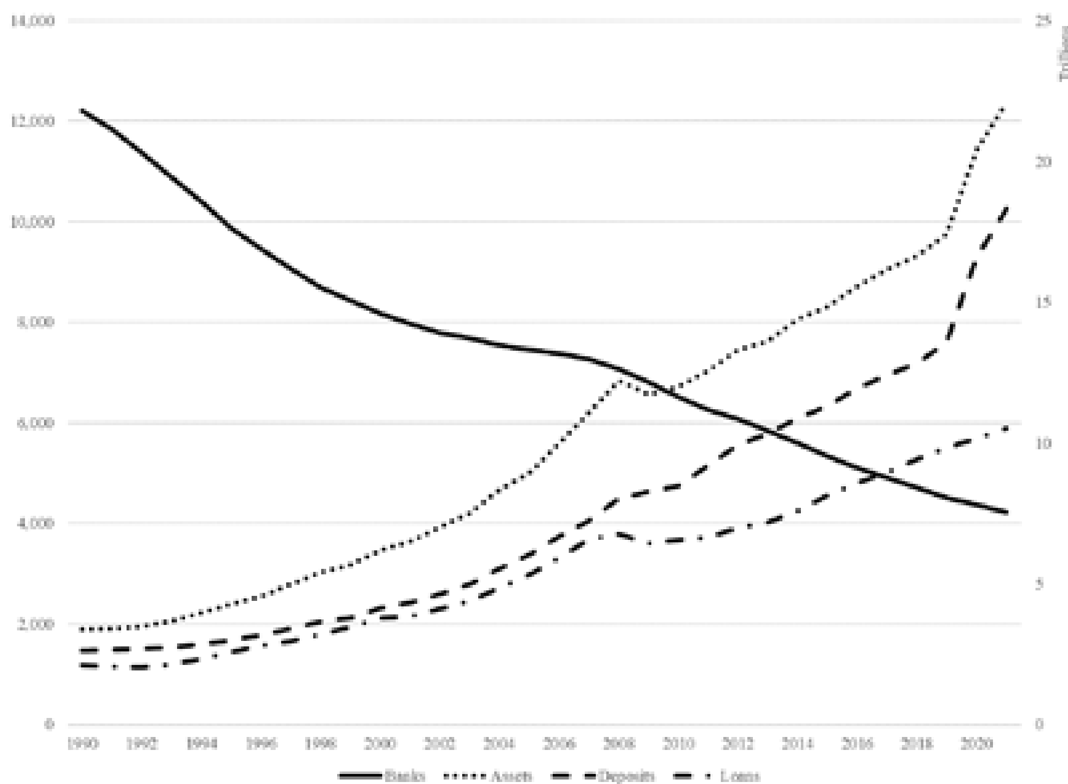
II. BANKING MARKET AND MARKET CONSOLIDATION

The banking sector is becoming more consolidated due, in part, to the number of banks decreasing significantly, while the total value of banking assets, deposits, and loans are increasing. The Acting Comptroller of the Currency Michael J. Hsu recently described the industry consolidation,

> "The banking system has changed significantly since 1995. Industry assets, which totaled $5 trillion in 1995, now total nearly $25 trillion. At the same time, the number of insured depository institution charters has decreased by about 60 percent. As a result, the size of the average bank has increased to almost $5 billion. Assets have become concentrated in the largest banks… The largest bank in 1995 had approximately $250 billion in total assets. Today, there are 13 banks with more than $250 billion in total assets, and the largest bank has over $3 trillion in total assets."[11]

Figure 1 shows the number of FDIC-insured banks in the United States decreased from 12,211 in 1990 to about 4,229 in 2021 (by about 65 percent or by 5.2 percent annually). In 1990, the total assets, deposits, and loans for these banks were about $3.4 trillion, $2.6 trillion, and $2.1 trillion, respectively. By 2021, the total assets had increased to $22.1 trillion (9.9 percent annually), deposits had increased to about $18.3 trillion (10.2 percent annually), and total loans increased to about $10.5 trillion (8.4 percent annually).

Figure 1 FDIC-insured Banks in the United States (1990-2021)



Source: FDIC.

The distribution of FDIC-insured banks suggests that the small or community banks are responsible for the reduction in the overall number of banks.[12] Table 1 below shows that banks with assets of less than $10 billion reduced from 15,099 in 1990 to 4,851 in 2020 (a decrease

11 Acting Comptroller of the Currency Michael J. Hsu, "Bank Mergers and Industry Resiliency," Remarks at Brookings, May 9, 2022, p. 3.

12 According to the Economic Growth, Regulatory Relief, and Consumer Protection Act, section 201, depository institutions and holding companies with less than $10 billion in total consolidated assets are considered community banking organizations.

of 67.9 percent). The assets and deposits held by these banks with assets less than $10 billion decreased more than the number of banks did (a decrease of 78 percent), which is likely a result of the largest of the banks becoming much bigger over time.[13]

Table 1 FDIC-insured Banks by Asset Size (1990 vs 2020)[14]

	Number of Banks		**Percent of Assets Held**		**Percent of Deposits Held**	
Asset Size	**1990**	**2020**	**1990**	**2020**	**1990**	**2020**
<$10B	15,099	4,851	66.4%	14.7%	73.9%	16.4%
$10B - $50B	52	102	20.2%	10.5%	18.5%	11.4%
$50B - $100B	7	16	10.0%	5.3%	6.4%	5.9%
$100B - $250B	1	20	3.4%	13.3%	1.2%	13.9%
$250B - $500B	0	8	0.0%	13.9%	0.0%	14.3%
$500B - $700B	0	1	0.0%	2.5%	0.0%	2.6%
≥$700B	0	4	0.0%	39.8%	0.0%	35.5%
Total	15,159	5,002	100.0%	100.0%	100.0%	100.0%

Source: FDIC.

The overall reduction in the number of banks can further be attributed to very small banks, or banks with assets less than $300, based on my review of nationally or state-chartered banks with assets greater than $300 million. For this report, I refer to community banks as banks with less than $10 billion in assets and non-community banks as banks with assets greater than $10 billion regardless of the year. Figure 2 below shows indices of the number of non-community banks (with assets greater than $10 billion) and the number of community banks (with assets less than $10 billion and greater than $300 million), both indices normalized to equal 1 for 2001 values. The number of community banks with assets greater than $300 million grew by 78 percent over the last twenty years (from 1,115 banks to 1,990 banks).[15] This is in stark contrast to the above results where FDIC data shows that the overall number of community banks (all banks with assets of less than $10 billion) went down from 15,099 banks in 1990 to 4,851 banks in 2020 — suggesting the reduction in community banks is concentrated in the segment of community banks with assets less than $300 million. Regarding the larger banks, Figure 2 shows the number of banks with assets greater than $10 billion was fairly flat from 2001 to 2011 (growing from 77 banks to 78 banks), but then increased by 70.5 percent from 2011 to 2022 (from 78 banks to 133 banks).[16] Overall, the total number of banks with at least $300 million in assets grew by 78.1 percent from 2001 to 2022 (from 1,192 banks to 2,123 banks).

