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Before the

FEDERAL TRADE COMMISSION
U.S. DEPARTMENT OF JUSTICE
Washington, D.C.

In the Matter of:
Request for Information on Merger Enforcement)
FTC-2022-0003)
U.S. Department of Justice)
U.S. Federal Trade Commission

Comments of ITIF

March 21, 2022

Revising Merger Guidelines While Preserving the Process of Creative Destruction

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I. Introduction

The Schumpeter Project on Competition Policy of the Information Technology and Innovation Foundation (ITIF) appreciates the opportunity to comment on the Request for Information on Merger Enforcement ("the RFI") jointly issued on January 18, 2022 by the Department of Justice's Antitrust Division (DOJ) and the Federal Trade Commission (FTC). The RFI announces the willingness of both federal antitrust agencies to revise merger guidelines – meaning the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines.[1] The FTC had already unilaterally rescinded the 2020 Vertical Merger Guidelines, signaling an abrupt shift from the recently adopted guidelines and spurring considerable concerns among the antitrust community.[2]

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[1] Department of Justice, Federal Trade Commission, "Vertical Merger Guidelines", June 30, 2020, https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf ; Department of Justice, Federal Trade Commission, "Horizontal Merger Guidelines," August 19, 2020, https://www.justice.gov/atr/horizontal-merger-guidelines-08192010

[2] Federal Trade Commission, "Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary", September 15, 2021, https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary (criticizing the guidelines as including "unsound economic theories that are unsupported by the law or market realities."). See Noah Joshua Philipps, Christine S. Wilson, "Dissenting Statement of Commissioners Noah Joshua Philipps and Christine S. Wilson Regarding the Commission's Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement", September 15, 2021, https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioners-noah-joshua-phillips-christine-s-wilson-regarding-commissions ("We lament the majority's continued rejection of administrable, predictable, and credible merger enforcement. Going forward, we fear consumers will lose the benefits of competition from vertical integration, and honest businesses will lose clarity regarding the boundaries of lawful conduct."); Carl Shapiro, Herbert Hovenkamp, "How Will the FTC Evaluate Vertical Mergers?", ProMarket, September 15, 2021, https://promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/ ("The Federal Trade Commission's recent withdrawal of its 2020 vertical merger guidelines is flatly incorrect as a matter of microeconomic theory and is contrary to an extensive economic literature about vertical integration."); Daniel Sokol, Abraham Wickelgren, "Populism at the FTC Undermines Antitrust Enforcement",

The RFI raises numerous questions about the merger analysis, but the "overriding question is how effectively the current guidance documents capture the competitive issues raised by mergers today and whether these documents adequately equip enforcers to identify and proscribe unlawful, anticompetitive transactions."[3] This overriding question reveals the agencies' assumptions: Agencies fail to allegedly block mergers because "today's" analysis has become obsolete. These assumptions – i.e., lax merger enforcement and the need to modernize merger guidelines – appear at best exaggerated, at worst inaccurate. Before answering key questions of the RFI, we shall address these assumptions. As antitrust agencies intend to revise merger guidelines, we argue that such revisions should refrain from embracing the populist narrative that pursues market deconcentration and corporate disintegration (through blocked mergers and/or unwinding past mergers) at the expense of companies' innovation, efficiency, and competitiveness capabilities, and more broadly at the expense of the very process of creative destruction which drives welfare and progress.

II. Dubious Assumptions Behind the RFI

The RFI conveys a number of assumptions, and emphasizes the anticompetitive effects of mergers without due consideration for their procompetitive and pro-growth effects. Indeed, the agencies seek i) comments on aspects of competition the guidelines may underemphasize or neglect, such as labor market effects and non-price elements of competition like innovation, quality, potential competition, or any 'trend toward concentration'" and seek ii) specific examples of mergers which "made it more difficult for customers, workers, or suppliers to work with the merger firm or competitors of the merged firm or made it more difficult for rivals to compete with the merged firm."

Therefore, the RFI exclusively seeks information that can one-sidedly reinforce the view that many undetected mergers are anticompetitive. The RFI does not seem interested in arguments or evidence which may illustrate the procompetitive or pro-growth effects of mergers. Furthermore, the anticompetitive effects that the RFI identify (i.e., mergers making "more difficult for rivals to compete with the merged firm") are highly controversial as the antitrust agencies seem to conclude that whenever a merger enables the merged firm to outcompete rivals such merger can be deemed to be anticompetitive whereas such increased competition inherently partakes to the competitive process that the agencies intend to preserve.[4] In other words, the agencies' RFI demonstrates that agencies may conflate anticompetitive mergers with procompetitive and pro-growth mergers.

ProMarket, December 13, 2021, https://promarket.org/2021/12/13/ftc-populism-antitrust-enforcement-sokol-wickelgren/ ("the current FTC leadership criticizes reliance on economic analysis, caricaturing academic literature to justify dropping the agency's guidance to companies about which vertical mergers may be challenged.")

[3] Department of Justice, Federal Trade Commission, "Request for Information on Merger Enforcement", January 18, 2022, https://www.justice.gov/opa/press-release/file/1463566/download

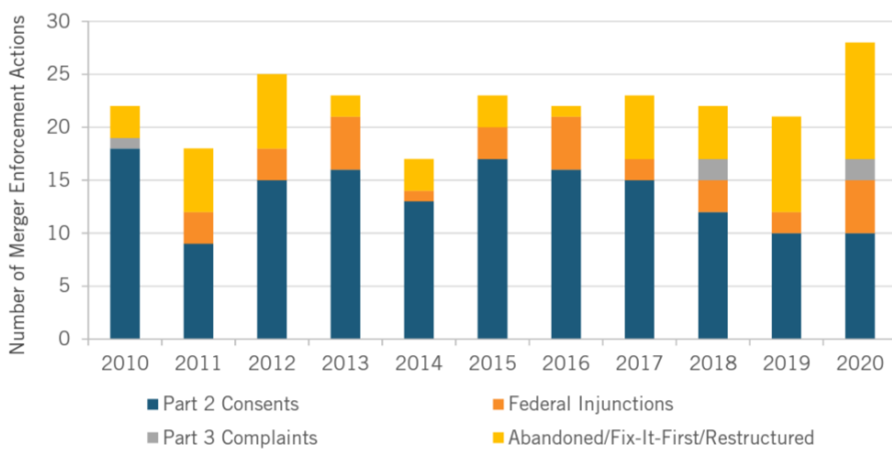
[4] The RFI's confusion between the protection of rivals from the competition generated by mergers with the alleged anticompetitive of such mergers was pointed out by Commissioners Phillips and Wilson in their statement where they raised concerns about the RFI's assumption that "difficulty for rivals equates harm to competition" whereas "mergers that benefit consumers through lower prices, enhanced quality, and more innovation may also make it more difficult for rivals to compete with the merged firm." See Noah Joshua Phillips, Christine S. Wilson, "Statement of Commissioners Noah Joshua Phillips, Christine S. Wilson Regarding the Request for Information on Merger

More generally, the RFI conveys a number of unfounded assumptions, including that 1) merger enforcement is excessively lax, 2) that the current merger wave is both unprecedented and unexplainable but for anticompetitive reasons, 3) that corporate consolidation leads to decreased competition, and 4) new theories of harm are needed.

