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ABSTRACT

This article analyses the proposals for reversing theburden of proof in the review of acquisitions by GAFAM, along with the experimental studies that retrospectively analyse these acquisitions. It finds that these proposals, which are based on the presumptions that acquisitions by GAFAM are anti-competitive, are not warranted in light of the experimental studies and enforcement track records of the Federal Trade Commission and Department of Justice. This article also highlights that there is evidence indicating that the consumer benefits stemming from acquisitions by GAFAM may outweigh any possible anti-competitive impact and emphasizes that the proposals for the reversal of the burden of proof undermine (i) the risk of losing synergies and chilling innovation; (ii) the legitimate motivations of parties for conducting such acquisitions; and (iii) the risk of entrenching larger firms' market power while discouraging smaller firms from competing and innovating. All in all, highlighting the lack of empirical evidence on the anti-competitive harm and risks that may arise as a result of reversing the burden of proof, this article concludes that even erring on the side of under-enforcement, in relation to the review of these mergers until revealing their actual competitive effect, may be preferable to the alternative.

Cet article analyse les propositions de renversement de la charge de la preuve dans l'examen des acquisitions par les GAFAM, ainsi que les études expérimentales qui analysent rétrospectivement ces acquisitions. Il constate que ces propositions, qui reposent sur la présomption que les acquisitions par les GAFAM sont anticoncurrentielles, ne sont pas justifiées à la lumière des études expérimentales et des antécédents en matière d'application de la loi de la Federal Trade Commission et du Department of Justice. Cet article souligne également qu'il existe des preuves indiquant que les avantages pour les consommateurs découlant des acquisitions par les GAFAM peuvent l'emporter sur tout impact anticoncurrentiel éventuel et souligne que les propositions de renversement de la charge de la preuve compromettent (i) le risque de perdre des synergies et de freiner l'innovation ; (ii) les motivations légitimes des parties à réaliser de telles acquisitions ; et (iii) le risque de renforcer le pouvoir de marché des grandes entreprises tout en décourageant les petites entreprises de se faire concurrence et d'innover. Dans l'ensemble, en soulignant le manque de preuves empiriques sur les dommages et les risques anticoncurrentiels qui peuvent résulter du renversement de la charge de la preuve, cet article conclut que même une erreur du côté de la sous-application, en ce qui concerne l'examen de ces fusions jusqu'à ce que leur effet concurrentiel réel soit révélé, peut être préférable à l'alternative.

I. Introduction

1. Acquisitions by the five major technology companies—namely, Alphabet Inc. ("Google"), Amazon.com, Inc. ("Amazon"), Meta Platforms, Inc. ("Facebook"), Apple Inc. ("Apple") and Microsoft Corp. ("Microsoft") (together referred to as "GAFAM")—have been at the centre of the merger policy debate in recent years. The alleged concerns regarding these acquisitions point out, among others, that (i) GAFAM may be conducting these acquisitions to terminate the targets' relevant innovation efforts and eliminating nascent competitive threats;[1] (ii) GAFAM's entrance into a new market may discourage other new entries into that market;[2] and (iii) GAFAM may require the users of the acquired platform and their primary platform to give consent for the bundling of the data collected from the two relevant platforms so that GAFAM may increase their market power in the target market by monetizing the data collected through the primary platform and the primary platform can be shielded from competition.[3]

2. In this line of reasoning, the report of the Stigler Committee on Digital Platforms ("Stigler Report") argues that "*acquisition by a dominant platform of a much smaller and possibly nascent firm could be very damaging to competition if, absent the acquisition, the smaller firm would develop into a major competitive threat or would lead to significant change in the nature of the market.*"[4] Also, the US House of Representatives Majority Staff Report on Investigation of Competition in Digital Markets ("US Majority Staff Report") remarks that the "dominant platforms" conducted several hundred acquisitions from 2000 to 2019 and argues that such acquisitions may eliminate nascent competitors.[5]

1 For different models related to various theories of harm in relation to big tech mergers, *see* M. Motta and M. Peitz, Big tech mergers, *Information Economics and Policy*, Vol. 54, 2021 art. No. 100868.

2 S. K. Kamepalli, R. Rajan and L. Zingales, Kill Zone, *NBER Working Paper* No. 27146, 2022.

3 D. Condorelli and J. Padilla, Harnessing Platform Envelopment in the Digital World, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3504025.

4 Stigler Center for the Study of the Economy and the State, Stigler Committee on Digital Platforms: Final Report, 2019, p. 88, https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf.

5 J. Nadler and D. N. Cicilline, Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, 2020, p. 387, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519.

3. This begs the question of what a nascent competitor is. The term "nascent competitor" is used for an undertaking "*with an existing product or technology, whether inside or outside some relevant product market, that could, at some point, be considered a significant competitor, or be developed into a significant competitor.*"[6] Therefore, it differs from a potential competitor—an undertaking that is likely to develop a competing product.[7] The nascent competitor may be active in an adjacent market at the time of the acquisition.[8] According to Yun, the assessment of both potential and nascent competition requires a forecast about entry, but the assessment of nascent competition also entails a forecast about future differentiation of an existing technology and the level of success of this differentiated technology (i.e. whether it would become a significant competitor).[9]

4. Moreover, some nascent acquisitions are considered "killer acquisitions." In such acquisitions, the acquirer conducts the transaction to "*terminate the development of the target's innovations to preempt future competition.*"[10] Cunningham et al. analysed the acquisitions in the pharmaceutical sector and asserted that the incumbent undertakings are more likely to cease the development of the acquired companies' products if there is an overlap between the said product and the existing product of the acquirer.[11] They also claimed that (i) 5.3% to 7.4% of the acquisitions that they have analysed can be considered killer acquisitions, and (ii) the parties to killer acquisitions seem to have avoided the review of competition authorities as their transaction value remained below the notification thresholds.[12] Caffarra et al., on the other hand, argued that the more prevalent case in the digital market is "reverse killer acquisitions" as opposed to "killer acquisitions." They claimed that post acquisitions, rather than ceasing the innovation of the target, the buyers forego their stand-alone expansion and innovation efforts in relation to the target's market.[13]

5. Also, Kamepalli et al. introduced another concept to this matter, which is creating "kill zones." They argued that with the acquisitions, the acquirer with existing market power in the digital industry extends its power in the market in which the target is active and makes the new technology available for everyone, thereby decreasing the benefit of early adoption of this technology. They allege that this decreases the value of other stand-alone entrants into the target's market and ultimately discourages potential new entries into the market.[14]

6. This ongoing debate on nascent acquisitions by digital firms has led to the emergence of legislative change proposals targeting acquisitions in the digital sector. This article analyses the legislative change proposals brought forward in the US regarding acquisitions by GAFAM in light of experimental studies where the effect/pattern of the acquisitions made by GAFAM are analysed retrospectively. This article concludes that the proposals for the reversal of the burden of proof, which are based on the presumptions that acquisitions by GAFAM are anti-competitive and that the current merger regime resulted in under-enforcement in the review of these acquisitions, are not warranted, since (i) the experimental evidence, including a recent report published by the Federal Trade Commission ("FTC"), either disproves or fails to prove that acquisitions by GAFAM actually restrict competition or innovation, and (ii) the enforcement record of the FTC and the Department of Justice ("DOJ") does not support the argument that the current merger regime leads to an under-enforcement in relation to the nascent/potential competition cases. This article also highlights the risks that the proposals for the reversal of the burden of proof may undermine.

