

Doomsday Mergers: A Retrospective Study of False Alarms

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Executive Summary

A well-placed cadre of progressive scholars and advocates—several of whom have in more recent years come to occupy top positions in America’s antitrust agencies—have long-focused their attention distinctly on high-profile mergers and acquisitions. For more than a decade, hardly a deal could be proposed without these critics claiming that it would create an unassailable monopoly, be the final nail in the coffin of small businesses, and/or cement the political sway of big business. For these so-called “neo-Brandeisian” critics, the repeated pattern has been, first, to entreat authorities to block these deals and then, should they be cleared nonetheless, to cite such approvals as evidence that U.S. antitrust law is in dire need of reform.

The bombastic rhetoric employed by these critics stands in sharp contrast with the technocratic and measured approach to enforcement that has traditionally been the norm for U.S. antitrust agencies and courts. Indeed, for better or worse, antitrust case law in the United States generally focuses on tangible and short-term metrics, rather than hypothetical doomsday scenarios that are notoriously hard to predict. Under this measured approach—rooted in the consumer welfare standard—theories of harm are dismissed if they rely on mere conjecture. Unsurprisingly, the critics have routinely lambasted this status quo.

But the paradigm has been shifting. With the elevation of progressive critics such as Lina Khan to chair the Federal Trade Commission (FTC), Jonathan Kanter to head the U.S. Justice Department’s (DOJ) Antitrust Division, and Tim Wu to serve as special assistant to President Joe Biden for technology and competition policy, the tide of U.S. antitrust enforcement may be turning. In recent months, the antitrust agencies have brought several high-profile suits that seek to combat what their new leadership believes to be excessive corporate consolidation. This includes the FTC’s failed challenge of the Meta-Within deal, as well as ongoing cases against the Microsoft-Activision Blizzard and Illumina-Grail mergers.

The rhetoric accompanying these challenges has departed significantly from traditional antitrust discourse and has instead been more closely aligned with the populist style that these agencies’ leaders employed before their nominations. For instance, in its Meta-Within complaint, the FTC argued that clearing the deal would put Meta “one step closer to its ultimate goal of owning the

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entire ‘Metaverse.’” In the Illumina-Grail suits, the agency claimed that “after the Acquisition, Illumina will control the fate of every potential rival to Grail for the foreseeable future.”

Against this backdrop of increasingly alarmist merger claims, this paper analyzes whether previous doomsday merger scenarios have materialized, or whether the critics’ claims missed the mark. Our retrospective analysis shows that many of the alarmist predictions of the past were completely untethered from prevailing market realities, as well as far removed from the outcomes that emerged after the mergers.

Amazon-Whole Foods

The first merger we look at is Amazon’s purchase of Whole Foods. Critics at the time claimed the deal would reinforce Amazon’s dominance of online retail and enable it to crush competitors in physical retail. As now-FTC Chair Lina Khan put it: “Buying Whole Foods will enable Amazon to leverage and amplify the extraordinary power it enjoys in online markets and delivery, making an even greater share of commerce part of its fief.”

These claims turned out to be a bust. As we explain, at the time of writing, several large retailers have grown faster than Amazon; Whole Foods’ market share has barely budged; and several new players have entered the online retail space. Moreover, the Amazon-Whole Foods deal appears to have delivered lower grocery prices and increased convenience to consumers.

Beer-Industry Consolidation

A second notable example comes from the beer industry. In the early 2000s, the industry witnessed a wave of consolidation, culminating with ABI’s acquisition of SABMiller in 2016, which critics claimed would increase the price of beer and decimate the burgeoning craft-beer segment.

Instead, the concentration of the beer industry *decreased* after the mergers, prices did not increase on average, and the craft-beer segment thrived. This is not to say that all is rosy; the price of *some* beers did indeed increase after the wave of mergers. Regardless, it is clear the post-merger outcome was a far cry from the doomsday scenario that critics predicted.

Bayer-Monsanto

Along similar lines, Bayer’s acquisition of Monsanto (along with the Dow-Dupont merger) was met with stern rebukes from policymakers and academics. Critics argued that the merger would raise the price of key seeds, such as corn, soy, and cotton. Perhaps more fundamentally, the deal’s opponents argued it would further concentrate the agri-food industry, forcing farmers to deal with only a handful of seed providers. Accordingly, many cited this merger as evidence that antitrust merger enforcement needed reform.

Fast forward to today, and these fears appear overblown. Seed prices have remained roughly constant (though we do not know the counterfactual), and there is little evidence that the life of farmers and

rural communities has been significantly affected by the merger. There is thus little reason to believe that the mergers justified the legislative and policy changes that many called for at the time.

Google-Fitbit

Google's acquisition of Fitbit is another case where progressive scholars' dire predictions failed to materialize. The deal's opponents claimed the merger would reinforce Google's position in the ad industry and prevent new entry; harm user privacy by enabling Google to integrate Fitbit health data into its other ad services (or sell this data to health insurers); and crush burgeoning rivals in the wearable-device industry.

At the time of writing, available evidence suggests the exact opposite has occurred: Google's share of the online-advertising industry has declined, as has Fitbit's position in the wearable-devices segment. Likewise, Google does not use data from Fitbit in its advertising platform; not even in the United States, where it remains free to do so. Meanwhile, the merger enabled Google's entry into the smartwatch market as an upstart competitor against the market leader, Apple. In short, enforcers' "terrible decision" to clear the merger appears vindicated.

Facebook-Instagram

Facebook's acquisition of Instagram provides a different perspective. At the time, basically no one worried about it from an antitrust perspective and many pundits lambasted the purchase as a poor business decision. It is only in retrospect that people have started to see it as the merger that got away and evidence of the problems with allegedly weak enforcement. This perspective ignores the fact that enforcement agencies only ever have that data which is available at the time.

Even in retrospect, however, it is far from obvious that the acquisition was anticompetitive. Immediately upon purchase, Facebook was able to bring Instagram's photo-editing features to a much larger audience, generating value for users. Only later did Instagram turn into the social-media giant that we know today. The recent rise of TikTok casts further doubt on claims regarding the supposed market dominance of a combined Facebook and Instagram. A merger that benefited consumers without generating impenetrable market dominance hardly seems like overwhelming proof of the failures of enforcement.

Ticketmaster-Live Nation

We close with Ticketmaster for two reasons. First, it has received significant negative attention recently due to technical failures during Taylor Swift's latest concert sales, which has prompted the DOJ to investigate the company.¹ Second, people have complained about Ticketmaster being a monopolist ever since it came to prominence. Yet, there was little outrage at the merger with Live Nation. While there was a congressional hearing at the time and some concern expressed in *The New*

¹ David McCabe & Ben Sisario, *Justice Dept. Is Said to Investigate Ticketmaster's Parent Company*, NY TIMES (Jan. 24, 2023), <https://www.nytimes.com/2022/11/18/technology/live-nation-ticketmaster-investigation-taylor-swift.html>.

York Times, the contemporaneous claims were refreshingly mild relative to more recent comments by the neo-Brandeisians.

Despite having antitrust authorities investigate its previous acquisitions, including the merger with Live Nation, Ticketmaster has avoided having any of its mergers blocked outright. Perhaps more importantly, Ticketmaster's market share appears to have fallen following the merger with Live Nation. There is thus little sense that the deal harmed consumers. So why the disconnect between longstanding frustration and antitrust enforcement? The agencies have seen the beneficial effects of mergers in a difficult multi-sided market between fans, venues, and artists. After investigation, the agencies found that the merger was primarily a vertical one between a ticketing website (Ticketmaster) and a concert promoter (Live Nation), which could be pro-competitive for the overall multi-sided market. The DOJ placed behavioral remedies in place and allowed the merger. We explain how a technical failure more than a decade later can hardly be blamed on the antitrust authorities for letting it slip through.

The Upshot

One potential counterargument to the focus of this paper is that the mergers we discuss may not be representative of broader trends—and, accordingly, that tougher antitrust enforcement may still be warranted. While this is a possibility, it misses our main point. Too often, mergers are met with alarmist fearmongering in policy circles, with many observers arguing a given transaction will irrevocably harm consumers and the economy. These calls for action occur despite the existence of a highly sophisticated merger-control apparatus that is designed precisely to minimize the likelihood of such harms, while enabling consumer-benefitting transactions to pass regulatory muster.

Our call for regulatory prudence may seem modest, but it increasingly faces challenges. The most high-profile challenge is perhaps the FTC and DOJ's joint repudiation of the most recent (2010) merger guidelines, and their ongoing effort to revise the guidelines, almost certainly in ways to facilitate more aggressive merger enforcement. As FTC Chair Lina Khan remarked upon the initiation of the merger-guidelines-revision effort, in the wake of merger activity allegedly due to lax enforcement, "many Americans historically have lost out, with diminished opportunity, higher prices, lower wages, and lagging innovation.... These facts invite us to assess how our merger policy tools can better equip us to... halt this trend."

And as Matt Stoller approvingly notes of the revision effort, "mergers are the key fulcrum that has consolidated power in American society. And now, for the first time in our lifetimes, antitrust enforcers are genuinely pushing back, with real merger challenges and now a revamp of this until-now catastrophic set of guidelines."

Many in the media have similarly pushed for more aggressive merger enforcement, unmoored from its economic rigor. A recent *Financial Times* piece by Rana Foroohar, for example, encapsulates the prevailing zeitgeist, intimating as it does that authorities should ditch sophisticated and technocratic economics in favor of what she calls "kitchen table economics," in which "economic policy

discussions [should be in] the purview of not just economists, but also lawyers, activists and ordinary people.”

If there is one thing to take away from our paper, it is that basing merger enforcement on kitchen-table economics—the idiosyncratic preferences of “activists and ordinary people”—would be disastrous. Our retrospective study shows that popular and populist fears about corporate consolidation are often completely untethered from economic reality and wildly erroneous. The less these fears influence antitrust policy, the better.

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Introduction

Antitrust law and policy may be on the move. The neo-Brandeisian antitrust movement advocates radical reform,¹ and seems not so much ascendent as ascended, finding support in the White House² and at the head of the two federal antitrust agencies, the Federal Trade Commission (FTC)³ and the Antitrust Division of the U.S. Justice Department (DOJ).⁴

In remarks often quoted or echoed by FTC Chair Lina Khan, President Joe Biden laments that “we’ve lost the fundamental American idea that true capitalism depends on fair and open competition.”⁵ He lays that supposed loss at the feet of antitrust: “Forty years ago, we chose the wrong path, in my view, following the misguided philosophy of people like Robert Bork, and pulled back on enforcing laws to promote competition.”⁶

The bombastic rhetoric employed by these critics stands in sharp contrast with the technocratic and measured approach to enforcement that has traditionally been the norm for U.S. antitrust agencies and courts. Indeed, for better or worse, antitrust case law in the United States generally focuses on tangible and short-term metrics, rather than hypothetical doomsday scenarios that are notoriously

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¹ See, e.g., Lina Khan, *The New Brandeis Movement: America’s Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRACTICE 131 (2018); Matt Stoller, *How Democrats Killed Their Populist Soul*, THE ATLANTIC (Oct. 24, 2016), <https://www.theatlantic.com/politics/archive/2016/10/how-democrats-killed-theirpopulist-soul/504710>.

² See, e.g., Exec. Order No.14, 036, 86 Fed. Reg. 36,987 (Jul. 9, 2021).

³ Lina M. Khan Sworn in as Chair of the FTC, FED. TRADE COMM’N (Jun. 15, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/06/lina-m-khan-sworn-chair-ftc> (noting Khan’s prior role at the Open Markets Institute).

⁴ See, e.g., Jonathan Kanter, *Assistant Attorney General Jonathan Kanter of the Antitrust Division Testifies Before the Senate Judiciary Committee Hearing on Competition Policy, Antitrust, and Consumer Rights* (Sep. 20, 2022) (advocating for statutory reform and increased funding for antitrust enforcement).

⁵ *Remarks by President Biden at Signing of an Executive Order Promoting Competition in the American Economy*, THE WHITE HOUSE (Jul. 9, 2021).

⁶ *Id.* (In the very same speech, Biden—curiously, if not paradoxically—states that “America is on track. We’re now on track for the highest economic growth in 40 years and among the highest growth records on record”); see also Lina Khan, Chair, Fed. Trade Comm’n, *Remarks at Charles River Associates Conference Competition & Regulation in Disrupted Times* Brussels, Belgium (Mar. 31, 2022) (quoting President Biden’s remarks with approval); Guy Rolnick, *Q & A with FTC Chair Lina Khan: ‘The Word ‘Efficiency’ Doesn’t Appear Anywhere in the Antitrust Statutes’*, PROMARKET, (Jun. 3, 2022), <https://www.promarket.org/2022/06/03/qa-with-ftc-chair-lina-khan-the-word-efficiency-doesnt-appear-anywhere-in-the-antitrust-statutes> (“the change is being driven by a deep recognition that something has been awry in how we’ve been doing antitrust,” in response to a question about “this takeover of the Khan, Kanter, and Wu partnership over Washington.”).

hard to predict. Under this measured approach—rooted in the consumer welfare standard—theories of harm are dismissed if they rely on mere conjecture.⁷ Unsurprisingly, the critics have routinely lambasted this status quo.⁸

These neo-Brandeisian ideas are now starting to filter into mainstream antitrust policy. With the elevation of progressive critics such as Lina Khan to chair the Federal Trade Commission (FTC), Jonathan Kanter to head the U.S. Justice Department’s (DOJ) Antitrust Division, and Tim Wu to serve as special assistant to President Joe Biden for technology and competition policy, the tide of U.S. antitrust enforcement may be turning. In recent months, the antitrust agencies have brought several high-profile suits that seek to combat what their new leadership believes to be excessive corporate consolidation. This includes the FTC’s failed challenge of the Meta-Within deal, as well as ongoing cases against the Microsoft-Activision Blizzard and Illumina-Grail mergers.⁹

The rhetoric accompanying these challenges has departed significantly from traditional antitrust discourse and has instead been more closely aligned with the populist style that these agencies’ leaders employed before their nominations. For instance, in its Meta-Within complaint, the FTC argued that clearing the deal would put Meta “one step closer to its ultimate goal of owning the entire ‘Metaverse.’”¹⁰ In the Illumina-Grail suits, the agency claimed that “after the Acquisition, Illumina will control the fate of every potential rival to Grail for the foreseeable future.”¹¹

Meanwhile, the FTC recently issued a new *Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act*¹² that turns the established methods, measures,

⁷ PHILLIP E. AREEDA & DONALD F. TURNER, *ANTITRUST LAW VOL. V*, 1103c (1980) “public policy cannot rationally seek to prevent the realization of more efficient production modes out of the speculative fear that monopoly might result”.

⁸ See, e.g., Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, (2020) (“The fact that antitrust had shed its public appeal in favor of an expert-driven enterprise becoming “less democratic and more technocratic” - was generally seen as further evidence of its success. Today, however, it is clear that what may have appeared as the end of antitrust history proved instead to be a prolonged pause in an enduring clash over the purpose and values of the U.S. antitrust laws.”); See also, Maurice E. Stucke & Marshall Steinbaum, *The Effective Competition Standard: A New Standard for Antitrust*, 87 U. Chi. L. Rev. 596 (2020) (“If the United States continues with a light-if-any-touch antitrust review of mergers and turns a blind eye to abuses by dominant firms, concentration and crony capitalism will likely increase, competition and our well-being will decrease further, and power and profits will continue to fall into fewer hands.... This trend is reversible if we restore antitrust as a guarantor of effective competition. To tackle today’s market power problem, we offer an effective competition antitrust standard to replace the prevailing consumer welfare standard...”).

⁹ *FTC Seeks to Block Microsoft Corp.’s Acquisition of Activision Blizzard, Inc.*, FED. TRADE COMM’N (Dec. 8, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-block-microsoft-corps-acquisition-activision-blizzard-inc>; *FTC v. Illumina, Inc.*, U.S. Dist. LEXIS 75172 (2021); *FTC v. Meta Platforms Inc.*, U.S. Dist. LEXIS 29832 (2023).

¹⁰ *FTC v. Meta Platforms, Inc.*, 3:22-cv-04325, 6 (2022) (complaint).

¹¹ *In the Matter of Illumina, Inc., and Grail, Inc.*, No. 9401, 6 (complaint).

¹² *Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act*, FED. TRADE COMM’N (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

and goals of antitrust on their heads.¹³ It rejects, among other things, the consumer welfare standard and the rule of reason that are at the heart of contemporary antitrust jurisprudence. And more importantly for this paper, it is anticipated that the FTC and the Antitrust Division will soon release new merger guidelines, covering both horizontal and vertical mergers. The agencies have launched a “Request for Information on Merger Enforcement,”¹⁴ soliciting public input on diverse issues that range from basic concepts, evidence, and analytical methods to the goals of merger enforcement, some 91 questions under 15 topical headings. More recent statements from the agencies suggest that new guidelines are forthcoming.¹⁵

The agencies’ aim seems clear: strengthening—or at least increasing—antitrust merger enforcement.¹⁶ Khan has quoted from President Biden’s executive order that “industry consolidation and weakened competition have ‘den[ied] Americans the benefits of an open economy,’ with ‘workers, farmers, small businesses, and consumers paying the price.’”¹⁷ That same executive order includes a general condemnation of the state of U.S. competition, which it blames on “Federal Government inaction”—that is, on a putative failure of antitrust enforcement. Khan goes on to note that:

[The merger guidelines review] 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.... While the current merger boom has delivered massive fees for investment banks, evidence suggests that many Americans historically have lost out, with diminished opportunity, higher prices, lower wages, and lagging innovation. A lack of competition also appears to have left segments of our economy more brittle, as consolidated supply and reduced investment in capacity can render us less resilient in the face of shocks.

¹³ For a general discussion, see Daniel Gilman & Gus Hurwitz, *The FTC’s UMC Policy Statement: Untethered from Consumer Welfare and the Rule of Reason*, INTERNATIONAL CENTER FOR LAW & ECONOMICS (Nov. 16, 2022), <https://laweconcenter.org/resources/the-ftcs-umc-policy-statement-untethered-from-consumer-welfare-and-the-rule-of-reason>.

¹⁴ *Request for Information on Merger Enforcement*, FED. TRADE COMM’N (Jan. 18, 2022), <https://www.regulations.gov/docket/FTC-2022-0003>.

¹⁵ *Assistant Attorney General Jonathan Kanter Delivers Remarks on Modernizing Merger Guidelines*, U.S. DEP’T JUSTICE (Jan. 18, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-modernizing-merger-guidelines> (“And ultimately, that’s what today’s announcement is about: strengthening our joint merger guidelines to meet the challenges and realities of the modern economy.”); See also, *Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement*, Docket No. FTC-2022-0003, FED. TRADE COMM’N (Jan. 18, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599783/statement_of_chair_lina_m_khan_regarding_the_request_for_information_on_merger_enforcement_final.pdf (“Keeping with past practice, the DOJ and FTC today are issuing a request for information, identifying key questions and topics on which we are particularly keen to receive public comment. These public comments will be critical for informing our review of the existing guidelines and our process for considering potential revisions and updates.”)

¹⁶ Kanter, *id.*; see also *Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers*, FED. TRADE COMM’N (Press Release) (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>.

¹⁷ Khan, *supra* note 15 (quoting Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (Jul. 9, 2021)).

These facts invite us to assess how our merger policy tools can better equip us to discharge our statutory obligations and halt this trend.¹⁸

And as Matt Stoller approvingly notes of the revision effort, “mergers are the key fulcrum that has consolidated power in American society. And now, for the first time in our lifetimes, antitrust enforcers are genuinely pushing back, with real merger challenges and now a revamp of this until-now catastrophic set of guidelines.”¹⁹ Whether or to what extent this drive for revision or reform might find support in the federal courts is less clear.²⁰

Neo-Brandeisian scholars are not the only ones pushing for substantial reform and, specifically, considerably increased interventions by antitrust enforcers into mergers and other commercial conduct. For example, the American Antitrust Institute (AAI) identifies itself as an original and central player in “the modern ‘progressive antitrust’ movement.”²¹ The AAI advocates for “vigorous” public enforcement, characterizing its mission as a reaction against “the conservative law and economics movement,”²² which, AAI says, “steered antitrust policy in a non-interventionist direction marked by lax merger control and forbearance from policing monopolistic and other anticompetitive practices.”²³ While AAI has a decidedly pro-intervention perspective, it is arguably more moderate and research-based than the neo-Brandeisian movement. Yet, collectively, progressive antitrust advocates and neo-Brandeisians have formed a vocal movement in favor of more invasive antitrust enforcement, based on a shared view that lax enforcement has caused unremedied harm throughout the economy.

And many in the media have similarly pushed for more aggressive merger enforcement, unmoored from its economic rigor. A recent *Financial Times* piece by Rana Foroohar, for example, intimated that authorities should ditch sophisticated and technocratic economics in favor of what she calls “kitchen table economics.” Her piece encapsulates the prevailing zeitgeist:

The popularisation of antitrust is part of a much larger shift in which economic policy discussions are increasingly the purview of not just economists, but also lawyers, activists and ordinary people. These groups are less interested in technocratic debates about

¹⁸ *Id.* Notably, the evidence posited to support these contentions is far from settled. Indeed, it is not even clear that concentration is increasing. See Brian Albrecht, *Is Market Concentration Actually Rising?*, ECONOMIC FORCES (Dec. 8, 2022), <https://pricetheory.substack.com/p/is-market-concentration-actually>.