1. *The myth of lax merger enforcement*

The RFI stems from a general belief that the current merger guidelines generated a period of lax merger enforcement. Such lax merger enforcement is however not demonstrated empirically.[5] Over the last decade, the total merger enforcement actions have remained relatively stable as Figure 1 illustrates:

Figure 1: Total merger enforcement actions[6]



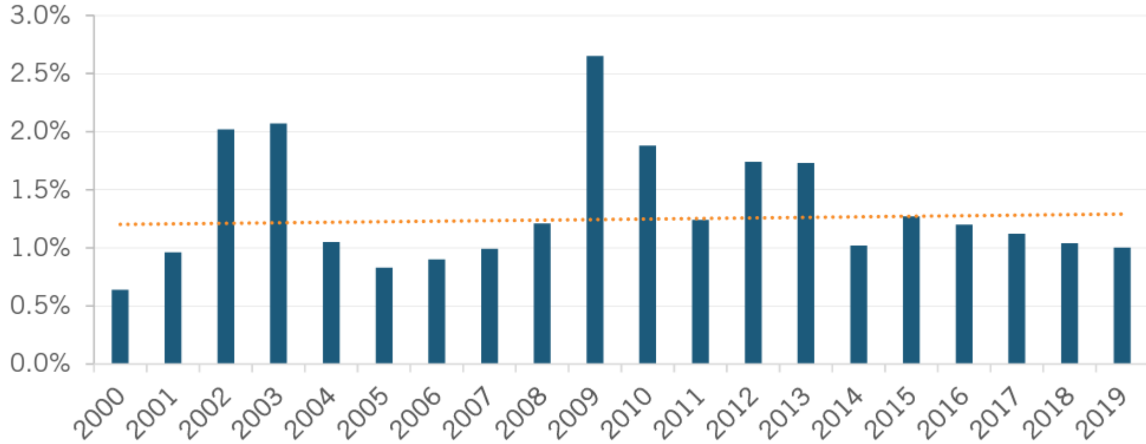
The data regarding the last decade of merger control reveals no lax enforcement or decline thereof. Moreover, the merger enforcement intensity measured as the ratio of enforcement actions in proportion to the reportable mergers under the Hart-Scott-Rodino Antitrust Improvement Act of 1976 remains stable on average as Figure 2 illustrates:

Enforcement", January 18, 2022, https://www.ftc.gov/public-statements/2022/01/statement-commissioners-phillips-wilson-request-for-information-merger-enforcement

[5] Aurelien Portuese, "Reforming Merger Reviews to Preserve Creative Destruction", (ITIF Report, September 27, 2021), https://itif.org/publications/2021/09/27/reforming-merger-reviews-preserve-creative-destruction (noting that "antitrust agencies have not fundamentally reduced merger control over the last decade; and recent studies also demonstrate that there is no under-enforcement in merger policy."); Aurelien Portuese, "Pharmaceutical Consolidation & Competition: A Prescription for Innovation", (ITIF Comments, June 25, 2021), https://itif.org/publications/2021/06/25/comments-ftc-pharmaceutical-consolidation-and-competition (noting that "vigorous antitrust enforcement against pharma mergers takes place regularly.")

[6] Merger enforcement actions comprise Part 2 consents, federal injunctions, Part 3 administrative complaints, and abandoned/fix-it-first/restructured remedies. Data from the FTC and DOJ's Antitrust Division activities. Data available at https://www.ftc.gov/competition-enforcement-database . See also Aurelien Portuese, "Reforming Merger Reviews to Preserve Creative Destruction", (ITIF Report, September 2021), https://itif.org/publications/2021/09/27/reforming-merger-reviews-preserve-creative-destruction

Figure 2: Merger enforcement intensity[7]



Merger enforcement intensity experiences sudden increases following economic crisis – namely, 2002 and 2003 after the burst of the dot-com bubble, and 2009 and 2010 after the financial crisis. These observations provide evidence that mergers can be an exit strategy for failing firms but also that mergers prove necessary whenever companies need to compete through innovation and synergies.[8]

2. *The myth of unprecedented and unexplainable merger wave*

Antitrust populists place aggressive merger review as the first priority of their Neo-Brandeisian agenda. Tim Wu indeed wrote that "the priority for Neo-Brandeisian antitrust is the reform of merger review."[9] They claim that today's merger waves are unprecedented and unexplainable but for anticompetitive reasons.[10] Indeed, Chair Lina Khan argued that "evidence suggests that decades of

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[7] FTC/DOJ, "Hart-Scott-Rodino Annual Report. Fiscal Year 2019," https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competitiondepartment-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf . See also Aurelien Portuese, "Reforming Merger Reviews to Preserve Creative Destruction", (ITIF Report, September 2021), https://itif.org/publications/2021/09/27/reforming-merger-reviews-preserve-creative-destruction ; Jeffrey T. Macher and John W. Mayo, "The Evolution of Merger Enforcement Intensity: What Do the Data Show?" Journal of Competition Law & Economics (2021), https://academic.oup.com/jcle/advance-article-abstract/doi/10.1093/joclec/nhaa037/6124659

[8] Jorge Padilla, Joe Perkins, Salvatore Piccolo, Paul Reynolds, "Merger Control Z", SSRN Working Paper, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3889230

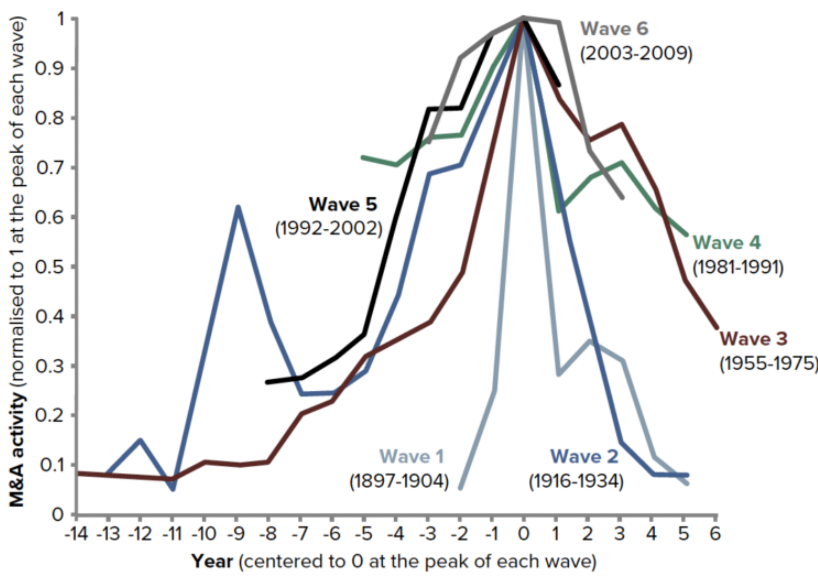
[9] Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age*, (New York: Columbia Global Reports, 2018):127. See also Lina M. Khan, "The End of Antitrust History Revisited", 133 *Harvard Law Review*, (2020):1655-1682 arguing that "detailed studies of merger policy have revealed that a significant share of mergers has resulted in price increases: out of fifty-three transactions that took place over the last few decades, over seventy-five percent resulted in price increases without any offsetting benefits in quality, costs or nonprice measures.")

[10] Lina Khan, "Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement. Docket No. FTC-2022-0003", January 18, 2022, https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-regarding-request-information-merger-enforcement (noting that "global

mergers have been a key driver of consolidation across industries, with this latest merger wave threatening to concentrate our markets further yet."[11]

It instead appears that the current merger wave is similar to previous merger waves.[12] Reports of merger waves are frequent, with each wave portrayed as "unprecedented" and on the verge of monopolizing the economy.[13] These merger waves regularly take place with different intensities and duration as Figure 3 demonstrates:

Figure 3: Intensity and duration of merger waves in the U.S. from 1897 to 2009[14]



deal-making in 2021 soared to $5.8 trillion, the highest level ever recorded….These facts invite us to assess how our merger policy tools can better equip us to discharge our statutory obligations and halt this trend.")

[11] Id.

