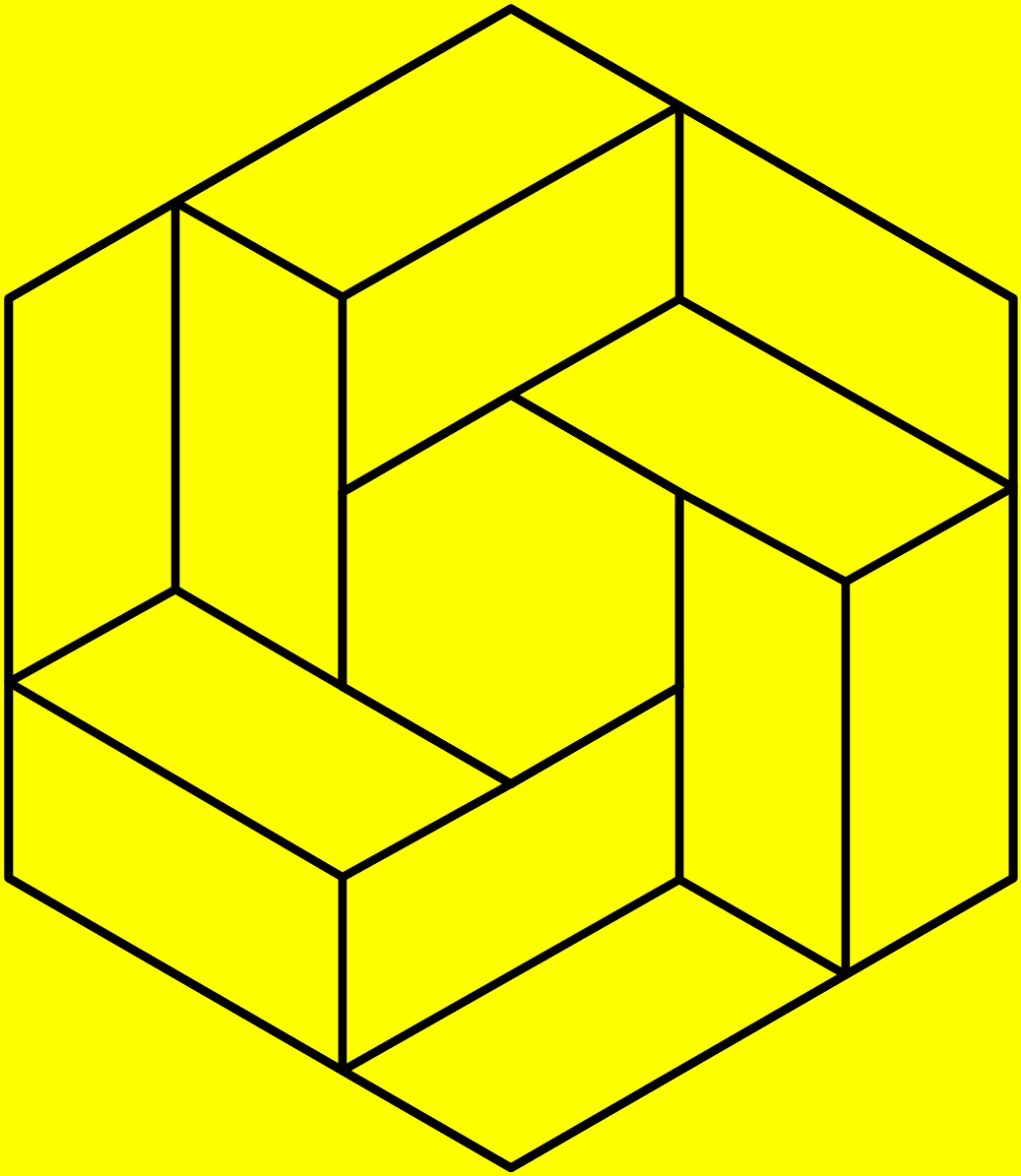
HOW THE NEW ANTI-MERGER POLICY MAY BE THE NEW ANTITRUST PARADOX



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By Maureen K. Ohlhausen & Taylor Owings

Neo-Brandeisian policies that would chill acquisitions by highly capitalized companies, or companies with 30%+ market share in some related market, would remove from the competitive race the companies that often have the best prospects for de-consolidating many markets, including digital markets that are prone to tipping.

I. INTRODUCTION

Neo-Brandeisians are in control at the White House, the Federal Trade Commission ("FTC"), and the Department of Justice Antitrust Division ("DOJ"). Raising barriers to mergers is in; concern about the impact of overenforcement is out. The classic Borkian antitrust "paradox" (that certain misguided forms of antitrust enforcement can be counterproductive to the goal of increasing competition) is out of vogue and maligned in public discourse. A little over a year since the Biden Executive Order on competition,[2] it's helpful to take stock of the Administration's policy on mergers and whether it risks falling into the original paradox of counterproductive overenforcement.