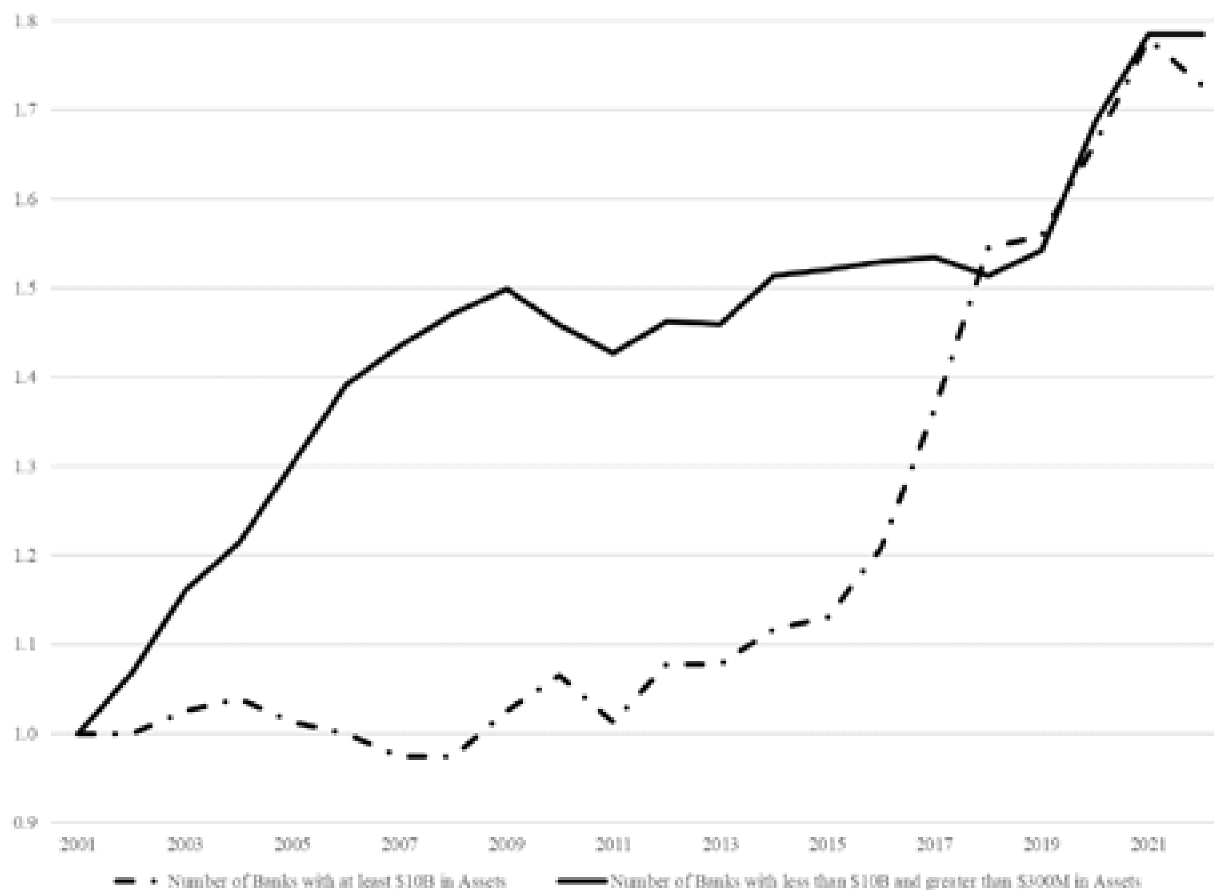
13 The percent of assets held by FDIC-insured banks went down from 66.4 percent to 14.7 percent. The decrease of 77.9 percent is measured as the percentage change in these percentages, or (14.7 percent – 66.4 percent) / 66.4 percent. The decrease of deposits held by FDIC-insured banks is calculated to be 77.8 percent using the same methodology.

14 The FDIC presented these data to show how the banking sector has become more consolidated over the last 30 years. See "Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Bank Merger Transactions," 87 Fed. Reg. 18,740 – 18,744 (March 31, 2022) (addressing 12 C.F.R. Part 303).

15 Small nationally or state-chartered banks include those with assets of more than $300 million, but less than $10 billion. From 2009 to 2019, there was not a lot of growth in banks with less than $10 billion in assets. This is likely related to the financial crisis in 2008 and macroeconomic conditions impacting the banking industry, including higher compliance costs due to financial reforms like the Dodd-Frank Wall Street Reform and Consumer Protection Act passed in 2010.

16 The Federal Reserve reports the number of insured US-chartered commercial banks with consolidated assets of $300 million or more. I compare annual data from 2001 to 2022 (as of September 30).

Figure 2 Indices of Non-community and Community Banks with at Least $300 million in Assets (2001-2022)



Source: Federal Reserve.

As noted above, the assets of banks increased over time. For banks with at least $300 million in assets, total assets grew from $5.8 trillion to $21.6 trillion from 2001 to 2022 (an annual growth rate of 6.5 percent). Figure 3 shows some of the distributional effects of bank assets held based on bank size.[17] The data suggest that rate of asset growth is positively correlated with bank size, with much of the growth in the industry assets over the last 20 years occurring for the 4 largest banks. For example, the following annual growth rates of bank assets from 2001 to 2022 are greatest for the 4 largest banks and smallest for banks with assets less than $10 billion and more than $300 million:

- 8.44 percent for the 4 largest banks,[18]
- 5.60 percent for the 5 to 10 largest banks,[19]
- 6.21 percent for the 11 to 25 largest banks,[20]
- 6.54 percent for banks with at least $10 billion in assets, not including the 25 largest banks,[21] and
- 3.31 percent for banks with less than $10 billion, but at least $300 million in assets.[22]

17 Figure 3 total assets are shown as indices normalized to equal 1 for 2001 values.

18 The total assets for the 4 largest banks grew from $1.7 trillion in 2001 to $9.1 trillion in 2022.

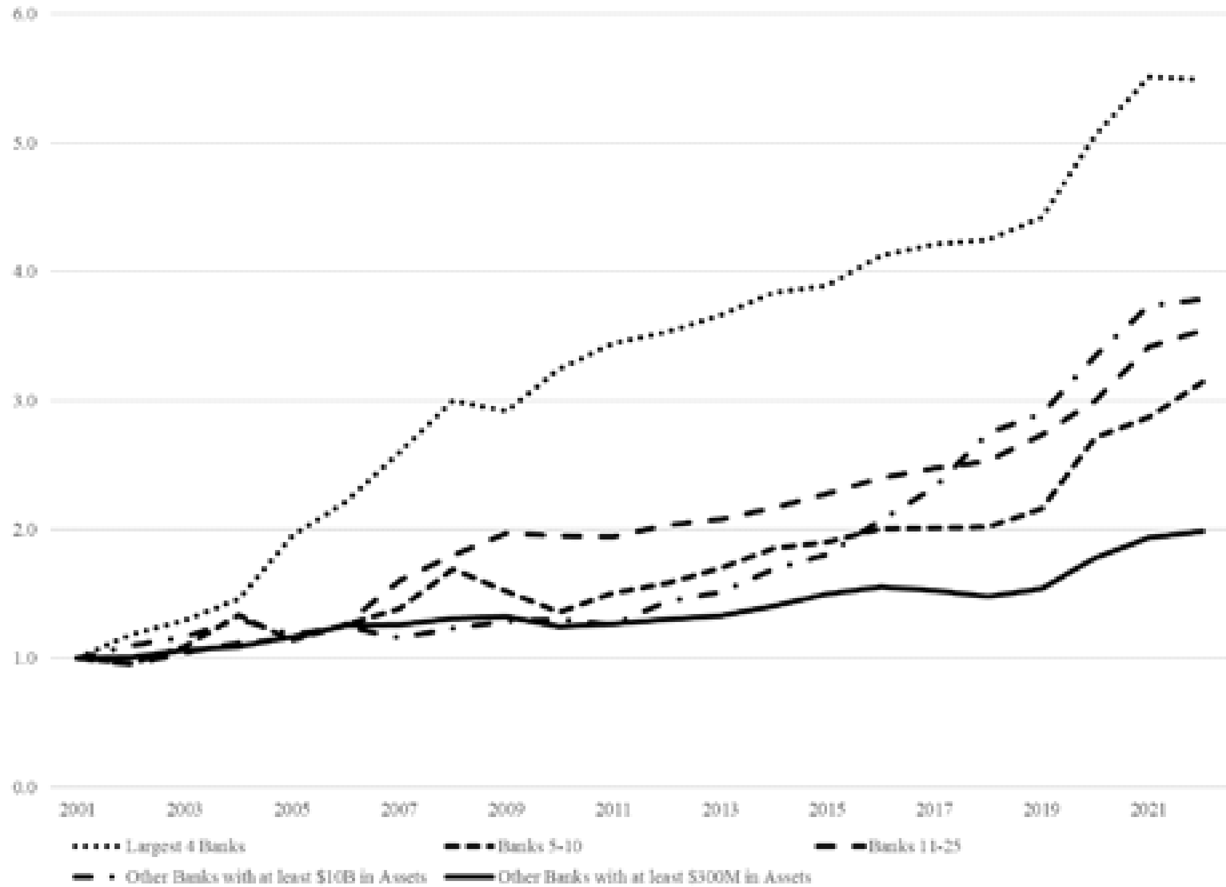
19 The total assets for the 5 to 10 largest banks grew from $950 billion in 2001 to $3.0 trillion in 2022.

20 The total assets for the 11 to 25 largest banks grew from $880 billion in 2001 to $3.1 trillion in 2022.

21 The total assets for banks with at least $10 billion in assets (not including the 25 largest banks) grew from $1.0 trillion in 2001 to $3.8 trillion in 2022.

22 The total assets of banks with less than $10 billion in assets and greater than $300 million grew from $1.3 trillion in 2001 to $2.6 trillion. The size categorizations are allowed to change each year. That is, a bank with less than $10 billion in assets during the earlier years might grow and cross the $10 billion threshold during later years. The analysis is based on the consolidated assets of banks. Some of the larger banks hold substantial foreign assets, but the designation of assets as domestic verses foreign does not impact this analysis.