[12] Ralph Nelson, *Mergers Movements in American Industry, 1895-1956,* (Princeton: Princeton University press, 1959); Brett Cole, M&A Titans: The Pioneers Who Shaped Wall Streets's Mergers and Acquisitions Industry, (New York: John Wiley & sons, 2008)

[13] See, e.g., Peter Behr, "Wave of Merger, Takeovers is a part of Reagan Legacy", Washington Post, October 30, 1988, https://www.washingtonpost.com/archive/business/1988/10/30/wave-of-mergers-takeovers-is-a-part-of-reagan-legacy/e90598c2-628d-40fe-b9c6-a621e298671d/ ("the Reagan years have witnessed one of the greatest waves of mergers…"); Leonard Silk, "The Peril Behind the Takeover Boom", The New York Times, December 29, 1985, https://www.nytimes.com/1985/12/29/business/the-peril-behind-t ("the biggest wave of corporate acquisitions and buyouts in American history is beginning to cause widespread alarm."); Jeffrey E. Garten, Mega-Mergers, Mega-Influence, The New York Times, October 26, 1999, https://www.nytimes.com/1999/10/26/opinion/mega-mergers-mega-influence.html ; Timothy M. Hurley, "The Urge To Merge: Contemporary Theories on The Rise of Conglomerate Mergers in the 1960s", 1 Journal of Business & Technology Law (2006):185-205, https://core.ac.uk/download/pdf/56354899.pdf

[14] Anchor Capital Advisors, "Strength and Characteristics of the M&A Market", Anchor Perspective, March 11, 2017, https://anchorcapital.com/capturing-the-opportunities-in-the-ma-market/

Technological innovations and economic crises best explain these merger waves: "Shocks, be they economic, regulatory, or technological, cause industry merger waves."[15]

Most importantly, the current merger wave is the predictable result of the Covid-19 pandemic which created the greatest economic recession in decades.[16] In that economic context, consolidations through mergers unsurprisingly appear to be a viable strategy for firms to compete.[17] Particularly, data demonstrates that the COVID-19 pandemic disrupted "economic stability (and) caused a Schumpeterian creative destruction of industries."[18] With the COVID-19 pandemic, it appears increasingly obvious that "we're currently in a period of unprecedented accelerated Schumpeterian Creative Destruction."[19] In that regard, Joseph Schumpeter was undoubtedly right when he wrote that "depressions are not simply evils, which we might attempt to suppress, but –perhaps undesirable– forms of something which has to be done, namely, adjustment to previous economic change."[20] This "cleansing effect" of mergers and acquisitions is essential to the process of creative destruction, itself a prerequisite for productivity and growth.[21] Since Schumpeter, we know that business cycles usher mergers and combinations as part of the evolutionary process of capitalism.[22] To the question "is the economic crisis induced by the COVID-19 pandemic "cleansing out

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[15] Jarrad Harford, "What drives merger waves?", 77 Journal of Financial Economics (2005):529-560, 559, https://www.sciencedirect.com/science/article/abs/pii/S0304405X04002041 (combining the neoclassical explanation where shocks cause merger waves and the behavioral explanation where overvalued stock incentivize asset acquisition).

[16] Lucia Mutikani, "U.S. economy contracted 19.2% during COVID-19 pandemic recession", Reuters, July 29, 2021, https://www.reuters.com/business/us-economy-contracted-192-during-covid-19-pandemic-recession-2021-07-29/ (noting that "the COVID-19 recession was the worst ever.")

[17] See, e.g., OECD, "Merger control in the time of COVID-19", May 25, 2020, https://www.oecd.org/daf/competition/Merger-control-in-the-time-of-COVID-19.pdf ("The COVID-19 crisis is an unprecedented economic shock that will have, as some of its consequences, a disruptive impact on the economy leading to the financial distress of many firms and forcing many firms to exit the market or merge."); Steven Nigro, "How The Covid-19 Pandemic is Reshaping The Mergers and Acquisitions Space", Forbes February 3, 2021, https://www.forbes.com/sites/forbesbusinesscouncil/2021/02/03/how-the-covid-19-pandemic-is-reshaping-the-mergers-and-acquisitions-space/?sh=6c7d7fbb7019 (noting that "the pandemic has created dual realities for the mergers and acquisitions world.")

[18] Chokri Kooli, Melanie Lock Son, "Impact of COVID-19 on Mergers, Acquisitions & Corporate Restructurings", Businesses, (2021), https://www.mdpi.com/2673-7116/1/2/8/pdf (noting that "Compared to the 2008 economic downturn where there was a lack of liquidity on the markets, in 2021 we can expect the M&A market to continue on this momentum, as debt and equity financing are readily available and low-interest rates prevail across the globe.")

[19] Steven Strauss, "Some Emerging Hypothesis on the Economic Opportunities and Challenges of the Post-Pandemic World", SSRN Working Paper, June 24, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3633391

[20] Joseph A. Schumpeter, "Depressions." In Douglass V Brown, Edward Chamberlin, Seymour Edwin Harris (Eds.) *Economics of the Recovery Program*, (New York: McGraw-Hill, 1934).

[21] See Murial Dal Pont Legrand, Haral Hagermann, "Do Productive Recessions Show the Recuperative Powers of Capitalism? Schumpeter's Analysis of the Cleansing Effect", 31 Journal of Economic Perspectives, (2017):245-256, https://pubs.aeaweb.org/doi/pdf/10.1257/jep.31.1.245

[22] See, e.g., Joseph A. Schumpeter, "Business Cycles. A Theoretical, Historical and Statistical Analysis of the Capitalist Process", (New York: McGraw-Hill Book Company, 1939); Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (New York and London: Harper & Brothers. (2nd edition 1947); Joseph A. Schumpeter, "The Present World Depression: A Tentative Diagnosis" 21 American Economic Review (1931):179–182.

unproductive firms, in line with the creative destruction process postulated by Schumpeter (1939)?", the World Bank unequivocally answers, following a global analysis using World Bank's data, that:

> " The results of this global analysis point to a Schumpeterian cleansing process in which less productive firms were more likely to permanently shut down than other firms… This analysis provides evidence of a high likelihood of exit among less productive firms more than a year after the start of the pandemic."[23]

Consequently, the current merger wave is neither unprecedented nor sustainable: It is a well-anticipated response to an economic crisis.[24] The pattern is well-known and unsurprising: After a fall in mergers due to recession, acquisitions rebounded as economic recovery was starting, thereby suggesting a V-shaped curve on global mergers. Global dealmakings reached $4 trillion in 2019, decreased to $3.7 trillion with the recession in 2020, and bounced back to $5.9 trillion in 2021 with the economic recovery. Therefore, corporate consolidation through mergers is neither unprecedented and surprising, nor it is specific to the American economy following the global pandemic.

In that regard, to fundamentally question the approach to merger analysis with hasted revisions of merger guidelines based only on the current business environment may generate considerable unintended consequences because today's exceptionally economic circumstances should not dictate the agencies' analysis for the next decades when the business environment would have changed dramatically. A dynamic approach to mergers rather requires sufficient flexibility and adaptability from agencies, and not crystallization of today's circumstances into merger analysis for years to come.

Moreover, divestitures also accompany mergers, and only looking at the latter overstates changes in concentration. In addition, the very claim that mergers have increased concentration is not supported by the latest data from the U.S. Census Bureau.[25]

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[23] World Bank Group, "Competition and Firm Recovery Post-COVID-19. Europe and Central Asia Economic Update", Office of the Chief Economist, Fall 2021, https://openknowledge.worldbank.org/bitstream/handle/10986/36296/9781464818028.pdf . See also Silvia Muzi, Filip Jolevski, Kohei Ueda, Domenico Viganola, "Productivity and Firm Exit During the COVID-19 Crisis", World Bank Group Policy Research Working Paper, 9671, May 2021, https://openknowledge.worldbank.org/bitstream/handle/10986/35632/Productivity-and-Firm-Exit-during-the-COVID-19-Crisis-Cross-Country-Evidence.pdf?sequence=1&isAllowed=y (finding that "the results show that there is a strong positive relationship between productivity and firm survival, consistent with the theoretical predictions of the Schumpeterian creative destruction.")