¹⁹ Matt Stoller, *Mergers Ruin Everything*, BIG (Feb. 4, 2022), <https://mattstoller.substack.com/p/mergers-ruin-everything>.

²⁰ Both agencies have suffered some setbacks already, but numerous cases remain under investigation or in-process, and the U.S. Supreme Court has yet to rule on any of the neo-Brandeisians’ novel theories of harm or established law. For example, the FTC recently declined to appeal the case it lost regarding Meta’s purchase of Within. See, Diane Bartz, *U.S. FTC Will Not Appeal Decision Allowing Meta to Purchase VR Content Maker Within*, REUTERS (Feb. 6, 2023), <https://www.reuters.com/markets/deals/us-ftc-will-not-appeal-fight-stop-meta-buying-vr-content-maker-within-2023-02-06>.

²¹ *Mission and History*, AMERICAN ANTITRUST INSTITUTE, <https://www.antitrustinstitute.org/about-us> (last accessed Feb. 2, 2023).

²² *Id.*

²³ *Id.*

market mechanisms than in a grassroots discussion about how corporate power has distorted the market in ways that they find absurd....

Thus, traditional economic theories about markets are no more, or less, useful than the collection of real world facts that either side can bring to a case.”²⁴

The classic problem with most antitrust enforcement—and merger enforcement, in particular—is that it is prospective; it entails making predictions about future effects and determining appropriate enforcement under conditions of uncertainty. Proponents of more vigorous enforcement assert that past failures to enforce have led to great economic harms and, thus, that merger policy should be categorically more stringent to protect against such harms in the future. But it is an open question whether these claims are accurate, and an even harder question to answer whether more stringent enforcement *in any particular case* would be desirable, even if it were established that an *overall* increase in enforcement would be. It is almost certain that separating merger enforcement policy from economic rigor would magnify this uncertainty.

This paper seeks to assess predictions from progressive and neo-Brandeisian advocates regarding the immense harm that past mergers would supposedly cause. We examine six selected mergers that were widely condemned, but nevertheless consummated, prior to the current administration’s appointment of its competition-policy team.²⁵ We assess whether the predictions concerning these mergers’ deleterious effects have ultimately materialized. The goal of this paper is *not* to provide rigorous, empirical analysis of the effects of these seven mergers, but rather to provide an accurate—but necessarily casual—assessment of the state of the post-merger markets. Using public information and relying on the insights of industry experts, we offer a detailed picture of these markets and an assessment of how they may have changed post-merger.

Our analysis shows that critics of the antitrust *status quo* routinely make dire predictions concerning the likely future effects of mergers that, as we explain, tend to be wide of the mark. This is not surprising: there is a reason why antitrust merger enforcement is entrusted to technocratic antitrust authorities with, among other assets, huge teams of PhD economists to run merger simulations. At the very least, however, our analysis suggests popular claims that given mergers will be harmful should be taken with a grain of salt; such claims tend to say more about the person making them than they do the likely effects of a merger. Likewise, these same scholars also routinely claim that

²⁴ Rana Foroohar, *The Rise of Kitchen Table Economics*, FINANCIAL TIMES (Feb. 20, 2023), <https://www.ft.com/content/e53e4b14-4653-4b6e-a72f-d50f75e97cb7?shareType=nongift>.

²⁵ That is, FTC Chair Lina Khan, Assistant U.S. Attorney General Jonathan Kanter, and Tim Wu, who served as special assistant to the president for technology and competition policy from 2021 to early 2023, and who is widely considered to have been the architect of President Biden’s July 2021 executive order on competition policy. See, e.g., David McCabe, *An Architect of Biden’s Antitrust Push Is Leaving the White House*, NY TIMES (Dec. 30, 2022), <https://www.nytimes.com/2022/12/30/technology/tim-wu-leaves-white-house.html> (describing Wu’s role at the White House and his status as “one third of a troika—along with Lina Khan at the Federal Trade Commission and Jonathan Kanter at the Justice Department” leading “aggressive” attempts at antitrust reform); Josh Sisco, *White House Antitrust Adviser Tim Wu Set to Depart*, POLITICO (Dec. 30, 2022), <https://www.politico.com/news/2022/12/30/tim-wu-leaving-white-house-00075859>.

antitrust merger enforcement is insufficient precisely because it enabled *these* mergers to go through unchallenged. Again, our analysis suggests that things are (unsurprisingly) more complicated: no single merger provides a silver bullet to sustain claims that antitrust merger enforcement is too lax—something that needs to be shown empirically.

While our selection of mergers is ultimately somewhat arbitrary, the list includes some of the most contentious mergers of the past decade. Our selection has been guided by public statements about these mergers by prominent neo-Brandeisians and others. Unifying themes are, first, the contention that antitrust enforcement had fundamentally dropped the ball and, second, that dire consequences would follow.

Two caveats are in order. First, statements from the neo-Brandisian movement—sometimes called “populist”²⁶ or “hipster antitrust”²⁷—have not been monolithic: this is an identifiable (and self-identified)²⁸ movement, but it is united by common concerns and an orientation, not by any official positions or definitive membership.²⁹ Still, there is an identifiable family of statements that has been directionally consistent, and often dire.³⁰ Second, although we cite to specific individuals, our focus is not on those individuals or the neo-Brandisian movement *per se*. Rather, we examine certain dire predictions about specific mergers, and the reasoning that lay behind those predictions. While these are characteristic of certain staunch advocates of substantially greater intervention into mergers, the predictions were not all made by individuals associated with the neo-Brandisian movement. Moreover, we do not assume that views or assessments, or methodological or theoretical priors, are uniform across a wider group of progressives. Given the considerable political influence of the neo-Brandeisians, however, it is not impertinent to ask whether they are generally correct in their policy prescriptions.

In brief, we examine a string of what might be called doomsday merger predictions. All of these mergers were supposed to damage competition and raise prices. For example, when Amazon acquired Whole Foods, Barry Lynn of Open Markets—an organization commonly associated with the neo-Brandeisians—provided a dire and sweeping assessment to the *New Republic*: “This is the crushing of competition. Amazon is monopolizing commerce in the United States.” “Commerce” seems an awfully broad market for antitrust analysis, but Lynn offered no further qualification about,

²⁶ See, e.g., Carl Shapiro, *Antitrust in a Time of Populism*, 61 J. INDUS. ORG. 714, (2018); Elyse Dorsey, et al., *Consumer Welfare and the Rule of Law: The Case Against the New Antitrust Populism*, 47 PEPP. L. REV. 816, (2020).

²⁷ Joshua D. Wright, et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. STATE L. J. 293, (2019).

²⁸ Khan, *supra* note 8.

²⁹ In addition, the predictions and assessments of the neo-Brandeisians are not always precise, or even sufficiently clear to be susceptible to testing.

³⁰ The statements comprise, among other things, predictions and concerns about the likely competitive effects of these mergers: namely, competitive disaster.

e.g., “premium natural and organic food markets,”³¹ online retail commerce, or even retail commerce writ large. Rather, the acquisition—a sizeable acquisition of a mid-sized grocery chain that was not among the 20 largest in the United States—would somehow lead to Amazon’s monopolization of commerce. Lynn would go on to say that only Uncle Sam would be able to save competitors from certain death.³²

In less hyperbolic terms, in 2014, it was predicted that the merger of ABI and SAB Miller would “impose significant price increases on consumers” and “undermine the continued emergence of craft beer.”³³ While there is evidence of slight price increases associated with certain previous mergers, such as the Miller-Coors merger that we analyze in this paper, the growing craft-beer trend has continued apace. In 2020, six years after dire predictions about ABI/SAB Miller, the staffs of the FTC and the Antitrust Division jointly observed a long-running growth trend in comments on a proposed policy change in California: in California alone, there were 200 craft brewers in 2000 and 1,039 in 2020.³⁴ There, the staffs’ concerns had to do with regulatory barriers to competition, not manufacturer consolidation.³⁵

One final prefatory note about this project and about merger retrospectives generally: Merger retrospectives have played an important role in incremental antitrust reform for several decades. For example, a series of retrospective studies of hospital mergers conducted by the staff of the FTC’s Bureau of Economics—sometimes in collaboration with academic economists—have been identified as key drivers in changing the way the federal courts view hospital mergers, where they seemed central to reversing a trend of agency losses in merger-challenge cases. They have, as well, helped to refine the tools available to enforcers and academic economists. In simplest terms, merger retrospectives examine quantifiable changes in competitively important market outcomes, such as price and output and, where demonstrable, quality or quality-adjusted price.³⁶ More specifically, retrospective analysis

³¹ “Premium natural and organic food markets” is the product market the FTC had identified in challenging a prior transaction involving Whole Foods—that is, its proposed acquisition of Wild Oats. See, *FTC v. Whole Foods Market, Inc.*, Case No. 1:07-cv-01021 (D. D.C. 2007) (complaint for temporary restraining order and injunction pursuant to Sect. 13(b) of the FTC Act).

³² Dirk Auer, *The Amazon/Whole Foods Overreaction: Antitrust Populism Exposed*, TRUTH ON THE MARKET (Aug. 28, 2018), <https://truthonthemarket.com/2018/08/28/the-amazon-whole-foods-overreaction-antitrust-populism-exposed>.

³³ Albert Foer & Sandeep Vaheesan, *The American Antitrust Institute to the U.S. Department of Justice*, AMERICAN ANTITRUST INSTITUTE (Nov. 19, 2014), <https://www.antitrustinstitute.org/wp-content/uploads/2014/10/AAL-Beer-merger-to-DOJ-11-19.14.pdf>.

³⁴ *Joint Comment of the FTC Staff and the DOJ Antitrust Div. Staff to the California State Assembly Concerning California Assembly Bill 1541*, FED. TRADE COMM’N (Mar. 20, 2020), https://www.ftc.gov/system/files/documents/advocacy_documents/joint-comment-ftc-staff-doj-antitrust-division-staff-california-state-assembly-concerning-california/v200008_california_beer_distribution_advocacy_2020.pdf.

³⁵ *Id.*

³⁶ *Overview of the Merger Retrospective Program in the Bureau of Economics*, FED. TRADE COMM’N, <https://www.ftc.gov/policy/studies/merger-retrospective-program/overview> (last accessed Feb. 3, 2023).

investigates “ex post how, if at all, a particular merger affected equilibrium behavior in one or more markets.”³⁷

To be clear, these merger retrospectives are most informative when situated within a larger body of theoretical and empirical research. They do not, in themselves, determine the framework within which, or methods with which, mergers are scrutinized. Moreover, we cannot in this paper hope to rival the deep empirical dives of the FTC’s hospital-merger retrospective series, which ranges over some 20 publications scrutinizing diverse methods and models applied by agency staff in specific investigations and the outcomes of consummated mergers.³⁸ We can, however, examine competitively relevant indicators such as price and output (and price and output trends), as the merger-retrospective literature has done, as well as such signals as market valuations.

While both we and the reform advocates lack access to much of the granular data and privileged information available to enforcers, that is part of our point: informal or off-the-cuff assessments of the likely competitive effects of any given merger are very likely to be inaccurate, if not plainly wrong, as can be crude indicators of concentration, such as 4-digit NAICS codes, when taken to be indicators of market power. That is part of the insight behind the decades-long shift to fact-intensive, rule-of-reason scrutiny in antitrust, and a conspicuous complication for reformers’ advocacy in favor of a return to *per se* rules and the development of ex ante antitrust regulations.

I. Amazon-Whole Foods

On June 16, 2017, Amazon revealed its intention to purchase the Whole Foods Market, known commonly as “Whole Foods,” a popular chain of organic and natural grocery stores. Despite Whole Foods’ small 1.2% share of U.S. food and grocery sales,³⁹ the announcement—along with the FTC’s rapid clearance of the deal—caused an uproar among progressive and interventionist commentators.⁴⁰ The merger was completed in August 2017, and Amazon quickly began implementing changes to the Whole Foods business model.

³⁷ Joseph Farrell, Paul Pautler, & Michael Vita, *Economics at the FTC: Retrospective Merger Analysis with a Focus on Hospitals*, 35 REV. INDUS. ORG. 369, (2009); For an example of merger reviews regarding non-price effects, see Patrick S. Romano & David Balan, *A Retrospective Analysis of the Clinical Quality Effects of the Acquisition of Highland Park Hospital by Evanston Northwestern Healthcare*, 18 INT. J. ECON. BUS. 45, (2011).

³⁸ See, e.g., Christopher Garmon, *The Accuracy of Hospital Merger Screening Methods*, 48 RAND J. Econ. 1068, (2017) (comparing predictions of screening methods based on pre-merger data with post-merger prices for 28 hospitals); Romano & Balan, *id.* (clinical quality effects of one merger); Orley Ashenfelter, Daniel Hosken, Michael Vita, & Matthew Weinberg, *Retrospective Analysis of Hospital Mergers*, 18 INT. J. ECON. BUS. 5, (2011). For a bibliography of merger retrospectives, including but not limited to hospital studies, see *Merger Retrospective Studies Bibliography*, FED. TRADE COMM’N, <https://www.ftc.gov/policy/studies/merger-retrospective-program/bibliography#bibliography> (last accessed Mar. 9, 2023).

³⁹ Lauren Thomas, *Don’t Worry, Wal-Mart; Amazon Buying Whole Foods Is Just a ‘Drop in the Bucket’*, CNBC (Jun. 21, 2017), <https://www.cnbc.com/2017/06/21/dont-worry-wal-mart-amazon-buying-whole-foods-is-just-a-drop-in-the-bucket.html>.

⁴⁰ *Statement of Federal Trade Commission’s Acting Director of the Bureau of Competition on the Agency’s Review of Amazon.com, Inc.’s Acquisition of Whole Foods Market Inc.*, FED. TRADE COMM’N (Aug. 23, 2017), <https://www.ftc.gov/news-events/news/press-releases/2017/08/statement-federal-trade-commissions-acting-director-bureau-competition-agencys-review-amazoncom-incs>.

A. The Predictions

Barry Lynn, director of the Open Markets Institute, claimed the deal would crush competition and allow Amazon to monopolize commerce in the United States, adding that only the government could save Amazon's rivals from certain downfall.⁴¹ Lina Khan—now chair of the FTC—intimated that Amazon would use its data to transfer its dominance from online to physical retail: “Buying Whole Foods will enable Amazon to leverage and amplify the extraordinary power it enjoys in online markets and delivery, making an even greater share of commerce part of its fief.”⁴² And, in a now-deleted tweet, Tim Wu called the merger a super-monopoly, referring to the multiple monopolies that Amazon would hold after the merger (presumably adding a grocery monopoly to its dominance of online retail).⁴³ Writing in *The New York Times*, Khan further predicted that “this deal would allow Amazon to potentially thwart future innovations.”⁴⁴ Other critics, such as Marshall Steinbaum, acknowledged the merger was legal at the time, but that its legality simply showed the flaws in the antitrust doctrine. According to Steinbaum, “this merger is a no-brainer to approve under existing antitrust doctrines, which is exactly why those doctrines are flawed. We, but not the law, know that Amazon is anticompetitive.”⁴⁵ The list goes on.

To support their claims, many of these critics pointed to the merger's short-term effect on the stock market—Amazon's competitors took a heavy hit when the deal was announced. Because of the share-price losses suffered by the stocks of rival companies, Scott Galloway surmised that markets were failing, and that Amazon should be broken up.⁴⁶ Galloway added:

Within twenty-four hours of the Amazon–Whole Foods acquisition announcement, large national grocery stocks fell 5 to 9 percent.

When the subject of monopolistic behavior comes up, Amazon's public-relations team is quick to cite its favorite number: 4 percent—the share of U. S. retail (online and offline) Amazon controls, only half of Walmart's market share. It's a powerful defense against the call to break up the behemoth. But there are other numbers. Numbers you typically

⁴¹ Alex Shephard, *How Amazon Is Changing the Whole Concept of Monopoly*, THE NEW REPUBLIC (Jun. 19, 2017), <https://newrepublic.com/article/143376/amazon-changing-whole-concept-monopoly>.

⁴² Lina Khan, *Amazon Bites Off Even More Monopoly Power*, NY TIMES (Jun. 21, 2017), <https://www.nytimes.com/2017/06/21/opinion/amazon-whole-foods-jeff-bezos.html>.

⁴³ Auer, *supra* note 32.

⁴⁴ Khan, *supra* note 42.

⁴⁵ Washington Bytes, *Will Amazon-Whole Foods Survive Antitrust Scrutiny Under Trump?*, FORBES (Jul. 3, 2017), <https://www.forbes.com/sites/washingtonbytes/2017/07/03/will-amazon-whole-foods-survive-antitrust-scrutiny-under-trump/?sh=53fa26088e1e>.

⁴⁶ Insider Business, *Scott Galloway Says Amazon, Apple, Facebook, And Google should be broken up*, YOUTUBE (Dec. 1, 2017), <https://www.youtube.com/watch?v=6NyFRlguIPo&t=1160s>; See also Scott Galloway, *Silicon Valley's Tax-Avoiding, Job-Killing, Soul-Sucking Machine*, ESQUIRE (Feb. 8, 2018), https://www.esquire.com/news-politics/a15895746/bust-big-tech-silicon-valley/?src=nl&mag=esq&list=nl_enl_news&date=020818.

won't see in an Amazon press release: • 34 percent: Amazon's share of the worldwide cloud business • 44 percent: Amazon's share of U. S. online commerce.⁴⁷

To summarize, critics claimed that Amazon's market shares (for both its online-retail platform and physical-retail business) and its stock price would grow faster than rivals' and lead to increased concentration in these markets and the exit of smaller rivals. This raises a simple question: have these prophecies come to pass?

B. What Happened?

Five years after the merger was consummated, it has become increasingly evident that critics' claims were wide of the mark. If anything, competition appears to have intensified in both the online and physical spaces, with new firms entering the market and Amazon's share both markets appearing to decline or at least stagnate.

One important indicator is the stock prices of both Amazon and its rivals. Indeed, if critics were correct and Amazon did indeed grab significant sales from rivals, thus increasing its profits, then its stock price should have outperformed those of rivals. Given the idiosyncratic years we have been through—with the COVID-19 pandemic, a marked increase in inflation, and fears of a widespread recession creating the potential for large outliers—it is worth looking at those share prices both one and five years after the merger.

One year after the merger, the picture looked nowhere near as bad as critics' most dire predictions. The stocks of Amazon's main rivals registered significant gains in the year following the announcement of the Whole Foods deal. Kohl's stock actually outperformed Amazon's (+82.05% versus +64.81%) in the year following the merger. Target, Macy's, Costco, BestBuy, Kohl's, and Nordstrom's also showed healthy gains, rising faster than the S&P 500 index. Of course, firms like J.C. Penney and Sears hit new lows, leading both companies to the edge of bankruptcy (although their decline started well before the Whole Foods merger). In short, the retail industry was still highly competitive, and rivals did not appear to be diminished one year after the merger.

From then on, the market appears to have become even more competitive. Looking at the situation almost five years after the merger, the stocks of many rival companies have *significantly* outperformed Amazon. These include Costco, Target, Kroger, Walmart, and BestBuy. Granted, this may have something to do with recent decline of tech stocks—a trend that could conceivably be reversed in the future. Whether this recent decline proves permanent or not, the bigger picture is that critics were mistaken when they claimed the merger would cause the food-retail industry to fall under Amazon's control—notably because of its technological superiority.

⁴⁷ *Id.*

Table I: Closing Prices of Amazon and Its Rivals

Company	Adj. Close Price 06/01/2017	Adj. Close Price 06/01/2018	% Change (06/2017 - 06/2018)	Adj. Close Price 02/01/23	% Change (06/2018 - 02/2023)
Costco	167.30	184.73	10.41%	517.01	179.87%
Target	48.07	65.33	35.90%	175.98	169.37%
Kroger	26.84	22.12	-17.58%	44.92	103.07%
Walmart	72.00	76.67	6.48%	144.67	88.69%
S&P 500	2430.06	2,734.62	12.53%	4119.21	50.63%
BestBuy	51.02	59.65	16.91%	89.65	50.29%
Amazon	49.80	82.08	64.81%	105.15	28.01%
Macy's	18.62	29.22	56.92%	24.03	-17.76%
Kohl's	31.21	56.82	82.05%	33.20	-41.56%
Nordstrom	37.49	44.77	19.41%	19.97	-55.39%

SOURCE: Yahoo Finance

Looking at (estimated) market shares tends to paint a similar picture. For a start, available evidence suggests the market share of Whole Foods has not meaningfully increased since its acquisition by Amazon—moving from 1.3% of the U.S. food-retail market to 1.6%.⁴⁸ This severely undermines critics' claims that Amazon would transfer its purported dominance of online retail to physical retail.