II. THE POLICY

Public statements from President Biden, FTC Chair Lina Khan, and Assistant Attorney General for Antitrust Jonathan Kanter have all sounded the call that antitrust enforcers should be discouraging or blocking more mergers.[3] The Biden Executive Order on competition prompted a joint FTC/DOJ statement expressing skepticism that the merger guidelines accurately reflect current economic realities and calling for a "hard look to determine whether they are overly permissive."[4] Tim Wu, advisor to President Biden for competition policy, has advocated for the agencies to dispense with merger review in favor of bright line rules,[5] and Chair Khan has made moves to "deter" companies from "proposing anticompetitive transactions in the first place."[6] Some legislators have proposed presuming that mergers are anticompetitive until the merging companies show otherwise.[7]

An important part of the deterrence policy, it seems, is to broadcast that the agencies are not amenable to merger remedies. In the summer of 2021, Chair Khan engaged in several public letter exchanges that announced her skepticism that agencies could identify and address isolated anticompetitive aspects of a merger: "While structural remedies generally have a stronger track record than behavioral remedies, studies show that divestitures, too, may prove inadequate in the face of an unlawful merger. In light of this, I believe the antitrust agencies should more frequently consider opposing problematic deals outright."[8] Chair Khan also embraced the scholarship of Professor John Kwoka, who has asserted

2 Executive Order on Promoting Competition in the American Economy (July 9, 2022), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

3 See *id.* (calling on the DOJ and FTC to "enforce the antitrust laws vigorously" and "challenge prior bad mergers that past Administrations did not previously challenge" amidst a Biden Administration policy of "greater scrutiny of mergers"); Remarks of Lina M. Khan Regarding Non-HSR Reported Acquisitions by Select Technology Platforms (Sept. 15, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/remarks-chair-lina-m-khan-regarding-non-hsr-reported-acquisitions-select-technology-platforms (highlighting the number of technology firms with non-HSR reportable acquisitions as a basis for re-working the merger review process); Remarks of Lina M. Khan Regarding the Request for Information on Merger Enforcement (Jan. 18, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-regarding-request-information-merger-enforcement ("This inquiry comes against the backdrop of a broader reassessment of the effects of mergers across the U.S. economy. 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."); Jonathan Kanter, Remarks of Jonathan Kanter for 2022 Spring Enforcers Summit (Apr. 4, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers (advocating for more forceful scrutiny of mergers and a renewed emphasis on litigation in favor of settlements).

4 Lina M. Khan & Richard A. Powers, Remarks of Lina M. Khan & Richard A. Powers on Competition Executive Order (July 9, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/07/statement-ftc-chair-lina-m-khan-antitrust-division-acting-assistant-attorney-general-richard-powers.

5 See Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age (2018) (recommending a "simple but *per se* ban on mergers that reduce the number of major firms to less than four").

6 Lina M. Khan Letter to Deese, Letter Exchange Between Lina M. Khan and Brian Deese, Director, National Economic Council (Aug. 25, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/08/Letter-to-Director-Deese-National-Economic-Council.pdf.

7 Senate Democrats, A Better Deal: Cracking Down on Corporate Monopolies, at 1 (2017), https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf. ("[U]nder our new standards, the largest mergers would be presumed to be anticompetitive and would be blocked unless the merging firms could establish the benefits of the deal").

8 Lina M. Khan, Letter from Lina M. Khan to Senator Elizabeth Warren on Merger Remedies (Aug. 6, 2021), https://www.warren.senate.gov/imo/media/doc/chair_khan_response_on_behavioral_remedies.pdf; Elizabeth Warren, Letter from Senator Elizabeth Warren Responding to Lina M. Khan (July 16, 2021), https://www.warren.senate.gov/imo/media/doc/FTC%20-%20DOD%20Letter%20re%20Behavioral%20Remedies%20-%207.16.21%20(Warren).pdf; See also Lina M. Khan Letter to Deese, Letter Exchange Between Lina M. Khan and Brian Deese, Director, National Economic Council (Aug. 25, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/08/Letter-to-Director-Deese-National-Economic-Council.pdf.

that merger remedies are frequently ineffective.[9] More recently, Professor Kwoka advocated for a "fix it or forget it" policy — where agencies should not consider remedies fashioned as part of a response to the merger review investigation.[10] After this article came out, Chair Khan hired Professor Kwoka as an economic advisor to the Chair.[11] Subsequently, the agencies issued their Request for Information on Merger Enforcement, which explicitly asked whether the merger guidelines should "adopt a formal process and deadlines for remedy proposals."[12]