7. Accordingly, Section II of the article explains the relevant proposals. Section III assesses the rationale behind the proposals for the reversal of the burden of proof and explains that such rationale is not supported by evidence based on the analyses of the experimental studies, including a recent report published by the FTC and the enforcement record of the agencies. Section IV analyses the proposals for the reversal of the burden of proof in light of (i) the lack of evidence of under-enforcement; (ii) the lack of evidence of the restrictive effect of these acquisitions on competition and innovation; (iii) the possible risks that may arise if the proposals are implemented; and (iv) the evidence related to the pro-consumer effects of acquisitions by GAFAM.

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6 J. M. Yun, Potential Competition, Nascent Competitors, and Killer Acquisitions, *The Global Antitrust Institute Report on the Digital Economy*, Vol. 18, 2020, p. 655.

7 Ibid., p. 654.

8 T. J. Penfield and M. Pallman, Looking Ahead: Nascent Competitor Acquisition Challenges in the "TechLash" Era, *The Antitrust Source*, June 2020, p. 2, https://www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/2020/june-2020/jun20_penfield_6_17f.pdf.

9 Yun, *supra* note 6, p. 655.

10 C. Cunningham, F. Ederer and S. Ma, Killer Acquisitions, *Journal of Political Economy*, Vol. 129, No. 3, 2021, DOI: https://doi.org/10.1086/712506, p.1.

11 Ibid., p. 3.

12 Ibid., p. 4–5.

13 C. Caffarra, G. Crawford and T. Valletti, "How Tech Rolls": Potential Competition and "Reverse" Killer Acquisitions, *Competition Policy International*, 2020, https://www.competitionpolicyinternational.com/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions/#.

14 Kamepalli, Rajan and Zingales, *supra* note 2.

II. The proposals regarding acquisitions by GAFAM

8. Several proposals have been put forward in the US in the last few years regarding the amendments to the law applicable to acquisitions by GAFAM. This article analyses the proposals for the reversal of the burden of proof in these cases. Other proposals concerning these acquisitions—i.e. the proposals regarding lowering the thresholds for mandatory notification and the rules that the FTC applies to be able to scrutinize the mergers in more detail—are also explained for the sake of completeness.

1. The proposals for the reversal of the burden of proof

9. There are certain proposals which involve requiring GAFAM to prove the lack of competitive harm in their acquisitions to be able to proceed with their transactions. The Stigler Report, for one, recommends that the burden of proof be reversed in reviewing the transactions involving a dominant platform.[15] The US Majority Staff Report also suggests that there should be a presumption against the acquisitions of nascent competitors and the acquisitions by dominant platforms.[16] According to the US Majority Staff Report, the parties may rebut the presumption by proving that "*the transaction was necessary for serving the public interest and that similar benefits could not be achieved through internal growth and expansion.*"[17] The US Majority Staff Report also suggests that Section 7 of the Clayton Act should be amended in a way that will enable the authorities to challenge transactions based on potential harm to nascent competition without proving that the target would enter the market in the counterfactual scenario.[18]

10. With respect to the legislative proposals, the draft Consolidation Prevention and Competition Promotion Act of 2017 proposed that there should be an outright ban on the transactions of large platforms that meet certain criteria.[19] This bill was not enacted.[20] The draft Competition and Antitrust Law Enforcement Act of 2021 proposes that if, among others, the transaction parties' annual sales or capitalization exceed certain thresholds, or the transaction concerns the acquisition by an undertaking holding 50% market share or with "*significant market power*" in a market where the acquirer "*competes or has a reasonable probability of competing*" with the target, the parties must prove that any harm to competition would not be more than *de minimis*; otherwise, the transaction would be deemed anti-competitive.[21] The draft Trust-Busting for the Twenty-First Century Act of 2021 proposes that if the acquirer's market capitalization exceeds a certain threshold and the effect of such transaction "*may be to lessen competition in any way*," the transaction must be prohibited.[22] The draft Tougher Enforcement Against Monopolies Act of 2021 proposes presumptions against transactions where the transaction parties "*compete, would compete, or would attempt to compete against each other, absent the transaction*."[23] The draft Platform Competition and Opportunity Act of 2021 proposes to prohibit acquisitions by certain digital companies unless they prove, based on "*clear and convincing evidence*," that the target is not a nascent or potential competitor.[24] Even beyond these proposals, the draft Prohibiting Anti-competitive Mergers Act of 2022 proposes to empower antitrust authorities to reject acquisitions valued at over $5 billion, outright in the first instance, without obtaining a court injunction.[25]

2. The proposals for lowering the thresholds for mandatory notification and rules that FTC applies for increased scrutiny

11. With respect to the notifiability thresholds, a common proposal is to make all acquisitions by GAFAM subject to mandatory notification, regardless of the transaction's size and the parties' revenue.

12. As background information in this matter, under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), the mandatory notification requirements are triggered if certain thresholds are met. Accordingly, if there is no applicable exemption (e.g. if the target has insufficient nexus to the US), the transaction must be notified if (i) either of the parties to a transaction is engaged in commerce or in any activity affecting commerce, and (ii) the transaction value exceeds $200 million (as adjusted, $403.9 million in 2022).[26] If the transaction value exceeds $50 million (as adjusted,

15 Stigler Report, *supra* note 4, p. 93.

16 US Majority Staff Report, *supra* note 5, pp. 388, 394.

17 Ibid., p. 388.

18 Ibid., p. 394.

19 Consolidation Prevention and Competition Promotion Act of 2017, S. 1812, 115th Cong. (2017) § 3.

20 *See* GovTrack.us, S. 1812 (115th): Consolidation Prevention and Competition Promotion Act of 2017, https://www.govtrack.us/congress/bills/115/s1812.