Figure 3 Indices of Total Assets Held by Bank Size (2001-2022)



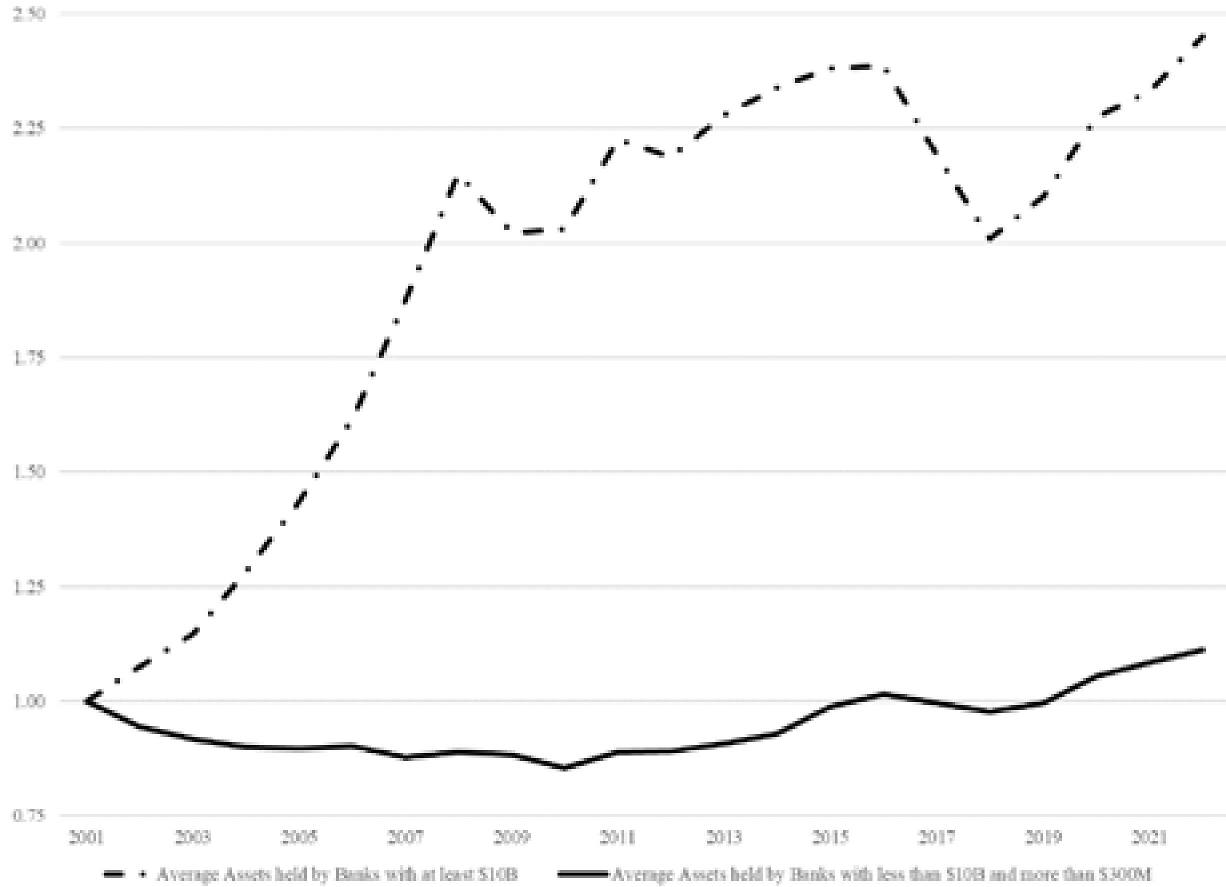
Source: Federal Reserve.

Combining the analyses of the total number of banks and total assets held by banks allows us to look at the average assets per bank and how it changes over time. Figure 4 shows the average total assets held by bank and how that changes over time.[23] The average assets per bank for banks with at least $10 billion in assets more than doubled from 2001 to 2008 (from $58.5 billion to $125.7 billion per bank) but is otherwise relatively flat from 2008 to 2022 ($143.3 billion per bank in 2022). In contrast, the average assets per bank for banks with less than $10 billion and more than $300 in assets decreased from 2001 to 2010 (from $1.2 billion per bank to $990 million per bank) and increased from 2010 to 2022 ($1.3 billion per bank in 2022).[24]

23 Figure 4 average assets are shown as indices normalized to equal 1 for 2001 values.

24 The series of average assets held by smaller banks is relatively smooth because those annual averages are taken over many more banks. There were 1,990 banks with assets of less than $10 billion and more than $300 million—compared to 133 banks with assets of at least $10 billion.

Figure 4 Indices of the Average Assets Per Bank (2001-2022)



Source: Federal Reserve.

Consistent with the disproportionate growth in the very large banks in the 2000s, we see the 4 largest banks grew more from 2002 to 2012 than they did from 2012 to 2022. Table 2 below shows the top 20 commercial banks based on consolidated assets in 2002, 2012, and 2022. JP Morgan Chase, Bank of America, Citibank, and Wells Fargo/Wachovia have maintained the top four positions since 2002. From 2002 to 2022, JP Morgan Chase, Bank of America, Citibank, and Wells Fargo/Wachovia, each increased their assets by $2.7 trillion (an increase of 446.8 percent), $1.8 trillion (an increase of 318.0 percent), $1.2 trillion (an increase of 256.1 percent), and $1.2 trillion (an increase of 258.7 percent), respectively.[25]

25 In 2008, Wells Fargo purchased Wachovia, which had been the fourth largest bank in 2002. See Table 2 and the Wells Fargo 2008 Annual Report, at https://www.wellsfargohistory.com/our-story/annual-reports/.

Table 2 Top 20 Commercial Banks by Consolidated Assets (2002, 2012, 2022)

Rank	Bank (2002)	Assets (Bil $)	Bank (2012)	Assets (Bil $)	Bank (2022)	Assets (Bil $)
1	JPMORGAN CHASE	605.1	JPMORGAN CHASE	1,850.2	JPMORGAN CHASE	3,308.6
2	BANK OF AMERICA	576.0	BANK OF AMERICA	1,448.3	BANK OF AMERICA	2,407.9
3	CITIBANK	481.4	CITIBANK	1,365.0	CITIBANK	1,714.5
4	WACHOVIA	311.9	WELLS FARGO	1,218.8	WELLS FARGO	1,712.4
5	BANK ONE (IL)	206.2	US BANK	342.6	US BANK	591.2
6	FLEET	175.5	PNC	292.5	PNC	553.4
7	US BANK	169.6	BANK OF NY MELLON	265.0	TRUIST	534.2
8	WELLS FARGO (CA)	165.5	STATE STREET	200.7	GOLDMAN SACHS	513.9
9	SUNTRUST	109.6	TD BANK	200.5	TD BANK	394.3
10	HSBC	87.0	HSBC	196.2	CAPITAL ONE	391.8
11	BANK OF NEW YORK	78.4	BB&T	176.4	BANK OF NY MELLON	344.7
12	KEYBANK	73.7	SUNTRUST	169.0	STATE STREET	300.0
13	STATE STREET	72.8	BANK OF AMERICA (DE)	161.9	CITIZENS	224.5
14	BB&T	62.9	CAPITAL ONE	161.3	SILICON VALLEY	210.2
15	PNC	61.0	REGIONS	120.8	FIRST REPUBLIC	205.1
16	LASALLE	59.3	GOLDMAN SACHS	120.4	FIFTH THIRD	204.3
17	BANK ONE (OH)	55.5	CHASE (DE)	115.9	M&T	197.7
18	WELLS FARGO (MN)	52.4	FIFTH THIRD	115.0	MORGAN STANLEY (NY)	194.9
19	SOUTHTRUST	49.7	RBS CITIZENS	107.2	MORGAN STANLEY (UT)	190.5
20	MBNA	48.0	NORTHERN TC	93.8	KEYBANK	187.7

Source: Federal Reserve.

Note: Commercial banks include nationally chartered member and state-chartered member and nonmember banks.