AAG Kanter has expressed similar sentiments, and the Antitrust Division has broadcast skepticism of merger remedies in recent public speaking appearances.[13] Deputy Assistant Attorney General Andrew Forman recently warned "[i]t will be a high bar to convince us we should be comfortable enough to make a filing in federal court that [a] settlement is in the public interest."[14] This posture matches the refrain that the DOJ would prefer to litigate to block mergers outright, rather than settle cases where they have concerns.[15]

The Neo-Brandeisian policy goes beyond just speeches and signals, however. The agencies are also erecting administrative hurdles to mergers. At the FTC, Chair Khan and the majority have:

- Suspended, indefinitely, the practice of early termination, by which parties can close their transactions without delay if the agency's inquiry reveals there is no competitive concern.[16]
- Kept open some merger investigations despite the HSR waiting period expiring and issued "close at your own risk letters" so as to free the agencies from any review timeline, and to clarify that the parties should remain uncertain about the antitrust risk from closing the deal.[17]
- Consolidated investigatory powers in the Chair, including for mergers of all kinds.[18] According to Congressional testimony by then-Commissioner Noah Phillips, the resolution means less oversight by the bipartisan Commission and will result in "more real red tape on American business, large and small."[19]
- Withdrawn from the Vertical Merger Guidelines in order to clearly indicate that the FTC does not recognize efficiencies from a merger as

9 See John Kwoka, Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy (1st Ed. 2014) (analyzing "retrospective" academic studies of consummated mergers to argue federal enforcement policies are ineffective insofar as they accept remedies); Lina M. Khan, Letter from Lina M. Khan to Senator Elizabeth Warren on Merger Remedies (Aug. 6, 2021), https://www.warren.senate.gov/imo/media/doc/chair_khan_response_on_behavioral_remedies.pdf. For a summary of the criticisms of Professor Kwoka's retrospective merger study, see Pallavi Guniganti and Charles McConnell, FTC economist criticizes Kwoka merger study, *Global Competition Review*, (July 18, 2017), https://globalcompetitionreview.com/gcr-usa/article/ftc-economist-criticises-kwoka-merger-study.

10 John Kwoka & Spencer Weber Waller, Fix it or Forget It: A "No Remedies" Policy for Merger Enforcement, *Competition Policy International* (Aug. 17, 2021), https://www.competitionpolicyinternational.com/fix-it-or-forget-it-a-no-remedies-policy-for-merger-enforcement/.

11 See Lina M. Khan, Announcement by Chair Lina M. Khan on New Agency Appointments (Nov. 19, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-chair-lina-m-khan-announces-new-appointments-agency-leadership-positions (appointing John Kwoka to Chief Economist to the Chair).

12 Fed. Trade Comm'n, Press Release, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers.

13 See Remarks of Jonathan Kanter for Georgetown Antitrust Law Symposium (Sept. 13, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-speech-georgetown-antitrust (advocating for a structural presumption for coordinated effects and for a presumption against mergers where there is direct evidence of "head to head competition");

14 Andrew Forman, Remarks of Deputy Assistant Attorney General Andrew Forman to the ABA M&A Committee (Sept. 17, 2021), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-andrew-forman-antitrust-division-delivers-remarks-aba.

15 See Jonathan Kanter, Remarks of Jonathan Kanter for 2022 Spring Enforcers Summit (April 4, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers (advocating for more forceful scrutiny of mergers and a renewed emphasis on litigation in favor of settlements); see also Bryan Koenig, DOJ Willing to Challenge Mergers Before Investigations End, *Law360* (Apr. 6, 2022), https://www.law360.com/articles/1481559/doj-willing-to-challenge-mergers-before-investigations-end.

16 Fed. Trade Comm'n, Press Release, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination.

17 Fed. Trade Comm'n, Press Release, FTC Adjusts its Merger Review Process to Deal with Increase in Merger Filings (Aug. 3, 2021) https://www.ftc.gov/news-events/news/press-releases/2021/08/ftc-adjusts-its-merger-review-process-deal-increase-merger-filings, see also Christine Wilson, Statement of Commissioner Christine Wilson Regarding the Announcement of Pre-Consummation Warning Letters (Aug. 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf.

18 Fed. Trade Comm'n, Press Release, Federal Trade Commission Authorizes Three New Compulsory Process Resolutions for Investigations (Aug. 26, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/08/federal-trade-commission-authorizes-three-new-compulsory-process-resolutions-investigations#:~:text=The%20Federal%20Trade%20Commission%20has%20approved%20three%20omnibus,to%20seek%20compulsory%20process%20in%20each%20related%20case.

