COST-BENEFIT ANALYSIS WITHOUT THE BENEFITS OR THE ANALYSIS: HOW NOT TO DRAFT MERGER GUIDELINES

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ABSTRACT

Previous iterations of the DOJ/FTC Merger Guidelines have articulated a clear, rigorous, and transparent methodology for balancing the procompetitive benefits of mergers against their anticompetitive costs. By describing agency practice, clear guidelines deter anticompetitive mergers while encouraging procompetitive ones, ensure consistent and reasonable enforcement, increase public understanding and confidence, and promote international cooperation.

But the 2023 Draft Merger Guidelines do not. They go to great lengths to articulate the potential anticompetitive costs of mergers but with no way to gauge "substantiality." Most significantly, they ignore potential benefits of mergers, which eliminates the need for balancing. In other words, the Draft Guidelines provide very little guidance about current practice, which increases enforcement risk and thus deters mergers, which may be the point of the Draft Guidelines. In this Article, we offer specific recommendations that do a better job differentiating pro- from anticompetitive horizontal, vertical, and tech mergers.

KEY WORDS: Antitrust, Merger Enforcement, Horizontal Mergers, Vertical Mergers, Technology Mergers.

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INTRODUCTION

The wealth-creating engine of capitalism is the movement of assets to higher-valued uses.[1] Our biggest and most valuable assets, and those with the greatest wealth-creating potential, are corporations. Antitrust law and practice work to facilitate this movement, while deterring the types of mergers that substantially lessen competition.

In the past, the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") (together, "the Agencies") have jointly issued guidelines for evaluating mergers that guide agency practice.[2] The guidelines have evolved over time to reflect changes in economic theory, legal doctrine, and the Agencies' enforcement experiences. Guidelines tell us what matters, why it matters, and most importantly how much it matters.

By articulating a clear, rigorous, and transparent methodology for distinguishing pro- from anticompetitive mergers, guidelines have encouraged good mergers and deterred bad ones, measured mostly by their effect on consumers, as the different iterations of guidelines provided antitrust enforcers and potential merging parties a common framework to evaluate evidence and argue cases.[3] As such, each iteration of the guidelines encouraged a dialog between potential plaintiffs and defendants and between attorneys and economists that moved antitrust law and policy forward to promote competition and innovation.

But the 2023 Draft Merger Guidelines[4] ("Draft Guidelines") move law and policy backwards. They begin with the premise that the bipartisan consensus of the past forty years has led to a gross underenforcement of the law, resulting in undue concentration and bad outcomes, measured not by whether consumers were harmed, but rather by whether competitors or others were.

The Draft Guidelines try to justify their approach by saying that they will not try to predict the effects of mergers; instead, they rely on legal principles from cherry-picked older decisions superseded by a long body of case law. As such, the Draft Guidelines seem atavistic, yearning for a return to a golden past that does not reflect the modern evolution of law or

1. *See generally* LUKE M. FROEB, BRIAN T. MCCANN, MIKE SHOR & MICHAEL R. WARD, MANAGERIAL ECONOMICS: A PROBLEM-SOLVING APPROACH (6th ed. 2023) (discussing core tenets of economics and the latest economic developments).

2. U.S. DEP'T. OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES 4 (drft. 2023) [hereinafter 2023 DRAFT GUIDELINES], http://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf [https://perma.cc/27WE-JVT5].

3. *See* Daniel A. Crane, *Rethinking Merger Efficiencies*, 110 MICH. L. REV. 347, 352 (2011).

4. 2023 DRAFT GUIDELINES, *supra* note 2.

economics.[5] Worse, in the new guidelines, economic analysis is relegated to one of four appendices rather than serving as the basis for the legal analysis. By sequestering the economics, legal burden shifting becomes untethered from economics, and incoherent.

We believe that merger enforcement should aggressively target only anticompetitive mergers while encouraging procompetitive ones. The Draft Guidelines have identified several scenarios where, under the right facts, a merger may be anticompetitive, but the Draft Guidelines say nothing about mergers that will not be challenged. Moreover, a set of scenarios is not a substitute for an analytical framework. Without one, we are left wondering how the Agencies will distinguish good from bad mergers. In sum, the Draft Guidelines do not provide much guidance.

