Reimagining Merger Analysis to Include Intent

Marina Lao*

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Introduction

The U.S. merger law, Section 7 of the Clayton Act,[1] is difficult to apply, even under ordinary circumstances. Its fundament goal is simple enough -- to identify and prohibit mergers and acquisitions that are likely to harm competition and consumers, without standing in the way of those that are beneficial or benign.[2] However, attempting to achieve this objective has always been challenging because it usually entails analyzing, *ex ante*, the future competitive impact of any merger or acquisition.[3] Moreover, while the statutory language of the Clayton Act is flexible and broadly written,[4] its interpretation and implementation have evolved into a narrow, economic-focused approach that seemingly requires (or expects) quantitative evidence and the use of statistical tests, econometric analysis, and associated empirical methodologies to establish competitive harm.[5] This has increased the evidentiary burden on plaintiffs.

The problem is more pronounced where the mergers involve dynamic technology markets in which firms compete more on innovation than on price. In such cases, evaluating an acquisition's dynamic, long-run effects is key to predicting whether it would likely substantially harm competition and consumers. But the usual economic tools on which antitrust is increasingly dependent, while quite good for analyzing short-term price impacts, are much less useful in predicting nonprice, dynamic effects farther out into the future.[6] Moreover, courts (and, until recently, antitrust enforcers[7]) have chosen, for decades, to err on the side of non-action when there is uncertainty in the prediction of effects,[8] and prediction, by definition,

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* Professor of Law, Seton Hall University School of Law. Acknowledgements . . .

[1] 15 U.S.C. §18.

[2] *See* U.S. Dept. of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines §1 (2010) [hereinafter HMG]

[3] Since the Hart-Scott-Rodino Act was passed in 1976, companies intending to merge are required to file premerger notifications with federal antitrust agencies if the acquisitions exceed a certain threshold. 15 USC §18(a). This means that, except for smaller transactions that do not trigger Hart-Scott-Rodino filing, most merger reviews and challenges occur pre-merger, and merger analysis is necessarily predictive.

[4] 15 U.S.C. §18 (prohibiting those acquisitions whose "effect . . . may be substantially to lessen competition, or to tend to create a monopoly" in any line of commerce in any section of the country).

[5] *See infra* Part I.

[6] *See, e.g.*, Marina Lao, *Erring on the Side of Antitrust Enforcement When in Doubt in Data-Driven Mergers*, *in* 1 Douglas H. Ginsburg, Liber Amicorum: An Antitrust Professor on the Bench ___ (Nicolas Charbit et al. eds., 2018) [hereinafter Lao, *Erring on the Side of Enforcement*]

[7] With Lina Khan appointed as the new Chair of the FTC, and Jonathan Kanter nominated to serve as the head of the Antitrust Division of the Department of Justice, the two federal antitrust agencies are clearly changing course. Khan and Kanter are both strong critics of Big Tech.

[8] *See, generally*, John M. Newman, *Antitrust in Digital Markets*, 72 VAND. L. REV. 1497 (2019) (generally criticizing the pro-defendant position taken in antitrust, particularly in digital markets); Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1 (2015) [hereinafter Baker,

entails uncertainty. The combination of these factors has resulted in the underenforcement of the merger laws, particularly in those markets where technology changes rapidly and any lessening of competition is likely to be seen in innovation.[9] Perhaps as a result, in the past ten to fifteen years, the largest digital technology giants – Google, Facebook, Amazon, Apple, and Microsoft – have boldly made over 500 acquisitions, many involving nascent competitors, largely unopposed by antitrust enforcers.[10]

With nascent competitor acquisitions by a dominant firm, the difficulty in establishing their anticompetitive impact is enhanced for several reasons.[11] First, because a nascent competitor, by definition, is typically not a *present* direct competitor of the acquiring firm in the firm's core market, it is harder to show with quantifiable evidence that its acquisition by the acquiring firm would substantially lessen competition. Second, a nascent competitor's product is often not fully developed when the acquisition is announced, which makes it difficult to reliably predict whether the product, when fully developed, would substantially threaten the acquiring firm and, therefore, determine whether the proposed merger should be prohibited as anticompetitive. Third, the common expectation today of courts and even of the antitrust agencies themselves is that quantitative evidence and precise economic tools should be used.[12] But quantitative evidence of potential innovation effects—the type of effects typically implicated in a nascent competitor acquisition—is usually unavailable, and empirical methods do not work well for that purpose.

Error Cost] (criticizing the error cost analysis as it is currently applied in antitrust, which is overly concerned with false positives and skews toward underenforcement of the antitrust laws); Steven C. Salop and Fiona Scott Morton, *The 2010 HMGs Ten Years Later: Where Do We Go From Here?*, 58 Rev. of Industrial Org. 81, 82 (2021) (observing that "'Chicago School' thought has worked to persuade courts that 'false negatives (i.e., under-deterrence and insufficient interdiction of anticompetitive mergers) are less harmful to consumer welfare than are 'false positives' (i.e., over-deterrence and excessive interdiction of potentially procompetitive mergers)").

[9] *See infra* Part II.

[10] *See* Jason Furman, Unlocking Digital Competition: Report of the Digital Competition Expert Panel 91 (Mar. 2019) [hereinafter Furman Report]; Nicolas Petit, *Technology Giants, the "Moligopoly" Hypothesis and Holistic Competition: A Primer*, at 28-29, Oct. 20, 2016, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2856502. *See also* Appendix, Investigation of Competition in Digital Markets, Majority Staff Report & Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary 406 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519 (listing all the mergers and acquisitions made by the four dominant platforms Amazon, Apple, Facebook and Google).

[11] *See infra* Part II-B.

[12] In the U.S., antitrust enforcers have recently become bolder; in a case challenging Visa's proposed acquisition of a potential competitor, Plaid, the Antitrust Division of the Department of Justice explicitly included references to intent in its complaint. Its theory was that the target, Plaid, could leverage its platform to compete with Visa's debit cards. The allegations in support of the claim included references to internal documents showing that Visa viewed the acquisition as an "insurance policy" because if Plaid developed its competing payment platform, "Visa may be forced to accept lower margins or not have a competitive offering." *United States v. Visa, Inc.*, Case 3:20-cv-07810 (N.D. Ca. 2020), https://www.justice.gov/atr/case-document/file/1334736/download. The parties abandoned the transaction soon after the DOJ sued. *See* Brent Kendall et al., *Visa Abandons Planned Acquisition of Plaid After DOJ Challenge; Justice Department Sued in November to Challenge the $5.3 Billion Deal*, Wall S.J. (online) (Jan. 13, 2021).

In this paper, I make a case for reimagining merger analysis to include intent, to help satisfy the plaintiff's evidentiary burden and strengthen merger enforcement.[13] If we insist on or strongly prefer empirical data or other measurable evidence to demonstrate the effects of a proposed acquisition, but that data is largely unavailable in some cases, the merger law would fail in its core mission for at least certain types of mergers. The better approach, therefore, is to be open to the use of other sources of evidence—namely intent--to supplement the standard economic analysis. Intent evidence has probative value in predicting the competitive effects of mergers and acquisitions and, therefore, can play a useful role distinguishing between mergers that are likely anticompetitive and those that are not.

The subjective statements of an acquiring firm's executives expressing their perceptions of their market, including how that market is likely to evolve and who might pose a future competitive threat to it, would greatly help in a comparative assessment of how a market would probably look in the future with and without the acquisition.[14] And that assessment is important in determining whether the proposed acquisition is likely to substantially reduce competition. How this might play out in practice can best be seen through an examination of the many subjective statements made by Facebook's senior management in connection with the company's acquisitions of two nascent competitors, Instagram and WhatsApp.[15]

There are, of course, other ways to address the problems with the existing analytical approach. One could, by legislation, completely ban all mergers and acquisitions by companies over a certain value threshold, but that could be overbroad in that it would cover efficient and otherwise beneficial transactions as well. Alternatively, a statutory amendment could be passed shifting the burden to the merging parties to show that a merger is *pro*competitive—as opposed to the plaintiff proving that it is *anti*competitive--for certain categories of mergers. In that case, the inherent difficulties of proof would fall on the merging parties, not the plaintiff. Senator Amy Klobuchar has, in fact, recently introduced a bill, the *Competition and Antitrust Law Enforcement Act*, that encompasses burden-shifting.[16] The House Judiciary Committee has also recently advanced a package of ambitious antitrust bills that takes aim at the four largest technology platforms – Google, Facebook, Amazon, and Apple.[17] One of these bills would prohibit those platforms from making any acquisition unless they can demonstrate that the

[13] *See infra* Part III.
[14] *See infra* Parts III
[15] *See infra* Part III-B-2, and III-B-3.
[16] S.225, 117th Cong. (2021-2022), https://www.congress.gov/bill/117th-congress/senate-bill/225/text. The bill would prohibit mergers that "create an appreciable risk of materially lessening competition, or to tend to create a monopoly or a monopsony." It would also shift the burden to the merging parties to show a merger is procompetitive if the acquiring firm has more than 50% market share; the acquisition eliminates a maverick; the transaction is valued over $5 billion; or the acquiring firm is valued over $100 billion and makes an acquisition valued over $50 million. *Id.*
[17] *See* Rachel Lerman, *Big Tech Antitrust Bills Pass First Major Hurdle in House Even As Opposition Grows*, Wash. Post (June 24, 2021).

target is not a rival or potential rival, and that the acquisition would not likely help enhance or maintain the platform's market position.[18]

Final passage of any of these bills, however, is expected to be difficult and uncertain. What's more, assuming that the House version is passed, it is expected to apply only to Amazon, Apple, Facebook, and Google if adopted in its current form.[19] That would leave unaddressed the limitations of the merger law as it is ordinarily applied to others, including to acquisitions by large pharmaceutical companies and by other technology heavyweights. A discussion of any changes that might be needed, short of legislation, to help strengthen merger enforcement, therefore, continues to be important.