The picture is more complicated when looking at Amazon's online-retail platform. Since the merger, Amazon's share of online retail has steadily increased from roughly 40% in 2017 to an estimated 56% in 2021 (though this is merely the continuation of a trend that predates the acquisition of Whole Foods).⁴⁹ This moderate market-share increase might, at first sight, appear more consistent with critics' predictions, but a closer look paints a different picture. While Amazon's share of online retail as a whole has increased relative to many of its rivals, this is not the case for its share of online *grocery sales* (the part of its online business that should presumably have benefited most from the Whole Foods acquisition). For instance, between 2017 and 2019, Amazon Fresh's consumer base stagnated, while Walmart's and Instacart's grew rapidly.⁵⁰ A more recent study explains that, while

⁴⁸ Matt Day, *Amazon Is Still Trying to Digest Whole Foods*, BLOOMBERG (Aug. 31, 2022), <https://www.bloomberg.com/news/articles/2022-08-31/amazon-s-whole-foods-deal-has-delivered-mixed-results?leadSource=verify%20wall>; see also Daniel Keyes, *Amazon and Whole Foods Have Failed to Upend Grocery*, INSIDER (Jun. 17, 2019), <https://www.businessinsider.com/amazon-whole-foods-have-not-upended-grocery-2019-6?r=US&IR=T>.

⁴⁹ *Amazon's Share of US eCommerce Sales Hits All-Time High of 56.7% in 2021*, PYMNTS (Mar. 14, 2022), <https://www.pymnts.com/news/retail/2022/amazons-share-of-us-ecommerce-sales-hits-all-time-high-of-56-7-in-2021>; other sources suggest Amazon's share of e-commerce increased from 37% to 50% between 2017 and 2021, see Stephanie Chevalier, *Projected Retail E-Commerce GMV Share of Amazon in the United States from 2016 to 2021*, STATISTA (Jul. 27, 2022), <https://www.statista.com/statistics/788109/amazon-retail-market-share-usa>.

⁵⁰ Sujay Seetharaman, *The Story of Amazon's Market Share*, PIPE CANDY (Oct. 30, 2019), <https://blog.pipercandy.com/post/amazon-market-share>.

Amazon's share of online grocery is hard to estimate, several rivals (Walmart Grocery, Shipt, Peapod, and Instacart) grew significantly between 2018 and 2021,⁵¹ with some data suggesting that their growth outpaced that of online-grocery sales as a whole.⁵² While all of this should be taken with a grain of salt, the initial picture we get is certainly not one of Amazon excluding rivals and dominating either the world of physical retail or that of online-grocery sales.

This overall assessment is corroborated by more anecdotal evidence suggesting that the Whole Foods deal has failed to live up to expectations. For a start, Amazon's executives have often been compelled to defend the deal against suggestions that Amazon overpaid and that the deal had failed.⁵³ As one piece surmised:

The success of the Whole Foods acquisition is difficult to measure because Amazon rolls its sales into the physical stores category, alongside its 60 Amazon Fresh grocery stores, an Amazon Style clothing store and 25 smaller Amazon Go stores. But Whole Foods is by far the biggest individual contributor in the group.

Earlier this year, things looked a little bleak. Days after Amazon missed estimates for its first-quarter earnings results, the company announced the closure of six Whole Foods stores.

As consumers get back into the habit of shopping in person, Whole Foods is showing signs of recovery. Placer.ai found the number of visits people make to Whole Foods is now hovering at about the same level as July 2017, before Amazon took over.⁵⁴

Of course, some may retort (fairly) that rivals might have performed even better absent the merger, but that is *not* the harm that critics were predicting when the deal was cleared. Instead, they claimed that many of Whole Foods' rivals would go out of business, and that Amazon would also dominate online-grocery retail. That simply was not the case.

Looking at the direct effects of the merger on Whole Foods' business model, we see many innovations. One of the most notable changes was the introduction of lower prices on a selection of

⁵¹ Thomas Ozbun, *Online Grocery Shopping Sales in the United States from 2019 to 2024*, STATISTA (Jan. 27, 2022), <https://www.statista.com/statistics/293707/us-online-grocery-sales>.

⁵² Janie Perri, *Instacart and Walmart Lead the Pack in Grocery Delivery Sales*, BLOOMBERG SECOND MEASURE (Jul. 20, 2021), <https://secondmeasure.com/datapoints/grocery-delivery-competitors-instacart-walmart-shipt-peapod-freshdirect>.

⁵³ Michele Gelfand, Sarah Gordon, Chengguang Li, Virginia Choi & Piotr Prokopowicz, *One Reason Mergers Fail: The Two Cultures Aren't Compatible*, HARVARD BUSINESS REVIEW (Oct. 2, 2018), <https://hbr.org/2018/10/one-reason-mergers-fail-the-two-cultures-arent-compatible>; see also Keyes, *supra* note 48; Lane Gillespie, *5 Years Later: Amazon's Whole Foods Buy a Study in Hubris and Determination*, BISNOW (Jun. 15, 2022), <https://www.bisnow.com/national/news/retail/amazon-might-have-nailed-the-science-of-selling-groceries-but-to-fine-tune-the-art-of-brick-and-mortar-it-still-has-work-ahead-113422>; Brittain Ladd, *This Is Why Whole Foods Is Failing*, BRITTAIN LADD (Oct. 7, 2020), <https://brittainladd.com/this-is-why-whole-foods-is-failing>.

⁵⁴ Katie Tarasov, *Amazon Bought Whole Foods Five Years Ago for \$13.7 Billion. Here's What's Changed at the High-End Grocer*, CNBC (Aug. 25, 2022), <https://www.cnbc.com/2022/08/25/how-whole-foods-has-changed-in-the-five-years-since-amazon-took-over.html>.

Whole Foods products, with Amazon Prime members receiving even deeper discounts.⁵⁵ This move aimed to make Whole Foods' prices more competitive with other grocery stores, and it helped to increase foot traffic in stores.

In addition to lower prices, Amazon also introduced new technologies to Whole Foods stores, such as the use of cashier-less checkout systems⁵⁶ and in-store pick-up for online orders.⁵⁷ They've even introduced entire stores without checkout lines.⁵⁸ Whole Foods also began offering a wider selection of products through Amazon's online marketplace.

The merger also had an impact on the broader grocery industry. Other major retailers, such as Walmart and Kroger, responded by also cutting prices and increasing their online-grocery offerings.⁵⁹ Kroger's partnership with Ocado marks a major shift in the grocery industry. Through this collaboration, Kroger will be able to benefit from Ocado's robotic technology for packing orders placed online.⁶⁰ Similarly, Target has tried to stay up to date with emerging technologies with its \$550 million acquisition of Shipt, a startup offering same-day delivery services.⁶¹

Walmart followed suit by acquiring Parcel, another startup that offers same-day delivery services, and has announced a partnership with Alert Innovation, which employs automated carts to fulfill grocery-pickup orders at stores. Walmart first introduced grocery pickup in 2017 and initiated a harder push starting in 2019.⁶² In 2018, the company also introduced same-day grocery delivery.⁶³ It's hard to square these developments with Lina Khan's prediction that the Whole Foods deal "would allow Amazon to potentially thwart future innovations."⁶⁴

The point is not that the Amazon-Whole Foods merger was the sole cause of these innovations. They required technological innovations that are separate from anything related to groceries. The

⁵⁵ Steve Watkins, *Kroger Rival Amazon Cuts Whole Foods Prices (Video)*, BIZ JOURNALS (Apr. 2, 2019), <https://www.bizjournals.com/cincinnati/news/2019/04/02/kroger-rival-amazon-cuts-whole-foods-prices.html>.

⁵⁶ Jon Porter, *Amazon Opens First Whole Foods Equipped with Cashierless Technology*, THE VERGE (Mar. 1, 2022), <https://www.theverge.com/2022/3/1/22956093/amazon-whole-foods-just-walk-out-cashierless-tech-glover-park-washington-dc>.

⁵⁷ Heather Haddon, *Whole Foods Introduces Grocery Pickup for Online Orders*, THE WALL STREET JOURNAL (Aug. 8, 2018), <https://www.wsj.com/articles/whole-foods-introduces-grocery-pickup-for-online-orders-1533700861>.

⁵⁸ Tarasov, *supra* note 54.

⁵⁹ *Id.*

⁶⁰ Russell Redman, *Kroger Launches Another Pair of Ocado 'Spoke' Facilities*, SUPERMARKET NEWS (Aug. 23, 2022), <https://www.supermarketnews.com/online-retail/kroger-launches-another-pair-ocado-spoke-facilities>.

⁶¹ Jonathan Shieber, *Target Is Buying Alabama-Based, Same-Day Delivery Service Shipt for \$550 Million*, TECHCRUNCH (Dec. 13, 2017), <https://techcrunch.com/2017/12/13/target-is-buying-alabama-based-same-day-delivery-service-shipt-for-550-million>.

⁶² Barbara Messing, *Introducing Our Biggest Walmart Grocery Pickup Campaign*, WALMART (Jan. 6, 2019), <https://corporate.walmart.com/newsroom/2019/01/06/introducing-our-biggest-walmart-grocery-pickup-campaign>.

⁶³ Hayley Peterson, *Walmart Is Offering Same-Day Delivery of Groceries Across the US – Here's How to Get It for Free*, INSIDER (Mar. 14, 2018), <https://www.businessinsider.com/walmart-free-grocery-delivery-code-2018-3>.

⁶⁴ Khan, *supra* note 42.

important takeaway is that the grocery market continues to innovate, particularly in the direction of online orders and rapid delivery. These are exactly the areas in which Amazon specialized and was expected to bring to Whole Foods with the merger. Despite Stacy Mitchell's claim that "delivery is key to sustaining a monopoly online" or that Amazon can "control rapid-package delivery," it appears today that delivery is just another part of the competitive process, and all the players realize they need to offer the service. Lina Khan's prediction that "[b]y bundling services and integrating grocery stores into its logistics network, the company will be able to shut out or disfavor rival grocers and food delivery services" has not panned out.⁶⁵

The reality of the grocery market is that competition has increased, as retailers like Walmart, Kroger, Giant, Harris Teeter, and others have expanded their delivery offerings. Similarly, delivery companies like Instacart, DoorDash, and UberEats have also expanded their offerings to include groceries. This has led to the emergence of successful startups in the grocery-delivery market, such as Thrive Market. As a result, consumers now have more options for convenient and efficient grocery delivery, while retailers and delivery companies are adapting to meet the market's demands.

All of these efforts demonstrate how traditional grocers are embracing new technologies in order to keep up with the ever-changing digital landscape and remain competitive in the market. These technological improvements allowed grocers to be better positioned for grocery pickup at the start of the COVID-19 pandemic. For example, online sales for Walmart grew 74% in the first quarter of 2020.⁶⁶

C. In Retrospect

Although it is still too early to draw any firm conclusions, it seems that the merger's anticompetitive potential was dramatically overplayed by its opponents. Most of Amazon's direct rivals are still making healthy profits (as reflected by their stock prices). This is inconsistent with the vertical-foreclosure and predatory-pricing stories put forward by critics. Under vertical foreclosure, rivals are deprived of key inputs (or outputs) that prevent them from competing. Predatory pricing occurs when a dominant firm prices below cost in the hope of recouping its losses once rivals have exited the market. Crucially, both of these scenarios necessarily imply that the bottom lines of rivals will suffer (ultimately falling to zero). At the time of writing, these theories have failed to pan out.

Of course, just because anticompetitive scenarios have not yet transpired does not guarantee that they will not occur in the future. Likewise, rivals' overall profits may conceal losses in those markets where they actually compete with Amazon. Finally, it is possible that these rivals' profits would have been higher still had the merger not gone through. Although these potential counterarguments might deserve some attention, they do not detract from the inescapable conclusion that, as of yet,

⁶⁵ *Id.*

⁶⁶ Kelly Tyko, *Walmart Sales Increase 10% as Online Buying Grew 74% During Coronavirus Pandemic*, USA TODAY (May 19, 2020), <https://www.usatoday.com/story/money/2020/05/19/coronavirus-walmart-quarterly-earnings-grocery-pickup-growth/5215832002>.

Amazon has not managed to exclude any of its large retail competitors thanks to its acquisition of Whole Foods.

More fundamentally, it is important not to lose sight of the other side of the coin: Amazon's purchase of Whole Foods may have generated important benefits that critics failed to consider. First and foremost, Amazon immediately implemented a number of price reductions following the deal.⁶⁷ It also started to harness the various synergies that existed between itself and Whole Foods. It notably made some of Whole Food's items purchasable on Amazon, and placed Amazon lockers in numerous Whole Foods stores (allowing consumers to pick up packages from these locations).⁶⁸ The online retailer also ensured that its Prime members would receive various discounts when they visit Whole Foods stores.⁶⁹

And thanks to the forces of competition, the benefits extend beyond Amazon and Whole Foods stores. Rivals notably reacted to the merger by replicating these cost reductions and innovative services. Walmart concluded a deal with Google to allow users to make purchases using Google's voice assistant.⁷⁰ Kroger decreased its prices and expanded its delivery service.⁷¹ And Target introduced a same-day delivery service.⁷² Of course, some of these changes would have happened anyway—grocery delivery was always going to gather momentum thanks to consumers' ever-improving access to the internet. It is also fair to assume, however, that Amazon's purchase of Whole Foods accelerated this trend by signaling to rivals they needed to up their game *rapidly*, or Amazon-Whole Foods might ultimately eat their lunch.

Of course, it is hard to tell whether these benefits would have been achieved without the Amazon-Whole Foods merger. Amazon could conceivably have concluded a long-term contract with Whole Foods, leading rivals to introduce their improvements regardless of the merger. But this is far from certain. As Benjamin Klein, Robert Crawford, & Armen Alchian famously pointed out, long-term

⁶⁷ Andria Cheng, *Two Years After Amazon Deal, Whole Foods Is Still Working to Shed Its 'Whole Paycheck' Image*, FORBES (Aug. 28, 2019), <https://www.forbes.com/sites/andriacheng/2019/08/28/two-years-under-amazon-whole-foods-still-has-its-work-cut-out-to-erase-the-whole-paycheck-image/?sh=17a3888d4227>.

⁶⁸ *Amazon & Prime at Whole Foods Market*, WHOLE FOODS MARKET, <https://www.wholefoodsmarket.com/amazon> (last accessed Jan. 18, 2023).

⁶⁹ Vicki Salemi, *7 Amazon Prime Member Benefits You Can Get at Whole Foods*, RETAIL ME NOT (Jan. 19, 2023), <https://www.retailmenot.com/blog/amazon-prime-benefits-at-whole-foods.html>.

⁷⁰ Andrew Sun, *Walmart Makes Voice Shopping Even More Affordable with New Google Device*, WALMART (Oct. 4, 2017), <https://corporate.walmart.com/newsroom/innovation/20171004/walmart-makes-voice-shopping-even-more-affordable-with-new-google-device>.

⁷¹ Erin Caproni, *Kroger Expands Home Delivery with Latest Partnership*, BIZ JOURNAL (Mar. 12, 2018), <https://www.bizjournals.com/cincinnati/news/2018/03/12/kroger-expands-home-delivery-with-latest.html>.

⁷² Kelly Tyko, *Target Launching Same-Day Delivery in First Markets Feb. 1*, USA TODAY (Jan. 25, 2018), <https://www.usatoday.com/story/money/nation-now/2018/01/25/target-launching-same-day-delivery-first-markets-feb-1/1067851001>.

contractual relationships sometimes entail significant practical obstacles.⁷³ The upshot is that it is often more cost-effective for firms to opt for an outright merger. And if a merger was indeed necessary to generate synergies between Amazon and Whole Foods, then there is little doubt that it also played some part in the competitive response of rivals. In short, there are strong reasons to believe that Amazon's acquisition of Whole Foods may have caused some of the benefits that U.S. retail consumers currently enjoy.

In short, many critics' response to the Amazon-Whole Foods merger was simply kneejerk antitrust populism. Nothing at the time of the merger—other than a presumption that big is bad and a dystopian fear that big firms inevitably continue to increase their market shares⁷⁴—justified the doomsday scenarios that were bandied about. This, among many other factors, is why the FTC ultimately allowed the merger to proceed without a protracted in-depth investigation.⁷⁵ Five years on, this decision appears fully vindicated, and critics' arguments appear even more unreasonable with hindsight. The doomsday scenario failed to transpire.

II. Consolidation in the Beer Industry

The beer industry has undergone significant changes in the 21st century, with a shift towards craft beers, an increase in the number of microbreweries, and a growing interest in different styles of beer. In the early 2000s, the industry was dominated by a small number of large multinational corporations, but over the past two decades, a wave of small, independent breweries has emerged, challenging the status quo and changing how consumers think about beer.

At the same time, there has been a reshuffling of ownership among the biggest U.S. brands: Anheuser-Busch, Miller, and Coors. In 2002, South African Brewing (SAB) acquired Miller Brewing to become SABMiller. In 2005, the Canadian brewing company Molson merged with Coors to become Molson Coors. In 2007, SABMiller and Molson Coors announced their “joint venture.” In 2008, InBev (itself a merger between the Belgian firm Interbrew and the Brazilian conglomerate AmBev) acquired Anheuser-Busch to become AB InBev or just ABI. In July 2016, ABI acquired SABMiller after approval from antitrust authorities. The deal included commitments from ABI to

⁷³ Benjamin Klein, Robert G. Crawford, & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J. L. & ECON. 297, (1978).

⁷⁴ Such fears are a common driver of progressive antitrust policy. See Geoffrey Manne & Dirk Auer, *Antitrust Dystopia and Antitrust Nostalgia: Alarmist Theories of Harm in Digital Markets and Their Origins*, 28 GEO. MASON L. REV. 1286 (2021) (“Underlying this pessimism is a pervasive assumption that new technologies will somehow undermine the competitiveness of markets, imperil innovation, and entrench dominant technology firms for decades to come. This is a form of antitrust dystopia. For its proponents, the future ushered in by digital platforms will be a bleak one—despite abundant evidence that information technology and competition in technology markets have played significant roles in the positive transformation of society.”).

⁷⁵ *Statement of Federal Trade Commission's Acting Director of the Bureau of Competition on the Agency's Review of Amazon.com, Inc.'s Acquisition of Whole Foods Market Inc.*, FED. TRADE COMM'N (Aug. 23, 2017), <https://www.ftc.gov/news-events/news/press-releases/2017/08/statement-federal-trade-commissions-acting-director-bureau-competition-agencys-review-amazoncom-incs>.

divest SABMiller's 59% equity stake in Molson Coors. Given this list of major mergers within the space, it is appropriate to consider both the effects of specific mergers and also the general trends.

A. The Predictions

While the earlier mergers were relatively underdiscussed, the final ABI-SABMiller merger received significant attention from antitrust watchers and commenters in the ABI-SABMiller merger process. The American Antitrust Institute warned that the merger would “eliminate competition,”⁷⁶ “impose significant price increases on consumers,” and “undermine the continued emergence of craft beer.”⁷⁷ AAI President Diana Moss told the *Washington Post* that the deal was “a terrible, terrible idea” and that “[t]his should be dead on arrival at the DOJ. There would be grave concerns over their power to control price ... and the effects on the craft-brewing industry would be devastating.” President Biden's 2021 executive order on competition singled out several sectors, including alcoholic-beverage production, as embodying apparently problematic concentration and a weakening of competition.⁷⁸ The U.S. Treasury Department report created in response to the executive order claimed that “[s]ome of the increased concentration may have resulted from the absence of consistent merger enforcement.”⁷⁹ While these claims are much less extreme than those we find in other contexts, it is still worthwhile to evaluate how reasonable they were and what evidence we have at this point about the effects of consolidation in the beer industry, to the extent that it has happened.

B. What Happened?

First, has concentration been rising in beer? The Treasury report assessing competition in the beer market asserts that concentration is rising.⁸⁰ It is unclear what period was under consideration, although the citations are to older literature from the early 2000s. A recent study by Kulick & Card using U.S. Census data suggests otherwise.⁸¹ They consider the concentration for the four largest firms in the industry. For breweries, that number was 90.8% in 2002, but has fallen to 68.6% in

⁷⁶ Albert A. Foer, *AAI Warns DOJ that Beer Merger Would Eliminate Competition in the United States*, AMERICAN ANTITRUST INSTITUTE (Nov. 20, 2014), <https://www.antitrustinstitute.org/work-product/aai-warns-doj-that-beer-merger-would-eliminate-competition-in-the-united-states>.

⁷⁷ Albert Foer & Sandeep Vaheesan, *The American Antitrust Institute to the U.S. Department of Justice*, AMERICAN ANTITRUST INSTITUTE (Nov. 19, 2014), available at <https://www.antitrustinstitute.org/wp-content/uploads/2014/10/AAI-Beer-merger-to-DOJ-11-19.14.pdf>.

⁷⁸ *Executive Order on Promoting Competition in the American Economy*, THE WHITE HOUSE (Jul, 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy>.

⁷⁹ *Competition in the Markets for Beer, Wine, and Spirits*, U.S. TREASURY DEPARTMENT (Feb. 9, 2022), available at <https://home.treasury.gov/system/files/136/Competition-Report.pdf>.

⁸⁰ *Id.* (Citing Kenneth G. Elzinga & Anthony W. Swisher, *The Supreme Court and Beer Mergers: From Pabst/Blatz to the DOJ-FTC Merger Guidelines*, 26 REV. INDUS. ORG. 245, (2005)).

⁸¹ *Industrial Concentration in the United States: 2002-2017*, U.S. CHAMBER OF COMMERCE (Mar. 9, 2022), <https://www.uschamber.com/finance/antitrust/industrial-concentration-in-the-united-states-2002-2017>.