In Table 2, the instances of relatively higher growth in assets held by banks may have been accomplished via bank mergers. A few examples of bank mergers include:

· JP Morgan Chase acquired Bank One in 2004, Bear Stearns and Washington Mutual in 2008, and JP Morgan Cazenove in 2010.[26] JP Morgan Chase's assets grew by 206 percent from 2002 to 2012 (from $605.1 billion to $1,850.2 billion).
· Bank of America acquired Merrill Lynch in 2009, Countrywide in 2007, LaSalle in 2007, U.S. Trust in 2007, MBNA in 2006, and Fleet-Boston in 2004.[27] Bank of America's assets grew by 151 percent from 2002 to 2012 (from $576.0 billion to $1,448.3 billion).
· Wells Fargo acquired Wachovia in 2008 and Greater Bay Bancorp and ABD Insurance and Financial Services in 2007.[28] Wells Fargo's assets grew by 636 percent from 2002 to 2012 (from $165.5 billion to $1,218.8 billion) and it moved up from the eighth largest bank in 2002 to the fourth largest bank in 2012.
· BB&T and SunTrust merged in 2019 to become Truist.[29] BB&T and SunTrust were the 11th and 12th largest banks in 2012, respectively, and merged to become Truist, the 7th largest bank in 2022. Truist (consolidated assets of $534.2 billion in 2022) represents growth of over 200 percent from either perspective of BB&T or SunTrust (with consolidated assets in 2012 of $176.4 billion and $169.0 billion, respectively).

The FDIC reports the number of bank mergers, bank creations, problem institutions, and failed institutions. Each year, there have been:

· between 165 and 342 mergers (2002-2021);
· between 95 and 194 banks created (2002-2008) and between 0 and 13 banks created (2010-2021);[30]
· between 44 and 291 problem institutions (2002-2008, 2014-2021) and between 467 and 884 problem institutions (2009-2013); and
· between 0 and 25 failed institutions (2002-2008, 2013-2021) and between 51 and 157 failed institutions (2009-2012).

26 See JP Morgan Chase, "History of Our Firm," www.jpmorganchase.com.

27 See Bank of America 2008, 2007, and 2004 10-Ks, at https://investor.bankofamerica.com/regulatory-and-other-filings/annual-reports.

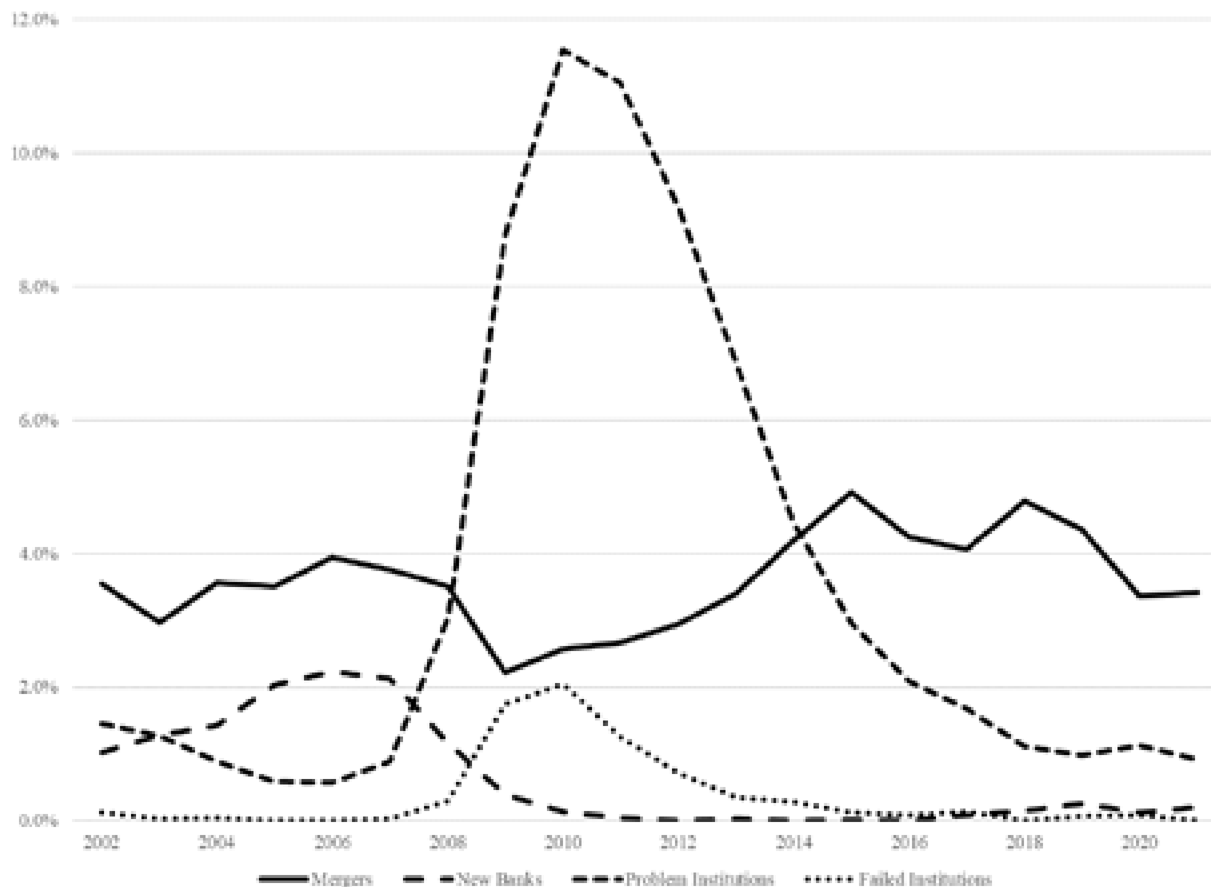
28 See Wells Fargo 2008 and 2007 Annual Reports, at https://www.wellsfargohistory.com/our-story/annual-reports/.

29 The creation of Truist resulted in the "sixth largest U.S. commercial bank, serving approximately 10 million customer households and a full range of business clients, with leading market share in many of the most attractive, high-growth markets in the country." See https://media.truist.com/2019-12-09-BB-T-and-SunTrust-complete-merger-of-equals-to-become-Truist.

30 There were 31 banks created 2009, which left out of the above bullet due to its value appears to be a transitional value.

These bank events are shown in Figure 5 below in terms of the number of existing banking institutions.[31] The number of bank mergers each year occurs somewhat regularly (between 2.2 and 4.9 percent of the existing banks). Bank creation used to be a common market practice (peaking at 2.1 percent of the existing banks), but bank creation has all but ceased since the financial crisis in 2008. Problem institutions were not too common prior to 2008 (around 1 percent of the existing banks) and failed institutions were rare events. As expected, both the problem and failed institution bank event trends show spikes in 2010 relating to the 2008 financial crisis, with as many as 11.5 percent of the bank population becoming problem institutions and 2.1 percent becoming failed institutions. While problem or failed institutions seem likely targets of mergers, the merger trend dips somewhat at the point where problem and failed institutions peak. This is likely a result of market participants experiencing wider spread financial distress and exercising caution when facing market uncertainty at that time.

Figure 5 Bank Events – Mergers, Bank Creations, Institution Failures (2002-2021)



Source: FDIC.

III. MERGERS SUBJECTED TO CURRENT ANTITRUST PRIORITIES

As previously mentioned, the DOJ and FTC have provided guidance on criteria they use to determine whether or not a merger will lead to sufficient loss to competition.[32] Generally, the guidance encourages the avoidance of mergers that "create, enhance, or entrench market power or to facilitate its exercise."[33] The direct result of exercising market power (resulting from or facilitated by mergers that harm competition) could be customers paying higher prices, reduced market output, inferior product quality, and diminished incentives for innovation within an industry.

Alternatively, mergers may be justified when they are found to be procompetitive. Below I discuss procompetitive and anticompetitive justifications of allowing mergers to occur. Subsequently, I discuss agreement as alternatives to mergers. Lastly, I discuss how bank mergers and their reviews differ from other types of mergers.

31 While the number of banks with assets greater than $300 million increase over this period, the overall number of banks decreased. See Figure 1 and Table 1. To account for this trend of fewer banks over time, I report the bank events as a percent of the overall number of banks.

32 See the DOJ and FTC, "Horizontal Merger Guidelines," issued August 19, 2010, and "Vertical Merger Guidelines," issued June 30, 2020.

33 See the DOJ and FTC, "Horizontal Merger Guidelines," issued August 19, 2010, p.2.

A. Procompetitive Arguments

Mergers may be efficiency enhancing. Combining entities can increase resources and capital (existing physical capital, intellectual property, human resources, customer lists, etc.) in a way that can improve the current practices and processes. For example, mergers can help a company expand and take advantage of economies of scale — allow the company to meet changes in demand and reduce costs, increasing the company's competitiveness within the market. Acquiring a company through merger can also take advantage of economies of scope — where product portfolio diversification can reduce risks and insulate the company in times of economic downturns.