Integrating intent into merger analysis should not require legislative action. Although courts have come to expect plaintiffs to rely principally on quantitative evidence and economic measurements and methodology in merger cases, the statute itself is broadly written and no major case has mandated such a narrow approach. Rather, the treatment of intent as irrelevant to antitrust simply became the "norm" as the discipline grew increasingly economic-oriented, which led to a view that intent evidence is too subjective and unreliable. Among the concerns most often raised by intent skeptics is that subjective statements are unreliable and prone to being misinterpreted and misused.[20] While I view these and other concerns as overstated, I also propose ways to minimize the identified risks of misuse.[21]

In this paper, I discuss in Part I the general difficulty in proving anticompetitive mergers under current application of the existing merger law. In Part II, I address the enhanced analytical problems when dominant firms acquire nascent competitors, using Facebook's acquisitions of Instagram and WhatsApp as illustration. In Part III, I make the case that intent evidence has probative value in merger analysis and that its inclusion can strengthen merger enforcement. Using the collection of emails and other statements from Facebook executives relating to the company's acquisitions of Instagram and WhatsApp, I show how considering those statements might have given the agency useful insights into the realities of Facebook's core market and how that and related markets were expected to evolve. That, in turn, could and probably would have changed the agency's decisions to clear those acquisitions at that time, decisions it clearly now regrets a decade later. And in Part IV, I address the major objections that opponents of the use of intent have raised and include suggestions for minimizing the issues raised by those objections.

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[18] The *Platform Competition and Opportunity Act of 2021*, HR 3826, 117th Cong. (2021-2022), https://www.congress.gov/bill/117th-congress/house-bill/3826/text?r=5&s=1.

[19] One of the many criticisms of the House antitrust package is that the proposed legislation, in practice, seems to be targeted at four specific companies, Amazon, Apple, Facebook, and Google—it is to be applied only to those companies declared to be a "covered platform," and the criteria listed for a covered platform are those who seem to be satisfied by only those four platforms. *See* Christopher Cole, *Hotly Debated Tech Antitrust Reforms Clear House Committee*, Law360.com, June 24, 2021, https://www.law360.com/articles/1397459?scroll=1&related=1.

[20] *See infra* Part IV.

[21] *See infra* Part IV-C.

I. Difficulty in Proving Anticompetitive Mergers Generally, Under Existing Approach

The current approach to merger analysis sets a high bar and makes it quite difficult for antitrust enforcers to successfully bring action against anticompetitive mergers generally. This difficulty does not stem from the statutory language of the Clayton Act itself, which simply declares a merger anticompetitive if its "effect . . . may be to substantially lessen competition or to tend to create a monopoly."[22] However, over the years, the Act's implementation has evolved into a highly technical and somewhat narrow approach that is hard to apply.[23] Current analysis increasingly insists on quantification, simulated modeling, econometric studies, and other associated expert methodologies, to establish a prima facie case, all of which raises the plaintiff's evidentiary burden and likely results in underenforcement of the merger law.[24]

The traditional approach to merger analysis typically begins by defining the market and measuring market shares, which would then yield information on the concentration of the relevant market and the extent to which a proposed merger would increase that concentration.[25] To the extent that this exercise is primarily a means to identify and prevent those mergers that would make an already concentrated market more concentrated, it is helpful for merger enforcement. That is, if it enables the use of the structural presumption articulated in *Philadelphia National Bank*,[26] then the focus on market definition and market share calculation serves an important function[27] and is an effective tool.

One of the problems with the market definition exercise, however, is that it has evolved into a rigid, threshold step that has taken on a life of its own. In this form, plaintiffs must satisfy this first step before having the opportunity to demonstrate a merger's effects, and cases are lost when the market is not satisfactorily defined or market shares are not quantified and

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[22] 15 U.S.C. § 18.

[23] *See, e.g.*, HMG, *supra* note 2, §§ 4.1 & 4.2 (the hypothetical monopolist "SSNIP" test for market definition; "critical loss analysis"); § 5.3 (the HHI test for the measurement of market concentration); §§ 6 & 6.1 (estimating "diversion ratio," "value of diverted sales," "upward pricing pressure"); § 2.1.2 (encouraging use of "natural experiment" evidence); § 6.1 (use of simulated modeling).

[24] *See* Salop and Morton, *supra* note 8, at 13 (noting that "without clarification, the greater emphasis on econometric evidence will lead to additional false negatives," that "econometric techniques exist to address only some competitive concerns but not others," and that "[c]ompetitive concerns that lack econometric techniques are no less important to consumer welfare than are others").

[25] *See* HMG, *supra* note 2, §4. In this 2010 revised version of the HMG, the agencies have attempted to diminish earlier emphasis on market definition by stressing that agency analysis "need not start with market definition."

[26] U.S. v. Philadelphia National Bank, 374 U.S. 321, 363 (1963) ("[A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."). *See also* FTC v. H.J. Heinz Co., 246 F.3d 708, 715-16 (D.C. Cir. 2001) (applying the structural presumption to establish a prima facie case).

[27] *See* Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 Yale L.J. 1996 (2018) (suggesting increased reliance on the structural presumption of *Philadelphia National Bank* to strengthen merger enforcement).

calculated to a court's satisfaction, even if there is direct evidence of the merger's potential (or even *actual*) harmful effects.[28]

Market definition entails identifying and including all reasonable substitutes available to a buyer for a seller's product or services, usually by applying the hyper-technical, hypothetical monopolist "SSNIP" test – *i.e.*, determining how buyers of the product at issue would respond to a "small but significant and non-transitory increase in price."[29] In technology platform markets where rivals compete more on innovation than on price, the SSNIP test is not very helpful, particularly in two-sided markets where one side of the market is "free."[30] Attempting to define a relevant product market by asking how its users would respond to a SSNIP is obviously not meaningful when the monetary price for the product is zero. Even assuming that a plausible market definition is made out, demonstrating the merging firms' market shares is also incredibly difficult because it is not clear what metrics or methodology can be used for the task. Unlike an ordinary goods market, there are no total revenues received from users if the monetary price is zero, and no units sold to them, from which market share data can be calculated. This, in fact, was the central rationale of a district court's recent dismissal of the FTC's antitrust complaint against Facebook.[31]

Even if the market-definition (and market share calculation) step in merger analysis were eased, an excessive focus on quantitative evidence and special empirical tests and studies[32] is not always effective in identifying mergers that are likely to harm consumers and competition. A merger is generally considered harmful if it leads to higher prices, poorer

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[28] *See, e.g.*, FTC v. Lundbeck, Inc., 650 F.3d 1236 (8th Cir. 2011) (affirming the district court's judgment for the defendant based on its finding that the FTC failed to properly identify a relevant product market to the court's satisfaction, despite clear evidence of the acquisition's consumer harm--prices of the only two drugs in the alleged product market were raised multifold after the acquisition).

[29] U.S. Dept. of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines §4.1 (2010).

[30] Many of the most successful digital platforms are two-sided, or multi-sided. Their business model involves developing and providing free or almost free online content or services (such as search, social media, email, mapping) to attract consumers on one side of the platform. The platform then monetizes the users' attention by "selling" their attention to advertisers on the other side, who pay in order to serve advertising to the users.

[31] Federal Trade Commission v. Facebook, Inc., ___ F.3d ___ (D.D.C. 2021), 2021 WL 2643627, at 12-13 [hereinafter Dismissal of Facebook Complaint] (dismissing the FTC's complaint against FTC, with leave to amend, finding that the government's allegation of defendant's market share in a monopolization claim was too conclusory to plausibly establish market power). The court faulted the FTC for not even alleging what it was measuring and said that, unlike a case involving a typical goods market, the court had nothing by which it could infer how the agency arrived at its market share allegation. *Id.* at 13.
The complaint against Facebook had alleged monopolization, based in part on the theory that Facebook acquired Instagram and WhatsApp as part of its strategy to maintain its dominance in the personal social networking market. FTC v. Facebook, Inc., Case 1:20-cv-03590 (D.D.C. 2020), https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_complaint.pdf. [hereinafter Facebook Complaint].

[32] *See, e.g.*, HMG, *supra* note 2, §2.1.2 (natural experiment evidence); §6.1 (simulation models).

quality, less consumer choice, or less innovation.[33] An effects analysis conducted using advanced economic tools generally works reasonably well for ordinary goods that compete primarily on price—for example, commercial baby food[34] or office supplies[35]--for there would be enough data and other information with which to calculate or predict the price or output impact of a proposed merger. But those tools are not well equipped to focus on nonprice competitive concerns in the long run, particularly the implications on future innovation. That advanced economic techniques do not exist for measuring certain competitive harms does not mean, however, that those nonprice harms do not exist or are unimportant.[36] It should mean only that other types of evidence and more appropriate methods of analysis are needed to supplement the usual economic analysis.

II. Enhanced Analytical Problems When Dominant Firms Acquire Nascent Competitors

The usual problems in a standard merger analysis are exacerbated when dominant firms acquire a nascent competitor because a nascent competitor, by definition, is not yet fully developed and only *promises* future competition. Thus, the potential competitive impact of its acquisition by a dominant firm is even more uncertain than usual. Furthermore, the quantifiable metrics that are strongly favored in merger analysis, and in antitrust generally, are unsuitable for evaluating nonprice effects in the long run. At the same time, protecting nascent competitors from removal from the market through acquisition by a dominant firm (that the nascent competitor might challenge in the future, if allowed to remain independent) is important since nascent competitors often hold the best promise of introducing meaningful competition into markets that experience rapidly changing technologies.[37] In those markets, a future paradigm-shifting innovation, more so than incremental or modest improvements of an incumbent's product by "clones," is more likely to make a breakthrough in a market with an entrenched incumbent with market power.[38]

A. Nascent Competitors and Why Their Protection Is Particularly Important

While there is no universal definition, the term "nascent competitor" is commonly understood to mean a potential *future* competitor whose innovation, though unproven, could

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[33] *See, e.g.*, *id.* § 1 ("The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise. . . . A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.").