2017, which is the most recent data. Instead of rising concentration, as commonly asserted, we actually see falling concentration within all alcoholic-beverage sectors, with the largest drop in beer brewing.

Table III: Alcoholic Beverage Production, 2002-2017

NAICS Industry	2002	2007	2012	2017	ΔCR_4
Breweries	90.8	89.5	87.8	68.6	- 22.2
Wineries	46.5	42.3	43.5	41.3	- 5.2
Distilleries	70.5	69.5	64.9	56.5	-14.0

SOURCES: *Economic Census Data, Kulick & Card (2022)*

It is quite possible that those declines in concentration would have been even greater but for the mergers, but the falling concentration is an important datapoint to understand in this discussion.

If we want better identified estimates, we need to look at specific mergers and events. The ABISABMiller merger is too recent for the economics-publishing process, but the merger with the best econometric evidence is SABMiller and Molson Coors. SABMiller and Molson Coors announced their “joint venture” in October 2007 and was approved in June 2008. At the time, Miller had a 17.52% market share and Molson Coors had a 10.43% share.⁸² Despite growing craft brewers, even at the time, almost 90% of beer revenue was from lagers.⁸³ In addition to high concentration, the main products were seen as close substitutes (Miller Lite and Coors Lite, for example).

Despite these possibly worrisome features of the market, the parties claimed large efficiency gains that would offset the market-power increases. The DOJ stated publicly that, in its investigation, “the Division verified that the joint venture is likely to produce substantial and credible savings that will significantly reduce the companies’ costs of producing and distributing beer.”⁸⁴ The reason was that “[p]rior to the merger, Coors was brewed in only two locations, whereas Miller was brewed in six geographically dispersed locations. The merger was expected to allow the combined firm to economize on shipping costs primarily by moving the production of Coors beer into Miller.”⁸⁵

Ashenfelter, Hosken, & Weinberg (2015) use retail-scanner data collected by IRI.⁸⁶ The data used was only for supermarkets, which Ashenfelter, Hosken, & Weinberg estimate accounted for 23% of total sales for 2011. They have data on brand, package size, and container type. They find that the concentration effect was roughly (but not completely) offset by the efficiency effect. In their preferred specification, the increase in concentration from the merger was predicted to increase by 2% across

⁸² Orley C. Ashenfelter, Daniel S. Hosken, & Matthew C. Weinberg, *Efficiencies Brewed: Pricing and Consolidation in the US Beer Industry*, 46 RAND J. ECON. 328, 332 (2015).

⁸³ *Id.*

⁸⁴ Ken Heyer, Carl Shapiro, & Jeffrey Wilder, *The Year in Review: Economics at the Antitrust Division, 2008-2009*, 35 REV. INDUS. ORG. 349, (2009).

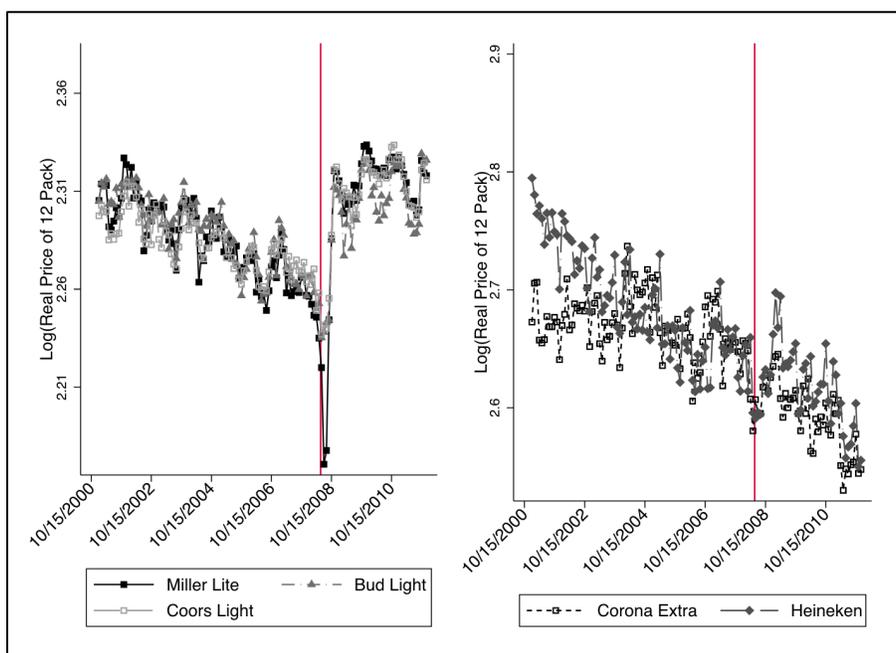
⁸⁵ Ashenfelter, Hosken & Weinberg, *supra* note 82.

⁸⁶ *Id.*

all lager-style beers but that was nearly offset by efficiency created by the merger.⁸⁷ Overall, prices were unchanged on average.

If we focus on specific beers, Miller & Weinberg (2017) find a significant price increase (6%-8%) after the merger for the most popular beer brands (Coors Lite, Miller Lite, and Bud Lite) but no effect for Corona Extra and Heineken, which are seen as more differentiated.⁸⁸ The authors take this as evidence of a coordinated price effect between ABI and Miller-Coors, since the market now had only two major players, compared to three before the merger. Looking at a local level, Ashenfelter, Hosken, & Weinberg (2015); Miller & Weinberg (2017); and Azar & Barriola (2022) all find a positive correlation between increases in HHI and price increases. Overall, there is credible evidence that the merger led to a price increase for the flagship brands.

Figure I: Price of Flagship Beers, 2000-2010



SOURCE: Miller & Weinberg (2017)

However, before we conclude that the merger was disastrous for the beer market, remember that concentration has been falling. That is because the big three are not the only players. Azar & Barriola (2022) study the effects of the merger on the craft-beer market.⁸⁹ They find that, in the average market over the four years following the merger, the merger led to over an 11% increase in the number of craft brewers, while the number of products per craft brewer remained the same. Since

⁸⁷ *Id.* at 330.

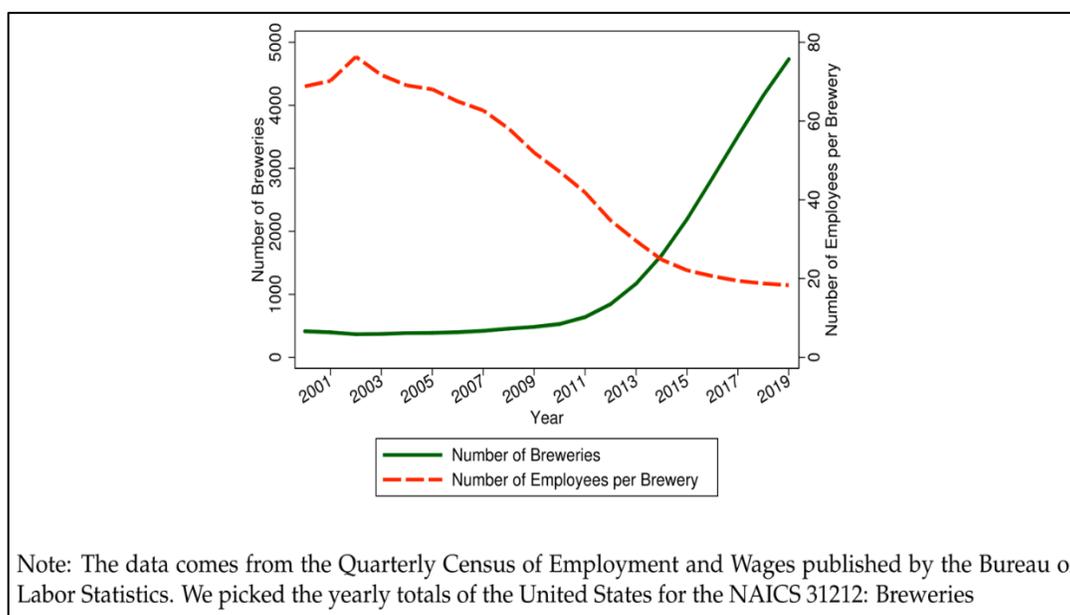
⁸⁸ Nathan H. Miller & Matthew C. Weinberg, *Understanding the Price Effects of the MillerCoors Joint Venture*, 85 *ECONOMETRICA* 1763 (2017).

⁸⁹ José Azar & Xabier Barriola, *Did the MillerCoors Joint Venture Strengthen the Craft Beer Revolution?*, 85 *INT'L J. INDUS. ORG.* (2022).

most of these entrants were small, the market shares were largely unaffected by entry. They point to the price increases as the driver of entry into the craft market, as it made entry profitable. This goes against a common theory that larger firms with more power will deter entry.⁹⁰ Another possibility, unexplored but consistent with higher entry, is that the merger increased the possibility that craft beers would be acquired by the large brewers.

At the same time, the large breweries are acquiring smaller breweries and changing their production process. For example, according to Elzinga & McGlothlin (2021), when ABI acquired Goose Island, there was a large increase in sales of craft beers, suggesting some sort of spillover from the big names to the craft beers.⁹¹

Figure II: Number of Breweries and Employees per Brewery in the United States



SOURCE: Azar & Barriola (2022)

C. In Retrospect

Overall, the effects of beer mergers seem to be neutral. While the prices of Coors Lite, Miller Lite, and Bud Lite increased, efficiency gains meant that the average price stayed flat, and we saw new entry from craft brewers. Continued growth in craft brewing suggests that Diana Moss' concern that "the effects on the craft-brewing industry would be devastating" appear not to have panned out. One thing that makes predictions about the ABI-SABMiller merger hard to assess in retrospect, however, is that many came before the spin-off of Coors was finalized as part of the deal. It is possible that

⁹⁰ Anthony M. Marino & Ján Zájbojník, *Merger, Ease of Entry, and Entry Deterrence in a Dynamic Model*, 54 J. INDUS. ECON. 397 (2006).

⁹¹ Kenneth G. Elzinga & Alexander J. McGlothlin, *Has Anheuser-Busch Let the Steam Out of Craft Beer? The Economics of Acquiring Craft Brewers*, 60 REV. INDUS. ORG. 147 (2022).

these concerns were conditional predictions that did not ultimately apply, as SABMiller needed to divest from Molson Coors as part of the DOJ agreement.

One aspect that affects the study of mergers in the beer market is that the alcohol market is extremely regulated, and those regulations change over time. Differences in regulatory regimes can serve to distinguish alcohol markets across states and over time, which makes it easier to compare more and less concentrated markets. At the same time, changing regulations also contaminate any causal analysis. The regulations introduce pressures to beer markets that differ from more standard product markets, such as smartwatches. As Barry Lynn of Open Markets described it: “The great effervescence in America’s beer industry is largely the product of a market structure designed to ensure *moral balances*...” (emphasis added).⁹² He added that “consolidation can also threaten the primary outcome of this market – the ability of communities and individuals to manage for themselves this ever so extraordinary commodity.”⁹³

Such moral questions, or questions about communities’ ability to manage themselves, are beyond the scope of this merger retrospective, but an unavoidable part of the larger policy debate surrounding beer.

III. Bayer-Monsanto

The Bayer-Monsanto merger, completed in 2018, brought together two of the world’s largest and most innovative agricultural companies, creating a leading player in the industry. The merger, valued at \$66 billion, has had a significant impact on the global agriculture industry and brought several benefits to farmers and consumers. After earning approval from the European Union, Russia, and Brazil, approval in the United States (particularly by the DOJ) was the deal’s final hurdle.

In order for the Bayer-Monsanto merger to pass, the DOJ required the companies to make certain divestitures. Divestitures are the process of selling off certain assets or businesses in order to mitigate concerns about the merger reducing competition in the market. The DOJ required Bayer to divest certain seed and herbicide assets in order to address concerns about the merger’s potential impact on competition in the seed and herbicide markets. In total, the two companies spun off \$9 billion in assets.⁹⁴ Specifically, Bayer was required to divest its cotton, canola, soybean, and vegetable-seed businesses, as well as its Liberty herbicide business, to BASF, a German chemical company. This divestiture helped to ensure that there would continue to be strong competition in the seed and herbicide markets after the merger.

⁹² Barry C. Lynn, *Big Beer, A Moral Market, and Innovation*, HARVARD BUSINESS REVIEW (Dec. 26, 2012), <https://hbr.org/2012/12/big-beer-a-moral-market-and-in>.

⁹³ *Id.*

⁹⁴ Brian Fung & Caitlin Dewey, *Justice Department Approves Bayer-Monsanto Merger in Landmark Settlement*, THE WASHINGTON POST (May 29, 2018), https://www.washingtonpost.com/business/economy/justice-department-approves-bayer-monsanto-merger-in-landmark-settlement/2018/05/29/25d56ec8-6358-11e8-a69c-b944de66d9e7_story.html.

Additionally, Bayer was also required to divest certain assets to ensure that there would continue to be competition in the digital-agriculture market. Specifically, the company was required to divest its “Xarvio” digital-agriculture platform to an independent third party.

The DOJ also imposed restrictions on Bayer’s behavior to ensure that the company would not use its strengthened position in the market to harm competition. For example, Bayer was required to license certain intellectual property to competitors to ensure that they could continue to compete effectively.⁹⁵ These required divestitures and restrictions on behavior helped to ensure that there would continue to be strong competition in the market after the merger.

A. The Predictions

Perhaps unsurprisingly, the merger drew stern rebukes from progressive advocates of more aggressive antitrust enforcement. Spencer Waller, a professor at Loyola University Chicago’s School of Law and the director of the Institute for Consumer Antitrust Studies, expressed standard fears about the merger: “The fear is that price is going to go up, quality is going to go down, and whichever company was trying super hard before, well, they got merged in, and they’re going to stop caring.”⁹⁶ Sen. Amy Klobuchar (D-Minn.) opined that “[l]arge-scale consolidations in the agricultural inputs sector could also significantly reduce competition, limit seed options for farmers, and raise prices for both farmers and consumers,” adding that the “company created by the Bayer-Monsanto merger would control about 24 percent of the world’s pesticides sales. Together, Bayer-Monsanto and Dow-DuPont would control 76 percent of the market for corn and 66 percent of the market for soybeans.”⁹⁷ These fears were echoed by academic work arguing that increased consolidation resulting from the Bayer-Monsanto and Dow-Dupont mergers would lead to significant price increases in the markets for corn, soy, and cotton seeds.⁹⁸

More generally, the merger (as well as others deals in the food sector) was repeatedly cited as an example of the failing state of antitrust enforcement. For instance, the Democratic Party’s “Better Deal” platform, published in July 2017, cited the food sector as one of five key sectors that required more stringent antitrust merger enforcement.⁹⁹ It also argued that the Dow-Dupont, Bayer-

⁹⁵ David Evans, *The Bayer/Monsanto Digital Farming Licensing Remedy: Structural or Behavioral?*, JD SUPRA (Apr. 4, 2018), <https://www.jdsupra.com/legalnews/the-bayer-monsanto-digital-farming-70116>.

⁹⁶ Robert Holly, *Weeding Out Competition: Farmers Left Paying Steep Prices As Seed Firms Merge*, ILLINOIS PUBLIC MEDIA (Dec. 9, 2016), <https://will.illinois.edu/news/story/weeding-out-competition-farmers-left-paying-steep-prices-as-seed-firms-merge>.

⁹⁷ Amy Klobuchar, *Klobuchar, Merkley, Senators Urge DOJ Antitrust Division to Conduct Thorough and Impartial Analysis of Bayer AG Acquisition of Monsanto Company*, KLOBUCHAR.SENATE (Jul. 21, 2017), <https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=B46520CA-8D6B-47D3-AD15-AFC33B9D8486>.

⁹⁸ Texas A&M, *Effects of Proposed Mergers and Acquisitions Among Biotechnology Firms on Seed Prices*, AGRICULTURAL & FOOD POLICY CENTER (Sep. 2016), available at https://www.afpc.tamu.edu/research/publications/675/WP_16-2.pdf.

⁹⁹ Pat Mooney, *Too Big to Feed*, INTERNATIONAL PANEL OF EXPERTS ON SUSTAINABLE FOOD SYSTEMS 82 (Oct. 2017), available at https://www.ipes-food.org/_img/upload/files/Concentration_FullReport.pdf.

Monsanto, and Syngenta-ChemChina mergers would harm farmers and rural communities. According to the document, these harms justified a more holistic approach to antitrust policy.¹⁰⁰

Finally, in addition to standard market-power concerns, some critics raised fears about the use of data to harm farmers. Margrethe Vestager, the European Union's top antitrust enforcer at the time of the merger, worried about the effects of collected data on farms. "Digitalization is radically changing farming," Vestager told a German newspaper. "We need to beware that through the merger, competition in the area of digital farming and research is not impaired."¹⁰¹ "If they own the data, then they can dictate what they plant, where they plant it, and how they're harvested," said Joe Maxwell, executive director of the Organization for Competitive Markets.¹⁰²

B. What Happened?

The merger did increase market concentration within the agriculture industry. Prior to the merger, Bayer and Monsanto were already two of the industry's largest players and the merger served to further consolidate their position. Increased concentration led to concerns about reduced competition and higher prices for farmers and consumers. But did they play out?

While people will point to rising seed prices as evidence of the merger's harms, it is important to view the rising prices in context. Several factors, unrelated to any mergers, contribute to the rising cost of seeds over time. One reason is the ongoing development of hybrids that have higher yields, making the seed more valuable. Additionally, the incorporation of biotechnology traits in corn hybrids has provided farmers with management advantages, such as possible reductions in the use of pesticides and tillage, which further increases the value of the seed.¹⁰³ Improvements in seed genetics and technology have led to increased costs of seeds, specifically, but may reduce the true costs of corn per-bushel, as yields have increased.¹⁰⁴

In addition, the merger has led to concerns about the potential for the newly merged company to wield significant influence over the regulatory process. The company will have significant resources

¹⁰⁰ *Id.*

¹⁰¹ *EU Antitrust Chief Says "Beware" of Bayer-Monsanto Control of Farm Data*, FOOD & POWER NEWSLETTER (Feb. 23, 2018), <https://www.openmarketsinstitute.org/publications/food-power-newsletter-eu-antitrust-chief-says-beware-of-bayer-monsanto-c>.

¹⁰² *Id.*

¹⁰³ The Food and Drug Administration cites lower pesticide use as an advantage of genetically modified seeds (GMOs). See, *Why Do Farmers in the U.S. Grow GMO Crops?*, FOOD & DRUG ADMINISTRATION (Feb. 17, 2022), <https://www.fda.gov/food/agricultural-biotechnology/why-do-farmers-us-grow-gmo-crops#:~:text=Farmers%20can%20use%20less%20spray,the%20soil%20to%20control%20weeds>; There is evidence, however, that pesticide use has increased with genetically modified crops. See, Charles M. Benbrook, *Impacts of Genetically Engineered Crops on Pesticide Use in the U.S. - The First Sixteen Years*, 24 ENVIRON. SCI. EUR. 24 (2012), <https://enveurope.springeropen.com/articles/10.1186/2190-4715-24-24>.

¹⁰⁴ Erik Stokstad, *New Genetically Modified Corn Produces up to 10% More than Similar Types*, SCIENCE (Nov. 4, 2019), <https://www.science.org/content/article/new-genetically-modified-corn-produces-10-more-similar-types>.

at its disposal, which could be used to influence regulators and shape policies in ways that benefit the company, but not necessarily the public.

Regulators argued that, by merging with Monsanto, Bayer would become a major player in the corn-seed market. The newly merged company would have significant market share and an increased ability to influence prices. Additionally, since Bayer also sells a key seed treatment to corn farmers, the company would have an incentive to raise the price of the treatment, knowing that farmers would have fewer choices of seed suppliers, which was one of the concerns that the government raised about the merger. This argument ignores the complementarity between seeds and seed treatment, in that any increase in price for seed treatment lowers the demand for your seeds. The merger actually aligned these incentives.

One market where Monsanto had relatively large market share is in corn and soybean seeds. Sen. Klobuchar worried that “Bayer-Monsanto and Dow-DuPont would control 76 percent of the market for corn and 66 percent of the market for soybeans.” While hardly rigorous econometric evidence, we can look at global corn and soybean prices, as shown in Figure III, to assess how the corn and soybean markets are doing. Both prices stayed steady after the merger, but these prices are not adjusted for inflation. Corn and soybean prices actually fell in real inflation-adjusted terms. Only the onset of the COVID-19 pandemic, with the ensuing inflation and supply-chain issues, drove corn prices back on par with previous nominal highs from around 2012-2013.