Furthermore, by jettisoning the traditional analytical framework, adopted largely by the U.S. courts, the Draft Guidelines increase enforcement uncertainty, which deters mergers, regardless of whether they are anticompetitive.[6] Judges will eventually realize that the Agencies are both bringing cases against procompetitive mergers and potentially failing to bring cases against anticompetitive ones, and discount the guidelines. As a result, these Draft Guidelines could, ironically, entrench case law that at times has been too lenient.

There is a better way. Guidelines should continue to recognize that most mergers have no anticompetitive effects, may have efficiency benefits, and articulate a safe harbor. For mergers outside the safe harbor, guidelines should use economics to determine whether a merger's anticompetitive costs are substantial and describe how the Agencies will predict whether a merger's costs are likely to outweigh its benefits. Without this, the Draft Guidelines violate the most basic rule of law: predictability.[7]

In the subsequent Sections, we propose a cost-benefit approach grounded in economics and more in alignment with current case law and presumptions.[8] As such, it is more likely to succeed in court. We focus on

5. *Cf.* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSPS. 43, 58 (2000).

6. *See* D. Daniel Sokol, Marissa Ginn, Robert J. Calzaretta, Jr. & Marcello Santana, *Antitrust Mergers and Regulatory Uncertainty*, 78 BUS. LAW. 1, 14–15 (forthcoming Fall 2023); Alice Bonaime, Huseyin Gulen & Mihai Ion, *Does Policy Uncertainty Affect Mergers and Acquisitions?*, 129 J. FIN. ECON. 531, 542 (2018).

7. *See* Gregory Werden, *Two Bridges Too Far: First Take on the Draft Merger Guidelines*, COMPETITION POL'Y INT'L (Sept. 5, 2023), https://www.pymnts.com/cpi_posts/two-bridges-too-far-first-take-on-the-draft-merger-guidelines [https://perma.cc/R9EG-ZAZ3].

8. While the proposed guidelines often ignore more current doctrine, there is perhaps a lack of understanding that the Supreme Court believes antitrust must change with advances in economics. *See*

three areas of merger control: horizontal, vertical, and tech mergers.

I. HORIZONTAL MERGERS

The overwhelming majority of mergers are benign or procompetitive, reducing costs or generating some kind of synergy.[9] Only a small number substantially lessen competition. Identifying those that do can be done with empirical comparisons, like previous mergers in the same industry, or with economic models that characterize observed competition (calibration) and measure the loss of competition (simulation).

Market delineation combined with concentration thresholds are useful starting points to the analysis. Although different concentration measures are more appropriate in some settings like auctions,[10] the change—much more than the level—of the Herfindahl Hirschman Index ("HHI") seems to capture the loss in competition for common models.[11] However, the competitive effects of changes in the HHI depend on the size of the efficiencies and the aggregate elasticity of consumer demand.[12] Though Volker Nocke and Michael Whinston wrote their 2022 paper as a critique of the high thresholds in the 2010 Merger Guidelines, their results can also be read as criticism of the thresholds in the 2023 Draft Guidelines:

> In terms of stringency, our results indicate that the thresholds in the current 2010 *Guidelines* are likely too lax, given the markets the agencies typically allege in litigation, unless one expects efficiency gains of 5 percent or greater from the typical merger, or other factors such as entry

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Kimble v. Marvel Ent., LLC, 576 U.S. 446, 461 (2015) ("We have therefore felt relatively free to revise our legal analysis as economic understanding evolves and . . . to reverse antitrust precedents that misperceived a practice's competitive consequences.").

9. *See, e.g.*, DAVID L. MEYER, U.S. DEP'T. OF JUST. ANTITRUST DIV., MERGER ENFORCEMENT IS ALIVE AND WELL AT THE DEPARTMENT OF JUSTICE 1 (Nov. 15, 2007), https://www.justice.gov/atr/file/519351/download [https://perma.cc/32PN-43YH] ("We recognize that most mergers are procompetitive, or at least competitively neutral, and we will not interfere with those transactions."); William H. Stallings, Gail F. Levine & Kathryn Lloyd, *The FTC's Proposed HSR Changes: What They Mean for Dealmakers*, MAYER BROWN (Jul. 7, 2023), https://www.mayerbrown.com/en/perspectives-events/publications/2023/07/the-ftcs-proposed-hsr-changes-what-they-mean-for-dealmakers [https://perma.cc/2W3E-EWP2] ("In other words, the Agencies had *no* interest in the overwhelming number of reported transactions (3,143 of 3,413, or 92% of the FY 2021 total).").