[34] FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001).

[35] FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997).

[36] Salop and Morton, *supra* note 8, at 13.

[37] *See* Carl Shapiro, *Antitrust in a Time of Populism*, 61 Int'l J. Indus. Org. 714,741 (2018) (observing that preventing an incumbent with substantial durable market power from acquiring "smaller firms that, if left to grow on their own, would become its strongest challengers" produces large payoffs).

[38] *See* C. Scott Hemphill and Tim Wu, *Nascent Competitors*, 168 U. Pa. L. Rev. 1879, 1886-87 (2020) (giving examples to show that "a significant number of disruptive innovations—those that transform the industry—have come out of very small firms with new technologies unproven at the time" rather than from "big firms with large research laboratories").

pose a serious threat to an incumbent when the nascent competitor's product is fully developed or evolved.[39] A nascent competitor is typically not (yet) a direct competitor in the incumbent's core market. Whether a nascent competitor's potential threat to the incumbent materializes is necessarily somewhat uncertain, but its potency, should it materialize, would be particularly significant in markets where the incumbent is protected by strong network effects, as many major digital platform markets are. A market characterized by substantial network effects means that benefits to users increase as the number of users increases.[40] A social network, such as Facebook, is a classic example of such a market.

In such markets, a new entrant must attain critical mass when it is launched in order to succeed or even survive, which leads to winner-takes-most markets and also discourages entry.[41] This effectively means that, after gaining dominance, an incumbent has little to fear from "clones," even those offering improved or additional features. A case in point was the inability of Google's social networking product, Google+, to gain traction against Facebook despite Google's formidable resources and technical talent.[42] In markets that benefit from strong network effects, therefore, any threat to an incumbent is likely to come, not from direct competitors within the market (not even a heavyweight like Google), but from a firm whose prospective innovation is potentially transformative, even if unproven and not fully developed. Because nascent competitors may offer the *only* serious potential challenge to an incumbent insulated from competition by network effects, their protection by antitrust is particularly important if we value innovation and competition. As will be discussed later, though Instagram and WhatsApp were not Facebook's direct competitors in the general social networking market when they were acquired, they were potent nascent competitors in that their products apparently had popular features that could be leveraged into building a different type of social network to challenge the incumbent.

B. Why Current Merger Analysis is Ineffective in Policing Dominant Firm Acquisitions of Nascent Competitors

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[39] *See, e.g.*, *id*, at 1880 (defining a nascent competitor as "a firm whose innovation represent a serious, albeit not completely certain, future threat to an incumbent"); Tracy J. Penfield and Molly Pallman, *Looking Ahead: Nascent Competitor Acquisition Challenges in the "TechLash" Era*, Antitrust Source 1, www.antitrust.com (June 2020), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/2020/june-2020/jun20_penfield_6_17f.pdf ("A nascent competitor, as distinct from a potential competitor, is a current competitor whose competitor is not fully actualized but could develop into a significant head-on competitor of the acquirer.").

[40] *See* Catherine Tucker, *Network Effects and Power: What Have We Learned in the Last Decade?*, Antitrust, Spring 2018, at 1 ("Economists use 'network effects' to describe contexts in which a good or service offers increasing benefits the more users it has.").

[41] *See* Maurice E. Stucke & Allen P. Grunes, Big Data and Competition Policy §11.06 (2016) (discussing how network effects work in data-driven markets, which tend to offer zero-price products).

[42] *See* Chris Welch, *Google Begins Shutting Down Its Failed Google+ Social Network*, Verge (Apr. 2, 2019), https://www.theverge.com/2019/4/2/18290637/google-plus-shutdown-consumer-personal-account-delete.

Merger analysis, which typically takes place pre-merger, is necessarily predictive in nature. It must assess "what will likely happen if a merger proceeds as compared to what will happen if it does not,"[43] to decide whether the merger, if unchallenged, may substantially harm consumers and competition by reducing competition. Though not demanded by the Supreme Court, there is a strong, and increasing, preference for quantitative evidence and the application of econometrics, merger simulations, and the like in merger reviews.[44] Economic concepts such as "diversion ratios," "value of diverted sales," "critical loss analysis," and "upward pricing pressure," for example, pervade the Horizontal Merger Guidelines.[45] Unfortunately, while these methodologies may do a good job analyzing measurable competitive effects--such as price--and predicting their prevalence, they are much less useful when the potential adverse effects defy quantification and measurement. This, in turn, means that in markets that experience rapid technological change, where the much-feared harm is reduced innovation in the long run, current merger analysis has been ineffectual in policing dominant firm acquisitions of nascent competitors.[46] The inherent difficulties can be seen, for example, in Facebook's ability to acquire Instagram and WhatsApp without facing any antitrust challenge.

1. Instagram Acquisition: How A Narrow Economic Effects Analysis Was Likely Deficient

By way of background, Instagram was developed as a smartphone app that allowed its users to easily edit and share photos taken on their smartphones via its network.[47] It emerged at an opportune moment when high-quality cameras were fast becoming a regular feature on smartphones, smartphone use was exploding, and consumers were increasingly migrating from desktop and laptop computers to their smartphones for internet access. Facebook, at that time, was primarily designed for use on desktops and laptops, not smartphones.

In 2012, to those outside the industry at least, photo sharing was not yet considered a major part of the social media experience. On the consumer side of the platform, Instagram did not look or operate like a social network as general social networks were usually understood.[48] On the advertising side, Instagram sold digital advertisements to support the

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[43] HMG, *supra* note 2, §1.
[44] *See* Jonathan B. Baker, *Merger Simulation in an Administrative Context*, 77 Antitrust L.J. 451 (2011); Jonathan B. Baker & Daniel L. Rubinfeld, *Empirical Methods in Antitrust Litigation: Review and Critique*, 1 Am. L. & Econ. Rev. 386 (1999).
[45] *See supra* note 23.
[46] This problem is widely understood. *See, e.g.*, Hemphill & Wu, *supra* note 38; Terrell McSweeney & Brian O"Dea, *Data, Innovation, and Potential Competition in Digital Markets—Looking Beyond Short-Term Price Effects in Merger Analysis*, CPI Antitrust Chron., Feb. 2018 at 5-6.
[47] For a discussion of Facebook's acquisition of Instagram, see Jonathan B. Baker, The Antitrust Paradigm 161-63 (Harv. U. Press 2019).
[48] While Instagram allowed its users to upload photos for sharing with others on the network, it was essentially limited to that feature. It did not have other popular features associated with general, personal social networks

consumer side, like other digital platforms that are free to consumers. But Instagram was only a small player in the online display advertisement market.[49]

Under the prevailing analytical methods and considering only the types of evidence that are generally considered relevant, one can see why neither the U.S. nor any other competition law authority challenged the acquisition. They would have foreseen little competitive impact on the advertising side of the market: in addition to Facebook, Google was a major player, as were Yahoo! and Microsoft; the acquisition, therefore, was unlikely to substantially affect the advertising customers.[50] On the consumer-facing side, Instagram, primarily a photo sharing service, was not seen as a major existing competitor in Facebook's core business. Thus, unless the FTC was able and willing to go outside the box and consider other indicia of effects, its choice to clear the merger was understandable if overly cautious.[51]

As will be discussed in more detail in a subsequent section, it is only when one examines a trove of internal communications among Facebook's senior executives that a different judgment might have been reached. Had they been considered, those candid communications would have clarified the potential effects of the acquisition, by providing a guide to understanding *how* and why a competitive challenge to Facebook would likely come from Instagram. They would have explained, in a way that no empirical analysis could, why Instagram, not Google+, presented a threat to Facebook's dominance, even though Instagram (unlike Google+) was not perceived as a general-purpose social network. The inability of the usual economic approach to consider these useful insights in merger analysis highlights one of its weaknesses.

2. WhatsApp Acquisition: How A Narrow Economic Effects Analysis Was Likely Deficient

The FTC's clearance of Facebook's acquisition of WhatsApp in 2014 provides another illustration of the deficiency of the typical, narrow effects analysis in the context of a nascent competitor acquisition. WhatsApp was an independent text messaging app in a market with several messagingproducts, which included Apple's popular iMessage for iPhones,[52] WeChat, and Facebook's Messenger. Just as in the case of Instagram, at the time of the transaction, the

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(e.g., Facebook and Google+), such as the ability to share articles, their own thoughts and opinion, posting anything to their own timeline, entering into private chats with other friends who are online, and so forth.

[49] The UK's Office of Fair Trading (OFT), like the FTC, also cleared the transaction. Unlike the FTC, the OFT provided a detailed explanation for its decision. The OFT found that Instagram was a small rival to Facebook in the online display advertising market and, that, moreover, Google, Yahoo!, and Microsoft were already competing in that market. *See* Baker, Antitrust Paradigm, *supra* note 47, at 161-62 (detailing the UK OFT's analysis).

[50] *See id.*

[51] It should be noted that the OFT did recognize that Instagram could have developed into a social network but did not analyze this potential harm because it saw 1) Facebook as already facing credible competition from Google+; and 2) the fact of Instagram's rapid growth as demonstration that entry into social networking would be easy. *See id.*, at 162.