19 See Noah Joshua Phillips, Oral Statement of Commissioner Noah Phillips Before House Committee on Energy and Commerce (July 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592981/prepared_statement_0728_house_ec_hearing_72821_for_posting.pdf/.

relevant to the legal question whether the merger will substantially lessen competition.[20]

- Required, going forward, "all merging parties subject to a Commission order to obtain prior approval from the FTC before closing any future transaction affecting each relevant market for which a violation was alleged," and extended significant similar prior approval requirements on divestiture buyers as well.[21]

All these administrative hurdles undergird a policy of chilling merger activity generally. These moves may be a prelude to a major substantive overhaul of the merger guidelines, if that is the result of the agencies' Request for Information on Merger Enforcement.[22]

The text of the RFI, along with the statements of Chair Khan and AAG Kanter accompanying the release of the RFI, suggest that the agencies are looking for ways to classify more mergers as illegal, on theories that have not been relied upon since the 1970s. Indeed, Neo-Brandeisian groups have expressly argued that the agencies should follow the approach set out in the 1968 Merger Guidelines.[23] They argue that the strict market-share-based thresholds for horizontal and vertical mergers in that set of guidelines "reflect the Clayton Act's purpose 'to preserve and promote market structures conducive to competition.'"[24] Chair Khan and the FTC majority reflected those same goals when they pulled the FTC out of the 2020 Vertical Merger Guidelines. The plan for a new set of guidelines, the FTC majority explained, is to dispense with the need "to predict which specific mechanism will lead to [the] lessening on competition in a specific case" in favor of relying on "evidence that a particular market structure tends to lessen competition."[25] The goal is to identify more mergers that are "presumptively anticompetitive."[26]

Likewise, AAG Kanter's remarks demonstrated an interest in classifying additional mergers as unlawful under the little-used, "tends to create a monopoly" prong of Section 7.[27] Shortly after announcing the merger guidelines RFI, AAG Kanter explained that he is worried about acquisitions even if the deal rationale is to compete more vigorously on the merits. He explained, "As enforcers, if we focus only on acquisitions of firms already set to enter a market, we miss acquisitions that allow digital platforms to strengthen their moats through innovation."[28]

These comments show that both Chair Khan and AAG Kanter are especially concerned by the M&A activity of what they call "dominant" firms. Under this theory, already-large companies should be barred from acquiring additional resources for growth, because the primary concern is not facilitating or protecting competition on the merits, but rather preserving "structural" outcomes. The Neo-Brandeisians point to a Senate

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20 Fed. Trade Comm'n, Press Release, Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary (Sept. 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary.

21 Fed. Trade Comm'n, Commission Statement, Use of Prior Approval Provision in Merger Orders (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

22 U.S. Dept. of Just. & Fed. Trade Comm'n, *Request for Information on Merger Enforcement* (Jan. 18, 2022) [hereinafter "RFI"], https://www.regulations.gov/document/FTC-2022-0003-0001.

23 Open Markets Institute and American Economic Liberties Project, Comment to the FTC & DOJ Vertical Merger Guidelines, *The Federal Trade Commission and the Department of Justice Should Abandon the Proposed Vertical Merger Guidelines and Embrace the Framework of the 1968 Guidelines* 21 (Feb. 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/comment_to_ftc-doj_re_vertical_merger_guidelines.pdf. See also Open Markets Institute, Press Release (Apr. 21, 2022), "Open Markets Institute Files Comment to FTC & DOJ on Merger Enforcement, et al., https://www.openmarketsinstitute.org/publications/response-by-the-open-markets-institute-to-the-request-by-the-federal-trade-commission-and-the-antitrust-division-of-the-department-of-justice-for-information-on-merger-enforcement.

24 Open Markets Institute, Press Release (Apr. 21, 2022), "Open Markets Institute Files Comment to FTC & DOJ on Merger Enforcement, et al., at 22 (quoting U.S. Dep't of Justice, 1968 Merger Guidelines §2) (emphasis supplied); Open Markets Institute, *The Failure and Potential Redemption of Federal Merger Policy*, FTC Comment 2 (Aug. 20, 2018) ("The FTC, along with the DOJ, must develop new guidelines on horizontal and vertical mergers. The agencies should look to the 1968 Merger Guidelines as a template. Accordingly, they should abandon the current rule of reason-like framework and establish market share and market concentration thresholds for horizontal and vertical mergers. Mergers that exceed these thresholds should be presumptively or per se illegal."), available at https://www.openmarketsinstitute.org/publications/open-markets-submits-comments-federal-trade-commission-upcoming-hearings-competition-consumer-protection-21st-century; Sandeep Vaheesan, *Two-and-a-Half Cheers for 1960s Merger Policy*, HLS Antitrust Association (Dec. 12, 2019), https://orgs.law.harvard.edu/antitrust/2019/12/12/two-and-a-half-cheers-for-1960s-merger-policy/ ("1960s merger policy, as embodied in the 1968 Guidelines, should be treated as a template. Strong rules, tied to market share and firm size, against all types of mergers are critical for controlling corporate power."); *id.* (praising 1968 guidelines, though taking issue that they did not do more on conglomerate effects).