Figure III: Global Prices of Corn and Soybeans, 2000-2022



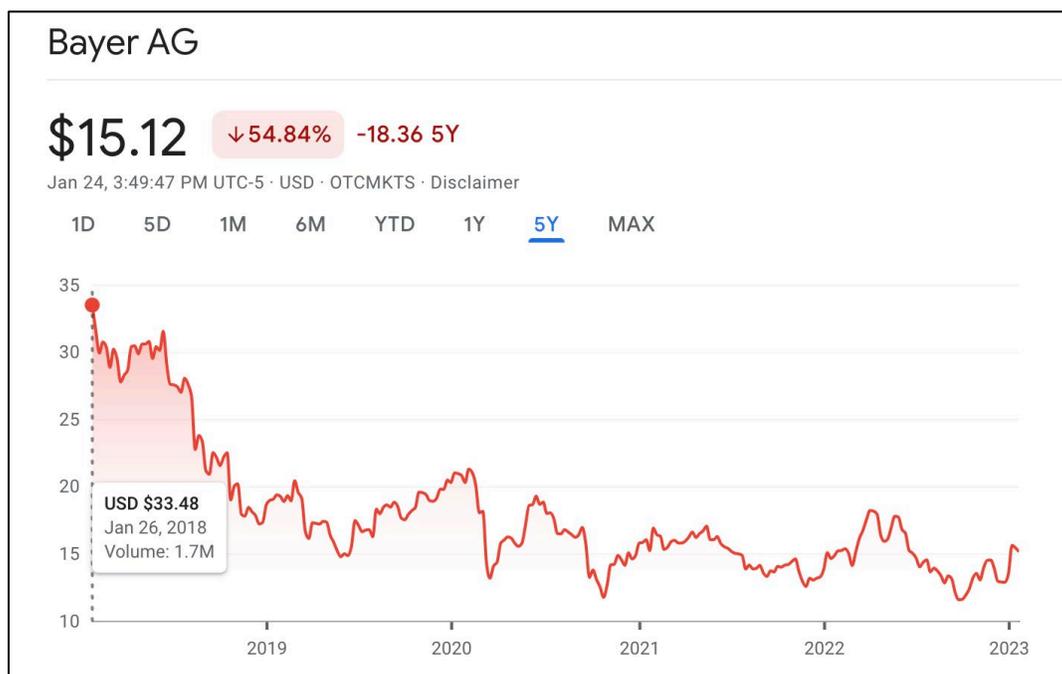
SOURCE: FRED; Shaded area represents recession

Among the primary benefits of the merger have been increased efficiency and cost savings. By combining the resources and expertise of both companies, the newly merged company is better positioned to invest in research and development, improve yields, and reduce costs for farmers. In 2018, along with the acquisition of Monsanto, Bayer announced annual cost savings of around \$1.5

billion.¹⁰⁵ In 2020, it announced an addition \$1.8 billion in annual savings.¹⁰⁶ It is important to note, however, that this latter cost savings was partially in response to the COVID-19 pandemic and should not be directly attributed to the merger.

These sort of cost reductions do, however, tell us something about the relevant markets, as well as the market position in which Bayer now finds itself. The need to cut costs drastically does not comport with a firm soaking in monopoly profits. If the best of all monopoly profit is a quiet life, Bayer does not have that life. Over the past five years, since just before the merger was allowed, Bayer's stock is down more than 50%.

Figure IV: Share Price of Bayer, 2018-2023



SOURCE: Google Finance (accessed Jan. 24, 2023)

C. In Retrospect

Five years after the merger, there is no evidence that Bayer can “dictate what they plant, where they plant it, and how they’re harvested.”¹⁰⁷ Again, the direst predictions have not occurred. Farming remains a difficult life. The hours are long, and prices are volatile. But it is hard to find a break in any trends.

¹⁰⁵ Liam Proud, *Breakingviews - Bayer Investors Get Unwelcome Antitrust Present*, REUTERS (Apr. 10, 2018), <https://www.reuters.com/article/us-monsanto-m-a-breakingviews-idUSKBN1HH1V0>.

¹⁰⁶ Angus Liu, *Beleaguered Bayer Adds \$1.8B to Cost-Cutting Goal Amid COVID-19 Slowdowns*, FIERCE PHARMA (Oct. 1, 2020), <https://www.fiercepharma.com/pharma/bayer-expands-restructuring-plan-for-1-8b-cost-cuts-amid-covid-19-slowdowns>.

¹⁰⁷ Bayer AG, GOOGLE FINANCE, <https://www.google.com/finance/quote/BAYN:ETR?hl=en> (accessed Jan. 24, 2023).

One of the challenges of a retrospective on the Bayer-Monsanto deal is the sheer variety of markets in which each company participates. This is a broader issue that applies to any retrospective analysis of mergers. We need to be careful that any perceived market harms are not actually the result of random chance. Even if most mergers are beneficial for competition, some will turn out to have generated a rise in prices. This is not conclusive evidence that allowing the merger was a mistake, even if it may appear so in hindsight. It is quite possible that at least one of the many markets affected by the Bayer-Monsanto merger did see a rise in prices. But looking across those many markets to find the particular one that generated a price rise is equivalent to p-hacking. We have the same problem in looking explicitly for markets where harm did not occur.

Instead, this retrospective focused on Bayer's overall market position, as reflected in its stock returns and need to cut costs, as well as the market for corn and soybean seeds, because these were markets that were explicitly highlighted as areas of potential concern by progressive critics. Looking at these metrics suggests that, despite an increased level of market power from the merger, Bayer has failed to raise prices or exploit its position in any meaningful way.

IV. Google-Fitbit

Google's purchase of Fitbit was one of the largest tech acquisitions of 2019. The \$2.1 billion deal marked Google's entry into the wearables market and added Fitbit's popular fitness-tracking devices to the tech giant's portfolio.¹⁰⁸ The acquisition also sparked a debate among industry experts, privacy advocates, and consumers regarding the potential consequences of combining the vast data collected by Fitbit with Google's already extensive data-collection and analysis capabilities.

A. The Predictions

The deal's announcement was swiftly met with cries of alarm from both privacy advocates, who feared it would enable Google to use consumers' health information to target ads, and from progressive-minded competition scholars, who believed the deal would cement Google's market position in online advertising. Lina Khan called allowing the acquisition a "terrible decision." This was part of her larger complaint that "[e]nforcers spent the last two decades waiving through hundreds of acquisitions by Google, only to watch it illegally renege on commitments, exclude rivals, & monopolize markets."¹⁰⁹

The fears surrounding the Fitbit acquisition are perhaps best summarized in a joint statement, signed by several consumer associations and progressive-advocacy groups, including BEUC (Europe's largest

¹⁰⁸ *Fitbit to Be Acquired by Google*, BUSINESS WIRE (Nov. 1, 2019), <https://www.businesswire.com/news/home/20191101005318/en/Fitbit-to-Be-Acquired-by-Google>.

¹⁰⁹ Leah Nylén, *Facebook, Google's Quintet of Antitrust Suits*, POLITICO (Dec. 18, 2020), <https://www.politico.com/newsletters/morning-tech/2020/12/18/facebook-googles-quintet-of-antitrust-suits-792395>.

consumer organization), the Open Markets Institute, and the Omidyar Network.¹¹⁰ Among other things, the organizations claimed the merger would prevent new firms from entering the market and would harm consumer privacy:

Wearable devices could replace smartphones as the main gateway to the internet, just as smartphones replaced personal computers. Google's expansion into this market, edging out other competitors would thus be significant. Wearables like Fitbit's could in future give companies details of essentially everything consumers do 24/7 and allow them to feed digital services back to consumers.... The exploitation of such data in a commercial context is an important concern that demands close scrutiny by regulators both for its anticompetitive effects (where huge bundles make it near-impossible for entrants to compete against incumbents) and anti-consumer effects (creating ever bigger bundles that undermine consumer choice).¹¹¹

Along similar lines, Tommaso Valletti & Cristina Caffarra intimated the deal would enable Google to use data from Fitbit devices in order to better target its ads. According to them, this would harm user privacy and suppress competition from other advertisers:

With Google as the acquiror, the concern is that the acquisition is intended to pre-empt the emergence of a potential rival who could otherwise develop by exploiting a key 'access point' for the collection of data and for access to our attention, with the ultimate aim to defend and enhance its position in the core advertising business...

[Google] already owns locational data that is hugely important for targeted advertising.... Combining this existing stock with enormously valuable biometric and behavioural data that can inform on other dimensions of the user's experience, Google will gain further strength in the supply of digital advertising in which it is already super dominant.¹¹²

In both cases, an important part of the argument was that the merger would harm competition because data from Fitbit devices would reinforce Google's already strong position in the online-ad industry.¹¹³ The authors supported this assertion by claiming essentially that the incentives to do so were simply too powerful for Google to ignore:

Google/Fitbit involves the acquisition by a giant digital platform—whose business is based on the monetisation of customers' data through microtargeted ads, and is already

¹¹⁰ Heather Landi, *Consumer Groups Warn Google's Fitbit Buyout Could Harm Data Privacy, Competition*, FIERCE HEALTHCARE (Jul. 2, 2020), <https://www.fiercehealthcare.com/tech/consumer-groups-warn-google-s-fitbit-buyout-could-harm-data-privacy-competition>; *Consumer and Citizen Groups Have Serious Concerns About Google Fitbit Takeover*, NGO JOINT STATEMENT (2020), available at https://www.beuc.eu/sites/default/files/publications/beuc-x-2020-060_joint_ngo_statement_on_google_fitbit_merger.pdf.

¹¹¹ *Id.*

¹¹² Tommaso Valletti & Cristina Caffarra, *Google/Fitbit Review: Privacy IS a Competition Issue*, VOX EU (Mar. 4, 2020), <https://cepr.org/voxeu/blogs-and-reviews/googlefitbit-review-privacy-competition-issue>.

¹¹³ *Id.*, "This deal is coming forward against a background of perceived major deterioration in privacy standards, as competition between data collectors has dwindled and users' attention is now funneled into very few giant 'attention brokers.'"

sitting on a mountain of personal data and analytics capabilities—of a target with unique data-generating assets in the most sensitive of all areas: capturing biometric data (health, and even emotions) 24 hours a day, every day.¹¹⁴

Or, as seven Democratic senators claimed:

Adding Fitbit’s consumer data to Google’s could further diminish the ability of companies to compete with Google in... ad technology markets and could raise barriers for potential competitors to enter these markets,’ the lawmakers wrote.¹¹⁵

Others, including Gregory Crawford, speculated that Google would combine health data from Fitbit devices with more general data about those same users, and sell this to insurance providers, enabling them to better price discriminate between consumers:

Combining health and non-health data will allow Google to use non-health data to “customize” insurance offers. Does he gamble? Does she search for symptoms of life-threatening illnesses? It’s easy to see how such info could reduce the quality of insurance offers.¹¹⁶

Regulators, however, were largely unconvinced by these claims, with the world’s largest antitrust authorities clearing the merger with only limited remedies. In the United States, the DOJ essentially waved the deal through, while the European Commission required only limited API access and data-use-related remedies.¹¹⁷

In short, vocal critics made three key claims about the merger, all of which have since turned out to be false: (i) that Google would use data from Fitbit devices to better target its ads, (ii) that Google would obtain a dominant position in wearable devices and prevent the entry of rivals in this segment, and (iii) that Google would reinforce its already strong position in the online-advertising market. As explained below, not one of these claims has turned out to be even remotely accurate.

¹¹⁴ *Id.*, The authors add: “Just as Google today promises that ‘Fitbit health and wellness ‘personal’ data will not be used for Google ads,’ Facebook at the time swore blind they would not exploit WhatsApp data and would monetise the \$21 billion by selling emojis—something they actually never did.”

¹¹⁵ *Seven Democratic Senators Urge Caution on Google’s Purchase of Fitbit*, REUTERS (Jul. 23, 2020), <https://www.reuters.com/article/us-fitbit-m-a-alphabet/seven-democratic-senators-urge-caution-on-googles-purchase-of-fitbit-idUSKCN24O2V6>.

¹¹⁶ @GregorySCrawfor, TWITTER (Dec. 22, 2020, 5:37 AM), <https://twitter.com/GregorySCrawfor/status/1341332072879800321>; see also, @GregorySCrawfor, TWITTER (Dec. 22, 2020, 5:44 AM), <https://mobile.twitter.com/GregorySCrawfor/status/1341333752136560641> (“More generally, consumers care about how their data is combined and used (even in the aggregate) and the combination of health and non-health data can also be interpreted as a quality-adjusted price increase of using Google’s *existing* services.”).

¹¹⁷ Ron Amadeo, *Google Says It’s Closing the Fitbit Acquisition—Uh, Without DOJ Approval?*, ARSTECHNICA (Jan. 14, 2021), <https://arstechnica.com/gadgets/2021/01/google-closes-the-fitbit-acquisition-pledges-to-not-use-data-for-ads> (“1. Google commits not to use any Measured Body Data or Health and Fitness Activity Location Data in or for Google Ads. 2. Google commits to maintain Data Separation. 3. Compliance with the commitments set out in paragraphs 1 and 2 above is to be achieved through a technical structure for data storage consisting of auditable technical and process controls, reflected in the following approach...”).

B. What Happened?

Critics' claims appear most mistaken in the advertising industry. Indeed, the fear was that, by purchasing Fitbit, Google would be in a position to better target ads throughout its entire platform, thereby increasing its hold on the broader advertising industry. Four years on, however, the opposite appears to have happened. From 2017 to 2022, Google's share of online advertising spend has steadily declined, falling from 34.7% to 28.8%.¹¹⁸ And it is not just in relative terms; the company's quarterly earnings reports show a clear decline in ad revenue, including year-over-year drops in the fourth quarter of 2022 of 8.6% for the Google network and 7.0% for YouTube.¹¹⁹ As usual, critics may retort that Google's revenues and market shares would have declined even more absent the merger but, once again, that was not the initial claim. Instead, they wrote that the merger would give Google an unbreakable grip on the online-advertising industry—the “horse has bolted” as Gregory Crawford put it¹²⁰—and that has not been the case.

A second major piece of the doomsday claims concerns the combination of health-related data from Fitbit with Google's other data concerning its users, either with the purpose of using it for Google ads or in order to sell it to insurers. While the remedy imposed by the European Commission precluded Google from combining data across platforms with the purpose of selling Google ads, it said nothing about the use of Fitbit and Google data for insurance purposes.¹²¹ Meanwhile, nothing prevented Google from doing any of this in the United States, where the DOJ chose not to challenge the acquisition.¹²² And yet, at the time of writing, even in the United States, Google does not use Fitbit data to target Google Ads. Fitbit's privacy policy is unambiguous in this respect. The “how we use information” section of the policy lists only four uses:

PROVIDE AND MAINTAIN THE SERVICES...

¹¹⁸ Sara Fischer, *Slow Fade for Google and Meta's Ad Dominance*, AXIOS (Dec. 20, 2022), <https://www.axios.com/2022/12/20/google-meta-duopoly-online-advertising>.

¹¹⁹ Nicole Farley, *Google Search, Network, and YouTube Revenue All Fell in Q4 2022*, SEARCH ENGINE LAND (Feb. 3, 2023), <https://searchengineland.com/google-search-network-and-youtube-revenue-all-fell-in-q4-2022-392611>.

¹²⁰ @GregorySCrawfor, TWITTER (Dec. 22, 2020, 5:37 AM), <https://mobile.twitter.com/GregorySCrawfor/status/1341332074591096834>.

¹²¹ *Commission Decision of 17.12.2020 Declaring a Concentration to Be Compatible with the Internal Market and the EEA Agreement (Case M.9660 – Google/Fitbit)*, EUROPEAN COMMISSION (Dec. 17, 2020), available at https://ec.europa.eu/competition/mergers/cases1/202120/m9660_3314_3.pdf (“1. Google commits not to use any Measured Body Data or Health and Fitness Activity Location Data in or for Google Ads. 2. Google commits to maintain Data Separation. 3. Compliance with the commitments set out in paragraphs 1 and 2 above is to be achieved through a technical structure for data storage consisting of auditable technical and process controls, reflected in the following approach...”); see also, *Mergers: Commission Clears Acquisition of Fitbit by Google, Subject to Conditions*, EUROPEAN COMMISSION (Dec. 17, 2020), https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2484 (“Google will not use for Google Ads the health and wellness data collected from wrist-worn wearable devices and other Fitbit devices of users in the EEA, including search advertising, display advertising, and advertising intermediation products. This refers also to data collected via sensors (including GPS) as well as manually inserted data.”).

¹²² Amadeo, *supra* note 117.

IMPROVE, PERSONALIZE, AND DEVELOP THE SERVICES...

COMMUNICATE WITH YOU...

PROMOTE SAFETY AND SECURITY...¹²³

None of these categories (which the privacy policy delves into in great detail) could reasonably be construed as entailing the use of Fitbit data in order to better target Google ads. The same applies to the “how information is shared” section of the same privacy policy.¹²⁴ In short, Google does not use Fitbit data to target Google ads. As the company summarized in an explainer regarding the merger:

Currently, all customers log in to Fitbit with a Fitbit account, and so your Fitbit data syncs to your Fitbit account, not to a Google account. However, you may still choose to transfer some Fitbit data to Google in limited cases, like if you use Fitbit with a Google service. For example, you may authorize Google Assistant to provide your Fitbit activity, like your step count and calories burned. For more information on connecting Fitbit and Google Assistant, please see *How do I use a voice assistant on my Fitbit smartwatch?* and the related Google help article. For more information on how Fitbit shares data with others, including Google, please see the Fitbit Privacy Policy section titled “How Information Is Shared.”¹²⁵

Thus, contrary to critics’ claims, Google does not integrate users’ Fitbit data into its broader advertising platform, nor does it share (or sell) that information with (to) insurers.¹²⁶ And nothing suggests it plans to do so in the future.

This leaves one final question: did the acquisition of Fitbit enable Google (and Fitbit) to significantly increase either of the firms’ market position in the burgeoning wearable-device industry? Once again, critics’ claims appear to fall short. Fitbit has been slowly losing market share. According to Counterpoint Technology Market Research, the overall smartwatch market grew by 22% from 2020 to 2021, but Fitbit’s share fell from 5.7% to 3.8%, as shown in Figure V. Counterpoint found similar declines in market share from 2021 to 2022.¹²⁷ Other competitors, such as Samsung and Garmin, saw an increase in their market shares, but Apple (rather than Google-Fitbit) remains the major player in the market by a substantial margin.

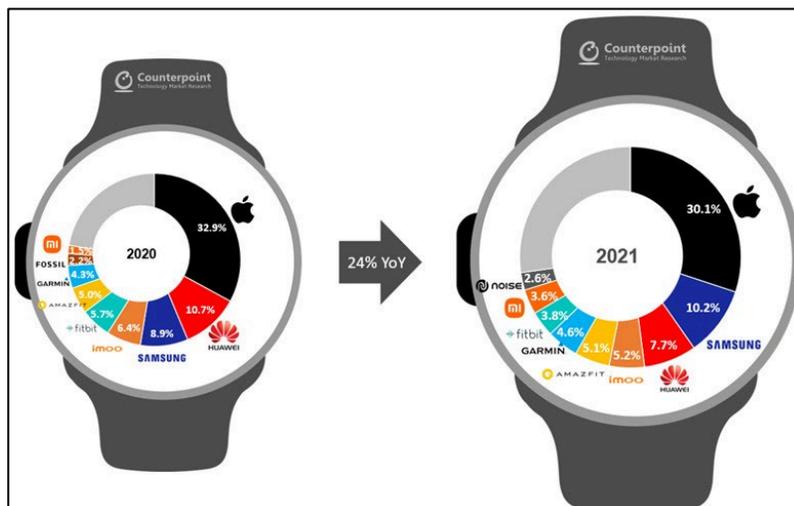
¹²³ *Fitbit Privacy Policy*, FITBIT (Sep. 16, 2022), <https://www.fitbit.com/global/us/legal/privacy-policy#how-we-use-info>.

¹²⁴ *Id.*

¹²⁵ *What Should I Know About “Fitbit by Google”?*, FITBIT, https://help.fitbit.com/articles/en_US/Help_article/2478.htm (last accessed Mar. 10, 2023).

¹²⁶ Note, however, that according to the Fitbit privacy policy, *insurers* themselves may share that information with Google if they provide Fitbit devices to their insureds. *Id.* (“We receive this information from you, your device, your use of the Services, your coach if you use our Live Coaching Services, third parties (like the other services you have connected to your Fitbit account, or your employer or insurance company if they offer you Fitbit Services as an employee or customer), and as otherwise described in this policy.”)

¹²⁷ *Infographic: Smartwatch Market | Q1 2022*, COUNTERPOINT (Jun. 10, 2022), <https://www.counterpointresearch.com/infographic-smartwatch-market-q1-2022>.

Figure V: Market Share in the Wearables MarketSOURCE: Telecoms.com¹²⁸

C. In Retrospect

It is important to situate the Fitbit acquisition in a broader tech-hardware market that all of the major players are trying to enter. One year after the relevant merger took place, Amazon introduced its Amazon Halo, which it describes as “a new service dedicated to helping customers improve their individual health and wellness. Amazon Halo combines a suite of AI-powered health features that provide actionable insights into overall wellness via the new Amazon Halo app with the Amazon Halo Band, which uses multiple advanced sensors to provide the highly accurate information necessary to power Halo insights.”¹²⁹

Many argued at the time that Amazon’s invention would become one of the biggest game-changers in the market for smartwatches. Nevertheless, two years after its launch, the Halo had not set the sales charts on fire and, in July 2022, the company cut its price steeply to \$45. It continues to stand as a cheaper alternative to more entrenched producers. Market watchers saw Amazon’s struggles as similar to Fitbit’s, with one tech-news site noting: “The Fitbit comparisons are immediately obvious, given the similar design and form factor.”¹³⁰ Yet, neither cheaper option has been able to supplant the Apple Watch.