21 Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (2021) § 4.

22 The draft Trust-Busting for the Twenty-First Century Act S. 1074, 117th Cong. (2021) § 3.

23 *See* the Section Headings of Tougher Enforcement Against Monopolies Act, S. 2039, 117th Cong. (2021) § 7(c)(2) and 7(c)(3).

24 The draft Platform Competition and Opportunity Act of 2021, H.R. 3826, 117th Cong. (2021) § 2.

25 The draft Prohibiting Anticompetitive Mergers Act of 2022, Section 3, para. 14(a), and Section 4(a)(3) and Section 4(2), https://www.warren.senate.gov/imo/media/doc/SIL22464.pdf.

26 For the adjusted amounts *see* FTC, Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 24 January 2022, https://www.ftc.gov/enforcement/premerger-notification-program/current-thresholds.

$101 million in 2022) but does not exceed $200 million (as adjusted, $403.9 million in 2022), the transaction must only be notified if the value of the parties' turnover and/or assets exceed certain thresholds.[27] However, the FTC and DOJ may also review a transaction which is not notifiable under the HSR Act (Clayton Act 1914 s. 7; Sherman Antitrust Act 1890 ss. 1–2, Federal Trade Commission Act 1914 s. 5).[28] Furthermore, they may review the transactions even after their consummation (for a recent example, see McLaughlin, 2021).[29]

13. Accordingly, regarding the updates in the thresholds, the Stigler Report suggests that digital companies that are found to hold a certain level of market power based on qualitative criteria should report all of their transactions before consummation, notwithstanding the size of the transaction.[30] The US Majority Staff Report also states that dominant platforms must notify all of their transactions.[31] Similarly, the draft Trust-Busting for the Twenty-First Century Act of 2021 proposes that "*dominant digital firms*" must notify all of their transactions.[32]

14. Parallel to the above proposals, and following the surge in merger applications, the FTC needed to address the challenges to its review process. In August 2021, the FTC announced that in cases where it will not be able to fully review the transaction within thirty days, it will send a standard form letter to companies stating that (i) it may challenge the transaction as the investigation is still open, and (ii) companies that close their transactions that have not been fully investigated are acting at their own peril.[33]

15. In October 2021, the FTC announced that it had restored its practice of requiring the firms that settled an anti-competitive deal to obtain approval from the FTC before closing any of their future transaction concerning the markets where there was an allegation of violation for at least ten years.[34]

27 HSR Act 15 U.S.C. § 18a.

28 Clayton Act 15 U.S.C. § 18 (1914), s. 7; Sherman Antitrust Act 15 U.S.C. §§ 1–7, ss. 1 and 2; Federal Trade Commission Act 15 U.S.C. §§ 41–58, s. 5.

29 D. McLaughlin, Google Closes Fitbit Deal Amid Ongoing U.S. DOJ Review, *Bloomberg Law*, 14 January 2021, https://news.bloomberglaw.com/antitrust/google-closes-fitbit-deal-amid-ongoing-u-s-doj-review?context=search&index=10.

30 Stigler Report, *supra* note 4, pp. 33 and 111.

31 US Majority Staff Report, *supra* note 5, p. 388.

32 The draft Trust-Busting for the Twenty-First Century Act S. 1074, 117th Cong. (2021) § 3.

33 H. Vedova, Adjusting merger review to deal with the surge in merger filings, FTC Competition Matters Blog, 3 August 2021, https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings. Under the HSR Act, the agency has thirty days to review the notified transactions and request further information if needed. The law allows the US authorities to investigate and prohibit a merger even after the consummation, although this has not been common in practice, since (i) if the transaction did not give rise to any material concern, the FTC let the thirty-day period expire, and (ii) if the transaction gave rise to any concern, the FTC informed the parties that they should restart the thirty-day period by refiling the transaction. *See* J. Jaeckel, A. Okuliar and D. J. Shaw, United States: Merger Review Process, *Global Competition Review*, 20 December 2021, p. 2, https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2022/article/united-states-merger-review-process.

34 *See* FTC, press release, FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers, 25 October 2021, https://www.ftc.gov/news-events/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive.

III. The rationale behind the proposals for reversing the burden of proof and whether such rationale is supported by experimental studies

16. The radical reform proposals aiming to reverse the burden of proof for the review of acquisitions by GAFAM are based on the presumptions that (i) acquisitions by GAFAM are anti-competitive and, relatedly, (ii) the current merger regime resulted in under-enforcement in the review of these acquisitions. However, although some theories of harm related to the competitive harm that may arise from such acquisitions are currently being discussed, there is no evidence to support the presumption of anti-competitive harm, even after a series of experimental studies where the effects and patterns of these acquisitions are analysed retrospectively, one of which has been conducted by the FTC. Moreover, the enforcement record of the FTC and DOJ under both Article 7 of the Clayton Act and Section 2 of the Sherman Act in relation to nascent acquisitions does not support the view that the current regime prevents the agencies from challenging these mergers.

1. The findings of the FTC's Report and whether these findings support the view that the acquisitions conducted by GAFAM were anti-competitive in light of subsequent studies

17. As a very recent study, the FTC released its report ("FTC's Report") on acquisitions by GAFAM that were consummated between January 2010 and December 2019 but not notified to the competition authorities under the HSR Act.[35]

18. The FTC's Report was based on the information provided by the relevant technology companies as per the special orders issued by the FTC under Section 6(b)

35 Non-HSR Reported Acquisitions by Select Technology Platforms, 2010–2019: An FTC Study, September 2021, https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf.

of the Federal Trade Commission Act, which authorizes the FTC to require companies to answer its information requests in writing. According to the FTC's Report, the aim of these special orders was to deepen the FTC's understanding of their acquisitions in light of concerns that these companies restricted competition and innovation through conducting serial acquisitions of their nascent competitors.[36] With that in mind, the FTC's special orders requested the undertakings, inter alia, to (i) identify the transactions that they have not notified to the competition authorities and (ii) provide information about these transactions in scope and detail similar to what is required under the standard HSR notification form.[37]

19. The FTC's Report finds that GAFAM conducted 616 non-notifiable transactions whose transaction value exceeds $1 million and approximately 60 transactions whose transaction value is below $1 million.[38] The FTC's Report focuses on the 616 transactions above $1 million transaction value. The following findings of the FTC's Report are relevant for the purposes of this article:

- The number of transactions in each transaction size bracket (i.e. from $1 million to $5 million, from $5 million to $10 million, from $10 million to $25 million, from $25 million to $50 million, from $50 million to the HSR threshold) generally increased during the period between 2010 and 2019.[39]
- For 68% of the analysed transactions, the companies also provided information about the number of non-sales employees of the target who were hired by the acquirers post-transaction. In 50% of these transactions about which the relevant information was provided, the number of non-sales employees of the target hired by the acquirer was between 1 and 10.[40]
- The target's age was below five years in at least 39.3% of the transactions where the relevant data is available. The relevant data was available in 86.9% of the transactions.[41]

20. It is important to note from the outset that the FTC's Report does not provide any evidence to support the argument that the acquisitions by GAFAM were anti-competitive. This should, in effect, also rule out any proposal for adopting a presumption against these acquisitions.