[24] Marc Bain, "Covid-19 is set to unleash a wave of corporate mergers and acquisitions", Quartz, April 27, 2020, https://qz.com/1846425/covid-19-could-unleash-a-wave-of-corporate-mergers-and-acquisitions/

[25] Robert D. Atkinson, Filipe Lage de Sousa, "No, Monopoly Has Not Grown", (ITIF Report, June 2021), https://itif.org/publications/2021/06/07/no-monopoly-has-not-grown (finding that "on average more concentrated industries got less concentrated from 2002 to 2017.")

3. The myth that deconcentration means competition

The RFI's fundamental assumption rests that concentration is opposite to competition. Indeed, interested in uncovering any "trend toward concentration" as potential evidence of unlawful mergers, the antitrust agencies controversially cite the seminal and decades old case of *Brown Shoe Co. v. United States* to illustrate the need to revise merger guidelines in order to return to allegedly originalist interpretation of the Clayton Act.[26] This case of 1962 has widely been criticized as being inconsistent with economic theory and practice, *reducing* (and not *increasing*) competition by preventing scale economies which would have generated lower consumer prices. The U.S. Supreme Court decided that a 1956 merger between Brown Shoe Company and G.R. Kinney Co. was illegal according to Section 7 of the Clayton Act despite the fact that Brown Shoe only controlled 4 percent of the market of shoe manufacturers while Kinney controlled only 0.5 percent of that market. The merger gave Brown Shoe 7.2 percent of the market for retail shoe stores and 2.3 percent of the market of shoe outlets.[27] Despite the insignificance of these market shares involved, hence of the market power held by Brown Shoe, the Court declared the merger illegal because it opposed the "rising tide of economic concentration" and wanted to ensure the "protection of small businesses."[28] The case predated the emergence of the economic analysis of antitrust laws and remains one of the most notable populist decisions of the Supreme Court on antitrust.[29]

Despite the economic incongruency of *Brown Shoe*, the RFI's explicit reference to *Brown Shoe* suggests that the antitrust populism of the agencies' leaderships hint toward a radical deconcentrationist view of competition, including their embrace of competition and small business for their own sake.[30] According to that radical view, large companies and concentrated markets are uncompetitive: There can be competition only with deconcentration. Agencies' leaderships favor "head-to-head competition", namely competition among firms as direct rivals over undifferentiated products and

[26] *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962). See the majority statement when the FTC rescinded the 2020 Vertical Merger Guidelines, Lina M. Khan, Rohit Chopra, Rebecca Kelly Slaughter, Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines. Commission File No. P810034, September 15, 2021, https://www.ftc.gov/public-statements/2021/09/statement-chair-lina-m-khan-commissioner-rohit-chopra-commissioner-rebecca (arguing that "the 2020 VMGs contravene the text of the statute, devoting a whole section to the discussion of procompetitive effects, or efficiencies, of vertical mergers.")

[27] 370 U.S. 302-303.

[28] 370 U.S. at 304. Other infamous cases include United States v. Von Grocery, 384 U.S. 270 (1966); FTC v. Procter & Gamble, 386 U.S. 568 (1967).

[29] The first merger guidelines reflected this populist "big-is-bad" approach with, for instance, the 1968 Merger Guidelines which indicated that mergers between two firms with 5 percent of market share each would be challenged. See Carl Shapiro, "Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets", 33 *Journal of Economic Perspectives*, (2019):69-93 (noting that "few if any antitrust economists today would favor applying the low thresholds in the 1968 Merger Guidelines, given what we now know about the effects of horizontal mergers.")

[30] Robert D. Atkinson, David B. Audretsch, "Economic Doctrines and Approaches to Antitrust", (ITIF Report, January 2011), http://www.itif.org/files/2011-antitrust.pdf ; David M. Hart, "Antitrust and Technological Innovation in the US: Ideas, Institutions, Decisions, and Impacts, 1890-2000," Research Policy 30, no. 6 (2001): 923-936

services.[31] Referred as "neck-to-neck" competition in the economic literature, this competition-as-deconcentration view overlooks market realities.

Indeed, in an age of disruptive innovation where firms compete through innovation (i.e., product differentiation) rather than through prices (between homogenous products), neck-to-neck competition is both dynamically unstable and economically detrimental. Neck-to-neck competition is dynamically unstable because neck-and-neck competition suggests that firms compete with the same technological level over relatively homogenous products. This competition leads to innovation – i.e., the so-called "escape-competition effect".[32] But, as firms innovate, products escape competition with increased differentiation, therefore no longer being subject to neck-and-neck competition. In other words, it is hopeless for antitrust agencies to try attaining a stable, long-term neck-and-neck competition among rivals since such competition is not sustainable dynamically.

Also, neck-and-neck competition cannot take place whenever some rivals are less innovative: These laggard firms are discouraged to compete under the so-called "Schumpeterian effect".[33] In other words, perfect competition with complete deconcentration is unachievable since companies in different states of technological advancement will or will not have an incentive to compete depending on their technological capabilities. Oligopolistic structures naturally emerge out of such evolutionary selection process.

Finally, neck-and-neck competition is a poor indicia for competition: As competition increases in the economy, the number of neck-and-neck sectors decreases under the "composition effect".[34] In other words, because of the instability of the neck-and-neck competition under the escape-competition effect, the economy tends to have more sectors where the Schumpeterian effect plays out: Firms increasingly have unequal technological levels and competition takes place in oligopolistic markets.

Consequently, the idea that competition can only take place with neck-and-neck competition whereby a large number of small firms compete against one another is a flawed idea ignoring the role of innovation in shaping competitive strategies of firms, and ignoring how such innovation upends the idealized market structure of atomistic competition. Competition through innovation does not dynamically take place under perfect competition model but under oligopolistic structures where firms can effectively innovate in order to outcompete rivals.

Despite these market realities, the agencies' leaderships signal a return to the dystopian idea of competition through deconcentration where the true rivalry can only be the one exerted in atomistic markets by small businesses compete neck-and-neck. Notable commentators signaled that

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[31] Jonathan Kanter, "Assistant Attorney General Jonathan Kanter Delivers Remarks on Modernizing Merger Guidelines", Washington DC, January 18, 2022, https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-modernizing-merger-guidelines (willing to know more about "head-to-head competition between merging parties…")

[32] Philippe Aghion, Stefan Bechtold, Lea Cassar, Holger Herz, "The Causal Effects of Competition on Innovation: Experimental Evidence", 34 *The Journal of Law, Economics, & Organization*, (2018):162-195

[33] Id.

[34] Id.

"evaluating mergers based on protecting small businesses or their employment effects would hinder rather than promote long-run economic growth".[35] This is because as federal government statistics show, on average smaller businesses are less productive than larger ones, and pay their workers less.[36] However, the RFI hints to just that damaging direction: A return to *Brown Shoe* would protect less productive small businesses at the expense of the competitive process of creative destruction, and to include labor considerations would discard increased organizational efficiencies as job destruction rather than as income-boosting labor reallocation. The reality is, despite what some populists have asserted, that efficiency gains that show up as productivity do benefit the average American worker.[37]

4. *The myth that merger policy needs new theories of harm*

The gradual evolution of merger guidelines neatly follows both economic knowledge and enforcement practice. The RFI not only suggests a departure from current economic knowledge but also suggests that new merger guidelines will not "codify" merger practice contrary to previous revisions but rather drive merger enforcement in new, untraveled roads for antitrust agencies. "New theories of harm" becomes a catchphrase for ignoring current theories of harm and for increasing the indeterminacy of merger analysis.[38]

First, subsequent merger guidelines incorporated improved economic knowledge to better reflect the understanding of markets. About revisions of horizontal merger guidelines, Carl Shapiro notes that "with each revision, less weight was given to market shares and greater weight was attached to more direct evidence about how competition has taken place in the industry and how the merger would likely alter that competition."[39] Regarding vertical merger guidelines, the 2020 revisions clearly represented an improvement from the 1982 merger guidelines.[40] Despite these well-accepted and recent improvements, the agencies' leaderships reveal with the RFI their desire that merger guidelines reflect their understanding of market realities – i.e., a view that large and merged firms inevitably compete in a way that makes it more difficult for rivals to compete in return. Current merger guidelines improved gradually, giving less importance to market share and market structure, price effects and market definitions in favor of a more dynamic, innovation-driven analysis of

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[35] Herbert Hovenkamp, Carl Shapiro, "Horizontal Mergers, Market Structure, and Burdens of Proof", 127 *The Yale Law Journal* (2018):1996-2025, at 2020.