25 Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, & Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines Commission at 6–7, File No. P810034 (Sep. 15, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-commissioner-rohit-chopra-commissioner-rebecca-kelly-slaughter.

26 *Id.*

27 Jonathan Kanter, AAG, Modern Competition Challenges Require Modern Merger Guidelines, DOJ (Jan. 18, 2022), https://www.justice.gov/opa/speech/file/1463546/download.

28 AAG Jonathan Kanter Delivers Keynote at CRA Conference, Keynote (Mar. 31, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-cra-conference.

report that the aim of Section 7 "is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects."[29] The main target for these concerns are companies that are highly capitalized and have a large number of users.

The U.S House of Representatives conducted an investigation[30] into Amazon, Apple, Google/Alphabet, and Facebook/Meta, culminating in a 2020 report that was co-authored by Chair Khan, and cited by her now that she is at the FTC.[31] The legislative proposals coming out of this report, including one banning mergers, targeted companies based on their market capitalization and number of online users.[32] The implication is that acquisitions by the very large companies are always, or almost always, competitively harmful. But this policy of chilling mergers in general, and acquisitions by large companies in particular, should be more closely examined before it is adopted in the merger guidelines, where, if wrong, it will take years of litigation to undo.

III. THE PARADOX

There is no agreement on a single, optimal structure for a competitive and innovative market,[33] and chilling mergers across the board on the presumption that maintaining a less concentrated market is always superior could hamper one of the economy's engines for innovation and competition. The paradox of the Neo-Brandeisian policy is that its targets — highly capitalized companies and companies with a strong reputation, or large number of users, in an adjacent product market — may often be the very best candidates to reposition into consolidated markets, where innovation and competition are most needed. Restricting the best-qualified companies in particular from acquiring the resources that would facilitate successful entry in concentrated markets is a policy that itself may substantially lessen competition.

Business and antitrust scholars alike agree that some consolidated markets are most likely to see entry and real competition only from other highly capitalized competitors. Digital markets experts frequently observe that the most powerful competitive forces are coming from large platforms competing against each other.[34] This makes sense where there are huge benefits to operating at scale. A company that already benefits from network effects or other size advantages may in many instances only be threatened by the prospect that another company could get to a similarly large, efficient operating size.

For many companies, including innovative start-ups, entry at that sort of size is out of reach. But two realistic methods of successful entry could be accomplished by large companies not currently in the market: they could cross-sell a large number of already-existing customers in an adjacent market, or they could invest large amounts of capital to "buy" new customers through introductory offers and other methods of attracting customers on the merits. Maintaining the threat of potential competition thus depends in part on creating a regulatory environment where highly capitalized companies, or companies with a lot of customers in an adjacent market, have all the available tools for entry at their disposal.

This phenomenon is on display in the so-called "streaming wars."[35] Though the "N" in Netflix sometimes made an appearance in the acronym referring to the supposedly moat-protected tech companies — "FAANG" — highly capitalized companies have launched streaming services in direct competition with it, betting that they can finance growth with low-priced introductory subscription offers and massive invest-

29 *Id.* (quoting S. Rep. No. 1775, 81st Cong., 2d Sess. 4-5 (1950)).

30 The House's investigation included a review of documents, testimony, submissions, and interviews. U.S. House of Representatives, Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations at 8 (Oct. 2, 2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519.

31 See Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines Commission 8, n.42, File No. P810034 (Sept. 15, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-commissioner-rohit-chopra-commissioner-rebecca-kelly-slaughter (citing Majority Staff Rep. and Recommendations of the Subcomm. on Antitrust, Commercial, and Admin. Law of the Comm. On the Judiciary, 116th Cong., Investigation of Competition in Digital Markets, at 406-31(2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519.

32 See, e.g. H.R. 3826 – Platform Competition and Opportunity Act of 2021 – 117th Cong. (introduced June 11, 2021 by Rep. Jeffries), available at https://www.congress.gov/bill/117th-congress/house-bill/3826?q=%7B%22search%22%3A%5B%22jeffries%22%5D%7D&s=1&r=8.

33 See, e.g. Carl Shapiro, Competition and Innovation Did Arrow Hit the Bull's Eye? (describing the continuing Arrow-Schumpeter debate on the relationship between market structure and innovation), available at https://faculty.haas.berkeley.edu/shapiro/arrow.pdf.