¹²⁸ Andrew Wooden, *The Smartwatch Market Hit Record Levels in 2021*, TELECOMS.COM (Mar. 14, 2022), <https://telecoms.com/514060/the-smartwatch-market-hit-record-levels-in-2021>.

¹²⁹ *Introducing Amazon Halo and Amazon Halo Band—A New Service that Helps Customers Improve Their Health and Wellness*, AMAZON (Aug. 27, 2020), <https://press.aboutamazon.com/2020/8/introducing-amazon-halo-and-amazon-halo-band-a-new-service-that-helps-customers-improve-their-health-and-wellness>.

¹³⁰ Ted Kritsonis, *Amazon Halo View Review: A Lightweight Fitness Tracker Tied to a Deeper App*, ANDROID POLICE (Oct. 20, 2022), <https://www.androidpolice.com/amazon-halo-view-review>.

It is also important to note that the Google-Fitbit merger helped enable Google to enter the smartwatch market to compete with the market leader, Apple. And the Fitbit acquisition was not the only move Google made aimed at competing with its biggest smartwatch rival: In 2019 Google also acquired Fossil Group's smartwatch-related IP and a portion of its R&D personnel.¹³¹ Google introduced the Pixel Watch in late 2022, following two failed previous attempts (both cancelled ahead of their release) to introduce a Pixel-branded smartwatch to compete with the Apple Watch.¹³²

Why did Google take so long to build a smartwatch? When I asked that question to Rick Osterloh, Google's SVP of hardware..., **his answer was one word: Fitbit. Google couldn't make the smartwatch it wanted without a killer health and fitness platform, and until very recently, it simply didn't have one.**¹³³

There have also been policy changes that have affected the market and particularly the data concerns that some observers raised. Among the significant legislative changes were the EU's General Data Protection Regulation (GDPR) and the California Consumer Privacy Act (CCPA), both of which took effect in in 2018. In 2019, Sens. Bill Cassidy (R-La.) and Jacky Rosen (D-Nev.) first introduced the Stop Marketing And Revealing The Wearables And Trackers Consumer Health (SMARTWATCH) Data Act, which proposes "prohibitions on the use, sharing, or selling of health data collected, stored, and transmitted by wearable devices, including smartwatches."¹³⁴

Those developments notwithstanding, it appears clear that critics' fears concerning the Fitbit acquisition were dramatically overblown and failed to reflect the competitive reality that Google faced. With intense competition for wearable devices, integrating Fitbit data into the broader Google Ads ecosystem was always going to be an unpopular move that Google could ill afford. Meanwhile, integrating the Fitbit *platform* into Google's *smartwatch ecosystem* was exactly the needed boost to finally enable it to compete with Apple in the smartwatch space.

V. Facebook-Instagram (and WhatsApp)

Public reaction to the Facebook-Instagram merger (and, to a lesser extent, Facebook's purchase of WhatsApp) could be seen as the inverse of what happened with the mergers discussed in the previous sections. While many progressives today see this merger as "the one that got away" from authorities, at the time, it was mostly seen as benign and was even derided as a poor business decision on Facebook's part. Very few competition scholars or advocates of aggressive antitrust stepped forward to assert that it would harm competition. In other words, a deal that is now seen by many as the

¹³¹ Pixel Watch, WIKIPEDIA (last visited Mar. 15, 2023), https://en.wikipedia.org/wiki/Pixel_Watch.

¹³² *Id.*

¹³³ David Pierce, *Google Thinks Smartwatches Are the Future Again—Are You Buying It?*, THE VERGE (Oct. 6, 2022), <https://www.theverge.com/23389978/google-pixel-watch-wearables-fitbit-future> (emphasis added).

¹³⁴ *Smartwatches: Regulatory Trends*, VERDICT (Jul. 20, 2020), <https://www.verdict.co.uk/smartwatches-regulatory-trends>.

quintessential “killer acquisition”¹³⁵ struck most as harmless when it was announced. As in the previous case studies, this suggests that media coverage and the commentary surrounding a merger is often a poor predictor of its likely future effects on competition—or, at least, a poor predictor of which mergers critics will come to see as harmful in the future.

As the previous paragraph intimated, critics today (and a handful of them at the time of the deal) have come to see Facebook’s acquisition of Instagram (and WhatsApp) as uniquely harmful to competition. It has been described as a killer acquisition, not for actually killing Instagram, but for Instagram’s failing to develop as it might have but for being acquired.¹³⁶ It is worth noting, as we explain at length in a separate paper, that even this contemporary take is deeply flawed.¹³⁷ Indeed, there are important reasons to believe that, rather than kill a competitor, the merger is ultimately what enabled the Instagram platform to thrive in ways that would have been impossible without the merger.

A. The Predictions

While they were few and far between, there were *some* objections to the deal when it was announced. For example, Om Malik opined that Facebook was essentially buying off a competitor: “Facebook was scared shitless and knew that for first time in its life it arguably had a competitor that could not only eat its lunch, but also destroy its future prospects.”¹³⁸ This critique aside, the merger did not draw anywhere near the amount of attention at the time as it currently occupies in policy discussions.

Indeed, the deal was widely derided when it was announced, not for antitrust reasons, but as a terrible purchase by Facebook. For instance, Florian Ederer remembers telling his MBA students, “This makes no sense.”¹³⁹ Others argued that it was evidence of a tech bubble. Charles Arthur, a columnist for *The Guardian*, wrote that:

[I]t’s hard to imagine how a service that just lets you take a photo of your breakfast, colour it blue and share it could possibly be worth anything. Perhaps Instagram isn’t

¹³⁵ Although it is commonly bandied about to describe the Instagram acquisition because of its pejorative connotation, the term “killer acquisition” is decidedly inapt given the ongoing maintenance and enormous success of Instagram following the acquisition.

¹³⁶ Mikah Roberts, *Killer Acquisitions and the Death of Competition in the Digital Economy*, 24 TENN. J. BUS. L. 61 (2022).

¹³⁷ Geoffrey A. Manne, Samuel Bowman, & Dirk Auer, *Technology Mergers and the Market of Corporate Control*, 86 MISSOURI L. REV. 1047, 1118 (2021) (“At the very least, this raises the prospect of an alternative story in which Facebook’s acquisition of Instagram was mostly about improving both firms’ products. This story is consistent with the tremendous growth of both Facebook and Instagram since the acquisition.”); John M. Yun, *Potential Competition, Nascent Competitors, and Killer Acquisitions*, 18 THE GLOB. ANTITRUST INST. REP. ON THE DIGIT. ECON. 652, 652–53 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733716.

¹³⁸ Om Malik, *Here Is Why Facebook Bought Instagram*, GIGAOM (Apr. 9, 2012), <https://gigaom.com/2012/04/09/here-is-why-did-facebook-bought-instagram>.

¹³⁹ Roberta Kwok, *A Wave of Acquisitions May Have Shielded Big Tech from Competition*, YALE INSIGHTS (Mar. 7, 2023), <https://insights.som.yale.edu/insights/wave-of-acquisitions-may-have-shielded-big-tech-from-competition>.

really worth anything: if the electricity goes off, it will simply cease to exist, except as some bits on a hard drive somewhere. But until then, enjoy the bubble while it lasts.¹⁴⁰

Along similar lines, another *Guardian* piece asked several progressive commentators, including Kara Swisher, what they thought was the rationale for the deal. None of them cited anticompetitive behavior—some even brushed that concern aside. Instead, the consensus appeared to be that the merger would reinforce Facebook’s platform and enable it to compete against Google’s now defunct Google+ social-media service:

Seeing the Instagram acquisition as merely quashing a potential competitor to one aspect of Facebook’s offering is far too narrow an outlook, though. Better, surely to view the deal against the increasingly familiar backdrop of Facebook’s “It’s complicated” relationship with Google and Apple. One of the things people like most about the Google+ social network is its photo-sharing features. Buying Instagram not only bolsters Facebook’s capabilities on that front—photo filters in its official app within a few months, anyone?—but also keeps the startup out of Google’s clutches, should it have been tempted to make its own acquisition bid.¹⁴¹

These reactions are understandable. The Instagram platform grew from roughly 24 million users and no revenue at the time of the acquisition to more than 1.2 billion users today.¹⁴² Given that, contemporary observers unsurprisingly failed to imagine that the merger would later be construed as a ploy to take out Facebook’s budding rival.

With the benefit of hindsight (or perhaps the “benefit” of a newly accommodating political environment), however, many have come to see Facebook’s purchases of Instagram and WhatsApp as perhaps *the* quintessential “killer acquisitions”—in which an incumbent acquires a potential rival in order to preserve its market position.¹⁴³ This criticism ultimately led the U.S. House Judiciary Committee to open an investigation into competition in digital markets that focused heavily on Facebook’s acquisitions.¹⁴⁴ It also led the FTC and 46 state attorneys general to lodge antitrust

¹⁴⁰ Charles Arthur, *Instagram and Facebook: The Next Tech Bubble?*, THE GUARDIAN (Apr. 10, 2012), <https://www.theguardian.com/technology/2012/apr/10/instagram-and-facebook-another-tech-bubble>; see also, John Gapper, *Facebook Is Scared of the Internet*, FINANCIAL TIMES (Apr. 11, 2012), <https://www.ft.com/content/b9783142-82fe-11e1-ab78-00144feab49a>.

¹⁴¹ Amanda Michel & Amanda Holpuch, *Why Did Facebook Buy Instagram for a Whopping \$1bn?*, THE GUARDIAN (Apr. 9, 2012), <https://www.theguardian.com/commentisfree/cifamerica/2012/apr/09/facebook-instagram-1bn-storify>.

¹⁴² See, e.g., Case No. COMP/M.7217 Facebook/WhatsApp, 2014 O.J. (L 24) 1; see also, Anticipated Acquisition by Facebook Inc. of Instagram Inc., ME/5525/12 (OFT Aug. 22, 2012); see also, S. Dixon, *Number of Instagram Users Worldwide from 2020 to 2025*, STATISTA (Feb. 15, 2023), <https://www.statista.com/statistics/183585/instagram-number-of-global-users/#:~:text=In%202021%2C%20there%20were%201.21,percent%20of%20global%20internet%20users.>

¹⁴³ See Collen Cunningham, et al., *Killer Acquisitions*, 129 J. POL. ECON. 649 (2021).

¹⁴⁴ See, *Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations* (Oct. 2020), <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/html/CPRT-117HPRT47832.htm>.

complaints.¹⁴⁵ As Rep. Ro Khanna (D-Calif.) put it: “Imagine how different the world would be if Facebook had to compete with Instagram and WhatsApp. That would have encouraged real competition that would have promoted privacy and benefited consumers.”¹⁴⁶

There has also been significant criticism of the deals in academic circles. Among the more restrained, Steven Salop has written that “while Instagram *might* have provided an efficient photo-sharing technology that Facebook could utilize, it *might* have grown into a social media competitor absent the acquisition.”¹⁴⁷ This led Jason Furman and his co-authors to conclude that the deal *should* likely have been blocked by authorities:

With the benefit of hindsight, we can now observe that Instagram has grown considerably since 2012 and offers a service that many see as an alternative to Facebook. Facebook owns both networks, meaning that consumers switching from its original network to Instagram do not cause it competitive concern, and does not provide an incentive for Facebook to improve its services in response. Analysis of the social media market in Chapter 1 illustrates how this acquisition may have offset some of the decline in Facebook’s share of the market....

While the CMA continues to be required to demonstrate at phase 2 that a substantial lessening of competition is more likely than not to occur, the panel is concerned that it could be unable to challenge mergers of this kind effectively, despite the scale of potential harm being very large.¹⁴⁸

Writing only a couple of years ago, these scholars believed that, absent the merger, Instagram would have grown into a powerful social-media competitor to Facebook, leading to better services for users, cheaper advertising on both platforms, and facilitating market entry for new challengers.

Similarly, Tommaso Valletti & Cristina Caffarra have argued that Facebook’s purchase of WhatsApp magnified the company’s ability to extract personal data from users (although their reasoning likely extends to the Instagram purchase, as well):

We have also collectively recognised (ex post) that the review of Facebook/WhatsApp missed the true driver for the deal—capturing the millennial generation’s users and

¹⁴⁵ *Fed. Trade Comm’n v. Facebook*, No 1:20-cv03590, 2021 WL 2643627. (Dec. 9, 2020) (Complaint for Injunctive and other Equitable Relief), available at https://appliedantitrust.com/16_foreclosure/cases_ftc/facebook_ftc2020/1_ddc/facebook_ftc_ddc_complaint2020_12_09.pdf; see also, *State of New York, et al. v. Facebook*, 1:20-CV-03589 (Dec. 3, 2020) (Complaint), available at https://appliedantitrust.com/16_foreclosure/cases_states/facebook_states2020/facebookok_states_ddc_complaint2020_12_09.pdf.

¹⁴⁶ Regina Balana, *Facebook’s Merger Is Causing Privacy Concerns Among Regulators*, TECH TIMES (Jan. 28, 2019), <https://www.techtimes.com/articles/238014/20190128/facebook-s-merger-is-causing-privacy-concerns-among-regulators.htm>.

¹⁴⁷ See, generally, Steven C. Salop, *Potential Competition and Antitrust Analysis: Monopoly Profits Exceed Duopoly Profits*, GEO. UNIV. L. CTR. 7 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3839631 (emphasis added).

¹⁴⁸ *Unlocking Digital Competition*, OGL 98 (Mar. 2019), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

monetising yet more personal data, increasing Facebook’s power in advertising markets in disregard of privacy rules.¹⁴⁹

In short, while Facebook’s purchase of Instagram was widely seen as benign when it was announced, it later came to be seen as cementing the company’s unassailable position in the social-networking space.

B. What Happened?

Recent developments in the social-media space are making contemporary criticism of the Facebook-Instagram deal look increasingly misguided. Indeed, only a couple of years after many experts opined that the deal enabled Facebook to maintain its monopoly, the company’s social-media “empire” is showing significant cracks. With the entry and rapid rise of TikTok, there is now a strong sense that Facebook’s market position was never as secure as critics made it out to be. This might not be so bad if these critiques were not so quick to overlook the many consumer benefits that were likely generated by the Instagram deal, and that seem to have been obvious to observers when it was announced.

To begin, despite numerous assertions of the alleged anticompetitive nature of the Instagram and WhatsApp mergers, Facebook (now Meta) has, in fact, experienced a loss in daily users. “Meta’s once all-powerful, unmatched social graph is no longer the market advantage that it once was,” it has been noted.¹⁵⁰ Meanwhile, TikTok “has seen great success (...) with the app opening to a ‘For You’ feed of algorithmically-selected clips, based on your viewing habits.”¹⁵¹ Thus, 11 years after the Instagram merger and only a couple of years removed from the most scathing condemnations of its effects, Meta is struggling to compete with the growing threat posed by TikTok. This stands in contrast to the many arguments that the merger had cemented Facebook’s long-term supremacy. As one observer put it:

As reported by WSJ, TikTok users are spending over 10x as many hours consuming content in that app as Instagram users currently spend viewing Reels. According to a leaked internal report, Reels engagement is also in decline, dropping 13.6% in recent months—while ‘most Reels users have no engagement whatsoever.’¹⁵²

¹⁴⁹ Valletti & Caffarra, *supra* note 112.

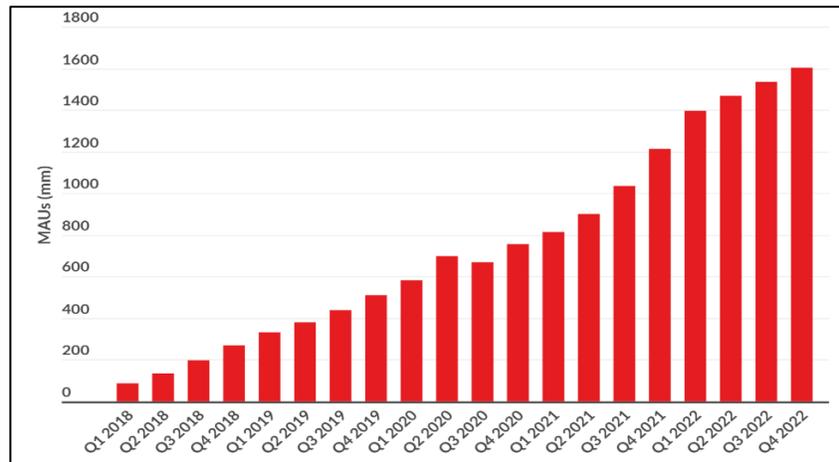
¹⁵⁰ Andrew Hutchinson, *New Report Highlights the Decline of Facebook and IG, as TikTok Becomes the New Home of Entertainment*, SOCIAL MEDIA TODAY (Sep. 12, 2022), <https://www.socialmediatoday.com/news/new-report-highlights-the-decline-of-facebook-and-ig-as-tiktok-becomes-the/631694>.

¹⁵¹ *Id.*

¹⁵² *Id.*

It is estimated that TikTok will grow to 834.3 million monthly users worldwide in 2023.¹⁵³ There is thus reason to believe that, within a short time span, it could become the largest of the Big Five worldwide social networks (Facebook, Instagram, TikTok, Snapchat, and Twitter).

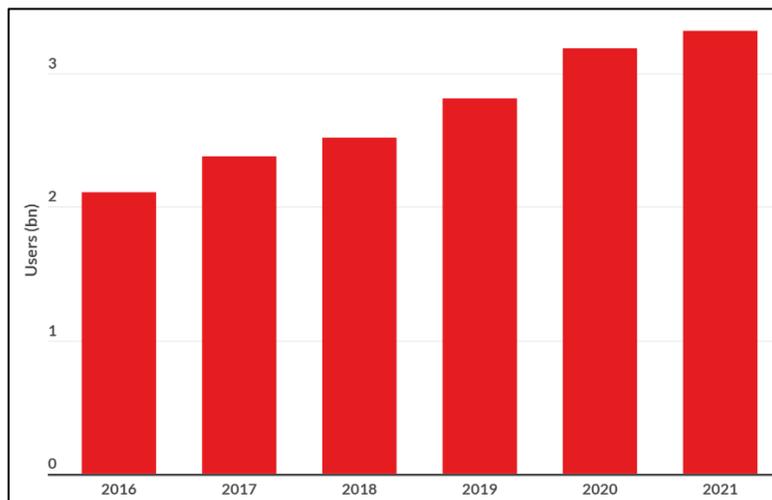
Figure VI: TikTok Quarterly Users, 2018-2022 (mm)



SOURCE: Data.ai, CNBC, Company data

This competition is all the more worrying for Meta, given that many segments of the social-media industry are still growing, and new niches are still being discovered. New segments like the so-called “metaverse” and game-based communities such as Fortnite all potentially create new footholds for rivals to exploit. Similarly, older segments of the industry also continue to grow, opening avenues for rivals to compete for new users who are not already attached to one of Meta’s services. This is notably the case for messaging apps, which continue to attract millions of new users every year (see Figure VII).

¹⁵³ *TikTok Users Worldwide (2020-2025)*, INSIDER INTELLIGENCE (Jan. 19, 2023), <https://www.insiderintelligence.com/charts/global-tiktok-user-stats>.

Figure VII: Messaging App Annual Users, 2016-2021 (bn)

SOURCE: Business Insider, eMarketer, Kommandotech

Given what precedes, it is not surprising that many have started to suggest that Meta’s market position is under significant threat.¹⁵⁴ As one columnist wrote in the *New Yorker*:

Facebook, it seems, is moving away from its traditional focus on text and images, spread among people who know one another, to instead adopt TikTok’s emphasis on pure distraction. This shift is not surprising given TikTok’s phenomenal popularity, but it’s also shortsighted: platforms like Facebook could be doomed if they fail to maintain the social graphs upon which they built their kingdoms.

Along similar lines, the *Washington Post* published a piece titled “How TikTok Ate the Internet” that suggested that TikTok may have already won fight to become the largest social-media network:

In five years, the app, once written off as a silly dance-video fad, has become one of the most prominent, discussed, distrusted, technically sophisticated and geopolitically complicated juggernauts on the internet – a phenomenon that has secured an unrivaled grasp on culture and everyday life and intensified the conflict between the world’s biggest superpowers.