[36] Robert D. Atkinson, Michael Lind, *Big Is Beautiful: Debunking the Myth of Small Business*, (Cambridge MA: MIT Press, 2018)

[37] Richard G. Anderson, "How Well Do Wages Follow Productivity Growth?" *Economic Synopses*, no. 7 (2007), https://files.stlouisfed.org/files/htdocs/publications/es/07/ES0707.pdf.

[38] Aurelien Portuese, "Reforming Merger Reviews to Preserve Creative Destruction", (ITIF Report, September 27, 2021), https://itif.org/publications/2021/09/27/reforming-merger-reviews-preserve-creative-destruction

[39] Carl Shapiro, "Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets", 33 *Journal of Economic Perspectives*, (2019):69-93

[40] Herbert Hovenkamp, "Competitive Harm From Vertical Mergers", 59 Review of Industrial Organization (2021):139-160, https://link.springer.com/article/10.1007/s11151-021-09821-2 (concluding that "the 2020 Vertical Merger Guidelines are not perfect, but they are a significant step in the right direction.")

mergers. The "new market realities" that the RFI refers to are in fact the old market analysis of the 1960s when antitrust populism prevailed.[41]

Second, revisions of merger guidelines have traditionally "codified" merger enforcement practices. For instance, the 1968 guidelines codified the *Brown Shoe* case among others, the 1982 guidelines codified the more economic analysis of the 1970s, the 2010 guidelines have built on the innovation effects in mergers, and the 2020 guidelines integrate nonprice effects such as the elimination of the double marginalization problem. Each time, the guidelines have not represented a considerable departure from practice, but rather, have set in a policy document existing practice.

The 2022 RFI signals a totally different approach with increased uncertainties: the agencies' leaderships want to depart from both current economic knowledge and from current guidelines without having gradually changed the enforcement practice in the first place. In short, the upcoming merger guidelines will no longer be a retrospective exercise as previous guidelines have traditionally been, but rather a prospective exercise. With such a lack of enforcement experience, economic speculations and risks of judicial backlashes loom large. Indeed, the prospective nature of the current revisions of the merger guidelines will test both new economic theories as well as judges' eagerness to disrupt settled case law. Such prospective exercise plagued with considerable legal uncertainties should warrant caution. Rather than "new theories of harm" which will undermine the well-accepted consumer welfare standard, antitrust agencies need clarification of current merger enforcement.[42] Unfortunately, the RFI does not provide such clarification but rather kickstarts a process of increased merger scrutiny under an indeterminate merger analysis. The below part addresses key questions of the RFI.

III. Potential and Nascent Competition

7.b Should the guidelines focus on whether either merging firm is contemplating entry into, or is well situated to enter, a market where the other firm competes? Should it be sufficient to demonstrate either firm's capability of entering a concentrated market or that the acquiring firm has market power?

7.d. In the case of a nascent competitor—a firm that, while small now, might evolve into a competitive force—how should the guidelines assess its potential path of evolution into a plausible competitor? What degree of probability should serve as sufficient, especially in cases where technology and products evolve rapidly or unpredictably? Should the sufficient probability vary depending on the degree of market concentration?

Assessing the extent to which a firm is contemplating entry into a market, is well situated to enter a market, or has the capability to enter a market is, and should continue to be, a part of the merger review process under the horizontal merger guidelines. When determining participants in a relevant

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[41] Aurelien Portuese, Joshua Wright, "Antitrust Populism: Towards a Taxonomy", 25 Stanford Journal of Law, Business & Finance, https://law.stanford.edu/publications/antitrust-populism-towards-a-taxonomy/

[42] See Michael L. Katz, Howard A. Shelanski, "Mergers and Innovation", 74 *Antitrust Law Journal* (2007):1-85 ("Under the consumer-welfare standard, agencies challenge mergers they think are likely to increase the ability of the merged parties to control prices and output of given goods and services. The courts use a largely standardized process to evaluate mergers when the agencies bring such legal challenges.")

market, the agencies include "firms not currently earning revenues in the relevant market, but that have committed to entering the market in the near future."[43] However, a fulsome analysis of a merger's impact must also consider the competitive constraint provided by firms poised to enter the market. The extent of that constraint will depend on the degree to which customers view the products of nascent competitors as substitutes to currently available products—including the acquirer's products.

Merely assessing a nascent competitor's ability to enter a concentrated market, absent consideration of the competitive constraint that firm may provide, is not sufficient to determine the likely competitive effect from an acquisition. Similarly, a finding that the acquiring firm has market power is also not sufficient. In Cunningham et al. (2021), which studies "killer acquisitions" in the pharmaceutical industry, the critical consideration for identifying anticompetitive transactions is not the ability of nascent competitors to enter a concentrated market nor the market power of the acquiring firm but that the acquired drug project is a substitute for the acquirer's drug project.[44] For killer acquisitions to take place, the products of the acquired firm must be close substitutes for the products of the acquiring firm. Therefore, any assessment of the potential anticompetitive impact from the acquisition of a nascent competitor must focus on the anticipated competitive constraint provided by the nascent competitor absent the acquisition and not merely its ability to enter or the acquirer's market power.

In some instances, there may be uncertainty as to whether a nascent competitor would evolve into a competitive constraint to the acquiring firm absent the acquisition. The degree of uncertainty depends, in part, on whether the innovation introduced by the nascent competitor is radical or incremental. Radical innovations are disruptive, and the firms developing these innovations tend to displace incumbent firms—Amazon's innovations in retailing fit this category. Amazon has nearly displaced Walmart as the leading U.S. retailer.[45] Incremental innovations build on prior innovations of incumbent firms. For example, Waze's innovation in crowd-sourcing traffic information builds on Google's innovations with respect to Google Maps. The need to replicate an incumbent's assets (e.g., customer base, technology infrastructure, etc.) to effectively compete means that an incremental innovator is less likely to evolve into a competitive constraint than a firm engaged in radical innovation. Therefore, a key consideration in evaluating the likely evolution of a nascent competitor should be the extent to which the nascent competitor is engaged in radical innovation that is likely to displace the acquiring firm. The degree of market concentration does not determine whether a nascent competitor's innovation is radical or incremental and, therefore, is not relevant for determining a threshold probability at which this evolution is likely.

IV. Innovation and IP

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[43] U.S. Department of Justice and Federal Trade Commission, "Horizontal Merger Guidelines" (August 19, 2010), 15, https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

[44] Colleen Cunningham et al., "Killer Acquisitions," Journal of Political Economy 129 (March 2021): 649-702, https://www.journals.uchicago.edu/doi/10.1086/712506.

[45] "Amazon and Walmart Are Nearly Tied in Full-Year Share of Retail Sales," March 11, 2021, https://www.pymnts.com/news/retail/2021/amazon-walmart-nearly-tied-in-full-year-share-of-retail-sales/.

10.a Should the guidelines use a different approach to market definition when considering innovation as compared to price effects? Should market definition play a secondary role to analysis of how the merger directly affects the incentive to innovate?

10.b.To what extent does a focus on product market overlaps fail to identify broader concerns about incentives to innovate, particularly given that innovation may involve the creation of new product or service categories?