34 *The New Rules of Competition in the Technology Industry*, The Economist (Feb. 27, 2021), https://www.economist.com/business/2021/02/27/the-new-rules-of-competition-in-the-technology-industry; Ben Thompson, *First, Do No Harm*, Stratechery (Feb. 12, 2020), https://stratechery.com/2020/first-do-no-harm/ (for instance, preventing Snap from acquiring technologies that enable new features would stunt one of the most effective competitive forces in Meta's market).

35 See Ramon Lobato & Amanda Lotz, *Beyond Streaming Wars: Rethinking Competition in Video Services*, Media Industries 8(1) (2021), available at https://doi.org/10.3998/mij.1338 (describing the history of the "streaming wars" cultural narrative and the metrics along on which video content services compete). See also Joe Flint, *The War for Talent in the Age of Netflix*, The Wall Street Journal (Sept. 21, 2019), https://www.wsj.com/articles/the-war-for-talent-in-the-age-of-netflix-11569038435.

ments in unique "tentpole" content. These highly capitalized companies — Apple, Amazon, Disney (the 1st, 5th, and 42nd largest companies by market cap in the world, at the time of this writing) — are investing heavily to grow their streaming platforms.[36] They may also get a jump by cross-selling to their existing customers: Amazon to its Prime subscribers, and Apple to its hardware-owning installed base. The hope is that this will result in the same sort of economies of scale that Netflix enjoys, which economies are critical for any competitor that provides high-fixed cost content at low marginal cost to digital subscribers. The strategy is working to create competition so fierce that it is regularly denominated a "war."

Other digital markets commentators have observed a similar dynamic in the fierce rivalry between Apple and Meta, where Apple is moving into advertising while Meta is moving into hardware, making them each a dangerous rival for the other.[37] This type of competition has also played out in the Chinese digital economy in the past ten years: Alibaba's e-commerce dominance peaked at 62 percent in 2013, and has receded to about 50 percent since. Its fiercest competition has been from digital rival Tencent — which made important investments in e-commerce and, more recently, in another core Alibaba market: cloud computing.[38] These investments have challenged Alibaba in its core areas of market leadership, even though they are adjacent to Tencent's core competencies in social media and gaming. The Economist magazine summarized this economy-wide trend among the largest U.S. tech companies: the share of total revenue that substantively overlaps with the revenue earned by other big tech firms grew by nearly 20 percentage points from 2015 to 2020.[39]

The U.S. antitrust agencies, too, have previously acknowledged that not all firms can be viable potential entrants in consolidated markets and there is a special type of firm that "could use its pre-existing operations to facilitate entry" into a market.[40] In the 2020 Vertical Merger Guidelines, the agencies explained the conditions for entry into a special type of consolidated market: one where a vertically integrated company controls an input that other firms need to compete downstream. In this scenario, the vertically integrated firm will face competitive pressure only if there is a credible threat that a rival firm can enter at both levels of the market. As the agencies explained, "This two-level entry may be more costly and riskier than entering the relevant market alone, and thus may deter [potential competitors] from entering." Highly capitalized companies are in a much better position to make these sorts of costly and risky investments to establish a new source of the upstream input. Additionally, firms with a large presence in an adjacent market may be able to utilize aspects of that existing business model to re-create the needed upstream input.

As an example, let's return for a moment to the head-to-head competition in China: Alibaba, as an e-commerce company first, had a natural advantage in creating a third-party mobile payment market because it already had access to users' wallets when they paid for Alibaba transactions.[41] But Tencent was able to leverage an adjacent market to re-create this critical input: Tencent introduced a peer-to-peer payment function as part of its chat service. Its existing competency in connecting people was closely enough related to third-party payments that it was able to establish access to consumers' wallets in order to build the downstream payments business. The two companies are now fierce competitors in this downstream market, despite Alibaba's early lead.[42]

So, granting that some large firms may be the best potential entrants into consolidated markets, the question remains: why allow them to enter by acquisition? Is there any reason to suspect that they will be more successful as entrants if they are allowed to buy, rather than being forced to build, the operational capabilities they need in the consolidated market? There are several reasons the answer is yes.

The first reason is the relative length of time it takes to build rather than buy. In the very markets that Neo-Brandeisians are most worried about — digital markets prone to network effects and tipping — time to market is of the essence. The sooner a rival can enter, the sooner it can

36 Lauren Forristal, *Report: Top Streaming Companies Will Spend $140.5 Billion on Content in 2022*, The Streamable (Jan. 18, 2022), https://thestreamable.com/news/new-data-shows-top-9-media-and-tech-companies-will-spend-140-5-billion-on-content-in-2022; Sergei Klebnikov, *Streaming Wars Continue: Here's How Much Netflix, Amazon, Disney+ And Their Rivals Are Spending On New Content*, Forbes (May 22, 2020), https://www.forbes.com/sites/sergeiklebnikov/2020/05/22/streaming-wars-continue-heres-how-much-netflix-amazon-disney-and-their-rivals-are-spending-on-new-content/?sh=7be68657623b.