[52] Facebook Complaint, *supra* note 31, ¶114. Unlike Apple's iMessage, WhatsApp can be used on all major smartphone operating systems.

startup target did not directly compete against Facebook's core business as a social network provider.

If we were to look only at quantitative and other types of hard evidence that antitrust finds probative, there was not much that could have supported a case against the proposed acquisition. Like Instagram, WhatsApp neither looked like a social network nor functioned like one. Thus, its acquisition by Facebook could not have been expected to substantially impact the social network market. As for the text messaging market, while Facebook did offer a text messaging product, that product—Messenger--was not a significant player in a market where there were several important messaging providers besides WhatsApp. Facebook's acquisition of WhatsApp, therefore, could not have been expected to significantly impact the text messaging market either.

Yet, as in the case of Instagram, internal communications among senior Facebook management told a different story of the state of competition facing Facebook.[53] As perceived by those who would be in the best position to know—Facebook management—WhatsApp had the potential to develop and transform into a social network, despite being no more than a text messaging app at the time.[54] In fact, the executives' subjective statements revealed that Facebook's fears over the potency of WhatsApp's future potential competition were so intense that it was willing to pay $19 billion, ten percent of its market capitalization, to acquire it.[55] That the standard effects analysis would ignore the relevance of such useful subjective statements underscores the shortcomings of the customary approach.

III. A Role for Intent Evidence in Merger Analysis

I argue here that we should reimagine merger analysis to include intent but, first, there should be clarity in what is proposed. Specific intent is a required *element* that must be proven only in criminal antitrust[56] and in attempted monopolization[57] cases, and I am not suggesting

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[53] Few understood Facebook's paying $19 billion for a mobile messaging service. *See, e.g.,* Robert Hof, *In One Chart, Here's Why Facebook is Blowing $19 Billion on WhatsApp*, Forbes, Feb. 19, 2014, https://www.forbes.com/sites/roberthof/2014/02/19/in-one-chart-heres-why-facebook-is-blowing-19-billion-on-whatsapp/?sh=1a0ed0233d62 (concluding that the acquisition seemed "insane," and the purchase price was "too hard to justify [] on any kind of near-term factor.").

[54] Facebook Complaint, *supra* note 31, ¶ 17 (quoting Facebook executives' concern that mobile messaging apps like WhatsApp could "*enter* the personal social networking market, either by adding personal social networking features or by launching a spinoff personal social networking app."); ¶ 18 (citing Zuckerberg's email, which identified a trend of "messaging apps . . . using messages as a springboard to build more general mobile social networks.").

[55] *See* Hof, *supra* note 53. In fact, the size of the purchase price can be viewed as an intent metric.

[56] United States v. United States Gypsum Co., 438 U.S. 422, 435, 443 (1978) (maintaining that "a defendant's state of mind or intent is an element of a criminal antitrust offense," and concluding that "the criminal offenses defined by the Sherman Act should be construed as including intent as an element."); *id.*, at 436 n.13 (stating that the holding does not change the general rule that civil antitrust violations do not require proof of specific intent).

[57] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993) (holding that liability for attempted monopolization under section 2 of the Sherman Act requires "proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize.").

that it should be added as an element that *must* be proven for other antitrust claims.[58] Rather, my contention is that subjective intent has probative value in other antitrust cases, including mergers, and can be very helpful in helping to distinguish between mergers (or conduct) that are anticompetitive and those that are either procompetitive or neutral.

Though many jurists and antitrust scholars today are dismissive of intent and object to its use in antitrust cases (except for criminal and attempted monopolization charges),[59] courts have, in fact, historically recognized the relevance of an antitrust defendant's intent in explaining ambiguous conduct and interpreting effects in cases under the Sherman Act,[60] though not in merger cases under the Clayton Act. Intent evidence fell out of favor in antitrust generally, however, as various measurement and other economic tools improved, and as antitrust became increasingly influenced by neoclassical economic theory.[61]

I have, in previous writings, sought to reclaim a role for intent evidence in monopolization cases, arguing that it complements economic analysis.[62] Economic tools alone cannot always reliably determine the competitive effect of any alleged exclusionary conduct.[63] An intent inquiry could aid in an economic analysis because subjective statements can provide clues about ambiguous strategies and interpret their competitive effects.[64] Below, I argue that intent evidence is probative in merger analysis as well and that its use could strengthen merger enforcement. Drawing on statements and other documents produced in connection with the Facebook Instagram and WhatsApp acquisitions, I examine how consideration of those subjective statements could and should have made a difference in the FTC's review of those two acquisitions.

A. Relevance of Intent Historically

If we were to focus primarily on pronouncements made in commentaries and some cases, intent evidence would seem to have little relevance in contemporary antitrust analysis.

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[58] For an argument that specific intent should be a required element of a monopolization offense and that the evidence of such specific intent must be objective, see generally Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. Cal. L. Rev. 657 (2001).
[59] *See* Marina Lao, Reclaiming a Role For Intent Evidence in Monopolization Analysis, 54 Am. U. L. Rev. 151, 152-53 (2004) [hereinafter Lao, Intent in Monopolization Analysis].
[60] *See, e.g.*, Chi. Board of Trade v. United States, 246 U.S. 231, 238 (1918); see also Lao, Intent Evidence in Monopolization Analysis, *supra* note 59, at 161-64 (citing and discussing other cases).
[61] *See* Maurice E. Stucke, *Is Intent Relevant?*, 8 J.L. Econ. & Pol'y 801, 807 (2012) (attributing the objection to intent evidence in civil antitrust cases to "[j]urists and scholars oriented by neo-classical economic theory"); Lao, Intent in Monopolization Analysis, *supra* note 59, at 196-97 (tracing the diminishment of the role of intent evidence to the rise to prominence of the Chicago School); Spencer Weber Waller, *The Language of Law and the Language of Business*, 52 Case W. Res. L. Rev. 283, 315 (2001) ("In the wake of the Chicago School onslaught, intent evidence in all areas of antitrust analysis has been devalued").
[62] *See generally* Lao, Intent in Monopolization Analysis, *supra* note 59; Marina Lao, Aspen Skiing and Trinko: Antitrust Intent and "Sacrifice," 73 Antitrust L.J. 171 (2005) [hereinafter Lao, Antitrust Intent and "Sacrifice"].
[63] *See* Lao, Intent in Monopolization Analysis, *supra* note 59, at 178-81.
[64] *Id.*, at 196-98; Lao, Antitrust Intent and "Sacrifice," *supra* note 62, at 190-99.

Judge Frank Easterbrook famously declared in *A.A. Poultry Farms v. Rose Acre Farms*[65] that "[i]ntent does not help to separate competition from attempted monopolization,"[66] and that "[t]raipsing through the warehouses of business in search of misleading evidence both increases the costs of litigation and reduces the accuracy of decisions."[67] He further said that "the evidence offered to show intent will be even more ambiguous than the economic data it seeks to illuminate."[68]

Judge Richard Posner was equally dismissive of intent evidence, observing that: "We attach rather little weight to internal company documents used to show anticompetitive intent because, though they sometimes dazzle a jury, they cast only a dim light on what ought to be the central question in an antitrust case: actual or probable anticompetitive effect."[69] In *California Dental Association v. Federal Trade Commission*, the Ninth Circuit Court of Appeals likewise described most intent evidence as being of "no value" and referred to analyses of intent as being a "relatively fruitless inquiry" in antitrust rule of reason cases.[70]

The same distrust and skepticism toward intent evidence is also reflected in antitrust scholarship.[71] The leading antitrust treatise, for example, states that "bad intent is easily proven but seldom serves to distinguish situations where the defendant's conduct deserves condemnation from those in which it should be left alone."[72] Other scholars have made similar arguments, contending that "[f]rom an economic perspective, which focuses on effects, an emphasis on intent seems misplaced,"[73] and that the use of "hot" documents expressing intentions and motivations may result in a substantial likelihood of error.[74]

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[65] 881 F.2d 1396 (7th Cir. 1989).
[66] *Id.* at 1402.
[67] *Id.*
[68] *Id*.
[69] Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588, 595-96 (7th Cir. 1984).
[70] 224 F.3d 942, 948 (9th Cir. 1995). *See also* FTC v. Freeman Hosp., 69 F3d 260, 270 n.14 (8th Cir. 1995) (summarily rejecting opinion and intent evidence).
[71] Some scholars do recognize that intent evidence is relevant in antitrust. *See, e.g.*, Thomas L. Greaney, *Chicago's Procrustean Bed: Applying Antitrust Law in Health Care*, 71 Antitrust L.J. 857, 877-79 (2004) (criticizing several courts' summary rejection of opinion and intent evidence without evaluation of their probative value); Lao, *Intent in Monopolization Analysis*, *supra* note 59; Lao, *Antitrust Intent and "Sacrifice," supra* note 62; Stucke, *Is Intent Relevant?*, *supra* note 61; Lawrence A. Sullivan, *Monopolization: Corporate Strategy, the IBM Case, and the Transformation of the Law*, 60 Tex. L. Rev. 587, 632-33 (1982) ("Antitrust law would profit were [intent evidence] returned to its historical role"); Waller, supra note 61, at 315 (noting with disapproval the devaluation of intent evidence in antitrust analysis).
[72] 3 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 601, at 5; *see also* Herbert Hovenkamp, The Monopolization Offense, 61 Ohio State L.J. 1035, 1039 (2000) [hereinafter Hovenkamp, *Monopolization Offense*] (arguing that intent is not helpful because "the 'intent' to create a monopoly anticompetitively cannot be distinguished from the intent to do so competitively").
[73] Timothy J. Brennan, *Do Easy Cases Make Bad Law? Antitrust Innovations or Missed Opportunities in United States v. Microsoft*, 69 Geo. Wash. L. Rev. 1042, 1092 (2001).
[74] Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 Ariz. L. Rev. 609, 610 (2005).