Mergers may expedite growth in a way that reduces costs and limits risks. Acquiring technology may increase a company's efficiency in internal processes and provide security, therefore improving the quality of products offered. Mergers may allow a company to avoid developing its own, new technology. Saving time and resources by acquiring existing technology may reduce waste and increase a company's profitability. Technologies can also aid a company to expand its market presence, e.g. technology that increases a company's online capabilities.

Certain opportunities may benefit from quick expansion in production or capacity. Merging may allow the company to more quickly pivot when facing changing market conditions. For example, a merger could open up a geographic segment that would otherwise have taken much longer to expand organically without the merger.

B. Anticompetitive Arguments

The potential benefits of a merger must be considered against the potential harm to competition or harm from removing a competitor. Antitrust policy exists to avoid harming competition, which can occur through mergers and monopolizing behaviors. The "Horizontal Merger Guidelines" identifies two types of effects that they consider when trying to determine whether potential mergers harm competition, unilateral and coordinated effects.[34] Unilateral effects are adverse effects, where a merger enhances market power by eliminating competition. Coordinated effects come from a merger that enhances market power by increasing the risk of coordination among rivals. The competition regulating agencies predict the impact of a merger on competition by constructing a relevant market and calculating and comparing market shares presuming the proposed merger were to take place (treatment group) to market shares assuming the merger does not take place (control group).[35]

Market consolidation can reduce incentives to compete aggressively and can facilitate coordination among would be competitors—resulting in higher company profits (higher market prices) and inefficient markets (decreased market output)—both of which harm consumers.

C. Alternatives to Mergers

Companies may prefer other options for interfirm cooperation to mergers.[36] Effectively similar to mergers, agreements between companies can facilitate market coordination that is procompetitive or anticompetitive. These agreements can define market coordination that is horizontal or vertical in nature and may include a contract, licensing agreement, or joint venture agreement.

A horizontal agreement within the banking industry could be between a bank and a third-party service provider, such as a FinTech company. For example, a bank customer opening a deposit account may also be interested in banking-related services, such as online banking, applying for a mortgage, insurance, or various other services. The bank may be better off contracting or partnering with a third-party service provider to provide such a service. Antitrust concerns may exist depending on the substitutability of the provided service. For example, suppose the bank is providing traditional debit card services to its customer. The debit card market is very concentrated, with only two dominant brands, Visa and MasterCard. In response to the potential for debit card companies to exercise market power, the federal government adopted policy governing interchange transaction fees of debit cards.[37]

Vertical agreements allow upstream and downstream companies to work together. For example, a company seeking a vertical agreement may desire to increase market influence, reduce costs, and share risk with partner(s). For example, recognizing the potential financial

34 See the DOJ and FTC, "Horizontal Merger Guidelines," issued August 19, 2010.

35 To measure the impact of a hypothetical merger, relevant markets must be defined along product and geographic dimensions. The impact of the merger may be estimated based on the predicted change in prices, output, capacity, innovation, etc. The predicted change in market shares and market concentration can also inform on the merger's risk.

36 See Marshal, Robert C. & Leslie M. Marx, "The Economics of Collusion: Cartels and Bidding Rings," Massachusetts Institute of Technology, 2012, p. 5.
"Firms can potentially overcome the difficulty associated with not being a single corporate entity by mergers; however, there are legal and administrative issues related to mergers as well as potentially increasing costs of control as firm size increases."

37 See the Durbin Amendment as part of the Dodd Frank Act.

incentives loan originators may have to steer customers to a certain mortgage product that compensates the originators better, the loan originator may be required to disclose alternative financial products available to the borrower and any compensation incentives the originator may have.

D. Banking Merger Guidance

The current banking guidelines were published nearly 30 years ago and provide information about how the bank regulatory agencies and DOJ are to review the impact of bank mergers on competition.[38] These banking guidelines provide guidance specific to bank mergers and are intended to provide guidance beyond what is provided in the 2010 "Horizontal Merger Guidelines." As part of the review process for the Federal Reserve, the Federal Reserve Banks use certain initial screens based on market shares and market concentration to determine whether an application can be approved. Approval is not granted if: (i) the merger does not raise the Herfindahl-Hirschman index (HHI) by 200 points or more to a level of 1800 or higher or (ii) the merger or acquisition would not lead to the acquiring firm increase its market share to 35 percent or more. Applications that do not pass initial screens are then reviewed by the Board of Governors.[39]

President Joseph R. Biden, Jr. recently requested that the DOJ, Federal Reserve, FDIC, and OCC review their current practices and adopt a plan for revitalizing merger oversight in order to "ensure Americans have choices among financial institutions and to guard against excessive market power."[40] On March 31, 2022, the FDIC issued a request for comment (RFC) regarding the framework in meeting the requirements of section 18(c) the Bank Merger Act.[41] In addition to the traditional criteria for reviewing mergers, the Bank Merger Act also asks that the responsible agency:

> "…consider certain additional factors, including the financial and managerial resources and future prospects of the existing and proposed institutions, the convenience and needs of the community to be served, the risk to the stability of the United States banking or financial system, and the effectiveness of any insured depository institution involved in the merger at combatting money laundering."[42]

This additional charge may at times be a competing priority to the traditional antitrust priorities. The complication may be exacerbated by the fact that banks often offer many financial products and compete in many different geographic markets, where different levels of competition may exist in each of the markets.[43] There have been recent requests for proposed bank mergers to be assessed by product, in addition to geography.[44] However, without further guidance, it may not be clear how to assess mergers when the competition in product markets is both encouraged for some products and harmed for other products.[45]

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38 See DOJ, "1995 Banking Guidelines."

39 See Federal Reserve, https://www.federalreserve.gov/bankinforeg/competitive-effects-mergers-acquisitions-faqs.htm.

40 See White House, "Executive Order on Promoting Competition in the American Economy," July 9, 2021.

41 See "Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Bank Merger Transactions," 87 Fed. Reg. 18,740 – 18,744 (March 31, 2022) (addressing 12 C.F.R. Part 303).

42 See "Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Bank Merger Transactions," 87 Fed. Reg. 18,740 – 18,744 (March 31, 2022) (addressing 12 C.F.R. Part 303), p.18,742.

43 Benson, et al. discuss improving bank antitrust enforcement by incorporating criteria on geographic proximity because "(c)urrent HHI-based policy effectively gave safe harbor to 61% of close-proximity banking acquisitions that potentially have adverse outcomes due to the substitutability of the merging banks." See Benson, David, Samuel Blater, Serafin Grundl, You Suk Kim, & Ken Onishi, "Concentration and Geographic Proximity in Antitrust Policy: Evidence from Bank Mergers," SSRN id#3873502, September 21, 2021, p.6.

44 See Governor Michelle W. Boman, "The New Landscape for Banking Competition," Federal Reserve Speech, September 28, 2022. See Acting Comptroller of the Currency Michael J. Hsu, "Bank Mergers and Industry Resiliency," Remarks at Brookings, May 9, 2022, p. 6. See Daniel K. Tarullo, "Regulators should rethink the way they assess bank mergers," Brookings, March 16, 2022, at https://www.brookings.edu/opinions/regulators-should-rethink-the-way-they-assess-bank-mergers/.

45 Acting Comptroller of the Currency Michael J. Hsu said,

> "From my perspective, the frameworks for analyzing bank mergers need updating. Without enhancements, there is an increased risk of approving mergers that diminish competition, hurt communities, or present systemic risks. On the other hand, imposing a moratorium on mergers would lock in the status quo and prevent mergers that could increase competition, serve communities better, and enhance industry resiliency."

See Acting Comptroller of the Currency Michael J. Hsu, "Bank Mergers and Industry Resiliency," Remarks at Brookings, May 9, 2022, p. 1.

IV. CONCLUSION

The extent to which bank mergers harm competition must be weighed against the extent to which the merger may improve banking services in the community. The reviewing of the "1995 Banking Guidelines" may provide an opportunity to clarify the distinctions between local and national banking services, since online banking is becoming ubiquitous.[46] There may also likely be a need to update some of the thresholds used to assess the risks of a bank merger.[47]

For the reason of transparency, a merger may be preferable to agreements between otherwise independent companies. For instance, a merger triggers the review process and the scrutiny of the competition regulating agencies that would not have occurred without the merger.[48] However, this scrutiny may be misplaced and wasteful, if banks are regularly assessed as systematically important banks based on the merger guidelines. A review of the "1995 Banking Guidelines" could help determine if bank mergers are being approved too frequently and whether the criteria to assess bank mergers should be updated.[49]

The disappearance of new bank creation following the financial crisis in 2008 would be worth studying further. For example, are fewer banks being created because there are cost savings from taking over existing banks instead? The timing of the change suggests bank creation may have been negatively impacted by the financial reforms enacted as part of the Dodd-Frank Act.[50] If that is the case, the banking industry may benefit from softening the compliance burdens for small, newly formed banks.