37 Brett Ryder, *Apple's Duel with Facebook is a New Form of Big-Tech Rivalry*, The Economist (Feb. 27, 2021); Mark Gurman, *Apple Finds Its Next Big Business: Showing Ads on Your iPhone*, Bloomberg (Aug. 14, 2022), https://www.bloomberg.com/news/newsletters/2022-08-14/apple-aapl-set-to-expand-advertising-bringing-ads-to-maps-tv-and-books-apps-l6tdqqmg.

38 *The New Rules of Competition in the Technology Industry*, The Economist (Feb. 27, 2021), https://www.economist.com/business/2021/02/27/the-new-rules-of-competition-in-the-technology-industry.

39 *Id.*

40 Fed. Trade Comm'n and U.S. Dept. of Justice, Vertical Merger Guidelines (June 30, 2020) at 1, https://www.justice.gov/atr/page/file/1290686/download.

41 Liyan Chen, *Red Envelope War: How Alibaba and Tencent Fight Over Chinese New Year*, Forbes (Feb. 19, 2015), https://www.forbes.com/sites/liyanchen/2015/02/19/red-envelope-war-how-alibaba-and-tencent-fight-over-chinese-new-year/?sh=3ecbea8bcddd.

42 Eva Xiao, *How WeChat Pay became Alipay's Largest Rival*, TechinAsia (Apr. 20, 2017), https://www.techinasia.com/wechat-pay-vs-alipay.

compete for contested users and get to a minimum efficient scale. If the incumbent goes unchallenged for long enough, it may absorb so much of the addressable market that there would not be enough users left over for the challenger to reach minimum efficient scale.

The second reason to allow an acquisition that would facilitate entry is because, when the antitrust agencies are reviewing such a transaction, the directors and officers of the company have already assessed the relative costs and benefits of the build-versus-buy question and decided that it would be strategically advantageous to buy rather than build.[43] Business management scholarship suggests a couple reasons why this might be the case:[44]

1) The acquired firm has resources that the purchasing firm needs to achieve an operational efficiency (e.g. matching a product to a distribution network, or a unique combination of engineering resources that can solve a design problem); or
2) The acquired firm's business model is transformative, and the purchasing firm sees the need to adapt.

We see examples from the digital revolution that both of these strategies are utilized by highly capitalized companies and support entry into markets where the incumbent players are already large. For instance, Apple purchased chip designer P.A. Semi in 2008, whose engineering resources allowed Apple to solve the specific design problem of optimizing power consumption for mobile devices.[45] This resource play allowed Apple to enter and compete against entrenched incumbents like Nokia, Motorola, and Samsung in the mobile device market.

Another highly capitalized company, Walmart Inc., bought Jet.com in 2016 to acquire its unique business model: Jet.com had e-commerce strengths in a niche, urban market.[46] E-commerce was a disruptive threat to Walmart's traditional brick-and-mortar business, and, with the rise of Amazon.com, Walmart recognized that it would need to adapt in order to stay competitive. As business theorists instruct, it was critical that Walmart buy rather than attempt to build every aspect of the disruptive business model on its own Walmart.com site.

Clayton M. Christensen, the Harvard Business School professor who coined the term "disruptive innovation," recommends to acquirers that they not force too much integration between old and new business models and instead allow disruptors to innovate and transform the industry without being forced into the metrics and methods of the incumbent.[47] That's how Walmart, with Jet.com, could enter and really compete directly against Amazon.com with features like two-day and next-day delivery, in an e-commerce business that was unlike its traditional business model.[48]

Walmart and Apple are success stories of entry through acquisition, providing new competition and spurring transformative innovations that benefitted consumers. Surely antitrust enforcers should not want to chill acquisitions of these kinds, where buying resources or transforming a business model through acquisition provides the best chance of successful entry. And yet that is exactly what the Neo-Brandesian merger policy risks doing. They often justify the policy by suggesting that overenforcement is preferrable to underenforcement. Perhaps they'll erroneously block an Apple/P.A. Semi or Walmart/Jet.com here and there, but they believe on balance the negative effect is justified by preventing "killer acquisitions" and other problematic mergers through a general policy of chilling mergers by highly capitalized, or highly popular companies.