10. *See* Luke M. Froeb, Vladimir Mares, Steven Tschantz & Charles Taragin, *The Simple Algebra of Surplus in Private Values Open Auctions: A Nested Logit Merger Model*, ECON. BULL. 8 (Dec. 2, 2018), http://www.accessecon.com/Pubs/EB/2018/Volume38/EB-18-V38-I4-P209.pdf [https://perma.cc/TPQ9-Y46F].

11. *See* 2023 DRAFT GUIDELINES, *supra* note 2, at 22.

12. *E.g.*, Luke M. Froeb & Gregory J. Werden, *A Robust Test for Consumer Welfare Enhancing Mergers Among Sellers of a Homogeneous Product*, 58 ECON. LETTERS 367, 369 (1998). *See generally* Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, 10 B.E. J. THEORETICAL ECON., no. 1, 2010.

> and product repositioning to significantly constrain the exercise of market power postmerger.[13]

The main message of their paper is that concentration thresholds are merely starting points to merger analysis, which, as starting points, already offer a globally recognized standard.[14] To the extent that presumptions are developed, we suggest using the Hypothetical Monopolist paradigm to delineate markets and recognize that the change in HHI matters much more than the level.[15] Simply put, the magnitude of change in HHI that would prevent consumer harm depends on the aggregate elasticity of demand and on the size of the merger synergies. This is a shortcoming that should have been straightforward to address in any new guidelines. As a screen, we would recommend safe harbor for a change in HHI that is below 200, with the recognition that the economically correct threshold depends on the size of the efficiencies, the elasticity of demand, and the mode of competition (bargaining, bidding, pricing, or quantity).

II. VERTICAL MERGERS

In cases where mergers combine substitutes, harm to competition may arise from the internalization of horizontal pricing externalities, which may push prices up. When mergers internalize vertical pricing externalities, the opposite is true. This is satisfied under linear pricing, whether pricing is sequential (in vertical situations) or simultaneous (as in the Cournot complements case).[16] Consequently, the benefits of the elimination of double marginalization and Cournot complements are mathematically opposite to horizontal effects.[17] It would, therefore, be misguided to treat vertical and horizontal mergers similarly.[18]

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13. Volker Nocke & Michael D. Whinston, *Concentration Thresholds for Horizontal Mergers*, 112 AM. ECON. REV. 1915, 1946 (2022); *see also* U.S. DEP'T. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 19 (2010).

14. Org. for Econ. Coop. & Dev. [OECD], Market Concentration, at 4–5, OECD Doc. DAF/COMP/WD(2018)46 (Apr. 20, 2018) ("To form a preliminary assessment of the strength of competition in a given market, competition agencies often rely on market concentration as an imperfect indicator. However, this is done with caution since there is an ambiguous relationship between the structure of a market and the intensity of competition within that market.").

15. For a discussion of the Hypothetical Monopolist paradigm, see Malcolm B. Coate & Jeffrey H. Fischer, *A Practical Guide to the Hypothetical Monopolist Test for Market Definition*, 4 J. COMPETITION L. & ECON. 1031 (2008).

16. Daniel P. O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, *in* THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 46–51 (Arvid Fredenberg & Sten Nyberg eds., Swedish Competition Auth. 7th ed. 2008).

17. *Id.* at 51.

18. *See* Carl Shapiro & Herbert Hovenkamp, *How Will the FTC Evaluate Vertical Mergers?*, PROMARKET (Sept. 23, 2021), https://www.promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-

There is a similar argument regarding investments in cases of complementary versus substitute investments, although demand shifts may behave differently, potentially causing an over- or undersupply of variety or quality.[19] Once again, it would be highly unwise to make the same assumptions for these two cases.

Empirical studies, more often than not, confirm these effects: integrated firms internalize competition from complements in their decision-making.[20] The resulting benefits occur when market power exists at both levels, and it is a broadly applicable point. While firms may occasionally contract around the issues, and integrated firms may impose harm on competitors, it is the net effect that is important. This evidence does not endorse treating vertical mergers in the same way as horizontal ones.