To properly evaluate how a merger or acquisition might impact incentives for innovation, it is first necessary to understand what is meant by innovation. Innovation is more than a new idea or invention. Innovation requires implementation by either the firm that developed the innovation or by other firms. Discussions around innovation tend to focus on product innovation, but process innovation is equally important. Process innovation can include new or improved processes for producing goods and services, including distribution, logistics, marketing, and sales; information and communication technology services; administrative and management functions; engineering and related technical services; and business process development. A key feature of innovation is that characteristics of a product or process were not previously known to the firm implementing the innovation—although the product or process may already be used in other contexts (e.g., by other firms or in different geographies). In this way, diffusion of known innovations is also considered innovation.[46]

Mergers and acquisitions have an important impact on incentives to innovate. For some types of innovation, a venture-backed startup exit strategy that involves being acquired is often more profitable than head-to-head competition with an incumbent firm. This difference in the return to innovation is a crucial driver of startup innovation incentives.[47] Over the last 10 years, more than 70 percent of venture-back start-up exits were through acquisition.[48] In a recent Senate Judiciary Committee hearing, Bettina Hein, a serial entrepreneur, testified that acquisitions "enable startup investors to reclaim their invested capital, realize any gains, and recycle their capital into the next generation of startups, fueling the ongoing process of innovation-led economic growth and job creation."[49] Acquisition is part of a virtuous cycle of innovation and economic growth.

The ability to acquire other firms allows innovations to be diffused throughout the economy more quickly, and at lower cost, leading to more competitive industries and more innovation. For example, Walmart's presence in e-commerce was relatively limited until it acquired Jet in 2016. While Walmart ultimately shut down Jet, that acquisition, along with other e-commerce acquisitions, allowed Walmart to jumpstart their e-commerce business, expanding to "curbside pickup, delivery to

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[46] Organization for Economic Cooperation and Development, *Oslo Manual: Guidelines for Collecting, Reporting, and Using Data on Innovation* (2018), 44, 47, 72, https://www.oecd.org/science/oslo-manual-2018-9789264304604-en.htm.

[47] Luis Cabral, "Standing on the Shoulders of Dwarfs," (August 2018), http://luiscabral.net/economics/workingpapers/innovation%202018%2008.pdf.

[48] Pitchbook and National Venture Capital Association, "Venture Monitor" (Q2 2021), 27, https://pitchbook.com/news/reports/q2-2021-pitchbook-nvca-venture-monitor.

[49] The Impact of Consolidation and Monopoly Power on American Innovation, Before the Subcommittee on Competition Policy, Antitrust, and Consumer Rights, 117th Congress (2021) (Statement of Bettina Hein, Founder and Chief Executive Officer), p. 2, https://www.judiciary.senate.gov/imo/media/doc/Hein%20Testimony.pdf.

the home and expansion of categories beyond groceries, such as apparel and home decor." Walmart's e-commerce business expanded by 37 percent in 2019 and by 74 percent at the start of the pandemic.[50] This innovation through acquisition strategy allowed Walmart to achieve scale more quickly in e-commerce and become a more robust competitor in e-commerce. We saw the same dynamic with Google's acquisition of software-based mapping company Keyhole that helped create the free service of Google Maps.[51]

To avoid falsely characterizing innovation-enhancing mergers as harmful to innovation, it is necessary to clearly define the market in which the alleged harm to innovation is likely to occur. Section 7 of the Clayton Act outlaws mergers, "where in any line of commerce … in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Establishing the "line of commerce" affected by a merger is no less critical merely because the merger may affect the incentives to innovate. The agencies' enforcement record demonstrates that the current approach to market definition does not limit their ability to identify and block mergers that are harmful to innovation and that a new approach to market definition is not needed.[52] Market definition should play a primary, not secondary, role in analyzing how a merger may affect incentives to innovate.

In some instances, defining a product market may be sufficient to capture a merger's effect on incentives to innovate. In other instances, defining a technology market or an R&D market may be necessary to capture the merger's impact appropriately. A merger may affect incentives to innovate in a particular product market when at least one of the merging firms is engaging in efforts to introduce new products, or has capabilities that are likely to lead it to develop new products in the future, that would capture substantial revenues from the other merging firm.[53] However, when technology is licensed separately from product sales, a technology market may be more appropriate for evaluating the effects of a proposed merger on incentives to innovate. When innovations are incremental, a merger that is likely to increase licensing fees may reduce innovation incentives for implementers of the merged firm's technology, thereby reducing innovation and the returns to the implementer's R&D.

When product or technology overlaps are not sufficient to identify harms to innovation from a proposed merger, it may be necessary to define an R&D market. An R&D market "consists of the assets comprising research and development related to the identification of a commercializable

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[50] Melissa Repko, "Walmart Winds Down Jet.com Four Years After $3.3 Billion Acquisition of E-commerce Company," May 19, 2020, https://www.cnbc.com/2020/05/19/walmart-winds-down-jetcom-four-years-after-3point3-billion-acquisition.html.

[51] Book review by Robert D. Atkinson: Never Lost Again: The Google Mapping Revolution That Sparked New Industries and Augmented Our Reality (nyjournalofbooks.com)

[52] See, for example, Federal Trade Commission, "FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail," news release, March 30, 2021, https://www.ftc.gov/news-events/press-releases/2021/03/ftc-challenges-illuminas-proposed-acquisition-cancer-detection.

[53] U.S. Department of Justice and Federal Trade Commission, "Horizontal Merger Guidelines" (August 19, 2010), 23, https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

product, or directed to particular new or improved goods or processes, and the close substitutes for that research and development."[54] Substitutes may include R&D efforts, technologies, and goods to the extent they would influence the pace of R&D. The agencies have extensive experience evaluating both proposed mergers and firm conduct on incentives to innovate in R&D markets. In particular, the agencies have long understood the need to "consider whether a merger will diminish innovation competition by combining two of a very small number of firms with the strongest capabilities to successfully innovate in a specific direction."

Market definition need not focus on product overlaps to identify harms to innovation from mergers. Markets can alternatively be defined around technology or R&D instead. This need to be flexible in defining markets does not obviate the need to engage in the market definition exercise when evaluating the effect of a merger on incentives to innovate. Neglecting to define the relevant market in which harm to innovation is likely to occur may lead to arbitrary enforcement in the name of preserving innovation incentives. Such arbitrary enforcement may prevent pro-competitive, innovation-enhancing mergers.

V. Digital Markets

11.c. How should the guidelines approach market definition in zero-price markets, negative-price markets, or markets without explicit prices? Can "quality" and other characteristics play the same role as price in market definition?

11.f. How should the guidelines analyze mergers involving competition for attention? How should relevant markets be defined? What types of harms should the guidelines consider?

a. Overview of two-sided markets

Markets with zero price, negative price, or without an explicit price, and markets involving competition for attention are appropriately analyzed as two-sided platforms. Two-sided platforms are characterized by cross-platform or indirect, network effects. This means that participants on at least one side of the platform care about how many participants are on the other side of the platform. Ride-hailing companies such as Uber and Lyft exhibit cross-platform network effects. Drivers prefer to drive for companies with many passengers, and passengers prefer companies with many drivers. Drivers do not want to wait too long for their next fare, and passengers do not want to wait too long for a ride. Many participants on both sides of the platform limits these wait times and increases the platform's value to all participants.

Despite the increased value from having many participants on both sides of the platform, platforms often face a "chicken and egg" problem.[55] Drivers do not want to join a platform with no passengers, and passengers do not want to join a platform with no drivers. Platforms are faced with the problem of attracting both sides to the platform simultaneously. A common way to overcome

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[54] U.S. Department of Justice and Federal Trade Commission, "Antitrust Guidelines for the Licensing of Intellectual Property" (January 12, 2017), 11, https://www.justice.gov/atr/IPguidelines/download.