Despite the rhetoric and strong language surrounding some of the critiques, however, history shows that courts, in fact, have considered intent evidence in earlier Sherman Act cases where the conduct in question was ambiguous and its competitive effects unclear. In his famous formulation of the rule of reason in *Chicago Board of Trade v. United States*,[75] Justice Louis Brandeis expressly included intent as one of many factors to be considered under the test, "not because a good intention will save an otherwise objectionable regulation or the reverse, but because knowledge of intent may help the court to interpret facts and to predict consequences."[76] While intent evidence was not determinative of liability, older antitrust cases tended to value it because both the conduct itself and the effects may be unclear,[77] and there are generally two competing stories that could be told in any case – an anticompetitive one and a procompetitive or neutral one. The defendant's intent, gleaned from testimony or documents, could help the factfinder choose between the two.

As antitrust turned increasingly to hard metrics to answer key questions of liability, however, the role of intent evidence in antitrust analysis became greatly diminished. Even so, a careful examination of a few important modern monopolization cases, most notably *United States v. Microsoft*,[78] shows that some courts continue to consider intent evidence relevant and probative. In *Microsoft*, the core allegation against the company was that it perceived a future threat to its Windows operating systems monopoly from Netscape's *browser*, and proceeded to engage in conduct to remove that threat.[79] Bear in mind that Netscape's browser was not an operating system. Nor were its capabilities developed to a point where it could provide some of an operating system's critical functions. Moreover, it was uncertain that, but-for Microsoft's interference, Netscape would have ultimately reached that stage of development.

Thus, based on the economic evidence and the usual metrics, it would have been difficult for the court to find liability, even though there was ample evidence that Microsoft did act to block the efficient distribution of Netscape's browser. Yet the court did find liability, evidently having considered and given weight to intent evidence—the many subjective statements of Bill Gates and other Microsoft executives. Both the opinions of the Court of Appeals and the district court were replete with references to Microsoft's anticompetitive

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[75] 246 U.S. 231 (1918).
[76] *Id.*, at 238. *See also* Standard Oil Co. v. United States, 221 U.S. 1, 75-77 (1911) (speaking of the defendant's "purpose and intent" to maintain dominance in the oil industry "with the purpose of excluding others"); American Tobacco Co. v. United States, 328 U.S.781, 809 (1946) (stating that the power to exclude competitors "coupled with the purpose or intent to exercise that power" was sufficient to find a monopolization violation); Hovenkamp, *Monopolization Offense*, *supra* note 72, 1037-38 (noting, and criticizing, the historical role of intent in monopolization cases).
[77] *See* Lao, Intent in Monopolization Analysis, *supra* note 59, at 164 (arguing, in the context of monopolization claims, that knowing a defendant's intent can help explain ambiguous conduct and effects)
[78] U.S. v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).
[79] U.S. v. Microsoft Corp., 84 F. Supp. 2d 9, at ¶¶ 68-77 (D.D.C. 1999) (discussing in detail the government's main theory of the case); *Microsoft*, 253 F.3d at 53-54 (assessing the threat of Netscape's browser to Microsoft's Windows monopoly, as Microsoft perceived it).

intent.[80] They pointed to numerous internal corporate documents, senior executive statements, and email exchanges among senior Microsoft corporate executives expressing their fears that Netscape posed a substantial future threat to its Windows monopoly and their intention to obstruct Netscape to remove that threat.[81]

I have argued, in previous writings, that intent evidence was pivotal in both the district court and the D.C. Circuit's *Microsoft* decisions, though the courts' reliance on it was not explicit. The courts' willingness to rely on those statements, albeit not expressly, to support the finding of a violation shows that some courts remain open to the reliance on subjective statements in monopolization cases, despite much rhetoric to the contrary.

It is true, however, that most judicial considerations of intent have occurred in the context of Sherman Act cases, in determining liability in Section 1 rule of reason cases and in Section 2 monopolization cases. In the analysis of mergers under Section 7 of the Clayton Act, there have been few references to motive and intent. To the extent that intent evidence has come into play in merger cases, it has been limited to assisting with market definition, with courts relying partially on business documents or internal communications indicating whom the merging parties considered to be their competitors.[82] For example, in *United States v. H&R Block*, Inc., involving a proposed merger between two of the three major companies that produce digital do-it-yourself tax software,[83] the court relied primarily on the merging parties' documents to find that the relevant product market was limited to "digital do-it-yourself tax preparation products" (or "DDIY").[84] In rejecting the merging parties' arguments for a broader market definition, the court pointed to the companies' internal documents showing that each viewed only the other's DDIY product and TurboTax (the leading product) as the competition, and tracked their pricing and marketing,[85] but was unconcerned with the possibility of competition from assisted tax preparation or with manual tax preparation by taxpayers.[86]

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[80] *Microsoft*, 253 F.3d at 76 (stating that "Microsoft documents... indicate that Microsoft's ultimate objective was to thwart Java's threat to Microsoft's monopoly in the market for operating systems"); *Microsoft*, 84 F. Supp. 2d at ¶72 (noting Microsoft's fear that "[Netscape] Navigator's enthusiastic reception could embolden Netscape to develop Navigator into an alternative platform for applications development"); id. at ¶¶ 166-169 (explaining Microsoft's plan to bind Internet Explorer tightly to the Windows operating system, "maximize the usage of Internet Explorer at Netscape's expense," and "get consumers to use Internet Explorer instead of Navigator"); id. at ¶ 212 (addressing Microsoft's attempt at "establishing control over the boot process... to ensure preferential positioning for MSN and Internet Explorer");

[81] For a fuller discussion of intent evidence to explain effects in *Microsoft*, see Lao, Intent in Monopolization Analysis, *supra* note 59, at 153-54, 189.

[82] In addition to the two cases discussed below, United States v. H&R Block, Inc., 833 F.Supp. 2d 36 (D.D.C. 2011), and FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997), see also FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 51 (D.D.C. 1998) (finding that the relevant product market consisted of drug wholesalers only, since the merging parties documents showed that they considered only other drug wholesalers to be their competitors).

[83] United States v. H&R Block, Inc., 833 F.Supp. 2d 36, 44 (D.D.C. 2011).

[84] *Id.*, at 52-54.

[85] *Id*.

[86] *Id.*

Similarly, in *FTC v. Staples*, Inc.,[87] the court settled the dispute between the FTC and the defendants over the relevant product market by referring to the defendants' own business documents and other evidence of intent. If the market were defined narrowly as consumable office supplies sold by office *superstores*, the market would have been extremely concentrated and the merger between the top two would obviously be anticompetitive.[88] However, if the market were broadened to include consumable office supplies sold by *all* retailers, the merging parties' share of the market would have been much smaller and the proposed merger of little concern.[89] In accepting the FTC's narrower market definition, the court relied substantially on the merging parties' business documents and other intent manifestations that showed the defendants, two of the three U.S. office supply superstores, considered only each other and OfficeMax, the third superstore, to be competitors.[90] Notably, they showed concern when another office supply superstore entered their geographic areas but not when a non-superstore retailer that also sold office supplies, such as Walmart's, entered.[91]

But other than as an assist in market definition in some cases,[92] antitrust enforcers have rarely, if ever, attempted to rely on intent evidence to support a prediction that the effects of a proposed merger would be harmful to competition. I argue that intent evidence should also be allowed a role in the evaluation of potential competitive effects, particularly when the proposed acquisition target is a nascent competitor. Merger analysis, performed pre-merger, necessarily requires prediction, and the economists' measurement tools are not suitable for predicting nonprice effects in the long run. In that case, evidence of the intentions and motivations of the dominant firm making the acquisition can be particularly useful in shedding light on the issue.

B. How and Why Intent Evidence Would Help in Identifying Anticompetitive Acquisitions of Nascent Competitors

The strong emphasis on quantitative evidence and expert application of various econometric tests in merger analysis is not, in fact, mandated by the Clayton Act. The statutory language itself is general and does not require any precise or "scientific" method, or limit the type of evidence that may be considered. But, over the decades, the antitrust enterprise has grown increasingly technocratic and dependent on rigorous economic tools to demonstrate the potential competitive effects of a merger. While those tools are fine for mergers in markets where the expected competitive impact is on prices, they are far less capable of forecasting whether and how much a merger or acquisition might reduce innovation or adversely affect

[87] 970 F. Supp. 1066 (D.D.C. 1997).
[88] *Id.* at 1073.
[89] *Id*.
[90] *Id.*, at 1079 ("In document after document, the parties refer to, discuss, and make business decisions based upon the assumption that 'competition' refers to other office superstores only").
[91] *Id*., at 1077-78.
[92] Many other cases, however, reject the use of such documents in market definition. *See* Manne & Williamson, *supra* note 74, at 644-45 (discussing such cases).

other nonprice factors.[93] As discussed, these inherent limitations are more debilitating where the firm to be acquired is a nascent competitor. In such cases, a combination of greater uncertainty, a seeming institutional preference for quantitative evidence, and a tendency for courts to err in favor of defendants when in doubt,[94] has discouraged antitrust challenges. An approach that has made it practically impossible to prohibit any dominant firm acquisition of nascent competitors clearly needs re-thinking.

Of course, legislative reform that would either impose an outright ban on acquisitions by certain firms and or shift the burden of proof onto the merging parties for certain categories of mergers and acquisitions would greatly change the conversation, at least with respect to the firms and the types of mergers that are covered.[95] But, passing comprehensive legislation that makes fundamental changes to existing law is typically difficult, and passage of the antitrust reform bills that have been introduced by Senator Klobuchar or the House Judiciary Committee is far from certain. Short of legislation or regulation, taking intent evidence into account to supplement economic analysis could make a difference and could strengthen merger enforcement.