46 Daniel K. Tarullo from Brookings suggests that the way banking markets are evolving from local geographies to national markets is one illustration of the complexity of reviewing mergers. See Daniel K. Tarullo, "Regulators should rethink the way they assess bank mergers," Brookings, March 16, 2022, at https://www.brookings.edu/opinions/regulators-should-rethink-the-way-they-assess-bank-mergers/.

47 Benson, et al. suggest improvements can be made to current guideline processes, "incorporating objective criteria on determinants of substitutability can improve antitrust policy for differentiated product industries, in keeping with modern merger guidelines and complementing a broader body of work aiming to improve antitrust policy based on size and the HHI." See Benson, David, Samuel Blater, Serafin Grundl, You Suk Kim & Ken Onishi, "Concentration and Geographic Proximity in Antitrust Policy: Evidence from Bank Mergers," SSRN id#3873502, September 21, 2021, p.2.

48 See Marshal, Robert C. & Leslie M. Marx, "The Economics of Collusion: Cartels and Bidding Rings," Massachusetts Institute of Technology, 2012, p. 8.

> "Although it would seem that a merged entity could do anything a cartel could do, plus many other things, a cartel has the key advantage over a merged entity in that a merger is common knowledge to all market participants, but a cartel is a clandestine operation."

49 Governor Michelle W. Bowman of the Federal Reserve recently discussed the need to modernize the processes for competitive analysis to include: more systematic including of credit unions in analyses, factor in deposits at digital banks, and consider nonbank financial firms. Additionally, Governor Bowman pointed out the HHI criteria to review bank mergers is stricter than the criteria to review nonbank mergers. See Governor Michelle W. Boman, "The New Landscape for Banking Competition," Federal Reserve Speech, September 28, 2022.

50 The Dodd-Frank Wall Street Reform and Consumer Protection Act passed in 2010.

PROTECTING COMPETITION TO INNOVATE IS PROTECTING COMPETITION IN FUTURE MARKETS: TEN LAW REVIEW ARTICLES LEAVE NO DOUBT

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The ultimate merger to monopoly is, of course, if the only two firms selling a product become one firm. Surely, no self-respecting competition authority would allow such a merger. But what if the two firms were still developing their products? What if the two firms were to merge before the products existed? If no market yet existed, would this same self-respecting competition authority still block the merger?

Historically, the answer has been: "it depends." Often the answer was: "No, the authority will not block the transaction." Sometimes the authority concluded that if no product existed, then no market existed. There was no market within which it needed to protect competition.

But in many other cases the authority did not act because it felt it could not adequately predict the future. The relevant firms, the authority realized, may never develop a product. And even if the firms did eventually develop products, they may be sufficiently different that they would not compete against each other. Thus, many times the relevant competition authority, believing it could not adequately predict the future, did not block the relevant transaction. Both the European Commission[2] and U.S. Federal Trade Commission ("FTC"),[3] for example, believing they could not adequately predict the future, allowed Google to buy DoubleClick.

But sometimes the answer was: "Yes the authority will block the transaction." Sometimes the risk that the merging firms would monopolize the Future Market was just too obvious. This was, indeed still is, particularly true for pharmaceutical markets. The long drug development process makes it relatively easy for the authorities to see what drugs merging firms will probably sell in the future. If the authority believed that the risk that the merger would cause only one firm to sell products which, were it not for the merger, would compete against each other in the future was just too great, then the authority would, typically, only approve the merger if the merging firm licensed one of the relevant R&D programs.

The American and European competition authorities have been doing this since at least 1993. In these cases the authorities claim they are directly protecting competition to innovate. But they are not. They are protecting competition in Future Markets, markets for products[4] at least some of which do not exist yet.

Firms compete on innovation in an almost infinite number of ways. Low and no alcohol beer taste better than they ever because their manufacturers are very consciously trying to pull back their former customers, who are increasingly drinking Coca-Cola and other non-alcoholic beverages.[5] Supermarkets sell ready-made meals of ever higher quality, and thus increasingly compete against restaurants. More restaurants, in turn, now deliver food. And new services will deliver a recipe and just the food it requires. Food offerings, of different prices and quality, continue to proliferate.

Innovation is thus constant, and ubiquitous. From an antitrust perspective the question is: When are the relevant firms competing to innovate so directly that a competition authority may justifiably intervene in the market to preserve this competition to innovate? The answer is: When the firms are trying to make the same future product. In other words, when they are both competing in the same Future Market. This is the only criteria which effectively limits the authorities' actions. And as this implies, whenever any competition authority claims it is protecting competition to innovate it is actually protecting competition in a Future Market.

Competition to innovate burst onto the antitrust scene in 1995 when Richard J. Gilbert & Steven C. Sunshine, two then-high United States Department of Justice ("DOJ") officials, wrote a seminal article announcing that DOJ would protect competition in a market in which innovation itself was the product.[6] Confirming this, DOJ and the FTC said in their 1995 intellectual property licensing guidelines that they would indeed protect competition in an Innovation Market.[7]

Gilbert & Sunshine used as their primary example what became the founding case of the Innovation Market concept, *General Motors/ZF Friedrichshafen* ("*GM/ZF*").[8] In this case ZF wanted to buy the GM division which made automatic transmissions. In the United States the firms

2 Commission Decision of 11/03/2008 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (M.4731—*Google/DoubleClick*).

3 Statement of Federal Trade Commission Concerning Google/DoubleClick, F.T.C. File no.071-0170 (20 December 2007) (FTC Majority Statement).

4 These "products" could include services.

5 *Buzzkill: Alcohol-free beer is fizzing*, The Economist (Continental European Edition), July 10, 2021, p. 60.

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

7 *DOJ and FTC Antitrust Guidelines for the Licensing of Intellectual Property*, § 3.2.3 (1995). When the American enforcers updated these Guidelines, they claimed they could protect competition, not in "Innovation Markets" but instead in "R&D Markets." They changed the label, but not the substance. *DOJ and FTC Antitrust Guidelines for the Licensing of Intellectual Property*, § 3.2.3 (2017).

8 *United States v. General Motors Corp.*, No. 93-530 (D. Del. filed Nov. 16, 1993).

competed in only two narrow markets, those for automatic transmissions for busses and refuse trucks. But the firms competed broadly to make better automatic transmissions. DOJ wanted to preserve this broad competition to innovate, but it feared that if it tried to block this transaction ZF would simply sell GM's businesses in the two narrow markets in which both firms competed. DOJ therefore alleged that the firms competed in a broad Innovation Market to make better automatic transmissions. This, it hoped, would allow it to preserve the firms' broad competition to innovate.

But, as I showed in *Did Congress Actually Create Innovation Markets?*[9] the firms actually competed broadly. They competed in the broad current market to make many different kinds of existing automatic transmissions. But they competed in this market in Europe. DOJ simply used the Innovation Market concept so it could protect competition in a current market where, in reality, it lacked jurisdiction.

In fact, in that same article, *Did Congress Actually Create Innovation Markets?*, I analyzed in depth all the cases in which the American antitrust enforcers had at that time claimed they protected competition to innovate. I showed that in all these cases the enforcers really protected competition in Future Markets. As I showed, only if the relevant firms were trying to make the same future product, and only if an insufficient number of other firms were also trying to make comparable future products, would the enforcers block the relevant transaction. But, as I also said, the enforcers were acting reasonably. The enforcers, I said, should indeed ensure that Future Markets are competitive.

Having looked at how the American enforcers protected competition to innovate, I then turned to Europe. The European Commission had in fact reviewed many of the same cases I had analyzed in *Did Congress Actually Create Innovation Markets*. My article *Innovation Markets in Europe*[10] was the first to examine how the European Commission applied the American concept of Innovation Markets. It analyzed not only all the transactions which both the American and European authorities had reviewed, but also comparable cases which only the European Commission reviewed. This article shows that the European authority, just like its American counterparts, protected competition, not in Innovation Markets, but in Future Markets. Further, it showed that the European Commission did not claim otherwise. As I showed in this article, the Commission itself said it protected competition in Future Markets.