The European Non-Horizontal Guidelines have pushed the impact of pricing and investment externalities in non-horizontal mergers into the realm of efficiencies, where externalities are treated as afterthoughts.[21] The DOJ and FTC followed suit in the since-abandoned 2020 Vertical Merger Guidelines.[22] We are now in a situation where benefits from the internalization of pricing and complementary investment externalities are being sidelined as add-on efficiencies, rather than being recognized as integral effects on price or investment. As such, efficiencies are often overlooked by the Agencies. These efficiencies matter.

We offer an alternative approach. The Agencies should embrace

shapiro-hovenkamp [https://perma.cc/9WAJ-45AL] ("[W]e find it very helpful to think of [elimination of double marginalization] as just one example of a far more general concept: *some supply chains are handled more efficiently within a single firm than through contract*. An extensive economic literature about vertical integration and 'make or buy' decisions teaches us that vertical integration can spur innovation and greatly benefit consumers, especially when new methods require risky investments and coordination throughout the supply chain.").

19. *See generally* Nirvikar Singh & Xavier Vives, *Price and Quantity Competition in a Differentiated Duopoly*, 15 RAND J. ECON. 546 (1984) (substitutes); Craig Minerva, Loren K. Smith & Peter Herrick, *The Other Side of the Coin: Complementarity in Mergers of Multiproduct Firms*, ANTITRUST MAG. ONLINE, Oct. 2021 (complements in mergers).

20. *See* Laurent Frésard, Gerard Hoberg & Gordon M. Phillips, *Innovation Activities and Integration Through Vertical Acquisitions*, 33 REV. FIN. STUD. 2937, 2940 (2020); Enghin Atalay, Ali Hortaçsu & Chad Syverson, *Vertical Integration and Input Flows*, 104 AM. ECON. REV. 1120, 1120 (2014); Jaideep Shenoy, *An Examination of the Efficiency, Foreclosure, and Collusion Rationales for Vertical Takeovers*, 58 MGMT. SCI. 1482, 1498–99 (2012). *But see* Fernando Luco & Guillermo Marshall, *The Competitive Impact of Vertical Integration by Multiproduct Firms*, 110 AM. ECON. REV. 2041, 2061 (2020).

21. Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2008 O.J. (C 265) 6 (EC).

22. U.S. DEP'T. OF JUST. & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES (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 [https://perma.cc/N6KP-VTL4].

benefits and harms instead of *efficiencies* and harms. This is more than a change in nomenclature: benefits stemming from the internalization of externalities that cause price or investment effects in vertical mergers should not be overlooked—they should be viewed as direct effects, just like price effects in horizontal mergers. Thus, the Agencies should incorporate a balance of harms and benefits of vertical mergers by computing their net effect on consumers.[23]

III. TECHNOLOGY MERGERS

Nothing is more important than technological innovation. In the late 1950s, Nobel Laureate Robert Solow attributed about seven-eighths of the growth in U.S. GDP to technical progress,[24] and stressed the importance of policies to encourage growth—"[a]dding a couple of tenths of a percentage point to the growth rate is an achievement that eventually dwarfs in welfare significance any of the standard goals of economic policy,"[25] which includes antitrust.

The FTC and DOJ as antitrust enforcers can have a big effect on innovation by reducing the rewards from innovating.[26] In particular, acquisitions of tech firms often create incentives that induce firms to enter and innovate. However, these acquisitions can also eliminate future rivalry. Of course, there will be particular mergers that may threaten innovation, and there may be new antitrust learnings about specific markets that should be incorporated into the guidelines, but the critical issue is to create a system that weighs the pros and cons of mergers. The larger empirical literature suggests that merger and acquisition activities can promote innovation.[27]

23. *See* Fed. Trade Comm'n v. Microsoft Corp., No. 23-cv-02880-JSC, 2023 U.S. Dist. LEXIS 119001, at *75 (N.D. Cal. July 10, 2023) ("The Court finds, however, that even if the FTC had met its burden, the balance of equities do not fall in its favor."); United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 141 (D.D.C. 2022) ("Governing law requires the Court to 'mak[e] a prediction about the future,' and that prediction must be informed by 'record evidence' and a 'fact-specific showing' as to the proposed merger's likely effect on competition. Under this standard, 'antitrust theory and speculation cannot trump facts.' ") (citations omitted).