1. Intent Evidence Is Probative in Predicting Competitive Effects

As discussed previously, empirical data or other measurable evidence comparing, *ex ante*, the market with and without the merger--particularly with respect to innovation--is largely unavailable when a dominant firm proposes to acquire a nascent competitor. Thus, if only that type of evidence were deemed relevant and probative in an effects analysis, distinguishing between anticompetitive and procompetitive mergers could be extremely difficult, if not impossible. In many cases, though, there will be subjective statements made by the company's senior management relating to the transaction and, in every case, business documents justifying the merger or acquisition to the acquiring firm's board of directors. These statements and documents can serve as a helpful guide to decisionmakers who must assess the proposed acquisition's future effects on competition and make a judgment on the ultimate question of whether the acquisition is anticompetitive.

Making an intelligent judgment on the effects of a nascent competitor acquisition requires having knowledge of the state of future competition in the market in question, including how that market may evolve, and whether (and how) the acquisition target is likely to develop into a strong challenge to the acquiring firm if it remains independent or is acquired by

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[93] While the HMG does not commit the antitrust agencies to relying only on quantitative evidence or various economic techniques in merger reviews (and ultimately to prove a violation), emphasis on the use of these empirical tests and techniques pervades the Guidelines, and most examples provided within involve analysis of price and other quantitative data. *See generally* HMG, *supra* note 2.

[94] *See* Baker, *Error Cost*, *supra* note 8 (criticizing the error cost analysis as currently applied in antitrust, which is biased against antitrust enforcement); Lao, *Erring on the Side of Antitrust Enforcement*, *supra* note 6, at ___ (making the case that there should be less concern about the costs of false positives and more concern about false negatives in merger analysis).

[95] *See supra* notes 16-19 and accompanying text.

someone other than the dominant firm. But courts and antitrust enforcers typically do not have sufficient information or the expertise to answer these core questions. Considering the subjective statements of the acquiring firm's executives effectively enables government decisionmakers, be they courts or antitrust enforcers, to draw on the expertise of those with knowledge—the company's top management.

The acquiring firm's perceptions of the market and of their competition are relevant pieces of evidence because it is reasonable to assume that firms understand better than anyone else the market in which they operate, how that market may be transformed over time, and where their strongest competitive threats lie. Assume, for example, that senior managers of Dominant Firm A express concerns, through emails or other documents, that start-up Firm B may become a strong future challenge to its dominance, even though Firm B does not yet have a fully developed product and/or is not an existing direct competitor. In that scenario, the statements are probative in the evaluation of the future competitive effects of the acquisition because they are likely the informed assessments of those with expertise. Indeed, these statements should be assigned greater weight if they are reinforced by consistent objective evidence, such as an acquisition price that is so high that it makes no sense from an economic perspective absent a premium for foreclosing competition..

Dismissing intent evidence as insufficiently rigorous[96] and requiring quantitative evidence to establish effects is bound to result in the underenforcement of the merger laws when quantitative evidence is unavailable or difficult to generate. A better approach, and one that is more consistent with the high-level goals of the merger law, would be to use intent evidence as a helpful additional tool to complement economic analysis. Subjective statements of company executives revealing their perceptions of whether and how a nascent competitor may become a competitive force if it were to remain independent can enable courts and antitrust enforcers to understand how a market may look in the future with and without the acquisition. Subjective statements by senior managers can also open a window to the acquiring firm's true reasons for the proposed acquisition: whether it is to foreclose future competition and protect its dominance, which would be harmful, or to create synergies or improve on a product, which would be beneficial to consumers. That, in turn, can help judges and antitrust enforcers make better decisions and avoid false negatives.

How intent evidence might make a difference in merger reviews can be explained more clearly through an examination of the collection of internal communications between Facebook's executives in connection with the company's acquisitions of Instagram and WhatsApp several years ago. The FTC did not challenge either acquisition at the time, probably believing that it could not succeed under the prevailing methods of evaluating effects, which do

[96] *See, e.g.*, David McGowan, *Networks and Intention in Antitrust and Intellectual Property*, 24 J. Corp. L. 485, 514-16 (1999) (arguing that what one defines "as 'the firm's' intention in the run of cases will probably depend on who is asked, and even then the answer of one individual may not be worth much"); Richard A. Posner, Antitrust Law 214 (2d ed. 2001) ("Any doctrine that relies on proof of intent is going to be applied erratically at best.").

not consider intent evidence. Now, nearly a decade later and in the midst of a huge backlash against Big Tech, the agency evidently regrets its decisions and has filed a monopolization case against Facebook[97] based primarily on allegations that those acquisitions were part of the company's strategy to maintain its monopoly position in the personal social networking market.[98] In seeking divestiture of the two acquired companies as remedy, the FTC is effectively seeking to unwind the acquisitions, implicitly admitting that it should have taken action to prohibit the transactions at that time. (The district court has since dismissed the complaint, without prejudice, for failure to sufficiently allege Facebook's market power in the relevant market.)[99]

2. Facebook's Acquisition of Instagram: How Intent Evidence Might, and Should, Have Made a Difference in the Agency's Merger Review in 2012

Considering only quantitative evidence and the standard metrics the agency customarily employs and that courts have come to expect, it would have been difficult to establish to a court's satisfaction that the acquisition of Instagram in 2012 would substantially harm competition on either the consumer or the advertiser side of the social media platform. On the advertiser side, Instagram was just a small player in the sale of online digital advertising space to advertisers. It is well known that that, in addition to Facebook, Google was a dominant seller, as were Yahoo!, and Microsoft.[100] Thus, Facebook's acquisition of Instagram was unlikely to have much competitive impact on the advertiser side of the market.

On the consumer-facing side, Instagram was primarily a photo sharing app in the early 2010s. Though sharing photos was (and is) one feature of social networks, Instagram did not operate like a social network, at least not as general-purpose social networking services were understood at that time.[101] In other words, Instagram was not viewed as Facebook's direct competitor in providing general social networking services. Thus, under the usual analytical approach, its proposed acquisition by Facebook would be deemed to have negligible impact on competition on the consumer-facing side of the market as well.

But this hard, quantitative, evidence does not tell the full story. It alone does not and cannot tell us whether an independent Instagram would likely develop into a major threat to Facebook by leveraging its attractive features into building a general social networking platform, perhaps launching a new social network paradigm or model. But knowing the

[97] Facebook Complaint, *supra* note 31.
[98] *Id.*, ¶ 105 ("In sum, Facebook's acquisition and control of Instagram represents the neutralization of a significant threat to [Facebook's] personal social networking monopoly, and the unlawful maintenance of that monopoly by means other than merits competition."); *id.*, ¶ 127 ("In sum, Facebook's acquisition and control of WhatsApp represents the neutralization of a significant threat to [Facebook's] personal social networking monopoly, and the unlawful maintenance of that monopoly by means other than merits competition.").
[99] Dismissal of Facebook Complaint, *supra* note 31, at 12-13 (dismissing the section 2 claims grounded on the two acquisitions, but with leave to amend).
[100] *See supra* note 50 and accompanying text.
[101] *See supra* note 51 and accompanying text.

answers to that and other related questions is important in the analysis of effects. Had the agency felt free to consider the mounds of internal statements and communications among Facebook executives and senior managers relating to those questions, it could and probably should have made a different judgment on whether the acquisition would likely harm competition and, hence, whether to approve or challenge the acquisition.

For example, the subjective statements included a 2012 email from Mark Zuckerberg, Facebook's founder and executive, explaining that photo sharing was a growing and "concerning trend." In the same email, he worried that Instagram "will evolve in the mobile world," which he said would be "really scary;" he further said that it was worth "paying a lot of money" for the start-up.[102] Following the same theme, Zuckerberg wrote to another Facebook executive that "mobile app companies like Instagram . . . are building networks that are competitive with [Facebook's], and that Facebook should be willing to acquire them.[103] Importantly, Zuckerman recognized in that email that app companies like Instagram "are nascent but their the networks are established, . . . and *if they grow to a large scale they could be disruptive*" to Facebook.[104]

Through these and other internal communications, Zuckerberg and other senior Facebook executives and managers voiced their concerns about future competition from Instagram. They observed that photo sharing through mobile apps was fast becoming a popular trend and expressed fears that Instagram could pose a serious future threat to Facebook if it were able to independently achieve scale. Zuckerberg repeatedly predicted that Instagram could achieve considerable scale if it were to continue its growth, and repeatedly suggested said that Facebook should acquire Instagram to deal with that risk.

It was evident from the collection of subjective statements that Facebook viewed Instagram, though not a true social network, as a greater risk to Facebook's dominance as a social networking provider than Facebook "clones" such as Google+. It believed that an independent Instagram could and would expand, flourish, and evolve into a full-fledged personal social networking product that could successfully challenge Facebook, in a way that even Google+ could not. These are not insights that a purely economic analysis, no matter how "rigorous," would have revealed.

Had the FTC turned to these statements to help predict effects, it would essentially be drawing on the expertise and greater knowledge of those in the best position to know—Facebook executives and senior managers—to learn how the acquisition would likely play out for consumers in the long run. The statements would have helped the agency choose between two competing stories of every acquisition: an anticompetitive one (merger will reduce or eliminate present or future competition and allow the defendant to dominate the market); and

[102] Facebook Complaint, *supra* note 31, ¶ 89.
[103] *Id.*, ¶ 90.
[104] *Id.* (emphasis added).

a procompetitive one (merger will facilitate innovation or new product development, increase efficiency, and otherwise benefit consumers). Knowing that key Facebook executives believed that Instagram could and would likely morph from a mere photo-sharing app into a general social network equivalent, which could then disrupt Facebook's dominance in social networking, and that they urged acquiring the company to remove that risk, should have informed antitrust enforcers that the anticompetitive story is the more accurate one. That, in turn, could have and should have made a difference in the agency's decision on the acquisition at the time.