In *The Economics of Future Goods Markets*[11] I again showed that the competition authorities, on both sides of the Atlantic, act reasonably when they protect competition in Future Markets. The authorities are trying to ensure that Future Markets are competitive. Competitive markets, they believe, drive innovation. Indeed, the various competition law provisions all these authorities enforce assume that competition drives innovation. These legal provisions, in other words, implicitly reject Schumpeter's assertion that the monopolist is the better innovator. They instead accept Arrow's claim that the pressure competitive markets generate drives firms to innovate. And, as I conclude in this article, by protecting competition in Future Markets the authorities are doing what they should: ensuring that competitive markets drive innovation.

In *Innovation and the Structure of Competition*[12] I not only reviewed and confirmed the conclusions of these previous articles, I also put the authorities' efforts to protect competition in Future Markets in the larger legal context. I showed, for example, that when the American authorities protect competition in Future Markets, they are acting pursuant to Section 7 of the Clayton Act, which stops firms from acquiring assets "where in any line of commerce…the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

In *Competitiveness, Innovation Policy and the Innovation Market Myth: A Reply to Tom and Newberg on Innovation Markets as the "Centerpiece" of "New Thinking" on Innovation*[13] I responded to two FTC officials who claimed, once again, that the American enforcers could directly protect competition to innovate. All they could do, I showed yet again, was protect competition in Future Markets.

Then the European Commission came along and announced that it too could directly protect competition to innovate. But, the European Commission said, it does not protect competition in an Innovation Market. The European Commission instead created a new concept. The European Commission said in *Dow/Dupont*[14] that it protects competition in an Innovation Space.

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9 Lawrence B. Landman, *Did Congress Actually Create Innovation Markets?* 13 Berkeley Tech. L.J. 721, 759-767 (1998).

10 Lawrence B. Landman, *Innovation Markets in Europe*, 19 E.C.L.R. 21 (1998).

11 Lawrence B. Landman, *The Economics of Future Goods Markets* 21 World Competition: Law and Economics Review 63 (1998).

12 Lawrence B. Landman, *Innovation and The Structure of Competition*, 84 J. Pat. Off. Soc. Part 1, September, 728-740, Part 2, October, 789-802, and Part 3, November, 838-881 (1999).

13 Lawrence B. Landman, *Competitiveness, Innovation Policy and the Innovation Market Myth: A Reply to Tom and Newberg on Innovation Markets as the "Centerpiece" of "New Thinking" on Innovation*, 13 St. John's Journal of Legal Commentary 223 (1998).

14 Commission Decision of 27.3.2017 declaring a concentration to be compatible with the internal market and the EEA Agreement (M.7932—Dow/Dupont).

In *From Innovation Markets to Innovation Spaces: a new phrase is not innovation*[15] I showed that this is simply not true. Just as the American enforcers cannot protect competition in an Innovation Market neither can the European Commission protect competition in an Innovation Space. When the European Commission claims it is protecting competition in an Innovation Space it is actually protecting competition in a Future Market. To justify its intervention in the market the European Commission claimed in *Dow/Dupont* that if it did not act then the relevant products, which would have competed against each other in the future, would, because the firms were combining, not compete against each other in the future. What this claim really shows, as I said in this article, is that the Commission was protecting competition in a Future Market.

One the other hand, as I also show in *From Innovation Markets to Innovation Spaces: a new phrase is not innovation*, in *Dow/Dupont* the European Commission acted aggressively. The Commission assumed that various products which the merging firms were trying to develop would in fact compete against each other in the future. It made this assumption although it did not know if the relevant R&D programs would in fact succeed. It also made this assumption although it did not know the precise features of these products, which of course the firms were still developing. This case therefore shows that, while, on the one hand, whenever the competition authorities claim they are protecting competition to innovate they are really protecting competition in Future Markets, this case also shows that, on the other hand, while doing this the authorities can act more or less aggressively.

Building on this, in *The Future Markets Model: how the authorities really protect innovation*,[16] I explain the methodology the competition authorities always use when they protect competition in Future Markets. I call this the Future Markets Model. This is not the methodology I say the authorities should use. This is the methodology I say the authorities do use. I derived this methodology from all the cases in which the authorities, on both sides of the Atlantic, actually protected competition in Future Markets. It is thus *the methodology the authorities actually use*.

The Future Markets Model requires an authority to ask a series of four questions:

1. Does a current product exist?

2. How many firms are trying to develop a future product?

3. For each possible future product, is it sufficiently developed that the authority will consider it a possible future product?

4. How broad will the authority define the Future Market? Will the authority consider future products which are similar, but not identical, as future competing products?

Since the products do not exist yet, the authority can answer these questions more or less aggressively. And, as I show in this article, this is in fact the key policy decision any competition authority must make when it claims to be protecting competition to innovate, and thus is, in reality, applying the Future Markets Model: How aggressively should the authority apply the Model?

To pick one example which I use in this article, both the European Commission and the FTC reviewed Glaxo's purchase of Wellcome. Glaxo already sold an injectable form of an anti-migraine drug and both firms were trying to develop an oral form of the drug. The European Commission found that the existing injectable drug competed in the same Future Market as the two oral forms of the drug which the firms were trying to develop. And since three drugs competed in this Future Market the European Commission concluded that the Future Market was sufficiently competitive. The FTC, by contrast, found that the injectable and the oral forms of the drug competed in different Future Markets. Further, it found that since only two firms competed in the Future Market to make the oral form of the drug that Future Market was not sufficiently competitive. The FTC therefore required a remedy (licensing intellectual property) which the European Commission did not require.

Another example, which I also use in this article, and which I mentioned above, is Google's purchase of DoubleClick. Both the European Commission and the FTC, believing they could not adequately foresee the future, approved this acquisition. Dissenting Commissioner Pamela Harbour however, although she also recognized that she was facing uncertainty, nevertheless said the risk that the acquisition would allow Google to dominate the future online advertising market was too great. Acting more aggressively in the face of uncertainty, she would have blocked the acquisition.[17]

15 Lawrence B. Landman, *From Innovation Markets to Innovation Spaces in Europe: a new phrase is not innovation*, 42 E.C.L.R 30, 34 (2021).

16 Lawrence B. Landman, *The Future Markets Model: how the competition authorities really regulate innovation*, 42 E.C.L.R. 505 (2022).

17 *In the matter of Google/DoubleClick*, F.T.C. File no.071-0170 Dissenting Statement of Commissioner Pamela Jones Harbour (December 20, 2007).

The fact that whenever the authorities claim they are protecting competition to innovate they are really protecting competition in Future Markets also explains other actions the authorities have taken in this area. First, it explains the jurisdictional tangle in this field. As I explain in *Nascent Competition and Transnational Jurisdiction: the future markets model explains the authorities' actions*,[18] in a number of Future Market cases the competition authority of more than one jurisdiction has reviewed the same transaction. And they have often reach contradictory conclusions. Two examples make this very clear. First, although an American federal district court approved Sabre's purchase of Farelogix, the United Kingdom's Competition and Markets Authority disagreed. It blocked this transaction between two American companies, and thus, in effect, overruled the American court. And the European Commission has stopped Illumina from buying Grail. It has done so although the American authorities have not blocked this transaction, and despite the fact that Grail conducts no business in Europe – none whatsoever.

Once one understands that the authorities are regulating competition in a Future Market then these decisions make sense. The products of Future Markets do not exist. But they may exist in the future. And they may exist in the future everywhere. Future Markets are therefore everywhere and nowhere at the same time. For example, while Grail and its competitors are not yet selling their revolutionary cancer detection tests in Europe, if they develop the tests then they surely will. Thus, the European Commission reasonably wants to ensure that Illumina does not impose the vertical restraint it fears it will if it buys Grail. The European Commission wants to ensure that Grail's competitors have access to Illumina's equipment, which they need to develop and sell their tests. The Commission wants to ensure that Grail's competitors sell their revolutionary test in Europe because these tests, if they work as advertised, will save European lives. But for comparable reasons the Brazilian and South Korean competition authorities also want Grail's competitors to sell their tests in their jurisdictions. The Future Market is everywhere.

Understanding that the authorities are protecting competition in Future Markets also explains the authorities' efforts to protect nascent competition. As I also show in *Nascent Competition and Transnational Jurisdiction: The Future Markets Model Explains the Authorities' Actions*, nascent competition cases are just a subset of Future Market cases. In nascent competition cases a large firm is buying a small firm, one which the large firm fears will successfully compete against it in the future. The two firms are thus competing in the Future Market, the market for better versions of the larger firm's product. And the relevant competition authority, reasonably, wants to protect competition in this Future Market.