24. Robert M. Solow, *Technical Change and the Aggregate Production Function*, 39 REV. ECON & STAT. 312, 316 (1957).

25. Robert M. Solow, Nobel Prize Lecture: Growth Theory and After (Dec. 8, 1987), https://www.nobelprize.org/prizes/economic-sciences/1987/solow/lecture [https://perma.cc/Y9YG-V9DW].

26. *See* Richard N. Langlois, *Warren and Graham Emulate History's Failed Regulators*, WALL ST. J. (Aug. 4, 2023, 2:13 PM), https://www.wsj.com/articles/warren-and-graham-emulate-historys-failed-regulators-innovation-big-tech-firms-1ca2002d [https://perma.cc/3N4E-5DN4].

27. *See* Jan Bena & Kai Li, *Corporate Innovations and Mergers and Acquisitions*, 69 J. FIN. 1923, 1923 (2014); Marianna Makri, Michael A. Hitt & Peter J. Lane, *Complementary Technologies, Knowledge Relatedness, and Invention Outcomes in High Technology Mergers and Acquisitions*, 31

However, the Draft Guidelines single out tech acquisitions as a particular problem. The basis for this is a 2021 FTC study that collected data on acquisitions by Google (Alphabet), Apple, Facebook (Meta), Amazon, and Microsoft (collectively, "GAFAM")[28] for the stated purpose of analyzing the effects of these acquisitions on competition.[29] However, the FTC did not include these data in its report, or an analysis of the potential competitive effects of GAFAM acquisitions, ex ante or retrospectively.

Fortunately, academic research has stepped in to address questions that the FTC did not, including the competitive impact of GAFAM acquisitions in the areas in which these acquisitions occurred. Based on these works, two sets of conclusions have so far been reached. First, acquisitions of technology companies are critical in creating the incentives to enter and innovate—for technology ventures, exits via acquisitions are about five times more likely than IPOs.[30] These exits create an ex ante incentive to innovate. In addition, investors evaluate regulatory risks as part of their due diligence when considering an investment; excessive regulatory risks, like those posed by uncertain antitrust enforcement, can deter investors from investing, particularly in the early and growth stages of ventures.[31]

STRATEGIC MGMT. J. 602, 602 (2010).

28. FED. TRADE COMM'N, NON-HSR REPORTED ACQUISITIONS BY SELECT TECHNOLOGY PLATFORMS, 2010–2019 (2021). For the 2010–2019 period, the FTC's study reports the number of GAFAM acquisitions above $1 million, the frequency of acquisitions, the distribution of the acquisition amounts in dollars, the types of acquisitions, whether they were domestic in nature, some features of their corresponding merger agreements, the target companies' business areas, and the age distribution of the acquired companies. According to the FTC study, there were 616 acquisitions by GAFAM above $1 million during 2010–2019, but about two-thirds of them were below $25 million and about 80% were below $50 million. *See id.* at 13.

29. At the outset, the FTC had suggested that the study would assess whether the transactions had any impact—positive or negative—on competition. Press Release, Fed. Trade Comm'n, FTC to Examine Past Acquisitions by Large Tech. Cos. (Feb. 11, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies [https://perma.cc/8DQG-FNNP] ("The Commission plans to use the information obtained in this study to examine trends in acquisitions and the structure of deals, including whether acquisitions not subject to HSR notification might have raised competitive concerns.").

30. Dan Wang, Emily Cox Pahnke & Rory M. McDonald, *The Past Is Prologue? Venture-Capital Syndicates' Collaborative Experience and Start-Up Exits*, 65 ACAD. MGMT. J. 371, 378 (2022).