3. Facebook's Acquisition of WhatsApp: How Intent Evidence Might, and Should, Have Made a Difference in the Agency's Merger Review in 2014

The approval of Facebook's acquisition of WhatsApp in 2014 is another decision the FTC evidently regrets. WhatsApp was a mobile messaging app that allowed smartphone users to send free, short text messages via the internet. As the use of smartphones exploded in the 2010's, consumers' use of WhatsApp and other mobile messaging apps to communicate with one another grew in popularity. However, these text messaging apps did not have features that allowed users to engage in full-fledged social networking. In other words, WhatsApp was not generally viewed as a social networking platform and, therefore, not a competitor of Facebook in its core business.

The competitive concern expressed was that an independent WhatsApp could and would build on its features to develop social networking functions and become more of a substitute for Facebook.[105] Unfortunately, quantitative evidence of future innovation harms is typically unavailable and the usual economic tools, though sufficiently advanced to predict competitive impacts on price, are unable to effectively address the concerns presented by nascent harms.[106] But the lack of quantitative evidence or of empirical methods to measure and predict the prevalence of certain harms does not mean that no such harms existed. Hard economic evidence alone cannot reliably assess the capability of WhatsApp to develop into a future social networking competitor of Facebook. Nor can it predict the likelihood that it would do so. The FTC's unwillingness to look to intent evidence, or perhaps its belief that it could not do so, likely explains partially its 2014 decision to allow the acquisition to proceed.

Here, as with the Instagram acquisition, there was an abundance of subjective statements from Facebook's senior management effectively detailing the path that they feared WhatsApp could take to expand into the social networking space and disrupt Facebook's dominance. For example, a senior Facebook manager warned that mobile messaging "is a wedge into broader social activity/sharing on mobile," and described that as "scary."[107] A

[105] Facebook Complaint, supra note 31, ¶¶ 18, 108-11.
[106] *See supra* notes 43-46 and accompanying text.
[107] Facebook Complaint, supra note 31, ¶ 109.

Facebook scientist similarly predicted that mobile messaging apps could expand into "domain that more closely resembles social-networking services."[108]

Along the same lines, Mark Zuckerberg spoke of the trend of "messaging apps . . . using messages as a springboard to build more general mobile social networks."[109] Another email from a senior Facebook manager suggested that the company feared, not Google+, Facebook's direct competitor in the social networking services market, but rather mobile messaging services.[110] More formally, a presentation made internally to the board of directors of the company included warnings that mobile messaging services were "a threat to our core business . . . [and that] they have all the ingredients for building a mobile-first social network."[111] Facebook's additional concerns about WhatsApp was that, unlike Apple's iMessage, it was not limited to mobile devices of a single brand but was available on all major smartphone operating systems, "positioning it as a credible threat to achieve significant cross-platform scale."[112]

In the aggregate, these subjective statements left little doubt that Facebook insiders—who can be expected to have more much more information and expertise than outsiders—believed that text messaging apps had the potential to be built into social networking platforms, and predicted that WhatsApp specifically had the capability to do it. The executives, including Zuckerberg himself, spoke numerous times of the threat that posed and of the need to acquire WhatsApp, at a high price if necessary.[113] Facebook eventually purchased WhatApp in 2014 for $19 billion, which represented ten percent of Facebook's market capitalization at that time.[114]

No quantitative data or sophisticated economic tools could have generated the insights gleaned from these statements. The statements are valuable because, in demonstrating the perceptions, motives, and purposes of Facebook in seeking to acquire WhatsApp, they tell a more accurate story of the competitive realities facing Facebook in its core business. They explain clearly why a start-up that provided no more than mobile text messaging and had not yet turned a profit, nevertheless, held the promise of introducing innovation and competition in social networking. Had these statements been considered in the analysis of effects, they could have changed the agency's decision in the merger review.

IV. Objections to the Use of Intent, and Addressing Those Objections

Fortunately, no legal impediment appears to stand in the way of considering intent in merger analysis, or in antitrust analysis generally for that matter. The language of section 7 of

[108] *Id.*
[109] *Id.*, ¶ 18.
[110] *Id.*, ¶ 110.
[111] *Id.*, ¶ 111.
[112] *Id.*, ¶ 114.
[113] *See, e.g.*, *id.* ¶ 122 (remarking immediately after the acquisition was announced that paying 10% of market cap was "worth it").
[114] *See id.*, ¶¶ 121-22 Hof, *supra* note 53.

the Clayton Act does not preclude its use; nor does the Act even state a preference for quantitative evidence. Moreover, no Supreme Court case has specifically held that intent evidence is inadmissible or has no role to play in merger cases.

Rather, objection to intent seems to have developed, and hardened, as antitrust became increasingly technocratic, with heavy reliance on economic data and economic experts to prove its cases. Today, the Horizontal Merger Guidelines, which sets forth the enforcement agencies' analytical framework and methodology in merger reviews, focus heavily on quantifiable data and metrics, and empirical tests, and courts have come to expect their use.[115] Because subjective intent cannot be easily quantified or measured, the role of intent in antitrust analysis generally became greatly diminished. But it should not take new legislation or the overruling of any major case to create, or revive, a role for intent evidence in merger enforcement.

In this section, I address some of the major objections to intent inquiries, including the assertions that business executives making the statements may be wrong in their predictions, or that the statements may be unreliable for various other reasons. While I view these objections as mostly overstated, I also offer suggestions to mitigate the risks of unreliability.

A. Executives May Be Wrong

One argument that some have raised against the consideration of intent in antitrust analysis generally is that corporate managers may not be well-informed and may have incorrect perceptions of the realities of the market.[116] This contention essentially rejects the common assumption that no one knows better the realities and intricacies of a market than the market players themselves. These critics argue, instead, that corporate managers "are limited in what they do and what they can know, even if they behave as though they are fully informed, fully capable actors."[117] Therefore, "taking their actions and words at face value" would not provide a reliable basis for a decisionmaker's conclusions.[118] In other words, the argument is that the executives may be wrong in their perceptions of the market and in their predictions on the state of future competition; accordingly, reliance on their subjective statements to assess competitive effects would yield erroneous results.

Presumably, in the context of the Facebook/Instagram and Facebook/WhatsApp examples, the argument would go as follows: Facebook's executives may not have good

[115] A district court recently dismissed the FTC's complaint against Facebook alleging monopolization in part because it was dissatisfied with the agency's allegations regarding Facebook's market share (and thus market power). *See supra* note 31.
[116] Manne & Williamson, *supra* note 74, at 653 (Corporate managers are limited in what they do and what they can know, even if they behave as though they are fully informed, fully capable actors. The problem with taking their actions and words at face value is that it does not present any way to distinguish between actual and merely aspirational or simply wrong evidence of misconduct.").
[117] *Id*.
[118] *Id*.

information or full knowledge, and could have been overestimating the two start-ups' abilities to expand into full-fledged social networks. Or perhaps the Facebook executives responsible for the subjective statements were paranoid and saw serious nascent threats where none existed. To the extent that is true, the argument would likely continue, the many emails reflecting the executives' intent should not be treated as probative in an effects analysis.

The argument that intent evidence is suspect because corporate executives may be wrong and, therefore, their words and actions should not be taken at face value to the corporation's detriment is unusually pro-defendant. While corporate managers are neither infallible nor all-knowing, it is reasonable to assume that, relative to generalist judges, antitrust enforcers, and other outsiders, they have more far more knowledge and expertise about competition in their markets. Therefore, if they say that a start-up is a serious future threat that must be acquired to neutralize the threat, they should be believed as to their intentions. It seems incredible to argue that such a statement should be treated as irrelevant on the issue of competitive effects, on the grounds that the executive may be mistaken. Predictions, by their very nature, can turn out to be inaccurate sometimes. But, on balance, given the importance of nascent competition to innovation and the importance of innovation to society, erring on the side of using intent evidence to complement economic analysis and strengthen merger enforcement seems to be the right approach.

B. Reliability

Another related issue that those who oppose the use of intent evidence often raise is that of its possible unreliability. Judge Richard Posner has said that "[a]ny doctrine that relies upon proof of intent is going to be applied erratically at best."[119] Other scholars have similarly stated that "intent evidence is generally inferior to objective evidence because competitive and anticompetitive motivations are often indistinguishable."[120] Judge Frank Easterbrook of the Seventh Circuit Court of Appeals, who is most dismissive of intent evidence, goes further and claims that "[t]raipsing through the warehouses of business in search of misleading evidence" not only is costly but also "reduces the accuracy of decisions."[121] Additionally, according to Easterbrook, "[s]tripping intent away brings the real economic question to the fore at the same time as it streamlines antitrust litigation. Although reference to intent in principle could help disambiguate bits of economic evidence in rare cases, the cost (in money and error) of searching for these rare cases is too high . . . in large measure because the evidence offered to prove intent will be even more ambiguous than the economic data it seeks to illuminate."[122]

1. Problem of Attributing Intent

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[119] Posner, Antitrust Law, *supra* note 96, at 214.

[120] Joseph F. Brodley & Ching-to Ma, *Contract Penalties, Monopolizing Strategies, and Antitrust Policy*, 45 Stan. L. Rev. 1161, 1201 (1993).

[121] A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1402 (7^{th} Cir. 1989).