21. First of all, the FTC's Report does not assess the actual or potential horizontal and vertical overlaps between the activities of the target and the acquirer in the relevant acquisitions. The FTC's Report also (i) does not provide any explanation on whether these transactions were aimed at eliminating nascent competition, or had led to the discontinuation of the targets' nascent technologies, and (ii) does not reach any conclusion about the actual effects of these transactions on innovation and competition, despite the fact that the aim of the report was to deepen the FTC's understanding on the impact of these transactions.[42]

22. Moreover, the results are more likely to support the conclusion that most acquisitions do not seem to have the characteristics expected from killer acquisitions. The statistics released in the FTC's Report show that, excluding targets whose founding date is missing, the target's age was equal to or above five years in approximately 55% of the transactions and equal to or above ten years in approximately 23% of the transactions.[43] As rightly pointed out by Yun, in order to argue that an existing business over five or ten years old poses an emerging/nascent threat to the acquirer, the target business should have some additional features, for example, a new business line that would bring a new market entry/expansion that may cause a nascent threat to the business of the incumbent. Otherwise, the threat should be mature and evident from the market parameters such as market shares—which is beyond the threat that is argued to exist in these acquisitions. Hence, the statistics reveal that, for most of the transactions conducted by GAFAM during the period, it is not easy to argue that nascent competition was eliminated in the absence of additional findings related to the target.[44] Furthermore, approximately 65% of the transactions' value was below $25 million, and approximately 79% of the transactions' value was below $50 million.[45] At this point, Yun rightly notes that although a killer acquisition may involve a target that is valued at a low price, it is generally expected that a target that poses a substantial threat to the incumbent would not be valued at low price levels.[46]

23. In addition, although the FTC's Report shows that technology companies are increasingly conducting transactions that remain below the HSR thresholds, such a finding in itself is not sufficient to raise any alarms since the FTC's Report does not compare these statistics with the statistics related to the acquisitions by other companies.[47] Indeed, a recent study comparing acquisitions by GAFAM with acquisitions by other top acquirers between 2010 and 2020 reveals that (i) the pace of acquisitions by the top 25 private equity firms is higher

36 Ibid., pp. 1–2, citing, among others, Nadler and Cicilline, *supra* note 5.

37 Order to File a Special Report, FTC Matter No. P201201, February 2020, https://www.ftc.gov/system/files/documents/reports/6b-orders-file-special-reports-technology-platform-companies/6b_platform_study_sample_order.pdf.

38 The FTC's Report, *supra* note 35, pp. 13, 36.

39 Ibid., p. 14

40 Ibid., p. 37.

41 Ibid., p. 25.

42 Ibid., pp. 1–2.

43 Ibid., p. 25, figure 21 "Transactions by Target Age Group (Using Earliest Available Founding Year When Information Differs)."

44 J. Yun, Discriminatory Antitrust in the Realm of Potential and Nascent Competition, *CPI Antitrust Chronicle*, 2022, p. 4, https://www.competitionpolicyinternational.com/discriminatory-antitrust-in-the-realm-of-potential-and-nascent-competition.

45 The FTC's Report, *supra* note 35, p. 13.

46 Yun, *supra* note 44, p. 5.

47 In a similar vein, *see* Yun, *supra* note 44, p. 5, and L. Wagman, Tech Industry Acquisitions and Competition: Counterpoints to an Incomplete FTC Study and Legislation that Relies on It, Illinois Institute of Technology, Technical Report, 2022, p. 2.

than that of GAFAM since 2018; (ii) the top acquirers are increasingly acquiring in the tech categories where GAFAM themselves conduct acquisitions; and (iii) both the top acquirers and GAFAM carry out transactions in adjacent or unrelated business categories.[48] In a similar vein, according to the FTC's Report, GAFAM conducted 86 transactions where the target was a US company and the transaction value was over $50 million during the period between 2010 and 2019, whereas, according to the National Venture Capital Association, there were 2,100 US venture capital exits during the same period.[49] Therefore, the results defy the starting point of the arguments calling for a differentiated review for GAFAM's transactions—that is, that GAFAM's acquisitions have an extraordinary pattern in terms of the sheer numbers of transactions.[50]

24. Finally, the FTC's Report finds that there were plenty of full-time non-sales employees of the target that joined the acquiring firm after the transaction and that the number of such employees increased by the value of the transaction.[51] Nevertheless, it is difficult to support a theory of competitive harm purely based on this finding. In theory, it is possible that GAFAM may acquire not only the technology but also the talent of a potential/nascent competitor to fully eliminate the competitive threat. Nevertheless, one cannot argue that anti-competitive intent exists in these acquisitions without having the facts on whether these targets whose employees are hired by the acquirer were active in the supply of a service/product that may have posed a competitive risk to the incumbent. Indeed, such hiring may well be the result of a strategy aiming for an efficient integration of the functionalities of the acquired technology with the incumbent's technology, and the improvement of the incumbent's management.[52]

2. Other experimental evidence on the effect of GAFAM's acquisitions

25. In addition to the FTC's Report, there are several studies conducted by scholars on both sides of the Atlantic on the relevant acquisitions that either disprove or fail to prove that GAFAM's acquisitions restrict competition or innovation.