[55] Bernard Caillaud and Bruno Jullien, "Chicken & Egg: Competition among Intermediation Service Providers," *RAND Journal of Economics* 34, no. 2 (Summer 2003): 309–28, https://www.jstor.org/stable/1593720.

this problem is by subsidizing one side of the platform while charging a positive price to the other side. For example, Uber passengers do not pay any fees to use Uber's platform outside of the fare for the ride, but drivers pay fees to Uber to use the platform. The price to passengers is zero, but the net price to bring both sides on board is positive. Absent this subsidization of one side, the platform's services may not be available at all.

b. Types of two-sided markets

Two-sided platforms can be categorized as transaction or non-transaction platforms. The distinction is important when evaluating mergers involving two-sided platforms. Transaction platforms are two-sided platforms in which the platform facilitates a transaction between both sides of the platform. The ride-hailing platforms described above are two-sided transaction platforms as they facilitate the sale of rides between drivers and passengers. In two-sided transaction platforms, the platform operator can charge a fixed fee for joining the platform and a per-transaction fee for each transaction the platform facilitates.

Non-transaction platforms are two-sided platforms in which the platform cannot monitor transactions between both sides of the platform. Social network platforms such as Twitter are two-sided non-transaction platforms. An advertisement for Nike on Twitter may ultimately lead a consumer to buy a pair of sneakers, but the limited ability to connect purchases to specific advertisements means Twitter cannot be characterized as facilitating a transaction between Nike and the consumer. In two-sided non-transaction platforms, the platform operator can only charge a fixed fee for joining the platform, which might vary based on the intensity of use of the platform (e.g., number of ads placed), as the platform generally cannot observe transactions between both sides of the platform.

c. Market definition in two-sided platform markets

The type of two-sided platform must be considered when defining platform markets. A two-sided transaction platform requires defining a relevant market that incorporates both sides, while a two-sided non-transaction platform requires defining two interrelated relevant markets. For transaction platforms, "the product offered is the possibility to transact through the platform."[56] This necessarily requires consideration of both sides of the platform when defining the relevant market. The ability to hail a ride through Uber exists only if Uber is in the relevant market on both sides. Uber is in a relevant market that incorporates both sides, or it is not in the relevant market at all. Therefore, it is necessary to consider how substitutes to platform facilitated transactions constrain the platform on both sides in defining relevant markets.

Consider a hypothetical merger between Uber and Lyft. A merger analysis that focuses only on the driver side of the platform might conclude that the merger is anticompetitive based on expected higher fees for drivers. However, due to the cross-platform network effects, anything that affects one side of the platform will also affect the other side. Higher driver fees will reduce the number of

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[56] Lapo Filistrucchi et al., "Market Definition in Two-Sided Markets: Theory and Practice," *Journal of Competition Law and Economics* 10 (2014): 303, https://academic.oup.com/jcle/article-abstract/10/2/293/2846331?redirectedFrom=fulltext, p. 303.

drivers and may lead to longer wait times for passengers. Consequently, passengers may turn to alternatives such as hailing cabs directly on the street. This substitution may constrain the merged firm's ability to raise prices to drivers, potentially leading to the conclusion that the merger is not anticompetitive. To understand the likely competitive effects of a merger of two-sided transaction platforms, it is necessary to assess the extent to which other methods for facilitating transactions exert competitive pressure on both sides of the platform. This assessment requires a relevant market definition that includes both sides.

For two-sided non-transaction platforms, both sides of the platform must still be considered, but it is necessary to define two interrelated relevant markets instead of one relevant market incorporating both sides. Consider a hypothetical merger between Twitter, an ad-supported microblogging platform, and TikTok, an ad-supported short-form video platform. The two interrelated relevant markets to consider are the market for content and the market for advertising. While Twitter and TikTok may provide similar content, if the content format matters to consumers, Twitter and TikTok may not be in the same relevant content market. A merger analysis focused strictly on the content market might find that the merger does not raise any concerns. However, from the perspective of advertisers, Twitter and TikTok are likely to be in the same relevant advertising market. That is, the fees Twitter charges to advertisers are likely to be constrained by the fees charged by TikTok and vice versa. The effect of the merger in the advertising market will depend on the relative importance of Twitter and TikTok to advertisers but need not be the same as the effect of the merger in the content market. To understand the likely competitive effects from a merger of non-transaction platforms, it is necessary to assess the extent to which substitutes in each of the two interrelated relevant markets exert competitive pressure on the merged firm. This assessment requires defining two interrelated relevant markets.

D. The importance of appropriate market definition in two-sided markets

Appropriately defining relevant markets in the presence of two-sided platforms is necessary to avoid arriving at incorrect conclusions about the competitive consequences of proposed mergers. If both sides of the platform are not considered, pro-competitive mergers may be blocked, while anti-competitive mergers may be allowed to proceed. Concerning transaction platforms, when markets are defined to only include the paying side of the platform, above-cost pricing might incorrectly be viewed as evidence of market power. Analysis of market power should consider the revenue and cost associated with serving both sides of the platform.[57] Concerning non-transaction platforms, if a platform serves two interrelated markets, a merger analysis that focuses only on the more competitive of the two markets may miss the anticompetitive consequences of the merger in the related market. Therefore, to avoid these types of errors in merger analysis, markets with zero price, negative price, or without an explicit price and markets involving competition for attention should be analyzed as two-sided platforms.

[57] Julian Wright, "One-Sided Logic in Two-Sided Markets," *Review of Network Economics* 3, no. 1 (March 2004): 47-48, https://www.rnejournal.com/articles/wright_mar04.pdf.

VIII. Special Characteristics Markets: Non-horizontal mergers

12.f. Should the guidelines address the possibility that a large firm entering a new market comprised of smaller companies by acquiring one of those market participants may eliminate potential competition or raise entry barriers and thereby substantially lessen competition?

There is growing concern that acquisitions of potential competitors by incumbent technology platforms create "kill zones" which dissuade other firms from entering and limit the competitive threat to incumbents posed by new innovative firms. Kamepalli et al. (2021) develop a model which purports to demonstrate the circumstances in which technology platforms might create kill zones.[58] In particular, they show that for sufficiently high incumbent bargaining power, a firm with a substitute platform is more likely to enter when the incumbent firm cannot acquire it. Their model evaluates how the possibility of acquisition affects a potential competitor's entry and investment decision but says nothing about how such an acquisition—or lack thereof—might affect the entry decisions of *other* potential competitors. That is, it says nothing about the creation of kill zones. The authors themselves recognize that they provide little theoretical support to the idea of kill zones and state that it would be "premature to draw any policy conclusion on antitrust enforcement" based on their model.

The idea of kill zones is not supported as a matter of economic theory, nor is it supported by the observed acquisition activity of technology platforms. Jin et al. (2022) compare the acquisition activity of GAFAM firms (Google, Amazon, Facebook, Apple, and Microsoft) to other top acquirers of technology firms over the last decade.[59] They find that 82 percent of GAFAM acquisitions are unrelated to the core business of these firms and that only 14 percent of GAFAM acquisitions are in an adjacent line of business. This demonstrates that GAFAM's acquisition activity is not focused on acquiring potential competitors to their core business. Furthermore, there is little evidence of a kill zone as both GAFAM firms and other top acquirers continue to make acquisitions in the same technology areas as their initial acquisitions over time. The initial acquisitions do not deter the entry of other firms who are later acquired.

Economic theory and evidence do not support a concern that "a large firm entering a new market comprised of smaller companies by acquiring one of those market participants may eliminate potential competition or raise entry barriers and thereby substantially lessen competition." Such entry deterrence may be pro-competitive to the extent capital is efficiently reallocated to research at the technology frontier and away from well-established technologies. Unproven theories about anticompetitive acquisition activity by firms in one sector of the economy do not merit sweeping changes to merger enforcement in every other sector of the economy. To the extent the kill zone theory is valid, which seems unlikely, it is based primarily on incumbents acquiring potential substitute products. Recent DOJ and FTC enforcement actions demonstrate that the agencies are

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[58] Sai Krishna Kamepalli et al., "Kill Zone," *NBER Working Paper*, No. 27146 (February 2021), https://www.nber.org/papers/w27146.