[122] *Id.*

Parsing the unreliability objection further, some critics have raised the issue of attribution of corporate intent. They argue that the subjective statements of employees may be mistakenly attributed to the defendant corporation as expressions of corporate intent when, in fact, the employee making the statement does not speak for the corporation.[123] But this objection can be easily addressed by establishing a few straightforward, common-sense rules of attribution. To avoid the problem identified, we can limit attribution to the corporation the subjective statements made only by its senior executives, or by mid-level managers if the statement relates to matters over which the mid-level managers have policy-making authority within their areas of responsibility.

This rule of attribution is reasonable because corporations are entities that must act through individuals. Thus, in many areas of the law, courts attribute to a corporation the actions taken by, or statements made by, its corporate officers. Indeed, without this basic principle, no corporation could ever be found criminally liable even in straightforward per se price-fixing cases. Senior executive officers constitute a firm's top management and clearly act on its behalf. Thus, it is appropriate that their statements and perceptions be attributed to the company as evidence of corporate intent. Similarly, mid-level managers with policy-making functions act on behalf of the corporation within their areas of responsibility; it logically follows that, within these parameters, their subjective statements should be deemed to reflect the intent of the corporation.[124]

How this suggested attribution rule might apply in practice is that if Zuckerberg or other senior Facebook executives speak internally of their fears that a specific startup may emerge as a serious future threat to the company and discuss acquiring that start-up to deal with that risk, those executives' statements would be attributed to the corporation. In contrast, similar statements made by staff employees in conversations or in emails with one another would not be so attributed. This simple rule-of-thumb should more than address concerns that underlie the attribution objection.

2. Misinterpretation and Misuse of Subjective Statements

A more frequent objection that has been raised is the risk of misinterpretation and misuse of subjective statements, which could then lead to the erroneous condemnation of a transaction or conduct that is not, in fact, anticompetitive.[125] The gist of this argument is that executives often use hyperbole and loose language, which are prone to misinterpretation. Critics fear that if statements not intended to be interpreted literally are taken at face value,

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[123] *See, e.g.*, McGowan, *supra* note 96, at 514-16 (stressing the difficulty of determining the intention of a firm).
[124] Indeed, the applicable rule of evidence on party admissions not only supports this argument but is more expansive. Fed. R. Evid. §801(d)(2)(D) (providing that "a statement by [a party opponent's] agent or servant concerning a matter within the scope of the agency or employment made within the existence of the relationship" is admissible against the party opponent as an exception to the hearsay rule).
[125] Posner, Antitrust Law, supra note 96, at 214-15; Cass & Hylton, *supra* note 58, at 676

they could be misconstrued as expressions of anticompetitive intent.[126] Alternatively, some argue that an executive's statements should not be taken at face value because they may be influenced by many factors or may be tailored to achieve other purposes, such as win internal support for an initiative.[127] To assume, incorrectly, that the senior managers meant what they said, it is argued, could result in erroneous judgments and decisions.

In my view, these objections are overstated. If Mark Zuckerberg said in an email that "it is better to buy than compete,"[128] it is not clear why factfinders or decisionmakers are not competent to make a judgment as to whether he meant what he said, taking into consideration the context in which the statement was made. Similarly, if Facebook executives acknowledged in an internal writing that Instagram could leave Facebook "very behind in . . . how one of the core uses of Facebook will evolve in the mobile world," and that would be a "really scary" outcome for Facebook, it is again unclear why a decisionmaker would have unusual difficulty evaluating whether the statement should be considered credible or dismissed as simply a "poor choice of words," considering the context in which the statement was made.

Assessing whether a particular statement is credible or has evidentiary significance *is* the function of any factfinder or decisionmaker. The notion that intent evidence should be ignored as irrelevant because the speaker may not have intended their expressions to be taken literally – either because they were just "loose talk" or were influenced by a desire to achieve other goals—seems somewhat strange. In any case, the possibility of misinterpretation of subjective statements is not unique to antitrust. Factfinders, be they judge or jury, or agency enforcers reviewing investigatory facts, must routinely make judgments on the probative value of any intent evidence in a variety of cases. And there is no reason to believe that they are more vulnerable to being misled in antitrust investigations and litigation than in other cases.[129]

C. Minimizing the Risk of Misuse of Subjective Statements

Contending, as I do, that intent evidence should be afforded a role in merger analysis is not equivalent to an argument that *all* subjective statements should be assigned substantial probative value. To minimize the risk of misuse of subjective statements, we can require that those statements carry certain indicia of credibility before they are deemed to have probative value.[130] These indicators could include the absence of substantial contradictory evidence, the

[126] *See, e.g.*, Posner, Antitrust Law, supra note 96, at 214 (cautioning that statements may reflect "a clumsy choice of words to describe innocent behavior").
[127] *See* Manne & Williamson, *supra* note 74, at 652 ("[B]usiness actors are subject to numerous forces that influence the rhetoric they use and the conclusions they draw. These factors includes salesmanship; self-promotion; the need to take credit for successes and deny responsibility for failures; the need to develop consensus; and the desire to win support for an initiative or to neutralize its opponents.")
[128] Facebook Complaint, *supra* note 31, ¶ 5.
[129] Lao, Antitrust Intent and "Sacrifice," *supra* note 62, at 204; Lao, Intent in Monopolization Analysis, *supra* note 59, at 207-08.
[130] *See*, Lao, Intent in Monopolization Analysis, *supra* note 59, at 210-11; Lao, Antitrust Intent and "Sacrifice," *supra* note 62, at 205-06.

timing of the statements in question, and the setting or circumstances in which the statements were made. Additionally, the presence of corroboration by other events could serve to boost the probative value of the subjective statements.

An absence of substantial contradictory evidence could be an indicator of credibility of a subjective statement in that it suggests that the senior executive or manager making the statement, for example, was not simply paranoid or uninformed when they spoke of being "terrified" of the threat of a specific nascent competitor. We should, therefore, be able to take them at their word when they predict that the start-up would become a formidable challenger, and when they speak of the need to buy that start-up, even at a high price, to neutralize that risk. In contrast, if a subjective statement is inconsistent with, or is substantially contradicted by, other evidence, then the statement might be less credible and should be given less weight so as to minimize the risk of misinterpretation and misuse of the statement.

Yet another indicator of credibility could be the timing of the subjective statements.[131] If a subjective statement relating to the acquisition was made within a reasonable time frame before the announcement, it is likely to be credible and could be given substantial weight. In contrast, statements made about a nascent competitor and the reasons it should be acquired, for example, that were made long before the acquisition may be less credible and, therefore, less probative as a prediction of effects.

The circumstances in which a statement was made also bear on its credibility and probative value. If a subjective statement was made in a setting where a "wrong" remark carries cost consequences, the statement would bear the mark of credibility and should be taken seriously as an expression of intent.[132] For example, internal emails exchanged between a firm's product development head and its M&A head identifying a start-up as a serious future threat to the firm and discussing the need to acquire the start-up to neutralize the threat would be credible pieces of intent evidence, because those making the statements expect them to generate some reaction that carries cost consequences. Such emails are unlikely to be off-the-cuff remarks that are unreliable indicators of intent.

In contrast, subjective statements made in a context where "wrong" remarks entail few cost consequences would probably be less reliable, and less weight should be attached to them. In that setting, the statements could, indeed, be loose talk. For example, informal, unofficial email exchanges between the firm's coworkers regarding the same start-up could well be exaggerated remarks because no cost consequences are expected to follow. Recipients or listeners of the statements are unlikely, and are not expected, to change course or otherwise react to them in a way that entails costs. Concerns about the statement's reliability as an expression of corporate intent may then be justified, and those statements should have less value as a guide to assessing an acquisition's future competitive effects.

[131] *See* Lao, Intent in Monopolization Analysis, *supra* note 59, at 210.
[132] *See* Lao, Intent in Monopolization Analysis, *supra* note 59, at 210.

Finally, if a subjective statement is corroborated or reinforced by other events, its probative value should be enhanced. For example, the objective fact that a firm paid the equivalent of ten percent of its market capitalization to acquire a target that has not turned a profit, as Facebook did when it acquired WhatsApp, is consistent with the various subjective statements of Facebook managers and, therefore, increases their reliability factor. In short, so long as subjective statements bear one or more of these indicia of credibility, they are unlikely to be simply ill-considered or loose remarks with no probative value. Rather, they could and should serve as a valuable tool in evaluating and predicting the potential effects of an acquisition.

Conclusion

After decades of judicial and agency permissiveness in merger enforcement (and in controlling monopolization), there is now a major backlash against increased concentration and dominant firm market power, particularly in the digital markets. This paper has attributed lax enforcement in part to an increasingly economic-focused analytical approach that is dependent on quantitative evidence and the use of econometric and associated empirical tests to establish anticompetitive harm. Unfortunately, this "rigorous" approach, effective in predicting price effects in ordinary goods markets, does not work well in evaluating mergers in dynamic technology markets where firms compete more on innovation than on price. The difficulties are exacerbated when an acquisition involves a nascent competitor because a nascent competitor's future impact, though promising, is generally more uncertain and the types of evidence and analytical methodologies that are customarily preferred in antitrust are even less useful.

I have argued, in this paper, for a role for intent evidence in merger analysis to help strengthen merger enforcement. Intent evidence would complement economic analysis because subjective statements of an acquiring firm's senior management can provide insights that can help interpret facts and predict effects, as demonstrated by the collection of emails and statements made by Facebook's executives relating to the company's famous acquisitions of Instagram and WhatsApp. The consideration of intent evidence does not require legislative action as it has never been forbidden in major cases, though some courts and many commentators have been dismissive of its value. While critics have raised a few issues that deserve some attention, I have argued that the objections are overstated. In any case, there are ways to minimize the risks of misuse of subjective statements, one of the main objections that are raised. In short, intent evidence can be reliable and, when used properly, reduce false negatives in merger cases.