One crucial issue, at least for American lawyers, is that no court in the United States has developed a doctrine which allows the American enforcers to protect competition in Future Markets. Companies entering into the transactions I have analyzed have simply acquiesced to an enforcer's request that it take a certain action, such as licensing intellectual property, before approving a transaction. Only Illumina has challenged an enforcer's assertion that it has the authority to protect competition to innovate, which of course is really competition in a Future Market. And in the United States (unlike in Europe) Illumina prevailed. The administrative law judge would not allow the FTC to protect competition in the Future Market.[19]

In *Competition to Innovate and Future Potential Competition*[20] I develop the doctrine courts must use to protect competition in Future Markets. Building on the analysis of my earlier article, *Innovation and the Structure of Competition*, I show that Section 7 of the Clayton Act does allow courts to apply this new doctrine. As I explain, the closest applicable doctrine under current American law is perceived potential competition. Courts used Section 7 of the Clayton Act to develop perceived potential competition. This doctrine, however, only allows courts, and the enforcers, to determine if a firm may expand — geographically.

Because perceived potential competition addresses possible geographical expansion it does not address the fundamental question courts, and the enforcers, must address when they protect competition in a Future Market: Given that the authorities cannot predict with 100 percent certainty whether the relevant products will ever exist, or what their features will be, when should the enforcers nevertheless intervene in the market and block a transaction? In this article I develop the doctrine courts should use to answer this question. They should apply the doctrine I call Future Potential Competition.

Future Potential Competition requires courts, and the enforcers, to balance all appropriate variables. These variables include the probability that the relevant firms will actually develop the relevant products, the probable features of these products, and the number of competitors. It thus allows courts, and the enforcers, to determine when they should act.

Finally, not only can public authorities protect competition to innovate, but so too can private plaintiffs. I show this in *Private Plaintiffs*

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18 Lawrence B. Landman, *Nascent Competition and Transnational Jurisdiction: the future markets model explains the authorities' actions*, 43 E.C.L.R. 294 (2022).

19 Initial Decision (Redacted Public Version), *In re Illumina Inc.*, Docket No. 9401 (F.T.C. Sept. 9, 2022).

20 Lawrence B. Landman, *Competition to Innovate and Future Potential Competition*, 103 Journal of the Patent and Trademark Office Society, April 2023 (forthcoming).

Can Easily Protect Innovation: The Sherman Act's standard is surprisingly lax, and courts should also use it when applying the Clayton Act.[21] As I show, regarding private plaintiffs, and thus the Sherman Act, the landmark case, *United States v. Microsoft*[22] set the standard. In this case, which Netscape and Sun Microsystems initially brought, these two firms claimed that Microsoft's actions improperly excluded them from the future computer operating system market. Because these future operating systems would presumably have been better than the then-current version of Windows, these firms actually claimed that they were excluded from the Future Market for better computer operating systems.

In this case Microsoft claimed, most importantly, that the court could not hold it liable because the court could not know if Microsoft's exclusionary conduct had in fact stopped Netscape and Navigator from entering the Future Market. The court cannot know what would have happened, Microsoft said. In other word, Microsoft said, the plaintiff has not proven causation.

In its key finding the court rejected this argument. Microsoft had engaged in exclusionary conduct, the court said, and could not benefit from the uncertainty this exclusionary conduct caused. The court called its causation test "edentulous," and indeed it is toothless. As long as the products which Microsoft excluded from the market were potential future competing products, the court said, Microsoft may not exclude these products from the market. Thus, although the court recognized that it too was facing uncertainty, it acted in the face of this uncertainty. It found Microsoft liable.

The *Microsoft* court applied the Sherman Act. The enforcers review mergers and similar transactions pursuant to the Clayton Act. Thus, it seems that under current law a plaintiff will find it easier to use the Sherman Act, rather than the Clayton Act, to protect competition in a Future Market. But it is supposed to be the other way around. As the Supreme Court said in *United States v. Penn-Olin Chem. Co*. 378 U.S. 158, 170-171 (1964):

The grand design of the [Clayton Act is] to arrest incipient threats to competition which the Sherman Act did not ordinarily reach.

Thus, it would seem, courts should apply at least the same edentulous standard when applying the Clayton Act as they do when applying the Sherman Act. Courts will use the Sherman Act courts when they must, and in the face of uncertainty, to protect competition in Future Markets. They should do the same when applying the Clayton Act.

21 Lawrence B. Landman, *Private Plaintiffs Can Easily Protect Innovation: The Sherman Act's standard is surprisingly lax, and courts should also use it when applying the Clayton Act*, Journal of the Patent and Trademark Office Society (forthcoming).

22 *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) *cert. denied*, 534 U.S. 952 (2001).

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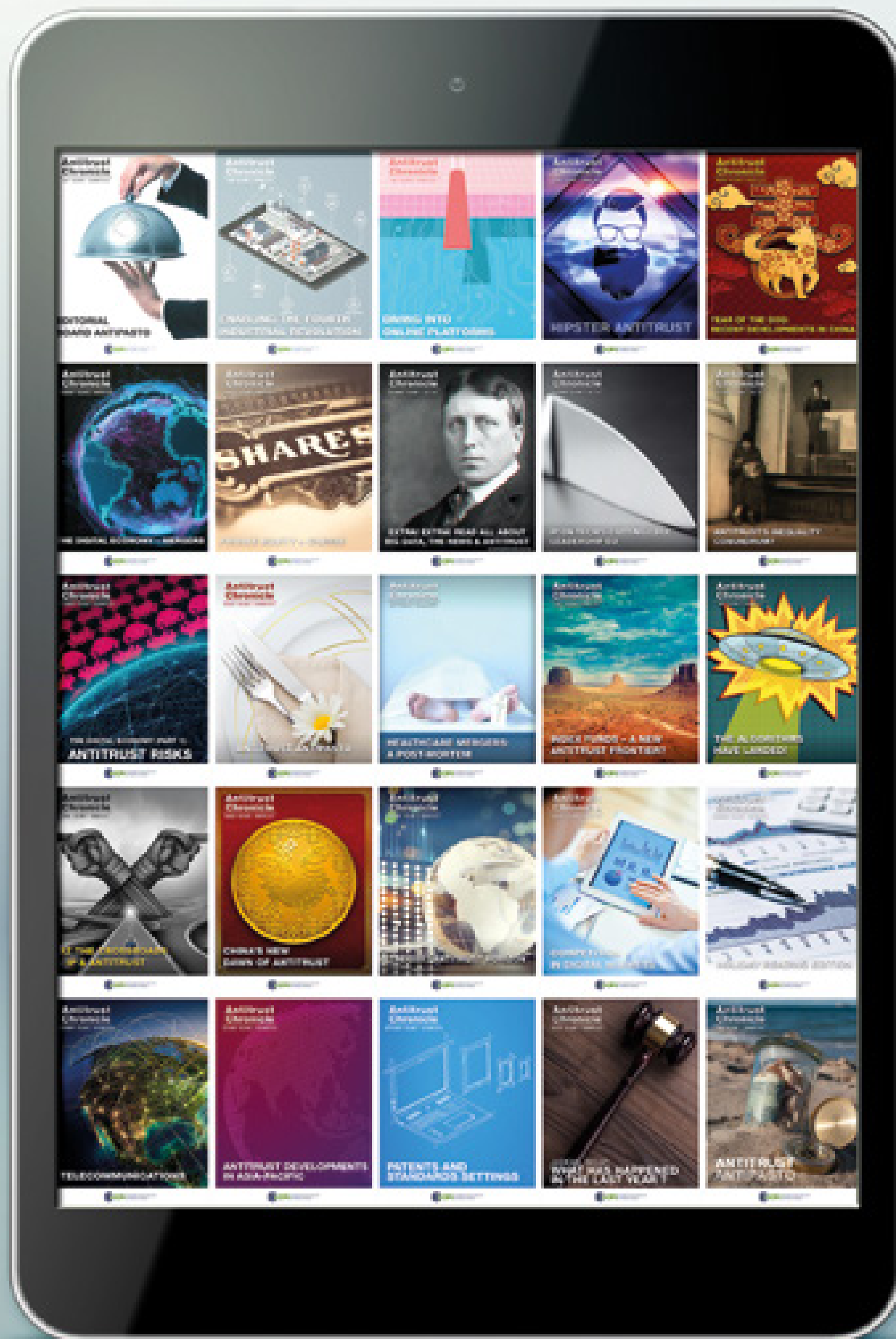

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