26. As cited in the US Majority Staff Report,[53] Kwoka argued that the competition authorities failed to act in most mergers that have caused price increases.[54] However, Vita and Osinski found that Kwoka's data sample was not large or diversified enough to support a general conclusion that the antitrust authorities were excessively permissive.[55]

27. Regarding Cunningham et al.'s study raising the concern about the discontinuance of the target's product in the pharmaceutical sector, a report published by the European Commission highlights that the target's product may be discontinued to integrate it into the acquirers' existing products/technology, and this may be pro-competitive.[56] Indeed, Cunningham et al. themselves acknowledged that the overall effect of these transactions on social welfare is not clear, since the possibility of being acquired may increase the incentive of the companies to develop new drugs, thereby contributing to innovation.[57] Moreover, it is very doubtful whether the results reached by Cunningham et al. are reflective of the situation regarding the acquisitions in the digital sector, which is the sector that has become the subject of most proposals. Holmström et al. note that firms can pursue the strategy of removing a nascent competitor only if they can observe and foresee the development of that competitor and its product/technology. While it may be argued that this may happen in the pharmaceutical sector, where the development of a drug is a clearer, observable and testable process, it is often difficult to foresee the development of a competitor in the digital sector, where there is no such development procedure and the innovations quickly become outdated.[58]

28. Latham et al. analysed the acquisitions by Google, Amazon, Facebook and Apple from 2009 to 2020. They found that in only 33 out of 409 acquisitions, the target had a horizontally overlapping product or a product that has a vertical relationship with the core business of the acquirer and could plausibly become a competing product. They then noted that they were not saying that these 33 acquisitions were "killer" acquisitions,[59] but pointed out that there may be reverse killer acquisitions where the incumbent ceases the process of developing its own

48 G. Z. Jin, M. Leccese and L. Wagman, How Do Top Acquirers Compare in Technology Mergers? New Evidence from an S&P Taxonomy, *NBER Working Paper* No. 29642, 2022, pp. 15–37.

49 B. Evans, When big tech buys small tech, 12 November 2021, https://www.ben-evans.com/benedictevans/2021/11/12/when-big-tech-buys-small-tech; also cited in Yun, *supra* note 44, p. 5.

50 *See also* Wagman, *supra* note 47, p. 4.

51 The FTC's Report, *supra* note 35, pp. 22–23.

52 G. Parker, G. Petropoulos and M. Van Alstyne, Platform mergers and antitrust, *Industrial and Corporate Change*, Vol. 30, Issue 5, 2021, pp. 1307-1336, p. 1320.

53 US Majority Staff Report, *supra* note 5, p. 393.

54 J. Kwoka, *Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy*, MIT Press, Cambridge, 2014, p. 155.

55 M. Vita and D. Osinski, John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review, *Antitrust Law Journal*, Vol. 82, Issue 1, 2018, pp. 361–388, at 377–386. For the shortcomings of Kwoka's work, *see also* J. M. Yun, Potential Competition and Nascent Competitors, *Criterion J. on Innovation*, Vol. 4, 2019, pp. 625–638, at 628 fn. 12, https://www.criterioninnovation.com/articles/potential-competition.

56 J. Crémer, Y.-A. de Montjoye and H. Schweitzer, *Competition policy for the digital era: Final report*, Publications Office of the European Union, Luxembourg, 2019, pp. 117–118, https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

57 Cunningham, Ederer and Ma, *supra* note 10, p. 6.

58 M. Holmström, J. Padilla, R. Stitzing and P. Sääskilahti, Killer Acquisitions? The Debate on Merger Control for Digital Markets, *2018 Yearbook of the Finnish Competition Law Association*, pp. 9–10.

59 *See* O. Latham, I. Tecu and N. Bagaria, Beyond Killer Acquisitions: Are There More Common Potential Competition Issues in Tech Deals and How Can These Be Assessed?, *CPI Antitrust Chronicle*, 2020, pp. 4–6, https://www.competitionpolicyinternational.com/wp-content/uploads/2020/05/CPI-Latham-Tecu-Bagaria.pdf.

technology and starts using the target's product. However, they noted that, even if reverse killer acquisitions exist, such acquisitions may only call for careful consideration of both pro- and anti-competitive effects and should not create questions on the change of evidentiary standard, as they do not raise the high-impact concerns that a killer acquisition might create. Hence, they do not reach a conclusion on whether the reverse killer acquisitions had an overall negative impact on innovation.[60]

29. Gautier and Lamesch analysed 175 transactions carried out by Google, Amazon, Facebook, Apple, and Microsoft; and found that in most cases, the supply of the target's product under its original brand name was discontinued. However, they acknowledged that (i) the reason behind the discontinuation does not have to be anti-competitive and that (ii) their data does not enable them to understand which discontinuation had an anti-competitive motive.[61]

30. Finally, using a categorization taxonomy developed by S&P Global Market Intelligence, Jin et al. compared the categories in which GAFAM conducted acquisitions between 2010 and 2020 with the categories where GAFAM did not. They did not find any evidence showing that the number of subsequent acquisitions by other players in the same category decreased after the initial acquisition of GAFAM. Therefore, their results contradict the argument that GAFAM acquisitions may create "kill zones" where the entry for buyout is discouraged, as they found that other players do continue their acquisitions, keeping the motivation of entry for buyout.[62]

3. The enforcement track records of the FTC and DOJ in relation to the nascent/ potential competition cases

31. The FTC and DOJ are able to pursue aggressive enforcement under the existing framework either under Section 7 of the Clayton Act or Section 2 of the Sherman Act. Considering the increasing number of cases, it is difficult to argue that the current regime prevents the agencies from challenging such mergers.[63] In a considerable number of cases, the parties abandon the transaction after the challenge of the agencies.[64]

32. The agencies challenge the acquisitions of nascent competitors under Section 7 of the Clayton Act, which prohibits transactions whose effect "*may be substantially to lessen competition, or to tend to create a monopoly*."[65] It is alleged that it is challenging for the authorities to bring a case under Section 7 of the Clayton Act in nascent and potential competition cases since the relevant provision requires the authorities to demonstrate not only that the potential competitor could enter the market absent the merger but also that the entry of the competitor would decrease concentration in the market or lead to other pro-competitive effects.[66] Nevertheless, the authorities now argue that under the *United States v. Microsoft* case, nascent acquisitions that are "*reasonably capable of contributing significantly to the defendant's monopolist power*" can be prohibited.[67] This decreases the evidentiary standard in these cases since, under Section 2 of the Sherman Act, the authority does not need to prove that the target would actually develop into a competitor.[68] This approach seems to have also been adopted by the US District Court for the District of Columbia ("District Court") with its recent judgement in *FTC v. Facebook, Inc.*

33. In the *FTC v. Facebook, Inc.* case, the FTC sued Facebook based on the allegation, among others, that Facebook maintained its monopoly and violated Section 2 of the Sherman Act by acquiring firms that might become a competitive threat against it, especially if acquired by another company, and thus challenged both the *Facebook/Instagram* and *Facebook/WhatsApp* merger in this complaint.[69] The FTC relied on, inter alia, the facts that (i) the employees of Facebook celebrated the acquisition by stating that WhatsApp was the only company that could become the next Facebook on mobiles[70] and the analyst report indicating that there may be a noteworthy competition between Facebook and WhatsApp in the future.[71] The District Court stated that the FTC has failed to show that Facebook has monopoly power in the market for personal social networking (PSN) services, which must be demonstrated for any claims under Section 2, and gave the FTC thirty days to amend its complaint. More specifically, although the District Court found that the market definition (i.e. the PSN services market) is plausible, it also noted that since it is not "*an ordinary or intuitive market*,"

60 Ibid., pp. 11–12.

61 *See* A. Gautier and J. Lamesch, Mergers in the Digital Economy, *Information Economics and Policy*, Vol. 54, 2021, art. No. 100890, pp. 10 and 15.