[59] Ginger Jin et al., "How Do Top Acquirers Compare in Technology Mergers? New Evidence from an S&P Taxonomy," *NBER Working Paper*, No. 29642 (January 2022), https://www.nber.org/papers/w29642.

more than capable of preventing anticompetitive mergers involving substitute products and services under current merger review procedures.[60]

IX. Concluding Remarks

The RFI opens the doors to an unprecedented revision of both vertical and horizontal merger guidelines simultaneously. The endeavor to revise guidelines simultaneously to being closer together merger enforcement irrespective of the nature of the merger (be it horizontal, vertical, or conglomerate) is something to welcome. Too often a merger hardly fits into one category, thus it is praiseworthy to have a consistency of merger analysis across merger guidelines.

However, the revision of guidelines takes place although the 2020 Vertical Merger Guidelines, adopted in June 2020 in the middle of a global pandemic and economic recession, have not been applied in normal economic times yet. How can one assert that these guidelines are inappropriate and unfit for market realities when they have not been utilized in normal economic times? Regarding the 2010 Horizontal Merger Guidelines, these guidelines received even larger approval by stakeholders so much so the new FTC leadership itself did not deem it necessary to rescind them when it rescinded the 2020 Vertical Merger Guidelines. In other words, the agencies' leaderships discard the 2020 Vertical Merger Guidelines without the necessary experience of these guidelines and discard the 2010 Horizontal Merger Guidelines although these guidelines have widely been recognized, even implicitly so by the current FTC leadership, as considerable improvements in merger enforcement. Consequently, it appears that the current revision of merger guidelines appears hasty.

Also, a number of concluding remarks are worth expressing as the process of revising the merger guidelines has irremediably started with the RFI. First, it is unclear how the expected merger guidelines would fit into the upcoming new approach to pharmaceutical mergers. On March 16, 2021, the FTC announced a multilateral working group to build a new approach to pharmaceutical mergers, including foreign agencies such as the Canadian Competition Bureau, European Commission Directorate General for Competition, and the United Kingdom's Competition and Markets Authority.[61] This working group has already requested public input in May 2021. It is unclear how and the extent to which the future merger guidelines would complement or substitute with the future pharmaceutical merger guidelines. Also, it is unclear why agencies should design an array of guidelines for specific sectors of the economy. After having singled out pharmaceutical mergers without clear rationale, the RFI singles out digital mergers with an equally confusing dividing line between these mergers and mergers from other sectors of the economy. Finally, it is

[60] See, for example, Federal Trade Commission, "FTC Approves Final Order Requiring Northeast Supermarkets Price Chopper and Tops Market Corp. to Sell 12 Stores as a Condition of Merger," news release, January 24, 2022, https://www.ftc.gov/news-events/press-releases/2022/01/ftc-approves-final-order-requiring-northeast-supermarkets-price.

61 Federal Trade Commission, "FTC Announces Multilateral Working Group To Build A New Approach To Pharmaceutical Mergers", March 16, 2021, HTTPS://WWW.FTC.GOV/NEWS-EVENTS/NEWS/PRESS-RELEASES/2021/03/FTC-ANNOUNCES-MULTILATERAL-WORKING-GROUP-BUILD-NEW-APPROACH-PHARMACEUTICAL-MERGERS ("a working group to update their approach to analyzing the effects of pharmaceutical mergers.")

puzzling to see that the agencies' leaderships were keen last year to engage in international coordination efforts when revising their approach to mergers but are no longer keen to do so although mergers have inevitable cross-border ramifications which warrant international coordination. Why are the agencies willing to draw international guidelines for pharmaceutical mergers but are not willing to do so for mergers generally? And to what extent the future domestic merger guidelines will be aligned with foreign agencies' approaches since the present RFI does not involve international considerations? These questions, and more generally the overall strategy of the agencies' approach to revising merger guidelines, generate considerable uncertainties and cast doubts about the agencies' desire to provide increased legal certainty and predictability for companies.

Second, agencies must keep in mind that any aggressive merger policy toward mergers may not only face judicial backlashes in courts, but would also face corporate circumventions if corporations are deterred from merging. After all, the main reason for firms to merge is to create synergies and improved or lower-cost solutions for customers via (horizontal or vertical) integration. Merging is the most integrated solution for companies' cooperation. But many alternatives exist from joint ventures to vertical restraints (i.e. exclusivity of supply, pooling of intellectual property rights, exclusive licensing, "acqui-hires" where human capital rather than financial capital is acquired…). Should mergers become virtually impossible under new merger enforcement policies, corporations will certainly continue to cooperate in order to reap off the benefits of synergies, but they would do so under different contractual arrangements. Correspondingly, an aggressive merger policy may generate greater use of so-called "restraints of trade" which are prohibited whenever they are unreasonable under Section 1 of the Sherman Act. In other words, the aggressiveness of a merger policy may crowd out merger cases under Clayton Act and crowd in cases under Section 1 of the Sherman Act. Would the economy become more competitive with the extended use of restraints of trade as opposed to mergers? Would consumers and innovation gain from such a shift? Any aggressive merger policy needs to be apprehended in the wider context of antitrust laws and how firms will react to a radical change of merger policy.

Third, the RFI adequately identifies market definition as a possible obsolete tool of antitrust enforcement in general, and of merger policy in particular. Market definitions poorly fit a dynamic approach to antitrust and mergers.[62] However, the recognition of the excessive static nature of market definitions in the RFI comes only to justify an aggressive merger policy whereby the exercise of defining market disappears so that merging firms can easily be considered as competitors despite their distance in the market. This indeterminacy of no longer defining markets would become a way to block *en masse* mergers among nonrivals. Such objective is both inconsiderate and damaging. Inconsiderate because if every company competes with every company in an open-ended exercise designed to block every merger, then companies do not compete: If competition is everywhere, competition is nowhere. Companies compete with few companies and can collaborate with others. Market studies are necessary but not as a way to supplement market definitions with a broad ban on

[62] Aurelien Portuese, "Principles of Dynamic Antitrust: Competing Through Innovation", (ITIF Report, June 2021), https://itif.org/publications/2021/06/14/principles-dynamic-antitrust-competing-through-innovation ("Market definition rules suffer from a self-contradicting rationale: Relevant markets are defined based on firms' market power inferences.58 These firms are chosen for depicting some market power, thereby anticipating the conclusion of the market definition exercise. Firms' market power can only be inferenced based on market shares. Therefore, the argument is circular, and the market definition exercise becomes a dead-end, as it intends to find the very assumptions upon which it already operates.")

all mergers whenever one of the merging companies portrays a particular size. Market definitions need to be reformed to better understand how competition takes place in the market, not to ignore the particular remits of competition in markets.

Finally, the most disturbing aspect of the RFI lies in the assumptions that mergers that may make it more difficult for rivals to compete may be deemed anticompetitive under the guidance of the agencies' new leaderships. The Schumpeterian process of creative destruction defines the dynamism of the capitalist society: Absent such a process, capitalism would be stagnant and would morph into a socialist society. But, this process of creative destruction involves…destruction! Destruction of the inefficient, destruction of the non-meritous, destruction of the non-innovative, destruction of the obsolete: Such destruction takes place in order to give way for creativity to flourish. Creative solutions, disruptive innovations, technological as well as social progress can thrive under the condition that the old was destroyed to give way for the new–i.e., the new combination, the new products, the new organization, the new source of supply, the new ideas. To prevent necessary and beneficial destructions to take place according to precautionary protection of the status quo would irremediably prevent the desirably new creations to emerge. Enforcers need to embrace disruptions, else the fierce competition unleashed by the process of creative destruction would be obstructed. Evidence has demonstrated that the process of creative destruction takes place.[63] The challenge is for enforcers to maximize, not minimize, such disruptive process with extortionately repressing merger policies.

63 Tom Nicholas, "Why Schumpeter was Right: Innovation, Market Power, and Creative Destruction in 1920s America", 63 The Journal of Economic History (2003):1023-1058.