31. *See* Jian Jia, Ginger Zhe Jin & Liad Wagman, *The Short-Run Effects of the General Data Protection Regulation on Technology Venture Investment*, 40 MKTG. SCI. 661, 662 (2021); Jian Jia, Ginger Zhe Jin & Liad Wagman, *Data Regulation and Technology Venture Investment: What Do We Learn From GDPR?*, COMPETITION POL'Y INT'L ANTITRUST CHRON., Jan. 2021, at 2, https://www.competitionpolicyinternational.com/wp-content/uploads/2021/01/6-Data-Regulation-and-Technology-Venture-Investment-What-Do-We-Learn-From-GDPR-By-Jian-Jia-Ginger-Zhe-Jin-Liad-Wagman.pdf [https://perma.cc/3UKS-KUUE]; Jian Jia, Ginger Zhe Jin & Liad Wagman, *The Persisting Effects of the EU General Data Protection Regulation on Technology Venture Investment*, ANTITRUST SOURCE, June 2021, at 1, https://www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/2021/june-2021/jun2021-jia.pdf [https://perma.cc/A85J-NACL].

Second, evidence suggests that GAFAM acquisitions do not necessarily pose anticompetitive risks; rather, they may encourage competition. GAFAM acquisitions account for less than 1.5% of tech acquisitions, and on a per-firm basis, other firms have matched or exceeded GAFAM in the volume of majority-control acquisitions each year since 2018.[32] In areas where GAFAM acquisitions have occurred, there tends to be an increase in acquisitions by other firms, undermining claims that GAFAM acquisitions deter future competition.[33] GAFAM primarily acquire tech companies in areas beyond their core businesses, and competition both within GAFAM and between GAFAM and other leading technology incumbents has been steadily rising.[34] Finally, investment in an industry increases in the short-term following a GAFAM acquisition in that industry.[35]

Relatedly, the only peer-reviewed case study of a specific high-profile tech acquisition merger finds that Facebook's (Meta's) integration of Instagram led to increased demand by consumers in the photo sharing industry following the merger. The study finds that Facebook's increased role in the photo sharing ecosystem through the acquisition of Instagram ultimately benefited the complementary market by increasing overall "foot traffic" in the space.[36]

These peer-reviewed empirical findings do not support the suggestion in the Draft Guidelines that tech acquisitions are likely to harm competition and consumers. Instead, allowing acquisitions of smaller tech companies and ventures by firms with "sufficient size and resources to enter," including potentially minority acquisitions, can better promote investment, innovation, and possibly competition than requiring would-be acquirers to develop the technologies in-house.[37] Acquirers with "sufficient size and resources" create the incentives to innovate in the first place—the prospect of acquisition attracts entry and investment.[38] The FTC/DOJ Draft Guidelines

32. Ginger Zhe Jin, Mario Leccese & Liad Wagman, *How Do Top Acquirers Compare in Technology Mergers? New Evidence from an SP Taxonomy*, 89 INT'L J. INDUS. ORG., Nov. 2022, at 9–10.

33. *Id.*

34. *Id.*

35. *See* Tiago S. Prado & Johannes M. Bauer, *Big Tech Platform Acquisitions of Start-Ups and Venture Capital Funding for Innovation*, 59 INFO. ECON. & POL'y, May 2022 (examining approximately 32,000 venture capital investments and 400 tech venture acquisitions by GAFAM firms from 2010 to 2020).

36. Zhuoxin Li & Ashish Agarwal, *Platform Integration and Demand Spillovers in Complementary Markets: Evidence from Facebook's Integration of Instagram*, 63 MGMT. SCI. 3438, 3455 (2017).

37. *See* 2023 DRAFT GUIDELINES, *supra* note 2, at 11–13.

38. Gary Dushnitsky & D. Daniel Sokol, *Mergers, Antitrust, and the Interplay of Entrepreneurial*

seek to eliminate this incentive, which may chill new innovation, and harm competition and consumers.

CONCLUSION

The new Draft Merger Guidelines are a missed opportunity to effectively guide agency enforcement. Without a coherent merger analysis that embraces both costs and benefits and does not relegate economics to secondary status in an appendix, the Draft Guidelines will likely deter mergers, regardless of whether they are anticompetitive. And if the Draft Guidelines are rejected by the courts, they may end up entrenching the 2010 Guidelines, which the Agencies' current heads see as too lenient, via case law. Paradoxically, under the Draft Guidelines, with its presumptions divorced from both economics and its application to law, the Agencies may find it harder to win good cases.

Activity and the Investments That Fund It, 24 VAND. J. ENT. & TECH. L. 255, 262 (2022).