But where is the evidence of a great number of "killer acquisitions" or other problematic mergers that need chilling? The FTC recently conducted a 6(b) study looking back at ten years of non-reportable acquisitions by Google/Alphabet, Apple, Facebook/Meta, Amazon, and Microsoft.[49] However, the 2021 staff report summarizing those acquisitions points out no evidence that the antitrust agencies missed any problematic

43 Indeed, the FTC's model Second Request includes a question designed to elicit the build-versus-buy comparative analysis performed as part of the decision to do the deal under review. See Question 21, FTC Model Second Request (Oct. 2021) at https://www.ftc.gov/system/files/attachments/hsr-resources/model_second_request_-_final_-_october_2021.pdf ("Describe in detail, quantify (if possible), and submit all documents relating to the benefits, costs, and risks anticipated as a result of the Proposed Transaction, including . . . an explanation of why the Company could not achieve each benefit, cost saving, economy, or other efficiency without the Proposed Transaction . . . .").

44 See Clayton M. Christensen et al., "The Big Idea: The New M&A Playbook," *Harvard Business Review* (Mar. 2011). There is also the influence of opportunity costs, where internal resources that would be used to build a capability might be directed to an even more productive use.

45 *Id.*

46 Dennis Green, *Walmart's $3.3 billion Acquisition of Jet.com is Still the Foundation on Which all of its E-Commerce Dreams are Built*, Business Insider (June 13, 2019), https://www.businessinsider.com/walmart-acquisition-of-jet-gave-ecommerce-boost-2019-6.

47 Clayton M. Christensen et al., "The Big Idea: The New M&A Playbook," *Harvard Business Review* (Mar. 2011).

48 Dennis Green, *Walmart's $3.3 billion Acquisition of Jet.com is Still the Foundation on Which all of its E-Commerce Dreams are Built*, Business Insider (June 13, 2019), https://www.businessinsider.com/walmart-acquisition-of-jet-gave-ecommerce-boost-2019-6.

49 Fed. Trade Comm'n, Press Release, FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies (Sept. 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-staff-presents-report-nearly-decade-unreported-acquisitions-biggest-technology-companies#:~:text=FTC%20Staff%20Presents%20Report%20on%20Nearly%20a%20Decade,Amazon%2C%20Apple%2C%20Facebook%2C%20and%20Microsoft%20September%2015%2C%202021.

mergers, and it suggests no industry- or market-wide practices over the longitudinal period that could reasonably suggest systemic underenforcement.

In fact, when researchers took an independent look at the same S&P 500 data that the FTC used in its 6(b) study, they found that the tech company acquisitions were rarely in the same market and tended to be correlated with a future increase in other companies acquiring in that same market.[50] Far from supporting a "killer acquisition" or "kill zone" hypothesis, the data was instead consistent with the hypothesis that tech companies are investing in and trying to forge new business offerings in the same "greenfield" space where lots of firms see room to grow.

Moreover, the fact that tech companies do not go back to the same area to buy additional companies tends to support the two deal rationales found in the business management literature discussed above: the data look more consistent with the thesis that the companies were buying rather than building when they wanted to sponsor competitive entry and needed some new resource or wanted to bet on a new, niche (and perhaps disruptive) business model to see whether it would transform the industry. If entry was the rationale, it would make sense to make one capability-enhancing acquisition in a particular area, and then move along to build other capabilities or place other bets.

Regardless of whether the past ten years of large tech company acquisitions can be explained by any single strategy, there is certainly no indication that the retrospective proved the Neo-Brandeisians' thesis of systematic underenforcement. Without this evidentiary underpinning, their policy will not create the desired results. At best, they will waste resources challenging individual mergers that are procompetitive or competitively neutral. At worst, they will undermine their own goal of deconcentrating markets by systematically chilling mergers that would have been important sources of entry.

IV. CONCLUSION

If the Neo-Brandeisians are serious about increasing market competition, they should consider where they need to recalibrate their policy: they should take a case-by-case approach in understanding deal rationales and avoid using administrative burdens to raise costs for acquisitions by large companies. The merger guidelines review will be an important test of which path the DOJ and FTC will take and whether they will be the authors either of a measured policy refinement or, perhaps, of the next antitrust paradox.

50 Ginger Zhe Jin et al., How Do Top Acquirers Compare in Technology Mergers? New Evidence From an S&P Taxonomy at 9 (Jan. 2022), https://www.nber.org/papers/w29642 ("In net, as far as our dataset and analyses indicate, the results seem inconsistent with competition concerns regarding kill zones, foreclosure, or raising rivals' costs, though of course, we cannot rule out the possibility that these concerns do exist but may be associated by non-majority transactions or are potentially cancelled out or affected by the potential positive signal that GAFAM acquisitions may convey about the profitability of the target category.")

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