No app has grown faster past a billion users, and more than 100 million of them are in the United States, roughly a third of the country. The average American viewer watches

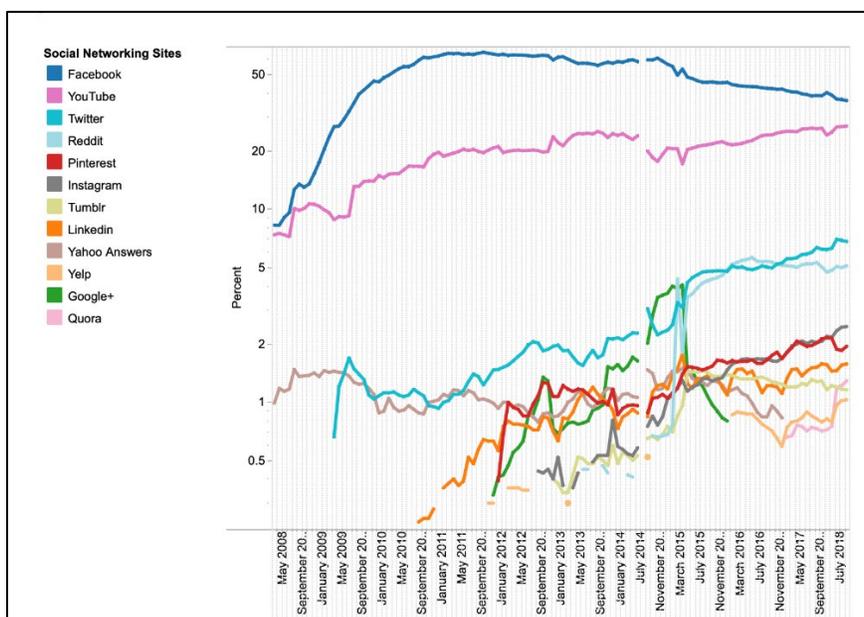
¹⁵⁴ Sam Anderson, “TikTok Will 100% Kill Instagram”: Social Experts on Influencers and Authenticity, THE DRUM (Jun. 1, 2022), <https://www.thedrum.com/news/2022/06/01/tiktok-will-100-kill-instagram-social-experts-influencers-and-authenticity>; see also, Juxtaposed Ideas, *Meta Platforms vs. ByteDance: The Impact of TikTok on Instagram*, SEEKING ALPHA (Feb. 10, 2022), <https://seekingalpha.com/article/4485772-meta-platforms-bytedance-impact-tiktok-instagram>; Cal Newport, *TikTok and the Fall of the Social-Media Giants*, NEW YORKER (Jul. 28, 2022), <https://www.newyorker.com/culture/cultural-comment/tiktok-and-the-fall-of-the-social-media-giants>.

TikTok for 80 minutes a day – more than the time spent on Facebook and Instagram, combined.¹⁵⁵

To make matters worse, Meta’s stock has lost more than half its value between its peak in 2021, when antitrust criticism of Meta reached its apex, and today.¹⁵⁶ While this may be partly due to the increased competition mentioned above, it may also be due to more widespread concerns about the long-term prospects of Big Tech firms, especially in an environment of rising interest rates.

In short, critics of the Instagram and WhatsApp mergers claim that they essentially enabled Facebook to build an unassailable monopoly over social media. Fast forward a couple of years, and claims of competition’s demise appear to have been premature.

Figure VIII: Top 10 Social Networking Sites by Market Share of Visits, 2008-2018



SOURCE: DreamGrow

C. In Retrospect

The Facebook-Instagram merger shows that critics are just as likely to underestimate the competitive significance of a deal as they are to overestimate its anticompetitive effects. On the one hand, observers at the time of the deal largely failed to grasp its rationale and implications. The merger was too often dismissed as Facebook overpaying for a photo-filter app, when in fact it was astutely negotiating the shift towards mobile-based social networking. On the other hand, critics writing only

¹⁵⁵ Drew Harwell, *How TikTok Ate the Internet*, WASHINGTON POST (Oct. 14, 2022), <https://www.washingtonpost.com/technology/interactive/2022/tiktok-popularity>.

¹⁵⁶ Meta Platforms, Inc. (META), YAHOO! FINANCE, <https://finance.yahoo.com/quote/META>; see also, Abram Brown, *Meta Stock Falls Over 20% After Metaverse Project Loses over \$10 Billion in 2021*, FORBES (Feb. 2, 2022), <https://www.forbes.com/sites/abrambrown/2022/02/02/meta-stock-drops-20-after-fourth-quarter-profit-dropped-more-than-expected/?sh=7885ecc4743c>.

a couple of years ago seem to have gone too far in the other direction. The notion that Facebook built an unassailable monopoly over the social-networking industry by acquiring Instagram is largely refuted by the rapid rise of TikTok. While it is conceivable there would be *even more* competition in the market absent the merger, it seems clear that the deal did not create anything close to an unassailable monopoly. In short, the deal had complex ramifications for the industry. The alarms raised by academics and pundits largely failed to capture this.

Of course, we are not the first to say this. As Robert Crandall & Thomas Hazlett write in a forthcoming review of digital-platform mergers, the effects of the Facebook-Instagram merger are, at this point, “ambiguous.”¹⁵⁷ They summarize the tradeoffs thusly:

In hindsight, it may be that, had Facebook not acquired Instagram, for example, the independent start-up would have evolved more or less as it did (integrated with Facebook) into a large social media platform and, with perhaps fewer economies of scale and scope (but competing with a Facebook having fewer of either, as well), thus creating additional choices for social media users at modest efficiency cost.

We may have a better sense once the FTC’s monopoly maintenance case against Facebook (first filed in 2020 and re-filed in 2021), in which the agency seeks a divestiture of Instagram and WhatsApp, proceeds further in court.¹⁵⁸ With a more thorough analysis, it may become clear that this was, indeed, the tech merger that “got away” from regulators. Nonetheless, as is common in the examples put forth in this paper, there were also large beneficial effects for consumers that we cannot simply wave away. We need to take these market complications seriously.

Moreover, even after the FTC resolves its complaint, we need to be careful about extrapolating too much from this case and thereby overcorrecting. Regulators might have decided, for example, that since they made a mistake on Facebook-Instagram, they should draw a hard line and bar the next merger in the social-media space. In this example, that would have been Microsoft’s acquisition of LinkedIn, which Crandall & Hazlett classify as “competitive,” as it further allowed LinkedIn to compete with Facebook.

We cannot simply conclude that, since there are network effects in social media, therefore social-media companies must not be permitted to grow larger through mergers. Sometimes network effects are beneficial for consumers, as when they allowed Facebook to bring Instagram’s technology to a larger audience more quickly. And the rise of TikTok (and SnapChat, and other social-media platforms) demonstrates that these network effects do not completely seal off competition.

In short, the Facebook-Instagram merger demonstrates that predicting the competitive effects of mergers is incredibly challenging. Even with all the expertise and, often, sophisticated analytical methods deployed by antitrust agencies, there may still be anticompetitive deals that escape

¹⁵⁷ Robert W. Crandall & Thomas W. Hazlett, *Antitrust in the Information Economy: Digital Platform Mergers*, J. LAW & ECON. (forthcoming).

¹⁵⁸ See Amended Complaint, *FTC v. Facebook, Inc.*, Case No.: 1:20-cv-03590-JEB (D.D.C. Sep. 8, 2021)

enforcers' vigilance—and the Facebook-Instagram may or may not be one such instance (we believe it is not). While this case-by-case, evidence-based process of adjudication may not be perfect, it remains vastly superior to relying on the intuitions of pundits, activists, and academics. The commentary surrounding the Facebook-Instagram deal suggests that such pronouncements often fall wide of the mark and are thus unreliable for policymaking purposes.

VI. Ticketmaster-Live Nation

For our last merger, we turn to Ticketmaster, which was back in the headlines in late 2022 after experiencing website issues during its sale of tickets for Taylor Swift's first tour in five years. Antitrust proponents have used the incident to call for investigations into Ticketmaster and its dominant position within the ticket-sales market. In an open letter to Ticketmaster's CEO, Sen. Klobuchar wrote "to express serious concerns about the state of competition in the ticketing industry and its harmful impact on consumers." *The New York Times* has reported that the DOJ has opened an investigation into Ticketmaster's parent company, Live Nation Entertainment.¹⁵⁹

Klobuchar and others have pointed to Ticketmaster's 2010 merger with concert promoter Live Nation as the primary source of problems in the market. Not mincing words, Rep. Alexandria Ocasio-Cortez wrote in 2022: "Daily reminder that Ticketmaster is a monopoly, it's merger with LiveNation should never have been approved, and they need to be reigned in. Break them up."¹⁶⁰ With Ticketmaster back in the news, now is a good time to review its history of mergers and acquisitions and what role they may have played in the public's current frustration with the company.

As we explain below, recent media coverage of Ticketmaster—particularly its failings related to the Taylor Swift tour—and the accompanying calls for tougher merger enforcement are largely unmoored from any actual antitrust issues. Indeed, there is little reason to believe that Ticketmaster's failings would have been averted absent its merger with Live Nation (or, more generally, if it faced tougher competition). Put differently, these issues appear to have little to do with market power and its reinforcement—the harm that antitrust merger enforcement seeks to prevent.¹⁶¹

It is also important to note that antitrust enforcers were not naïve about the state of competition in the ticketing market at the time of the merger. They clearly acknowledged that Ticketmaster held a dominant market position. Their assessment, however, was that, conditional on several remedies, the merger would not significantly increase the company's market power. With hindsight, this assessment appears vindicated, as Ticketmaster's market share does not appear to have materially

¹⁵⁹ David McCabe & Ben Sisario, *Justice Dept. Is Said to Investigate Ticketmaster's Parent Company*, NY TIMES (Jan. 24, 2023), <https://www.nytimes.com/2022/11/18/technology/live-nation-ticketmaster-investigation-taylor-swift.html>.

¹⁶⁰ @AOC, TWITTER (Nov. 15, 2022, 7:35 PM), <https://twitter.com/AOC/status/1592587226801934336>.

¹⁶¹ See, e.g., William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, HARV. L. REV. 495 (1981). ("Section 7 of the Clayton Act also requires proof of market power; in fact, the main purpose of section 7 is to limit mergers that increase market power.")

increased in the years since. And, as we have repeatedly noted with respect to other mergers discussed here, there may well have been important benefits from the vertical combination of Ticketmaster and Live Nation.¹⁶² The upshot is that not all business failings can be pinned on insufficient competition or lax antitrust enforcement. Progressive policymakers, scholars, and pundits often fail to acknowledge this, and their ensuing calls for tougher enforcement thus lack a sound basis.

A. The Predictions

In February 2009, concert promoter and venue operator, Live Nation, announced that it had reached an agreement to merge with Ticketmaster in a \$2.5 billion, all-stock deal. In January 2010, the DOJ approved the merger under a settlement agreement. Both the merger and the DOJ's approval were controversial at the time.¹⁶³ At the time of the announcement, a columnist for *The New York Times* wrote that the company was “known for the ever-rising cost of an assortment of tacked-on fees.”¹⁶⁴

This was not new territory for Ticketmaster. Complaints about Ticketmaster go back decades, and they are not uniquely tied to any one merger or event. In 1993, *Variety* reported that “Ticketmaster Corp. has been summoned to court Wednesday on allegations the nation’s largest ticket distrib has become an entrenched monopoly whose ‘service charges’ have gouged thousands of Southern Californians for years.”¹⁶⁵ The piece continues: “At stake is the \$1 billion-a-year tix purveyor’s unrivaled market position in the Southland for *computer-and-telephone sales* of seats to live events, from opera to ice hockey, from the Greek Theatre to the Whiskey.”¹⁶⁶ Despite all the technological changes since 1993, Ticketmaster has remained the big name in concert tickets and the complaints have followed it throughout.

Maybe surprisingly for a company that has been called a monopolist for so long, the concerns around the Live Nation merger were rather mundane, in contrast to the-sky-is-falling reaction to many of the mergers mentioned above. David Balto, for example, testified before Congress and argued:

The proposed merger raises serious vertical concerns. By combining a ticketing monopolist with a dominant firm in marquee concert promotion, the merged firm will be able to foreclose competition in both markets, leading to less choice and higher prices.... The proposed merger poses a significant threat to independent concert

¹⁶² See Alan J. Meese & Barak D. Richman, *A Careful Examination of the Live Nation-Ticketmaster Merger*, William & Mary Law School Research Paper No. 09-41 (Nov. 2009) at 93-104, available at https://scholarship.law.duke.edu/faculty_scholarship/2379.

¹⁶³ See, e.g., David Segal, *Calling Almost Everyone’s Tune*, NY TIMES (Apr. 24, 2010), <https://www.nytimes.com/2010/04/25/business/25ticket.html>.

¹⁶⁴ *Id.*

¹⁶⁵ Variety Staff, *Ticked Over Tix, Buyers Take ‘Master to Task*, VARIETY (Aug. 10, 1993), <https://variety.com/1993/biz/news/ticked-over-tix-buyers-take-master-to-task-109513>.

¹⁶⁶ *Id.* (emphasis added).

promotion.... The proposed merger will diminish competition from secondary ticket services which offer the potential for greater rivalry in the ticketing market.¹⁶⁷

At a 2010 presentation at South by Southwest, DOJ Assistant Attorney General Christine A. Varney noted:

- “Ticketmaster had maintained a market share of over 80% in the 15 previous years.”
- “Consolidation has been going on for some time, resulting in economic pressures on local management companies and promoters.”
- “Entry by new competitors was difficult for reasons of both technology and reputation.”
- “People view Ticketmaster’s charges, and perhaps all ticketing fees in general, as unfair, too high, inescapable, and confusing.”
- “Live Nation posed an ‘existential threat’ to Ticketmaster when it launched its own ticketing system.”¹⁶⁸

Subsequently, of course, critics have laid blame for virtually all perceived problems in concert and sports ticketing at the merger’s feet. In late 2022, a coalition led by the Economic Liberties Project (ELP) launched “Break Up Ticketmaster,” a campaign aimed at pressuring the DOJ to break up the merger, blaming it for “hiking up ticket prices, charging rip-off junk fees, and exploiting artists, independent venues, and fans.”¹⁶⁹ As noted by ELP’s executive director Sarah Miller (now an advisor to Chair Khan at the FTC):

Ticketmaster’s market power over live events is ripping off sports and music fans and undermining the vibrancy and independence of the music industry. With new leadership at the DOJ committed to enforcing the antitrust laws, our new campaign helps connect the voices of fans, artists, and others in the music business who are sick and tired of being at the mercy of Ticketmaster’s monopoly with enforcers who have the power to unwind it.¹⁷⁰

B. What Happened?

With the passage of time—13 years and counting—the DOJ’s decision to clear the merger increasingly appears to have been the correct one. While Ticketmaster remains the leading ticketing company, it

¹⁶⁷ David Balto, *The Ticketmaster-Live Nation Merger: What Does It Mean for Consumers and the Future of the Concert Business?*, CAP ACTION (Feb. 24, 2009), <https://www.americanprogressaction.org/article/the-ticketmaster-live-nation-merger-what-does-it-mean-for-consumers-and-the-future-of-the-concert-business>.

¹⁶⁸ Christine A. Varney, *The Ticketmaster/Live Nation Merger Review and Consent Decree in Perspective*, U.S. JUSTICE DEPARTMENT (Mar. 18, 2010), <https://www.justice.gov/atr/speech/ticketmasterlive-nation-merger-review-and-consent-decree-perspective>.

¹⁶⁹ BREAK UP TICKETMASTER (last visited, Mar. 18, 2023), <https://www.breakupticketmaster.com/>.

¹⁷⁰ Press Release, New Campaign Launches to Break Up Ticketmaster, ECONOMIC LIBERTIES PROJECT (Oct. 19, 2022), <https://www.economicliberties.us/press-release/new-campaign-launches-to-break-up-ticketmaster/>.

has failed to materially increase its market share and has not stopped new competitors from entering the market and achieving some measure of success.

At the time of writing, Ticketmaster's market share appears to be about 70%, although potentially as low 65%,¹⁷¹ in contrast to the 80% market share the company enjoyed at the time of the merger.¹⁷² Precise estimates are hard to come by and it is, of course, possible that this number would be higher if the relevant market were narrowed to certain key segments. Nevertheless, the big takeaway is that Ticketmaster's market share is no larger than it was in 2010, and it is probably somewhat smaller.

This shouldn't be surprising. There is considerable competition in event ticketing, even though Ticketmaster continues to be the largest provider. As Live Nation's 10-K notes:

We also face significant and increasing competition from companies that sell self-ticketing systems, as well as from venues that choose to integrate self-ticketing systems into their existing operations or acquire primary ticketing service providers. Our competitors include primary ticketing companies such as Tickets.com, AXS, Paciolan, Inc., CTS Eventim AG, Eventbrite, eTix, SeatGeek, Ticketek, See Tickets and Dice; secondary ticketing companies such as StubHub, Vivid Seats, Viagogo and SeatGeek; and many others, including large technology and ecommerce companies that we understand have recently entered or could enter these markets.¹⁷³

Ticketmaster faces important competitors that stand to gain should failures such as the Taylor Swift fiasco repeat themselves. These competitors include the likes of StubHub and SeatGeek—companies that, together, hold an estimated 30% of the market.¹⁷⁴ In fact, SeatGeek entered the market in earnest only *after* Live Nation's acquisition of Ticketmaster, dispelling the notion that the merger would make the entry and growth of new rivals *impossible*.¹⁷⁵ Whatever one thinks of the merger, it clearly is not a story of Live Nation acquiring Ticketmaster and succeeding to dominate the market as a result. Instead, the story is more consistent with Ticketmaster and Live Nation maintaining their positions in a complicated, multi-sided market via the merger.

¹⁷¹ Anna Edgerton & Leah Nysten, *Senators Blast Ticketmaster 'Monopoly' for Taylor Swift Woes*, BLOOMBERG (Jan. 24, 2023), <https://news.bloomberglaw.com/antitrust/senators-blame-ticketmaster-monopoly-for-taylor-swift-debacle>.

¹⁷² See, e.g., Daniel CH, *Ticketmaster Revenue and Growth Statistics (2023)*, SIGNHOUSE, <https://www.usesignhouse.com/blog/ticketmaster-stats#what-is-ticketmasters-market-share-in-the-e-ticketing-market> (last visited, Mar. 21, 2023); Emily Lorsch, *Why Live Nation and Ticketmaster Dominate the Live Entertainment Industry*, CNBC (Jan. 25, 2023), <https://www.cnbc.com/2023/01/25/the-live-nation-and-ticketmaster-monopoly-of-live-entertainment.html>; Gabriel Smith, *Ticketmaster and Live Nation Were Not Supposed to Create a Monopoly. Here's Why Music Fans, Lawmakers, and Taylor Swift Are Fed up with the Ticketing Platforms*, FORTUNE (Jan. 27, 2023), <https://fortune.com/2023/01/27/ticketmaster-live-nation-monopoly-music-fans-politics-taylor-swift-entertainment-gabriel-smith>.

¹⁷³ Live Nation Entertainment, Inc., Annual Report (Form 10-K) (Feb. 23, 2023) at 9.

¹⁷⁴ *Id.* See also, Jonathan Briskman, *Top Ticketing Apps in the U.S. for Q1 2019 by Downloads*, SENSORTOWER (Jun. 2019), <https://sensortower.com/blog/top-ticketing-apps-in-the-us-q1-2019-downloads>; Adam Blacker, *Ticketmaster Is the Ticket Master*, APPTOPIA (May 9, 2019), <https://blog.apptopia.com/ticketmaster-is-the-ticket-master>.

¹⁷⁵ *SeatGeek*, WIKIPEDIA, <https://en.wikipedia.org/wiki/SeatGeek> (last visited Mar. 21, 2023).

As in our previous case studies, it is of course conceivable that the market would have become *even more* competitive without the merger. But while this is a possibility, it reinforces—rather than undermines—the central point of this paper. Predicting the competitive effects of mergers is complicated. That is why we entrust this task to—usually—technically proficient agencies. Popular calls to prohibit mergers because they create even bigger firms fail to capture this reality. Similarly, ongoing attempts by the agencies’ current leadership to move away from this technocratic paradigm toward a more populist approach are fundamentally misguided.

Of course, it is important to highlight the important role that sound remedies—themselves the fruit of even-handed antitrust scrutiny—appear to have played in averting the worst-case scenarios. If Live Nation posed an existential threat, why did the DOJ allow the merger that would remove this threat? The Ticketmaster-Live Nation merger had elements of both a vertical merger and a horizontal merger. The combination of venues and promotion services with ticketing was considered vertical integration in the concert business. Because of Live Nation’s entry into ticketing, the merger was also seen as horizontal. As AAG Varney pointed out:

To be sure, Ticketmaster and Live Nation were strongest at different points in the live music chain, but Live Nation’s foray into ticketing only made clearer that the merger would help to preserve Ticketmaster’s power in the primary ticketing line of its business. Thus, the merger posed a threat to growing competition in primary ticketing.¹⁷⁶

In light of these concerns, the DOJ required several remedies—both structural and behavioral—from the merging parties. To start, the settlement included several *structural remedies* to address the DOJ’s concerns, including creating two new competitors to Ticketmaster. Ticketmaster was also required to license its ticketing platform to AEG, another major promoter and owner of venues. In addition, Ticketmaster would be forbidden from servicing AEG venues in the future. This second condition effectively required AEG to have its own ticketing platform or to direct its business to one of Ticketmaster’s competitors. Ticketmaster was also required to divest its Paciolan line of business to Comcast-Spectacor. Paciolan allows venues to host their own primary-ticketing service on their own websites. It was thought that this divestiture would introduce competition against Ticketmaster from the venues themselves.

The settlement also included several *behavioral remedies* for the next 10 years, or until 2020. Ticketmaster and Live Nation would be expressly prohibited from retaliating against any venue that works with or considers working with another primary-ticketing service. The businesses also would be prohibited from creating mandatory bundles of their services. For example, the merged firm would not be allowed to require that a client accept Live Nation as a promoter in order to access Ticketmaster’s primary-ticketing services, or vice versa. Ticketmaster would either (1) be forbidden from using its ticketing data in its promotion and management business, or (2) must give that information to other managers and promoters.