62 Jin, Leccese and Wagman, *supra* note 48, pp. 28–50.

63 In a similar vein, *see* N. J. Phillips, Reasonably Capable? Applying Section 2 to Acquisitions of Nascent Competitors – Antitrust in the Technology Sector: Policy Perspectives and Insights From the Enforcers, April 2021, https://www.ftc.gov/system/files/documents/public_statements/1589524/reasonably_capable_-_acquisitions_of_nascent_competitors_4-29-2021_final_for_posting.pdf; and Yun, *supra* note 6, p. 633.

64 For example, the parties abandoned *Sabre/Farelogix* after DOJ's challenge and the UK Competition and Markets Authority's blocking decision. *See* Complaint, *US v. Sabre Corp.*, No. 1:19-cv-01548-UNA (20 August 2019) p. 6, available on the DOJ's website, and CMA, Anticipated acquisition by Sabre Corporation of Farelogix Inc.: Final report, 9 April 2020, https://assets.publishing.service.gov.uk/media/5e8f17e4d3bf7f4120cb1881/Final_Report_-_Sabre_Farelogix.pdf.

65 Also, the transactions may be analysed under Section 1 of the Sherman Act, which prohibits "*every contract, combination in the form of trust or otherwise, or conspiracy* [that are] *in restraint of trade or commerce*." *See* Sherman Antitrust Act 15 U.S.C. § 1 and OECD, Start-ups, killer acquisitions and merger control – Note by the United States, 11 June 2020, para. 3.

66 J. Keyte, F. Jenny and E. Fox, Buckle Up: The Global Future of Antitrust Enforcement and Regulation, *Antitrust*, Vol. 35, No. 2, 2021, pp. 32–40, at 36.

67 Prepared Statement of the Federal Trade Commission Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms, September 2019, p. 5, www.judiciary.senate.gov/imo/media/doc/Hoffman%20Testimony2.pdf (quoting *United States v. Microsoft*, 253 F.3d 34, 59, 79 (D.C. Cir. 2001)).

68 OECD, *supra* note 65, para. 9.

69 Complaint, *FTC v. Facebook, Inc.*, No. 1:20-cv-03590, available on FTC's website

70 Ibid., p. 7.

71 Ibid., pp. 6–7.

the FTC's burden on proving that Facebook has a high market share in this market is heightened and it cannot go forward with uncertain market share allegations, given this is an unusual market where (i) the services are free of charge and (ii) it is not certain what a PSN service entails.[72] The FTC submitted the amended complaint to the District Court.[73] Based on the amended complaint, the District Court dismissed Facebook's motion to dismiss by stating, inter alia, that the FTC now provided sufficient facts to plausibly establish the monopoly power of Facebook and that it maintained this power via anti-competitive conduct (i.e. acquisitions of Instagram and WhatsApp).[74]

34. Visa's acquisition of Plaid was also challenged by the DOJ under Section 2 of the Sherman Act and Section 7 of the Clayton Act, based mainly on the argument that the transaction would eliminate a nascent but significant competitive threat.[75] Following the complaint by the DOJ, the parties abandoned the transaction.[76] Similarly, in Illumina's proposed acquisition of Pacific Biosciences, the parties abandoned the transaction following the FTC's complaint under Section 2 of the Sherman Act and Section 7 of the Clayton Act, based on the argument that the parties' different technologies may become substitutable for some customers in some projects.[77]

35. There are also cases that were brought under Section 7 of the Clayton Act but not Section 2 of the Sherman Act. For example, the FTC challenged the transaction concerning Procter & Gamble's acquisition of Billie, the fast-growing supplier of women's razors, arguing that Billie was growing rapidly and challenging the dominance of Procter & Gamble. Hence, the aim of the transaction was deemed to be the "*removal of the competitive threat*."[78] Following the complaint by the FTC, the parties abandoned the transaction.[79]

72 Memorandum Opinion, *FTC v. Facebook, Inc.*, Civil Action No. 20-3590 (D.D.C. June 2021). p. 27, https://s3.documentcloud.org/documents/21177063/memorandum-opinion.pdf.

73 Substitute Amended Complaint, *FTC v. Facebook, Inc.*, No. 1:20-cv-93590 (September 2021), available on the FTC's website.

74 Memorandum Opinion, *FTC v. Facebook, Inc.*, p. 2, https://s3.documentcloud.org/documents/21177063/memorandum-opinion.pdf.

75 Complaint, *US v. Visa Inc. and Plaid Inc.*, No. 3:20-cv-07810 ECF 1 (N.D. Cal. November 2020), available on the DOJ's website.

76 DOJ, press release, Visa and Plaid Abandon Merger After Antitrust Division's Suit to Block, 12 January 2021, https://www.justice.gov/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block.

77 *See* Administrative Complaint, FTC, *In the Matter of Illumina, Inc. and Pacific Biosciences of California, Inc.* (December 2019), available on FTC's website; and Joint Motion to Dismiss Complaint, FTC, *In the matter of Illumina, Inc. and Pacific Biosciences of California, Inc.*, 3 January 2020, available on the FTC's website.

78 Administrative Complaint, FTC, *In the Matter of The Procter & Gamble Company and Billie, Inc.*, December 8, 2020, available on the FTC's website.

79 FTC, Motion to Dismiss, *The Procter & Gamble Company and Billie, Inc.*, https://www.ftc.gov/system/files/documents/cases/d09400_jt_mtn_to_dismisspublic600378.pdf.

36. Other cases challenged by the US authorities involving nascent/potential competition include *Sabre/Farelogix*,[80] Össur Hf./College Park,[81] *Credit Karma/Intuit*,[82] *Nielsen/Arbitron*,[83] *CDK/AutoMate*,[84] *Edgewell/Harrys.*[85]

37. Indeed, in addition to the cases noted above, in the written contribution from the United States to the 133rd OECD Competition Committee meeting on 10–16 June 2020, numerous case examples were given where the FTC and DOJ challenged acquisitions that involved (i) the acquisition of a firm that could develop into a competitor to the incumbent, or (ii) emerging markets, to demonstrate the agencies' attentiveness to such acquisitions.[86]

38. These enforcement actions do not support the argument that the competition authorities are reluctant or less able to challenge the acquisitions of nascent competitors under the existing framework.