¹⁷⁶ *Id.*

The vast settlement agreement and list of remedies highlights the ways that technocratic antitrust can protect from the most doomsday scenarios. One complication, however, is that remedies take monitoring and may not ultimately be implemented. In this case, the DOJ accused Live Nation-Ticketmaster of withholding or threatening to withhold concerts from a venue if the venue chose a ticketer other than Ticketmaster. *Variety* reported that the company was not fined for the action but had agreed to pay the DOJ's attorney fees.¹⁷⁷ In 2019, the DOJ and the merged company agreed to extend the settlement agreement by another five years.¹⁷⁸

A final important point is that the failings that surfaced regarding Taylor Swift's tour appear largely unrelated to Ticketmaster's dominant market position, and much less to its merger with Live Nation. As mentioned above, Ticketmaster was back in the news after technical issues when sales opened for Taylor Swift's latest tour. The event is worth studying for what it can tell us about antitrust and what it cannot. According to Ticketmaster, more than 3.5 million fans registered to be able to buy tickets. Historically, around 40% of registered fans ultimately show up to buy tickets. Yet Ticketmaster found it had 3.5 billion total system requests, which was four times the previous peak.¹⁷⁹

On its face, a bad user experience would not seem to be an antitrust violation, and the Taylor Swift incident does not appear to be at all relevant to the company's 2010 settlement with the DOJ. Nonetheless, some have tried to frame a technical glitch—albeit a significant one—into an antitrust offence. For example, Yale economist Florian Ederer argued:¹⁸⁰

The allegations against Ticketmaster are that it abused its dominant market position by underinvesting in site stability and customer service. Thus, rather than causing harm to consumers by charging exorbitant prices, Ticketmaster is alleged to have caused harm by providing inferior quality—which it could not have done had it faced credible competitors.

It's a bit of a stretch to connect the dots between the Taylor Swift ticketing fiasco and a merger that occurred more than a decade earlier. The Taylor Swift concerts were going to sell out, regardless of the issues that Ticketmaster experienced. That's just what happens when there are vastly more people who want to buy tickets than there are tickets available. We need to understand the realities of the business.

¹⁷⁷ Jem Aswad, *Live Nation Settles With Dept. of Justice Over Ticketmaster Merger*, VARIETY (Dec. 19, 2019), <https://variety.com/2019/music/news/live-nation-settlement-dept-of-justice-ticketmaster-1203448994>.

¹⁷⁸ *Justice Department Will Move to Significantly Modify and Extend Consent Decree with Live Nation/Ticketmaster*, U.S. JUSTICE DEPARTMENT (Dec. 19, 2019), <https://www.justice.gov/opa/pr/justice-department-will-move-significantly-modify-and-extend-consent-decree-live>.

¹⁷⁹ Ben Sisario & Madison Malone Kircher, *Ticketmaster Cancels Sale of Taylor Swift Tickets After Snags*, THE NEW YORK TIMES (Nov. 17, 2022), <https://www.nytimes.com/2022/11/17/arts/music/taylor-swift-tickets-ticketmaster.html>.

¹⁸⁰ Florian Ederer, *Did Ticketmaster's Market Dominance Fuel the Chaos for Swifties?*, YALE INSIGHTS (Nov. 23, 2022), <https://insights.som.yale.edu/insights/did-ticketmasters-market-dominance-fuel-the-chaos-for-swifties>.

At the same time, it is nearly impossible to plan for big, unexpected traffic. For example, in 2018, Amazon’s website experienced a major service disruption due to an unexpectedly large influx of traffic on “Prime Day.”¹⁸¹ Two facts make the Prime Day crash even more surprising. First, Amazon is the best in the world at handling web traffic at scale. Their main profit-making unit, Amazon Web Services, was born out of the company’s success at handling web traffic. Part of their business includes consulting on how to scale information-technology services.¹⁸² Yet despite Amazon’s technological capabilities and economic incentive to keep its website up and running, the website still went down for more than an hour. Second, each second the website was down on Prime Day decreased sales on that day. The feedback was immediate.

Finally, it is worth noting that the link between market concentration and investment is even less clear than that between concentration and prices.¹⁸³ For example, the effect that market structure might exert on innovation—one type of investment—has been subjected to significant theoretical and empirical scrutiny, and the jury is mostly still out.¹⁸⁴ In other words, even if Ticketmaster’s merger

¹⁸¹ Dennis Green, *Amazon’s Likely Multimillion-Dollar Disaster on Prime Day Proved It’s Not Immune from Embarrassment*, BUSINESS INSIDER (Dec. 14, 2018), <https://www.businessinsider.com/amazon-prime-day-outrage-most-embarrassing-moment-retail-2018-12>.

¹⁸² AWS Well-Architected, AMAZON, <https://aws.amazon.com/architecture/well-architected/?wa-lens-whitepapers.sort-by=item.additionalFields.sortDate&wa-lens-whitepapers.sort-order=desc&wa-guidance-whitepapers.sort-by=item.additionalFields.sortDate&wa-guidance-whitepapers.sort-order=desc> (last accessed Mar. 10, 2023).

¹⁸³ For an introductory discussion of the latter, see Brian Albrecht, *Econ 101 Ignores 50 Years of Economic Science*, ECONOMIC FORCES (Mar. 16, 2023), <https://pricetheory.substack.com/p/econ-101-ignores-50-years-of-economic>.

¹⁸⁴ Richard Gilbert surveys the econometric literature concerning the effect of industry structure on innovation. See RICHARD GILBERT, *INNOVATION MATTERS: COMPETITION POLICY FOR THE HIGH-TECHNOLOGY ECONOMY* 116 (2020). He concludes that the relationship between both is indeterminate. See *id.* (“Table 6.1 summarizes the conclusions from these interindustry studies for the effects of competition and industry structure on innovation. Unfortunately, these studies do not reach a consensus, other than to note that innovation effects can differ dramatically for firms that are at different levels of technological sophistication. Although some studies find a positive relationship between measures of innovation and competition (alternatively, a negative relationship between innovation and industry concentration), others find that the relationship exhibits an inverted-U, with the largest effects at moderate levels of industry concentration or competition, and at least one study reports a negative relationship between competition (measured by Chinese import penetration) and innovation (measured by citation-weighted patents and R&D investment). One consistent finding is that an increase in competition has less of a beneficial effect, and may have a negative effect, on innovation incentives for firms that are far behind the industry technological frontier.”); see also Ronald L. Goettler & Brett R. Gordon, *Does AMD Spur Intel to Innovate More?*, 119 J. POL. ECON. 1141, 1141 (2011) (“Consistent with Schumpeter, we find that the rate of innovation in product quality would be 4.2 percent higher without AMD present, though higher prices would reduce consumer surplus by \$12 billion per year. Comparative statics illustrate the role of product durability and provide implications of the model for other industries.”); Mitsuru Igami, *Estimating the Innovator’s Dilemma: Structural Analysis of Creative Destruction in the Hard Disk Drive Industry, 1981–1998*, 125 J. POL. ECON. 798, 798 (2017) (“The results suggest that despite strong preemptive motives and a substantial cost advantage over entrants, cannibalization makes incumbents reluctant to innovate, which can explain at least 57 percent of the incumbent-entrant innovation gap.”); Elena Patel & Nathan Seegert, *Does Market Power Encourage or Discourage Investment? Evidence From the Hospital Market*, 63 J.L. ECON. 667, 667 (2020) (“We find a negative relationship between competition and investment. In particular, hospitals in concentrated markets increased investment by 5.1 percent (\$2.5 million) more than firms in competitive markets in response to tax incentives. Further, firms’ investment responses monotonically increased with market concentration.”).

with Live Nation increased both firms' market position, empirical economic research offers little reason to believe that this would affect the reliability of the Ticketmaster platform.

In short, antitrust is not a Swiss Army knife to be used to solve whatever complaints society might have about how companies run their operations. As much as people hate Ticketmaster and as much as Taylor Swift fans want to shake their fists at the company's bungled tour rollout, that fiasco was not an antitrust violation. Whatever one concludes about the effects of the Ticketmaster-Live Nation merger, website issues from the largest traffic they have ever experienced are not evidence of anticompetitive effects.

C. In Retrospect

Looking at the merger 13 years later, three conclusions rapidly emerge. First, Ticketmaster's market share does not seem to have materially increased since the merger—it may even have decreased. This tends to vindicate authorities' decision to clear the deal. Second, this outcome may be due to the complex package of remedies extracted by authorities. This is an important reason to entrust merger review to technocratic agencies and courts, and for authorities to resist calls for tougher merger enforcement based on popular—kitchen table¹⁸⁵—economics. Finally, the failings that surfaced around Taylor Swift's tour appear unrelated to the Ticketmaster-Live Nation merger.

More broadly, Ticketmaster's story is much more complex and nuanced than critics typically recognize. Ticketmaster did not come to dominance with the 2010 merger. In many ways, the story starts in 1991, with the company's acquisition of Ticketron.¹⁸⁶

For a short period of time, Ticketron and Computicket were the only two companies competing in the field of computerized ticketing. But Computicket went under in 1970 and Ticketron was left as the only firm in the industry. In 1976, Ticketmaster was founded and quickly grew.

In some ways, Ticketmaster's story is that of a scrappy upstart trying to compete against the then-monopolist Ticketron. One way Ticketmaster competed successfully was by paying advances to venue owners and promoters, instead of just charging ticket fees.¹⁸⁷ This practice fostered long-term exclusive agreements between Ticketmaster, venues, and promoters. Apparently, this practice was successful.

Contrary to popular belief, concentration at the ticketing level is far from the only parameter that affects the price of event tickets, and some levels of the distribution chain may be (far) less competitive than the one where Ticketmaster operates. Ticketmaster sits at the intersection of a two or three-sided market, as an intermediary among fans, venues, and artists. The other sides of the

¹⁸⁵ See Foroohar, *supra* note 24.

¹⁸⁶ Paul Farhi, *Competitor to Acquire Ticketron*, THE WASHINGTON POST (Feb. 28, 1991), <https://www.washingtonpost.com/archive/business/1991/02/28/competitor-to-acquire-ticketron/a9a6cb20-465a-4e1b-b218-79605e933ada>.

¹⁸⁹ See, e.g., PETER TSCHMUCK, THE ECONOMICS OF MUSIC 113 (2021).

market will not magically become perfectly competitive if the Ticketmaster-Live Nation merger were to be unwound tomorrow. As Irving Azoff (longtime music-industry executive and former CEO of Ticketmaster) has aptly noted:

“The biggest issue is that demand sometimes exceeds supply for many artists,” he continued. “More people want to see Taylor Swift, Beyoncé, Adele or Garth [Brooks] than there are tickets for sale. *There’s not a congressional hearing in the world that fixes the reality that demand exceeds supply.* There’s nothing that Ticketmaster, the building, the promoter or the artists can do to fix that.”¹⁸⁸

Indeed, arguably it is the *venues’* market power that Ticketmaster’s fees embody, not those of Ticketmaster as ticketing platform. The Ticketmaster model, pioneered by former CEO Fred Rosen (and copied by the entire market today), treats venues as its primary customer. Which makes sense: many venues inherently have market power because there aren’t very many of them. Each major city generally has only one or, at most, a few large-scale venues, which are typically local sporting arenas or stadiums. An artist like Taylor Swift in a city like Minneapolis will perform only at the professional football stadium. If disputes could not be resolved, she could maybe downgrade to the professional baseball stadium, but other professional sports stadiums (e.g., hockey or basketball) are far smaller. Stepping down from the largest venues, the number of options available still does not increase massively. Of course, there is some competition between the biggest arenas in different cities to attract performers. But even then, the competition is limited, and certain cities are surely “must-play” locales for the biggest touring acts.

Meanwhile, although venues may be its primary customers, servicing artists is also important to Live Nation’s success. As a result, Live Nation has continually increased its investment in putting on concerts, to “over \$9.6 billion [in 2022 vs. 2019] as Live Nation continues to be the largest financial supporter of musicians.”¹⁸⁹ This latter claim bears out, as the most recent data suggests record label annual A&R spending amounts to only \$5.8 billion.¹⁹⁰ Thus, while ticket prices might be rising, it may well be that this increase reflects in substantial part a shift in the basis for artists’ income, with fans presumably paying less for recorded music in exchange.

Indeed, as the primary revenue source for performers has shifted from selling recorded music to selling concert tickets, ticket prices have increased.¹⁹¹ As the late Princeton economist Alan Krueger identified, the primary source of increasing concert-ticket prices was “the erosion of

¹⁸⁸ Peter Larsen, *Garth Brooks, industry pros blame resellers, not Ticketmaster, for problems*, LOS ANGELES DAILY NEWS (Feb. 22, 2023), <https://www.dailynews.com/2023/02/22/garth-brooks-industry-pros-blame-resellers-not-ticketmaster-for-problems/> (emphasis added).

¹⁸⁹ Live Nation Entertainment Reports Fourth Quarter & Full Year 2022 Results, LIVENATIONENTERTAINMENT.COM (last visited March 21, 2023), <https://www.livenationentertainment.com/2023/02/live-nation-entertainment-reports-fourth-quarter-full-year-2022-results/>.

¹⁹⁰ Industry Data, IFPI.ORG (last visited March 21, 2023), <https://www.ifpi.org/our-industry/industry-data/>.

¹⁹¹ See, e.g., Lucas Shaw, *Concerts Are More Expensive Than Ever, and Fans Keep Paying Up*, BLOOMBERG (Sep. 10, 2019), <https://www.bloomberg.com/news/articles/2019-09-10/concerts-are-more-expensive-than-ever-and-fans-keep-paying-up>.

complementarities between concerts and album sales because of file sharing and CD copying.”¹⁹² The subsequent rise of online streaming and the continued significance of music piracy have only exacerbated this trend.

Artists have a virtual monopoly on tickets for their shows, and their performing schedules (and, of course, the limits of physical time and space) are the primary determinant of the number of tickets available and at what price:

The facts are simple and inarguable. Taylor Swift is playing 52 shows in venues with approximately 2.5 million seats available. As these shows are already being held in football stadiums, the only way to provide more seats is for Swift to add more shows, something Garth Brooks does routinely. Brooks will play two shows a day for as many days as it takes to absorb all the demand in a city before moving on to the next location. Each added stadium show opens another 50,000+ tickets for sale.

Math is both simple and brutal. For Swift’s North American tour there are only 2.5 million seats.... **Only one thing brings more seats: adding shows. Only one person can decide to add more shows: Taylor Swift.**¹⁹³

While it may be that Ticketmaster-Live Nation could have done a better job managing the ticket sale process for Taylor Swift’s tour, it had no control over the number of tickets for sale. “Demand, it turns out far exceeded available seats. This is not a problem of monopolistic practice, it is one of undersupply.”¹⁹⁴

Of perhaps greatest importance, particularly for concert tickets, the real action in ticket sales occurs today in the secondary or resale market. There are several reasons for this, but it must be noted at the outset that the presence of a vibrant resale market in which ticket prices are generally higher means, at the very least, that primary ticket sales (including service fees) are not occurring at their highest possible prices.¹⁹⁵ Indeed, because of a combination of promoter, artist, and venue hold-backs, artists’ interest in keeping ticket prices relatively low, fan-club and credit-card pre-sales, and the like, vanishingly few ticket purchasers actually buy tickets on the open, primary market where

¹⁹² Alan B. Krueger, *The Economics of Real Superstars: The Market for Rock Concerts in the Material World*, 23 J. LABOR ECON. 1, 1 (2005). See also *id.* at 25-26 (“Each band has some monopoly power because of its unique sound and style. So my hypothesis is that, in the past, when greater concert attendance translated into greater artists’ record sales, artists had an incentive to price their tickets below the profit-maximizing price for concerts alone. New technology that allows many potential customers to obtain recorded music without purchasing a record has severed the link between the two products. As a result, concerts are being priced more like single-market monopoly products.”).

¹⁹³ Eric Fuller, *Shoot First, Aim Later. The United States Senate Attacks Event Ticketing*, FORBES (Jan. 25, 2023), <https://www.forbes.com/sites/ericfuller/2023/01/25/shoot-first-aim-later-the-united-states-senate-attacks-event-ticketing> (emphasis added).

¹⁹⁴ *Id.*

¹⁹⁵ See Michael Clements, *Event Ticket Sales: Market Characteristics and Consumer Protection Issues*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-18-347 (Apr. 12, 2018) at 12-14, available at <https://www.gao.gov/products/gao-18-347> (collecting economic studies).

Ticketmaster is dominant.¹⁹⁶ In the secondary ticket exchange market Ticketmaster is far from dominant; rather, ticketing platforms like StubHub, Vivid Seats, Viagogo, and SeatGeek are the market leaders.¹⁹⁷

Overall, it seems unlikely that blocking the Ticketmaster-Live Nation merger would suddenly solve the difficult problems that plague this multisided market.

Conclusion

Antitrust enforcement is a difficult job, with many tradeoffs. To some doomsayers, no merger or acquisition is acceptable, and all mergers risk ruining one or more markets. In truth, the picture is much murkier. This retrospective examined the predictions and the aftermath for a set of mergers over the past 20 years. One major takeaway is that we should be skeptical of kneejerk projections of doom, whether from activists, competition scholars, or media pundits.

Against this backdrop, we find that calls to tighten antitrust merger enforcement to assuage popular concerns about corporate consolidation have little merit. The same is true of the FTC and DOJ's joint repudiation of the most recent (2010) merger guidelines and their ongoing effort to revise the guidelines, almost certainly in ways to facilitate more aggressive merger enforcement. In both cases, the underlying assumption is that today's technocratic approach to merger enforcement has failed consumers by allowing monopolies to consolidate and thrive while regulators are "asleep at the wheel."¹⁹⁸ These claims are often rooted in anecdotal evidence pertaining to high-profile mergers that, allegedly, marked the turning point in an industry's shift towards monopoly, or (when pundits are commenting before the fact) suppositions that such deals will have disastrous consequences for consumers.

By reviewing some of these claims, our paper sheds light on their inherent weakness. For all their bombast and intuitive appeal, claims of competition's demise have little connection to the competitive reality of the concerned markets. Some recent mergers, such as Amazon-Whole Foods, saw a huge number of dire predictions, despite quickly proving to be extremely procompetitive. Others, such as Facebook-Instagram, drew almost no concerns at the time, but are now seen as terrible mistakes on the part of antitrust enforcers. These failed prophecies are not surprising. It is a truism that predicting the future is a difficult task. That is why antitrust enforcers have historically focused on short-term and tangible metrics like prices, quantities, market shares, and barriers to entry, rather than speculative claims that mergers will be the death knell of competition. At the very

¹⁹⁶ New York State Attorney General Eric Schneiderman, *Obstructed View: What's Blocking New Yorkers from Getting Tickets* (Jan. 28, 2016) at 11-15, available at https://ag.ny.gov/pdfs/Ticket_Sales_Report.pdf ("Indeed, for many of the top shows, less than 25% of tickets were actually released to the general public in an initial public on-sale.").

¹⁹⁷ See, e.g., Drew Gainor, *Secondary Ticket Market Share Analysis*, AUTOMATIQ (Jul. 28, 2021), <https://automatiq.com/news-insights/secondary-ticket-market-share-analysis>.

¹⁹⁸ Luiz Blanquez, *Strong Winds of Change in the Antitrust World in Europe and the United States: Big Tech Under Cross Fire*, THE ANTITRUST ATTORNEY BLOG (Mar. 14, 2021), <https://www.theantitrustattorney.com/strong-winds-of-change-in-the-antitrust-world-in-europe-and-the-united-states-big-tech-under-cross-fire>.

least, if there is evidence that this relatively restrained approach has failed, it is not to be found in the public pronouncements of neo-Brandeisian scholars and media pundits.

More fundamentally, these claims fail not only because the future is hard to predict, but also because the world is too complex to fit the simple narrative that underpins populist calls for antitrust reform. Most mergers, even the ones we picked as noteworthy, are largely benign but pose a set of tradeoffs. This can be readily observed in the beer mergers which have raised some prices but lowered others, while opening new avenues for craft beer to flourish. In the end, reality failed to match the rhetoric. These ambiguous effects are precisely why evidence-based antitrust enforcement—along with careful remedies that can separate the wheat from the chaff—is as important today as it has ever been.

Unfortunately, our call for regulatory prudence is increasingly contested. As FTC Chair Lina Khan remarked upon the initiation of the merger-guidelines-revision effort in the wake of merger activity allegedly due to lax enforcement, “many Americans historically have lost out, with diminished opportunity, higher prices, lower wages, and lagging innovation... These facts invite us to assess how our merger policy tools can better equip us to... halt this trend.”¹⁹⁹ For the most part this reassessment of “merger policy tools” seems to contemplate a lessening of the role of rigorous economic analysis in exchange for “kitchen table economics” in which “technocratic debates about market mechanisms [give way to] a grassroots discussion about how corporate power has distorted the market in ways that [‘lawyers, activists and ordinary people’] find absurd.”²⁰⁰

If there is one thing to take away from our paper, it is that basing merger enforcement on kitchen-table economics—the idiosyncratic preferences of “activists and ordinary people”—would be disastrous. Our retrospective study shows that popular and populist fears about corporate consolidation are often completely untethered from economic reality and wildly erroneous. The less these fears influence antitrust policy, the better.

¹⁹⁹ Khan, *supra* note 15.

²⁰⁰ Foroohar, *supra* note 24.