IV. Assessing the proposals on reversing the burden of proof in light of the experimental evidence and the possible risks that the proposals undermine

39. As explained above, there is no actual evidence that acquisitions by GAFAM have restricted competition and innovation, nor that the competition authorities were reluctant to enforce the existing rules to challenge the acquisitions of nascent/potential competitors. In light of this, one should steer clear of those proposals that support adopting a presumption of anti-competitiveness against acquisitions by GAFAM.

80 *See* Complaint, *US v. Sabre Corp.*, No. 1:19-cv-01548-UNA (20 August 2019) at 6, available on the DOJ's website.

81 Complaint, *In the Matter of Össur Hf. and College Park Industries*, April 2022, available on the FTC's website.

82 Complaint, *In the Matter of Intuit Inc. and Credit Karma, Inc*, 25 November 2020, available on the FTC's website.

83 Complaint, *In the Matter of Nielsen Holdings N.V. and Arbitron Inc.*, 24 February 2014, available on the FTC's website.

84 Complaint, *In the Matter of CDK Global, Inc. et al.*, 19 March 2018, available on the FTC's website.

85 Complaint, *In the Matter of Edgewell Personal Care Company and Harry's, Inc.* February 2, 2020, available on the FTC's website.

86 OECD, *supra* note 65.

40. A deviation from the general rule of a case-by-case analysis by imposing a rebuttable presumption for the assessment of certain cases cannot be supported in the absence of an abundance of experience showing that the presumed case would almost certainly occur. That is because, in the absence of such experience, one cannot argue that the imposition of a rebuttable presumption would lead to a fair outcome and also decrease administrative costs. Indeed, if the proposals are adopted, the authorities will still need to conduct detailed analyses on whether the parties' arguments to disprove the presumption can be accepted given the lack of evidence on the effect of these transactions. In this context, it should be underlined that especially in cases where the administrative costs stemming from the detailed scrutiny and the costs of Type 1 (false positive) errors (i.e. prohibiting pro-competitive mergers) exceed the costs of Type 2 (false negative) errors (i.e. failing to block anti-competitive mergers), it is not possible to legitimize a presumption against certain types of mergers.[87]

41. In theory, one may argue that when the burden of proof is on the agency, it may become difficult to challenge an anti-competitive acquisition by GAFAM (leading to Type 2 errors) as it may not be certain whether an undertaking could turn into a viable competitor.[88] In line with this, the high burden of proof on the DOJ in nascent/potential competition cases is alleged to be the reason for its so-called failure to block the acquisitions of Instagram and WhatsApp by Facebook.[89] Nevertheless, as noted above, the enforcement record of the authorities shows that the FTC and DOJ indeed effectively challenge the acquisitions, even when the burden of proof rests with them. Moreover, there is no evidence proving that the so-called failure to block the acquisitions—including the *Facebook/WhatsApp* and *Facebook/Instagram* transactions—restricted competition or innovation.

42. Therefore, in light of the considerations provided above, it may even be preferable to err on the side of under-enforcement in relation to the review of these mergers until we have a conclusive understanding of their actual competitive effect, given that blocking these mergers without sufficient knowledge about their impact entails the risk of losing synergies and chilling innovation which is of immense importance in the digital sector.[90]

87 A detailed discussion on this balance is made by Manne et al. They reached the conclusion that the current proposals on technology mergers, including those for lowering the thresholds for mandatory scrutiny and reversing the burden of proof, fail to meet this error-cost framework. *See* G. A. Manne, S. Bowman and D. Auer, Technology Mergers and the Market for Corporate Control, *Missouri Law Review*, Vol. 86, Issue 4, 2021, pp. 1047–1169, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3899524.

88 M. L. Katz, Big Tech Mergers: Innovation, Competition for the Market, and the Acquisition of Emerging Competitors, *Information Economics and Policy*, Vol. 54, 2021, art. No. 100883.

89 F. Jenny, Competition law enforcement and regulation for digital ecosystems: Understanding the issues, facing the challenges and moving forward, *Concurrences* No. 3-2021, art. No. 101662, pp. 38–62, at 55.

90 *See* M. Bourreau and A. de Streel, Digital Conglomerates and EU Competition Policy, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3350512; Katz, *supra* note 88; J. Ezrielev, Shifting the Burden in Acquisitions of Nascent and Potential Competitors: Not so Simple, *Competition Policy International*, 2020, https://www.competitionpolicyinternational.com/shifting-the-burden-in-acquisitions-of-nascent-and-potential-competitors-not-so-simple.

43. Indeed, the acquisition of a nascent competitor may not reduce future competition, if the parties would not compete with each other in the absence of the merger, due to the target's failure to innovate and enter the market.[91] Even in cases where an acquisition eliminates a competitor, the competitive pressure of the competitors of the target and the acquirer would remain.

44. As for the impact on innovation, the acquisition of a nascent competitor may reduce future competition by eliminating a rival but, at the same time, increase innovation by enabling the realization of the innovation with its resources and expertise.[92] Hence, when a start-up is acquired by the incumbent, innovation may effectively be built on the prior innovation of the incumbent, and this not only makes acquisition a more profitable strategy for the start-up company than the direct competition with the incumbent, but also increases the chance of success of the contemplated innovative project.[93] Moreover, the possibility of being acquired by a large technology company may motivate the innovative ideas that emerge in start-up ecosystems.[94]

45. At this point, the proposals should not undermine the legitimate motivations of start-ups and GAFAM with respect to acquisitions. Indeed, the initial public offering (IPO) statistics of start-ups in 2019 and 2020 reveal that IPOs are becoming increasingly challenging for even well-known start-ups. As a result, most start-ups seek to be acquired rather than launch an IPO.[95] A Silicon Valley Bank survey shows that the long-term goal of half of the start-ups is to be acquired.[96] Also, in a certain stage of their growth, most start-ups become subject to an increased level of regulation and face challenges in raising sufficient and timely venture capital. At this stage, being acquired by a larger firm would be a viable method to be able to grow further.[97] From the perspective of the acquiring firm, it is a way of outsourcing R&D as the acquiring firm may wait until a certain innovative technology wins the competition among different smaller firms and then acquire and improve the relevant technology.[98]

91 J. Ezrielev, An Economic Framework for Assessment of Innovation Effects of Nascent Competitor Acquisitions, 2021, p. 3, https://ssrn.com/abstract=3810486.

92 Ibid., p. 3.

93 *See* J. Carlson, The Platform Competition and Opportunity Act Is a Solution in Search of a Problem, Information Technology and Innovation Foundation, 31 January 2022, p. 3, https://itif.org/publications/2022/01/31/platform-competition-and-opportunity-act-solution-search -problem.

94 *See* L. Cabral, Merger Policy in Digital Industries, *Information Economics and Policy*, Vol. 54, 2021, art. No. 100866.

95 *See* K. Fayne and K. Foreman, To Catch a Killer: Could Enhanced Premerger Screening for "Killer Acquisitions" Hurt Competition?, *Antitrust*, Vol. 34, No. 2, 2020, pp. 8–13, at 10.

96 Silicon Valley Bank, US Startup Outlook 2019: Key Insights From the Silicon Valley Bank Startup Outlook Survey, 2019, p. 10, svb.com/globalassets/library/uploadedfiles/content/trends_and_insights/reports/startup_outlook_report/us/svb-suo-us-report-2019.pdf, cited in Fayne and Foreman, *supra* note 95, p. 10.

97 *See* Fayne and Foreman, *supra* note 95, p. 10.

98 Ibid., p. 10.

46. Indeed, the proposals for reversing the burden of proof may lead to an outcome that is just the opposite of their purpose. Fayne and Foreman highlight this point by stating that the proposals may cause larger firms to entrench their market power while chilling the smaller firms' motivation to compete and innovate.[99] According to them, while the cost stemming from the *ex post* scrutiny is borne by the acquirer (i.e. the larger and well-capitalized firm in the nascent acquisition concept), the cost of increased *ex ante* scrutiny (e.g. the cost of uncertainty, increased review periods and opportunity costs related to the foregone agreement possibilities during that period) will disproportionately be borne by the smaller target firms as a result of the *ex ante* negotiations between the parties, since smaller firms are likely to have less bargaining power and more capital restraints. This will also reduce the reward of being acquired, thereby chilling the motivation for initiating a start-up and start-up's ability to hire talented workers.[100]

47. On the possible outcome of implementing the proposed rule on reversing the burden of proof, Agarwal and Jung conducted an *ex post* review on some of the acquisitions in certain sectors, including automobiles, agriculture and aviation, and argued that these acquisitions, which enabled large companies to provide new products in cheaper ways to consumers and smaller companies to survive and innovate, would have been banned/abandoned if the recently proposed rules/concepts related to the nascent acquisitions had been in place.[101] One of the examples they provided is General Motors' (a major automobile manufacturer) acquisition of its supplier of auto bodies, i.e. Fisher Body Company, which they asserted had helped General Motors to become a manufacturer of high-quality and affordable automobiles.[102] Citing the Nobel Prize winner Ronald Coase,[103] they noted that such mergers (i) effectively provide a solution to the "*asset specificity problem*" that arises if a firm's specialized manufacturing processes that depend on the relationship with the supplier become very risky to change, and (ii) incentivize smaller firms to develop products that can meet the specific needs of a larger possible buyer.[104] Nevertheless, they note that, with the proposed burden of proof in the nascent competitor acquisition cases, it would not have been possible for General Motors to prove that Fisher Body Company would not become a competitor by expanding its business line, and this merger would have been banned.[105]

48. Therefore, the proposals for reversing the burden of proof are not based on actual evidence of negative impact on competition or innovation, whereas implementing such proposals (i) entails the risk of losing synergies and chilling innovation; (ii) undermines the legitimate motivations of parties for conducting such acquisitions; and (iii) may lead to an outcome which is just the opposite of their purpose (i.e. chilling the smaller firms' motivation to compete and innovate). Importantly, despite the lack of empirical evidence showing the anti-competitive effect of acquisitions by GAFAM, a report prepared for the UK Competition and Markets Authority showed that (i) the *Facebook*/*Instagram* merger, which is given as a prominent example of the acquisition of nascent competition indeed have led to consumer benefits that outweigh any anti-competitive impact, and (ii) Instagram's growth can largely be attributed to the synergies that have arisen as a result of the transaction.[106]

V. Conclusion

49. This article analyses the proposals for the reversal of the burden of proof in the review of acquisitions by GAFAM and concludes that these proposals are not warranted. These proposals are based on the presumptions that acquisitions by GAFAM are anti-competitive and, relatedly, the current merger regime resulted in an under-enforcement regarding the review of these acquisitions. However, the experimental evidence, including a recent report published by the FTC, disproves these claims, or alternatively, fails to conclusively prove that the acquisitions by GAFAM restrict competition or innovation. Furthermore, the enforcement track records of the FTC and the DOJ, respectively, do not support the view that the current merger regime leads to under-enforcement in relation to the nascent/potential competition cases.

50. Moreover, this article highlights that notwithstanding the above-mentioned lack of empirical evidence showing the restrictive effect of these acquisitions on innovation and competition, there is, in fact, evidence to the contrary, which indicates that the consumer benefits stemming from acquisitions by GAFAM may outweigh any possible anti-competitive impact. This article also emphasizes that the proposals for the reversal of the burden of proof undermine (i) the risk of losing synergies and chilling innovation; (ii) the legitimate motivations of parties for conducting such acquisitions; and (iii) the risk of entrenching larger firms' market power while discouraging smaller firms from competing and innovating.

99 Ibid.

100 Ibid., pp. 8, 11 and 12.

101 A. Agarwal and A. Jung, The Long and Successful History of Nascent Acquisitions Suggests Caution in Rethinking Antitrust Enforcement, 2020, https://ssrn.com/abstract=3734429.

102 Ibid., pp. 3 and 17.

103 R. H. Coase, The Acquisition of Fisher Body by General Motors, *Journal of Law and Economics*, Vol. 43, No. 1, 200, pp. 15-32, at 20, cited in Agarwal and Jung, *supra* note 101, pp. 3–4.

104 Agarwal and Jung, *supra* note 101, pp. 3–4.

105 Ibid., p. 16.

106 Lear, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, p. 71, https://www.learlab.com/wp-content/uploads/2019/06/CMA_past_digital_mergers_GOV.UK_version-1.pdf.

51. All in all, highlighting the lack of empirical evidence on the anti-competitive harm and risks that may arise as a result of reversing the burden of proof, this article concludes that even erring on the side of under-enforcement, in relation to the review of these mergers until revealing their actual competitive effect, may be preferable to the alternative. Indeed, rather than a hasty presumption unsupported by evidence, more scrutiny based on case-by-case reviews would be able to inform the debate on the relevant competitive harms and the suitable remedies for resolving them, as well as how innovation is realized and can be further promoted in the digital sector. ■

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